IN THE SUPREME COURT OF NEW ZEALAND SC 93/2009

THE QUEEN

Appellant

v

GEORGE EVANS GWAZE

Respondent

Hearing:	25 February 2010
Coram:	Elias CJ Blanchard J McGrath J Wilson J
Appearances:	D B Collins QC with B J Horsley, J Kerr, and R A Rose for the Appellant J H M Eaton with C Gallivan for the Respondent

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CRIMINAL APPEAL

SOLICITOR-GENERAL:

May it please Your Honours. Mr Horsley, Ms Kerr and Ms Rose appear with me for the Crown but I also advise the Court that Mr Lange who was trial counsel is seated immediately behind me and with Your Honour's permission I'd like him to be able to see and be behind me during the course of the hearing?

ELIAS CJ:

Yes that's fine. Thank you.

MR EATON:

Yes Your Honour. I appear on behalf of the respondent with Mr Gallivan.

ELIAS CJ:

Thank you Mr Eaton, Mr Gallivan. Yes Mr Solicitor?

SOLICITOR-GENERAL:

Thank you very much Your Honours. Your Honours I've placed before the Court a one and quarter page document which sets out the 10 points which I wish to address during the course of the oral submissions and once I have concluded each of those 10 points I will advise the Court that I am moving on to the next topic set out on that sheet.

I commence with the introduction. It is the Crown's case, Your Honours, that the so called evidence attributed to Professor Rode should never have been admitted as it did not satisfy the requirements of sections 7, 8, 18 and 25 of the Evidence Act. That Professor Rode's statements could not be used to support the respondent's theories on the cause of Charlene's death. Furthermore the 14 May statement never satisfied the prerequisites necessary to enable it to be used to undermine the credibility of Crown witnesses. It is the Crown's case that the admission of the Professor Rode statements caused a mistrial, as all three members of the Court of Appeal concluded, and as all three members of the Court of Appeal concluded, caused a substantial wrong or miscarriage of justice because it was pivotal and by itself gave rise to a reasonable doubt, to quote from the trial Judge's summing up to the jury. It is also the Crown's case that a retrial should be ordered because of the seriousness of the offending and the quality of the true evidence which points to the respondent's guilt.

Members of this Court will appreciate that there is a limited purpose to Crown case stated appeals. That purpose does not involve this Court in determining

the respondent's guilt or innocence. The Crown's objective in pursuing a case stated appeal is confined to achieving a fair trial that produces a true verdict on properly admitted evidence.

Your Honours I'm now proposing to go on and deal with the matters I want to cover under the heading of "context". In order to understand the impact of the 14 May statement attributed to Professor Rode it is necessary to describe the context against which the Professor Rode statement was admitted. The Crown's written submissions set out in some detail the medical and forensic evidence presented at the respondent's trial and I'll just take a minute or two to summarise that evidence. On the evening of the 5th of January 2007 Charlene was comparatively well, and I'll say a little more about her condition then later in my submissions. That evening, on the 5th of January, she went to a church service with members of her family all of whom said that Charlene was fine. However, at approximately 6 am on 6 January Charlene was found to be very close to death. During the course of the 6th of January medical personnel at Christchurch Hospital made a number of discoveries and observations about Charlene's condition. The medial evidence adduced at trial focused on three parts of Charlene's anatomy. Firstly, anal-rectal injuries. Charlene's anal-rectal injuries involved severe radial tears to her anus caused by blunt traumatic force.

ELIAS CJ:

Mr Solicitor, we have of course read –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– closely the submissions. I'm not sure whether you're intending to give us all the background in this introduction or just touch on the important matters, but you can proceed on that basis.

SOLICITOR-GENERAL:

Thank you, Your Honour, and that's why I said I'd only take a minute or two to summarise this part of the Crown's case, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

If it's of assistance.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

Charlene also had petechial haemorrhaging extending just 7.75 centimetres up her anal canal and, importantly, no further. The injuries to Charlene's genitalia involved abrasions and swelling to her labia and her hymen had been torn by a penetrating blunt force. The brain injuries were consistent with her suffering a traumatic event produced by her brain having been starved of oxygen. The forensic evidence comprised a small amount of the respondent's sperm, which was found in the crotch of the pink underpants that Charlene was wearing on the night she was sexually violated and suffocated. The respondent's DNA was also found in other places on Charlene's underwear. It also comprised petroleum gel, which was found in faecal staining on a blue towel that had been used to clean Charlene on the morning of the 6th of January, and faecal staining on a pillow found in Charlene's, or found on Charlene's bed, and there were also traces of that gel found on the pink underpants that contained the respondent's sperm and DNA. It was accepted at trial that there had been no intruder into the Gwaze home, thus the perpetrator had to have been in the house on the night of the 5th or 6th of January.

At trial, the respondent endeavoured to undermine the evidence about the cause of Charlene's physical injuries by raising a number of suggestions and

theories about her injuries and how they might have occurred. And I will refer very briefly to some of the respondent's theories, many of which are noted in the Crown's written submissions. In relation to the anal-rectal injuries, it was suggested that those injuries might have been caused by the inserting of Panadol suppositories, by the parting of Charlene's buttocks, by the insertion of a proctoscope, by the wiping of diarrhoea. The defence theories about the causes of Charlene's anal-rectal injuries also included suggestions that those injuries might have been caused by natural means, namely the passing of a solid bowel motion, by diarrhoea and by the effect of HIV or other diseases and conditions. In relation to the genital injuries at trial, the respondent endeavoured to raise the possibility that the fresh tear to Charlene's hymen might have in fact been a natural cleft or notch. The respondent also raised the possibility that the tear to Charlene's hymen was caused by one of two nurses either inserting the Panadol suppositories or when inserting a rectal thermometer. It was also suggested that the insertion of the urinary catheter may have caused the injuries seen on Charlene's labia. And in relation to the brain injuries, it was suggested they may have been caused by septic shock, by HIV encephalitis, by lung infection and/or by oedema. A reading of the evidence reveals that these multiple theories and suggestions were rarely put as direct propositions to medical witnesses. Instead, these various theories were gently floated and not supported by direct evidence. And when these propositions were directly put that Charlene's injuries were caused by medical procedures, then those theories were rejected by Crown witnesses as being a very unlikely cause of Charlene's injuries.

I now want to move on to the factual errors in the respondent's submissions, and this is item 2.3 of the outline which I have provided the Court. In doing so, I appreciate that it is very unusual in an appeal to this Court for counsel to have to invite the Court to carefully scrutinise submissions on the facts. But it is necessary to do so in this case for two reasons. First, the facts are intricately linked to the legal issues associated with the second ground upon which leave to appeal has been granted and, secondly, it is extremely important in this case that the Court have a very accurate understanding of the facts. In addition to making a number of significant factual errors in his

submissions, the respondent has now endeavoured to minimise the significance of Professor Rode's hearsay statements and the use to which those statements were made at trial. I emphasise that that is an important topic which will be focused up by me later in my submissions.

I want to deal now with the key factual errors in the respondent's submissions, and this focus is primarily on the state of Charlene's health, both before and after the 5th of January. It is an important part of the respondent's case that the near death condition which Charlene was found to be in at 6.00 am on the 6th of January was, in effect, the end stage of a very rapid decline in her health, caused by disease or illness, and this theory is based upon three inter-related propositions. First, the respondent says that Charlene had been generally unwell since coming to New Zealand and that there is evidence that she was unwell and deteriorating during the evening of the 5th of January. Secondly, it also part of the respondent's case that the anal-rectal, genital and brain injuries which Charlene suffered from either materialised on the 6th of January when she was in hospital, or continued to deteriorate when she was in hospital as part of the natural progression of her illness. And, thirdly, the respondent says that all of the Crown's expert medical opinions were based on an assumption that Charlene was well on the 5th of January and that their opinions about the cause of Charlene's death were therefore undermined by the respondent's revelations that she was not well on the evening of the 5th of January. And, as I mentioned earlier, all three of these propositions require very close scrutiny.

Dealing first with Charlene's condition before and on the 5th of January. There is evidence that Charlene received regular treatment for her HIV condition when she was in Zimbabwe. However, after she came to New Zealand there were surprising few visits to a doctor. She went once for an ear infection in November 2006 and, on another occasion, to receive a meningococcal B vaccination, with two follow-up appointments. Those were her only contacts with the medical profession from the time she arrived in New Zealand in October 2005 through to the 6th of January 2007. According to the respondent and his wife, after arriving in New Zealand Charlene improved in

her health and gained weight. At the time of her death she was exactly the median weight of a girl of her age in New Zealand. Charlene's absences from school were considered by the deputy principal of Charlene's school, Ms Edlin. Her evidence is summarised in re-examination, volume 4, page 285, and suggests that a lot of Charlene's absences from school and classes were attributable to her avoiding subjects and physical activities she found challenging. On the afternoon and evening of the 5th of January Charlene attended a church function, had a meal and was observed by family members to be her usual self. None of the family members noted any matters of concern or anything out of the usual. The specific references to the observations of family members are all fully set out in footnote 18 of the Crown's submissions. There is evidence Charlene had a recurrence of her ear infection on 5 January and that one church elder did say a prayer for Charlene. The reality is, however, that during the evening of 5 January, when Charlene returned home at about 10.30, she seemed normal and "fine" to the respondent and to all members of her family whom she saw that evening.

We now need to move on to the discovery of the physical injuries on the 6th of January. The respondent says that Charlene's physical injuries either materialised or deteriorated during the course of 6 January as part of the progression of the natural conditions or were caused by medical procedures. And, again, it's necessary to very carefully examine these propositions.

ELIAS CJ:

Would it not be better to examine this factual background after getting to the points of law with which we are concerned? Because they're really consequential considerations for us, are they not?

SOLICITOR-GENERAL:

Eventually they have to be considered, at one point or another, Your Honour.

ELIAS CJ:

Yes, it's just, Mr Solicitor, we have read all this material. We are anxious to close on the very difficult issues that the appeal throws up. I'm not really sure, of course you need to make the points why this context impacts upon the decisions we have to take but presenting it in this narrative way may not be the best way of doing that.

SOLICITOR-GENERAL:

Thank you Your Honour. Can I summarise then –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– as quickly as I possibly can what the evidence would be if I needed to delve into it further. It that suitable to Your Honour?

ELIAS CJ:

Yes. We have read it.

SOLICITOR-GENERAL:

Yes I appreciate that but the point I'm endeavouring to make, Your Honour, is that there is another version of the evidence that is before you which needs to be very, very carefully scrutinised.

ELIAS CJ:

Well I think that that does come through clearly in the written submissions which we've read.

SOLICITOR-GENERAL:

The key point that I wish to emphasise is that when one actually examines very, very carefully the evidence, the injuries which occurred to Charlene and which were found by medical personnel on the 6th of January, were all entirely consistent with her having been sexually abused and suffocated. When one

looks very, very carefully at what my friend says are the facts, his analysis can be disproved on almost every key point that he attempts to raise and that is why, Your Honour, I was being very meticulous in making sure that the Court had that full understanding and could I give some examples. For example, my friend says that it is inexplicable why the nurses at the 24 hour medical centre did not find the injuries to Charlene's anal-rectal area which were observed later in the medical, at the emergency department. Sorry, later observed in the ICU. The answer to that is very clear. An examination of the evidence of the two nurses, Nurses Brophy and Pilling, and Dr Carpenter, is that at the time they did a very quick inspection and Charlene's anal-rectal area was smeared with diarrhoea and they said that was why they weren't able to see the radial tears and the other injuries to Charlene's anus which were later discovered following a more thorough inspection in the ICU at Christchurch Hospital. Similarly the respondent says that there was an inspection of Charlene's physical condition, her anatomy on her arrival in the ICU. In fact I can take Your Honours to the evidence of 12 different medical personnel who attended upon Charlene in the emergency department and their evidence is very clear, that on arrival in the emergency department the objective was to stabilise her condition. In fact it was never stabilised at all. There was a very cursory examination made to see if there was a rash on her back. There was no genital examination. There was no examination of the anal-rectal area at all. Indeed it was in the emergency department that Nurse – no that Dr Clarke and Dr England inserted the urinary catheter and it was at that time that the abrasion on Charlene's labia were noted for the first time. So that was at about 8.30 in the morning in the intensive care – in the emergency department before Charlene was transferred to the ICU.

Furthermore when one examines in particular the evidence of Professor Beasley he undertook two proctoscopies and he said that there was in effect no material change at all during the eight hour period between the time that he undertook the examinations, very detailed medical examinations, of Charlene's anal-rectal area. So the overwhelming evidence, when one actually very carefully scrutinises exactly what was said at trial, is that these conditions were, as I emphasised earlier, entirely consistent with sexual

violation, suffocation and the Crown witnesses completely refuted any suggestion that these injuries either materialised on the 6th of January while Charlene was in the medical care at Christchurch Hospital or were caused in any way by medical procedures or were indeed part of a natural progression of a pre-existing condition.

Can I reserve then the opportunity to return in more detail to this if it becomes necessary –

ELIAS CJ:

Of course because if it's necessary you'll have to take us to the evidence.

SOLICITOR-GENERAL:

Just finally on that point my friend says that the validity of the medical opinions which were preferred by the Crown was undermined because they didn't know about Charlene's so called condition on the 5th. While that was put to Dr Sage who candidly refuted that proposition, he said it made no difference, and similarly Professor Beasley, Dr Doocey, Dr Meates-Dennis and Dr Byard, all of whom were told about Charlene's alleged condition on the 5th of January, said they weren't in any way dissuaded to alter their conclusions about the cause of Charlene's death.

Can I now then move on to item 3. The 14 May hearsay statement. I have attached all three statements to the Crown's case, to the Crown's submissions and I'll just very briefly summarise the three statements. Dealing first with the 14 November – sorry 14 May jobsheet.

ELIAS CJ:

Can you just tell me, I just want to note on my copy where we find these in the case on appeal because I have been using your –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Later will be fine, I just would like to look at them.

SOLICITOR-GENERAL:

Yes the 14 May statement is in the case stated. The 15 May email is in, I think it's summarised in the case stated, and the 16 May statement is also referred to but not fully summarised at all in the case stated. Dealing just with the 14 May statement first, if that's of assistance. The following four points emerge. First, that Professor Rode had dealt with a group of HIV patients aged between 8 and 10 years in South Africa who had died very quickly.

ELIAS CJ:

Sorry, does that answer mean that you don't actually have the documents before us? We just have the references to them and in the case of the 16 May statement the very passing reference in the case stated?

SOLICITOR-GENERAL:

Yes, yes although I think that the judgments in the Court of Appeal are set out in full. They're certainly set out in the judgment of the present Court of Appeal.

ELIAS CJ:

Yes. Thank you.

SOLICITOR-GENERAL:

The four elements to the 14 May statement. First, that Professor Rode had dealt with a group of HIV patients aged between 8 and 10 years in South Africa who had died very quickly. Secondly, the symptoms of the children in South Africa included rapid brain deterioration, radial tears of the anus and watery green diarrhoea. As portrayed by Professor Beasley Charlene's symptoms were consistent with the South African cases and it is important to note that Professor Rode wanted to see photos and the post-mortem report. He also wanted information about how Charlene's parents had died and other information about Charlene's medical condition

before reaching any opinion. There was a reason why Professor Rode wanted this additional information. He had, by this stage, not had the opportunity to review any case specific information and the Judge adjourned on the 14th of May to see if Professor Rode was able to form an opinion relevant to Charlene's case after reviewing case specific material that he wanted to review.

The second statement is in the form of the email from the Crown prosecutor to defence counsel concerning a statement Professor Rode is said to have made on 15 May. In that statement Professor Rode is reported to have said in his provisional view that Charlene may have suffered sexual assault and suffocation but wanted to consider the matter further.

The third statement attributed to Professor Rode is set out in the police jobsheet of 16 May and the following points emerge from that jobsheet. First, there is the reference to the physical injuries to Charlene being possibly due to "full-blown AIDS". Secondly, Professor Rode was reported to be very concerned that 14 May statement not be used in "any prejudicial sense". Thirdly, careful consideration needed to be given to the possibility that Charlene's injuries were due to her having been sodomised and suffocated or strangled and, finally and most importantly, Professor Rode needed more time before he could reach a considered opinion.

Your Honours, in the interests of time, I will not at this moment focus upon the challenges which, the objections which the respondent now takes to the Court's – considering that the 16 May jobsheet was clearly considered very relevant and important by the Court of Appeal. My friend takes exception to that. If it is a matter that is of concern then I will address it, and I have legal submissions to be able to address it, but I think in the interests of time I would prefer to –

ELIAS CJ:

Well, what's the summary of your position on it?

SOLICITOR-GENERAL

Well, it is clearly a matter that it is extremely relevant, because it was a matter that the trial Judge was obliged to take into account at the time that he made his final ruling, ruling number 4, at approximately 2.15 on the 16th of May. And that failure to take into account relevant matters is, in itself, the basis of a question of law. And, as I understand the Court of Appeal judgments, they had no hesitation in accepting that fundamental proposition. Indeed, when one reflects on it, Your Honour the Chief Justice, it would be a recipe for a gross injustice if a trial Judge either deliberately chose or omitted to take into account relevant matters, and then that error was compounded on appeal by the Court of Appeal saying, "Well, because the Judge didn't take account of those matters we can't consider them." That, with the greatest respect, is quite loose and erroneous reasoning.

ELIAS CJ:

Well, your point is that he took it into account, –

SOLICITOR-GENERAL

Yes.

ELIAS CJ:

– as he was obliged to do, because it was relevant to the determination he was making, and, equally, the Court of Appeal was entitled to take it into account, and we, if we need to.

SOLICITOR-GENERAL:

Indeed.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes. My point, in relation to how much of it was taken into account by the trial Judge is, of course, a matter of some dispute.

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

I now want to focus on exactly what the trial Judge did, and this takes us on to item number 4 in my synopsis. On the 14th of May, when the 14 May statement was made available to the trial Judge, the trial Judge allowed the evidence of Dr Byard to be interrupted, and then he adjourned the trial. And the trial Judge recorded that the purpose of the adjournment was to, "Provide an opportunity for Professor Rode to be given and review the post-mortem report and the photos relating to the case." And that's set out in the case dated at paragraph 18, Your Honours. Now, clearly, there would have been no reason for this adjournment on the 14th of May if the trial Judge didn't envisage on the 14th of May that the 14 May statement attributed to Professor Rode would be used as the basis of an opinion about the cause of Charlene's death. Review of the case specific material could have had no impact on the reliability of the 14 May comments as a factual statement about the cases in South Africa. Then the following day, on the 15th of May the trial Judge adjourned the trial for a further day. In trial ruling number 3, made on the 15th of May, the trial Judge said – and this is case on appeal volume 1 under tab 12, this particular trial ruling, at paragraph 15. He said that in his view it would not be possible for the accused to receive justice if the crux of the information that had emerged so far was withheld from the jury.

McGRATH J:

So, I think that I'd better have this in front of me. Did you say – is this at volume 1 or volume 2?

SOLICITOR-GENERAL:

Volume 1, Your Honour.

ELIAS CJ:

Page 12.

BLANCHARD J:

I think you gave the wrong tab reference.

SOLICITOR-GENERAL:

Oh, did I? I'm sorry, Sir.

ELIAS CJ:

It's page 12 of the case.

SOLICITOR-GENERAL:

Page 12.

McGRATH J:

Thank you.

SOLICITOR-GENERAL:

Paragraph 15. In his view it would not be possible for the accused to receive a fair trial if the crux of the information that had emerged so far was withheld from the jury. His Honour said that the crux of the information was that in South Africa there had been a group of patients aged eight to 10 who were congenitally HIV-positive and who had died rapidly after being diagnosed with radial tears to the anus and discharging watery green diarrhoea. And in ruling number 3 the trial Judge explained that the purpose of the further adjournment was to see if it could be ascertained that the police jobsheet accurately conveyed what Professor Rode had told Professor Beasley. That's at paragraph 16. So, on the 15th we have two reasons for the adjournment. One, to see if an opinion can be formed and, two, on the face of it it appears that the Judge is then focusing on whether or not the statement was reliable.

Then on the 16th of May, which is the crucial day, in the Crown's view. Soon after 2.00 pm, starting at about 2.15 I gather, the trial Judge delivered ruling number 4. And that needs to be carefully considered. His Honour said, in paragraph 1, that – and this is at page 14 of volume 1 – it would be

impossible for the accused to receive a fair trial if the crux of Professor Rode's comments to Professor Beasley was withheld from the jury. He recorded that the prosecution counsel had spoken to Professor Beasley the previous evening and that Professor Rode was reported to have said, "Charlene's death might have been a case of sexual assault and suffocation," but he still wanted to consider the matter further and discuss it with his colleagues. He recorded that he had received the 16 May police jobsheet and that he was aware the jobsheet recorded –

McGRATH J:

Just where are you at, at the moment?

SOLICITOR-GENERAL:

This is at paragraphs 4, 5 and also 15, Your Honour. He recorded he'd received the 16 May jobsheet and that he was aware the jobsheet recorded that Professor Rode was quite alarmed to think that his 14 May comments, "Might be used in Court in any prejudicial sense." He then –

ELIAS CJ:

That being a reference to what you call the "16 May jobsheet"?

SOLICITOR-GENERAL:

No, he said that in the 16 May jobsheet, but his concern was what he was reported to have said on the 14th of May not be used in any prejudicial sense.

ELIAS CJ:

I see.

SOLICITOR-GENERAL:

That's most important, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Nothing he said, from his perspective, was to be used in Court, at all.

ELIAS CJ:

Yes. But this is a reference to the indication of alarm, and in any prejudicial sense is a reference to what's recorded in the 16 May jobsheet, is that right?

SOLICITOR-GENERAL:

Correct, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

He noted that according to the 16 May jobsheet Professor Rode believed there were features of the case which were suggestive of sodomy and strangulation or suffocation, which needed to be carefully assessed. He observed that it was understandable that Professor Rode wanted to, "Fully consider the whole matter before expressing any opinion." Concluded that the comments attributed to Professor Rode satisfied the definition of hearsay, and that the circumstances relating to the statement provided reasonable assurance that the statement was reliable within the meaning of section 18(1)(a) of the Evidence Act.

ELIAS CJ:

Sorry, what are you now referring to?

SOLICITOR-GENERAL:

Paragraph 12, Your Honour.

ELIAS CJ:

12, thank you.

McGRATH J:

I think you've really got to let us know where you're at.

SOLICITOR-GENERAL:

Sorry.

McGRATH J:

I know you're wanting to go through this quickly, but I don't want to miss anything.

SOLICITOR-GENERAL:

Thank you, Your Honour. So, just continuing with paragraph 12, there were three parts to his reasoning. Namely, that Professor Rode's statement involved a relatively straightforward comment about the circumstances surrounding the deaths of some children in South Africa. Secondly, that the statement reflected Professor Rode's personal knowledge and, thirdly, there was no reason to doubt that Professor Beasley would have accurately relayed the information to the police – actually, that's in paragraph 18, Your Honours.

ELIAS CJ:

The background to this, or the first point made under the heading "Discussion", is that the Judge had already ruled out any prospect of aborting the trial.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Is that a matter of some criticism by the Crown –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– that in considering the whole question of this evidence the question of discharging the jury and enabling this lead to be followed up should have been one of the considerations?

SOLICITOR-GENERAL:

Yes and indeed Your Honour on the 16th of May the Crown formally applied for the trial to be aborted and that was rejected by His Honour.

ELIAS CJ:

On the 16th of May?

SOLICITOR-GENERAL:

Yes indeed.

ELIAS CJ:

Before or after this ruling?

SOLICITOR-GENERAL:

Before ruling number 4 Your Honour.

ELIAS CJ:

Before ruling number 4. Yes, thank you.

SOLICITOR-GENERAL:

And it's rejected in ruling number 4.

ELIAS CJ:

That's the one we're looking at?

SOLICITOR-GENERAL:

Yes indeed. I'll come onto that in –

ELIAS CJ:

I see.

SOLICITOR-GENERAL:

That was right at the end of ruling number 4 Your Honour.

BLANCHARD J:

Well it's referred to in the opening portion of paragraph 10.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

I think there is a formal ruling right at the end paragraph – of ruling number 4.

ELIAS CJ:

There must have been an oral indication earlier referred to, which is what's referred to, because there's no reasons given in this for that stance, is there? Oh yes it's para 6, is it, that you're referring to?

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

He seems to be indicating at the opening of paragraph 10 that he's already made a ruling.

SOLICITOR-GENERAL:

Yes he describes it as an indication Sir. I took this to be the ruling. It is a little unclear I do acknowledge Sir but as I understood it the Crown was seeking the trial –

BLANCHARD J:

Well it probably doesn't matter. I don't suppose there's any dispute about the fact that he did rule out aborting the trial –

SOLICITOR-GENERAL:

Correct.

BLANCHARD J:

– or delaying the trial until Professor Rode was available and could give a full opinion.

SOLICITOR-GENERAL:

Yes that is true Sir.

ELIAS CJ:

It's not either or though really is it? In the assessment that the Judge has required to undertake in ruling whether the evidence should be admitted, one of the options was aborting the trial and one would have thought that the two were so inter-related that it wasn't a sequential decision?

SOLICITOR-GENERAL:

Yes, I agree with Your Honour. Just in summarising the balance of ruling number 4, His Honour determined that the aim was not to obtain "a full opinion" from Professor Rode, that that was not feasible, he says that in paragraph 15. He held that the information coming from Professor Rode was within the general knowledge, general body of knowledge that made up his expertise and that therefore section 25(3) of the Evidence Act didn't create any obstacle and towards the end he ordered that the defence counsel could cross-examine the officer in charge and Dr Sage about the jobsheet. On the basis that Professor Rode's reported comments about this possibly being a case of sexual violation and suffocation or strangulation also be included in the cross-examination to provide "balance" implying that this was providing a counter-point to what the Judge must have thought was an earlier opinion of the case of Charlene's death.

The trial Judge also, importantly in the Crown's submission, declined the application to have Dr Meates-Dennis recalled for her to respond to the comments attributed to Professor Rode. This is important because the respondent stresses in this Court, quite wrongly in the Crown's submission, that the sole purpose in adducing Professor Rode's hearsay statement was to impugn the credibility of Crown witnesses who didn't know about the cases said to exist in South Africa. Now if this is true it's impossible to understand why Dr Meates-Dennis was not permitted to be recalled since she was the one Crown witness who possessed expertise in HIV children. In addition the Judge said twice in paragraph 21 in ruling number 4, and in paragraph 33 in the case stated, that the "essence" of the hearsay evidence had already been put to Dr Meates-Dennis. Now that comment, with the greatest of respect to the trial Judge, just doesn't make sense. If, as the respondent now says, the intended purpose and the sole purpose of the evidence from Professor Rode was to undermine the Crown witnesses' claims to expertise.

Furthermore, at paragraph 21 of ruling number 4 the Judge said that what had already been put to Dr Meates-Dennis was "the question of age related factors giving rise to Charlene's illness and death including the matters involving the South African children." In fact those factors were not put to Dr Meates-Dennis by reference to any allegedly relevant comparator group let alone a specific group of children in South Africa. She was not even asked if she knew if any other children had died in similar circumstances. There was no attempt to cross-examine her in order to undermine her expertise in HIV and of course no basis upon which defence counsel could, at that stage, have attempted to do so because the Professor Rode comments had not come to light.

ELIAS CJ:

Do you have the reference, you don't need to take us there at the moment, but do you have the reference to the cross-examination of Dr Meates-Dennis?

SOLICITOR-GENERAL:

Yes Your Honour I'll have one of my assistants bring it up.

ELIAS CJ:

I can't remember, is it in your written submissions?

SOLICITOR-GENERAL:

There is quite extensive reference to Dr Meates-Dennis in the Crown's written submissions, yes Your Honour.

ELIAS CJ:

And the references are given there? That's fine. I haven't looked at them but it may be necessary to do so.

SOLICITOR-GENERAL:

Yes. This is quite an important point.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

As I'm sure Your Honours will fully appreciate. Dr Meates-Dennis was the only Crown witness who could appropriately have responded to what was being said was attributable to Professor Rode and indeed the Judge was, with the greatest respect, quite confused at this stage when he says that the essence of what Professor Rode was saying had already been put to her.

WILSON J:

Had the Crown sought to recall Dr Meates-Dennis?

SOLICITOR-GENERAL:

Yes indeed, yes, and that was specifically ruled out in the final paragraph of ruling number 4 Sir.

ELIAS CJ:

When you –

SOLICITOR-GENERAL:

Paragraph 21.

ELIAS CJ:

What dates did Dr Meates-Dennis give her evidence on, was it before this emerged?

SOLICITOR-GENERAL:

Yes Sir it was – I'm sorry Your Honour.

ELIAS CJ:

That's all right. It's happened before, I've been called worse.

SOLICITOR-GENERAL:

Not by me you haven't Your Honour. Yes it was, I think from memory, the week before but I'll just ask somebody to confirm the exact dates that she gave her evidence. From my memory of going through the transcripts it was about a week before.

ELIAS CJ:

Yes, that's fine, I just wanted an indication.

SOLICITOR-GENERAL:

Definitely well before anything was known of Professor Rode. Now I want to move on to, having discussed what the trial Judge actually did, move on to item number 5, namely how Professor Rode's statements were used. The Court will appreciate that the trial Judge's rulings that the statements attributed to Professor Rode were admissible and that the statements could be put to the officer in charge and Dr Sage, provided the defence with their own positive platform from which to advance the theory that Charlene had died from complications associated with her HIV status and that she had been

neither sexually violated or murdered on the respondent's theory. It's very important to stress, Your Honours, that up until the 14th of May jobsheet, all of the evidence pointed in one direction, namely that Charlene had been sexually violated and suffocated. This was not a case in which there were different expert opinions and where the new material from Professor Rode tipped the balance. This was a case in which the Professor Rode statement was able to be used affirmatively to advance a theory about the cause of Charlene's death which had hitherto not been supported by witnesses. The open-ended ruling of the trial Judge enabled the defence to use the Professor Rode statement very broadly. As His Honour Justice Hammond in the Court of Appeal said, as a forensic club in circumstances where that opportunity should never have been permitted to arise. Now I'll just very briefly take the Court to the key points –

ELIAS CJ:

It didn't, of course, it wasn't entirely detached from the evidence that was given because there was the evidence that initially on her reception into the hospital natural causes had first been thought to be the reason for the condition so it's not out of the blue?

SOLICITOR-GENERAL:

But –

ELIAS CJ:

I understand that the witnesses didn't hold that view when they came to give evidence.

SOLICITOR-GENERAL:

They – and they didn't hold that view in the case of some by the end of the 6th of January and certainly by the completion of the autopsy.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And indeed, Your Honour, that is why the need to very, very carefully scrutinise the respondent's factual submissions is not understated by me in this Court. It is true and one would think quite naturally that upon admission to the emergency department the provisional diagnosis was that this could be a case of meningitis or some form of major sepsis, but it was the discovery of the anal, the genital and the brain injuries that led the medical experts to the conclusion that tragically this was not a case of this young girl suddenly deteriorating so dramatically from 10.30 the evening before to 6 am the next morning, to the point where she was fine to being close to death. And indeed it was Dr Doocey who I think very accurately summarised the brain injury of Charlene where she said that suffocation, and I'm summarising her evidence and I'll take you to it, but suffocation was in essence the only plausible explanation that fitted all of the symptoms that Charlene presented with.

So how was the Professor Rode statement used –

ELIAS CJ:

Does that include the temperature?

SOLICITOR-GENERAL:

Yes I believe it does Your Honour.

ELIAS CJ:

Right. And there's evidence of that is there?

SOLICITOR-GENERAL:

Can I just pause before I answer that?

ELIAS CJ:

It doesn't matter. Pass on now and it may be necessary to come back to it. I'm not sure how, to what extent we're going to be engaged with those facts.

SOLICITOR-GENERAL:

Right. So the Professor Rode statement was used in cross-examination and in the Crown's written submissions I've set out exactly when and how in cross-examination the Professor Rode statement was put twice to the officer in charge and quite extensively to Dr Sage and I won't go through that now unless the Court wishes me to. Now when summing up, and this becomes quite important in this appeal Your Honour, the trial Judge reiterated the defence approach to the information attributed to Professor Rode in the following passages. The summing up annex is under tab 6 and I propose to take the Court to about five paragraphs. First, the trial Judge, at paragraph 21, summarised the defence case as involving four propositions. Those four propositions were that Charlene's death was due to HIV.

ELIAS CJ:

Sorry I've lost where we are.

SOLICITOR-GENERAL:

Paragraph 21.

ELIAS CJ:

Yes thank you, yes I have it.

SOLICITOR-GENERAL:

Page 27 Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

This is where the trial Judge is summing up what the defence case is and this is very much the brief summary. The four points, that Charlene's death was due to HIV. Secondly, that the DNA found in Charlene's underwear could have innocently transferred to her underwear. Third, was unlikely Nothando would have been unaware of Charlene being suffocated and sexually violated

as she was in the room when this was happening asleep. And fourthly, there was no physical evidence of asphyxiation. I then invite the Court to turn to page – paragraph 30 –

ELIAS CJ:
That's external evidence?

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:
Bruising and –

SOLICITOR-GENERAL:
Precisely. Yes, Your Honour. Sometimes referred to as direct evidence in the transcript.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
In the case. The next paragraph I want to refer to is paragraph 30. This is where the trial Judge referred and summarised Professor Rode's evidence or certainly the evidence that had been admitted, attributed to him. He says that the defence says, [Professor Rode's statements] are pivotal because they must give rise to a reasonable doubt. That's the last sentence on the foot of page 29. Then you go to paragraph 32 over the page where he says, that is the trial Judge says, all Professor Rode was saying about asphyxiation during sexual assault was that this might be such a case "it might not be as well" and then goes on to add that the jury would be "extraordinarily bold" if they gave Professor Rode's comments no weight at all.

The next part of the summing up which I want to specifically draw the Court's attention to is in paragraph 67. When summarising the first main defence,

namely that Charlene had died of natural causes, His Honour summarised the defence proposition saying, “The evidence from Professor Rode about there being a group of children in South Africa who had died quickly with remarkably similar symptoms [was] of extreme importance in this case.”

And then finally paragraph 74 again summarising the defence case and the last sentence, the trial Judge reminded the jury that the defence had said that Professor Rode’s evidence demonstrated that the Crown’s medical experts were wrong.

His Honour Justice Hammond accurately summarised the effect of Professor Rode’s 14 and 15 May comments when he described them as “a godsend for the defence” and that they were used as “a forensic club” in a way which the Crown could not respond to.

The Court will have noted from the respondent’s written submissions that the respondent now says that Professor Rode’s hearsay statements were not pivotal at all. What is clear, from rulings number 3 and 4 and the summing up, is that the defence relied on the 14 May statements attributed to Professor Rode, as a powerful rebuttal for the Crown’s case the Charlene had died from criminal causes. The proposition that Professor Rode’s 14 May hearsay statement was only used to impugn the credibility of Crown medical witnesses, who didn’t know about the alleged cases from South Africa, cannot, with respect, be deduced from the relevant trial rulings, it cannot be deduced from the summing up or the case stated. Furthermore, that theory is irreconcilable with the failure to recall Dr Meates-Dennis, to have the hearsay statements attributed to Professor Rode put to her. It is also not reconcilable with what the Crown understands to have been the respondent counsel’s closing address to the jury, and it is certainly not consistent or reconcilable in any way with what the Court of Appeal understood the respondent’s case to be.

I was now going to move on to what the trial Judge should have done, and this is item number 6 on my synopsis. Lest there be any misunderstanding,

whilst the primary error was made on the 16th of May, it is the Crown's case that as at the 14th of May that 14 May statement by itself was not admissible. It is apparent that the trial Judge –

ELIAS CJ:

Can you – one query I have, which you can take us to later if you like, I would like to see how the statement was produced. I know it was put to Dr –

SOLICITOR-GENERAL:

Sage?

ELIAS CJ:

– Sage in cross-examination.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Was it just put orally, was it?

SOLICITOR-GENERAL:

It was, Your Honour. It was first put to the officer in charge, on two occasions, as was the 15 May email. None of the documents, no, none of the three documents were actually produced as exhibits.

ELIAS CJ:

And again, in your written submissions there the reference to the transcript where those –

SOLICITOR-GENERAL:

Absolutely.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Well, where only the 14 May and the –

ELIAS CJ:

Yes, 14 May, yes.

SOLICITOR-GENERAL:

– 15 May statement was put, because 16 May was never put.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And there seems to have been some confusion as to whether or not the trial Judge had actually specifically ruled that out or not.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Whatever the truth of the matter is, it was never put.

ELIAS CJ:

It wasn't put.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Which, you say, has nothing to do with the decision to admit the evidence by the Judge, the earlier evidence, by the Judge?

SOLICITOR-GENERAL:

The fact that it wasn't put is not relevant.

ELIAS CJ:

That the 16 May statement was relevant and could be used in the decision whether to admit the earlier statements.

SOLICITOR-GENERAL:

Yes, so, to make sure I'm not inadvertently causing any confusion, there are two prongs –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– to the submission. The first is that the 14 May statement by itself was inadmissible.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The 16 May statement merely confirmed, many fold over, that the 14 May statement was inadmissible.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And it may pay if I very, very briefly just summarise those two points which I've just made, Your Honour. The 14 May statement was not admissible, because there was no legitimate purpose for which it could be used. It could not be used as an opinion, the trial Judge on the 14th of May seems to have reached that conclusion, which is why he wanted or permitted the, or wanted

the trial adjourned, to see if further information or an opinion could be extracted from Professor Rode after he had looked at and reviewed case specific materials, photos, autopsy report, information about how Charlene's parents had died. But it was plainly not an opinion on the 14th of May, it didn't come anywhere near forming an opinion, and that was merely confirmed. The next day, when an alternative hypothesis was floated, and then on the 16th of May, when it became abundantly clear that Professor Rode was horrified at the thought that a comment that he has made on the 14th May might be being treated as an opinion on the cause of Charlene's death.

Now, I don't anticipate that the Court will have any difficulty with what I have just said. What the respondent now endeavours to emphasise is a proposition which the trial Judge didn't seem to appreciate and the Court of Appeal Judges certainly didn't seem to understand from their judgment, and that is this notion that the sole purpose of adducing the 14 May statement was simply to undermine the credibility of Crown witnesses, who didn't know about these alleged cases in South Africa. Now, this is a basis of cross-examination which has its foundation in some jurisdictions in the United States. In the United States there is a concept of cross-examination of expert witnesses known as the learned treatise principle. Professor Frickleton, in his –

ELIAS CJ:

It's used a lot in competition cases, isn't it?

SOLICITOR-GENERAL:

Professor Frickleton calls it the "are you up to date" concept of cross-examination.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And the way that that process works is that it is permissible in some jurisdictions in the United States to cross-examine a witness as to whether or not they know of certain learned treatises.

ELIAS CJ:

But isn't the short point, in answer to that, that that's not the way the Judge treated it in his summing up to the jury?

SOLICITOR-GENERAL:

Well, there's an even more fundamental point, which is why this argument can't get off the ground in New Zealand, Your Honour, and that is there was no treatise, there was no publication.

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

It just, it's a remarkable extension of a narrow avenue of cross-examination which the Supreme Court of Canada has examined and expressly rejected as being permissible, unless the witness is prepared to adopt the learned treatise work as being an expression of an opinion with which they agree.

McGRATH J:

What's the Supreme Court of Canada decision?

SOLICITOR-GENERAL:

I've got copies available, Your Honour.

BLANCHARD J:

It's hard to see how it has any relevance, except as an opinion. Otherwise it's just a disconnected set of facts. There has to be implicit in the use of it the concept or the assertion that there's some similarity –

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

– between those facts and what has happened to Charlene.

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

Otherwise it's irrelevant.

SOLICITOR-GENERAL:

And that's what His Honour seemed to be thinking on the 14th, but by the 15th his thinking had changed to him thinking that this was simply a statement of fact, full stop, that was somehow admissible. And now, in this Court, what the respondent says is, "Well, it wasn't being, we're not saying it was pivotal, it wasn't being used as an opinion, it was simply being used to undermine the credibility of the Crown's medical witnesses." And the Crown says, "Well, it's not the way it was dealt with at trial, it's not the way the Court of Appeal dealt with it," and in any event it's not surprising that my friend doesn't cite any case to support this proposition because there is no case that the Crown has been able to uncover which comes even remotely close. The nearest concept is, as I say, the learned treatise principle or are you up to date concept but there has to be the opportunity for the witness to be familiar with that public, with those publications and in this case Dr Sage did, gave evidence and gave a – that he did a very careful literary search to see if there was any reference anywhere to these cases that were being attributed to Professor Rode. He made it very clear that there were no such references that he'd been able to find anywhere in the literary. So the learned treatise or are you up to date concept just doesn't get off the ground. I agree, Your Honour, that the Judge's thinking seemed to have changed from the 14th where he thought maybe this could be the nucleus of an opinion, which is why he permitted an adjournment to see if some of the more basic foundations for an opinion could be obtained, but by

the 15th, when there was the alternative theory being floated and attributed to Professor Rode, and certainly by the 16th, it must have been very, very clear that this just couldn't possibly be used as an opinion.

ELIAS CJ:

But the point that's being put to you is one that you don't seem to have strongly advanced in your submissions and certainly doesn't emerge in the Court of Appeal judgments and that is that the whole notion of this, these facts being relevant required an implicit acceptance that they're of an opinion that they were linked to the particular case.

SOLICITOR-GENERAL:

And that's exactly how they were used by defence counsel in front of the jury.

ELIAS CJ:

So there's an immediate section 7 issue?

SOLICITOR-GENERAL:

Absolutely. And a section 8. And a section 18.

ELIAS CJ:

Yes, but the section 7 is the more fundamental one.

SOLICITOR-GENERAL:

Yes yes and by the 16th Your Honour I say that they weren't relevant on the 14th. Even if Your Honours disagree with me on that by the 16th it is plain they couldn't have been relevant for two fundamental reasons. One, it could never possibly have been considered to be an opinion because the author of the statement was absolutely adamant and made it abundantly clear he had formed no opinion and the trial Judge accepted that. He said we weren't even trying to get an opinion from Professor Rode. And secondly, the trial Judge, if he had any lingering concerns, should have had his concerns more than adequately displaced by the quite significant change in terminology on the 16th of May from Professor Rode supposedly making comparisons with a

case, a group of cases in South Africa with HIV to supposedly on the 16th of May now referring to cases in South Africa which were AIDS, full-blown AIDS is what the 16th of May jobsheet refers to, and the Court will know that there is a world of difference between those two conditions and there –

BLANCHARD J:

You say that the trial Judge didn't see it as opinion evidence?

SOLICITOR-GENERAL:

On the 14th he didn't see it as opinion evidence.

BLANCHARD J:

And on the 16th?

SOLICITOR-GENERAL:

Um –

BLANCHARD J:

Because there he is actually referring to the opinion section of the Evidence Act?

SOLICITOR-GENERAL:

He is but then he's saying that it isn't an opinion. It's not very clear exactly what the trial Judge was actually thinking as at the 16th Your Honour. There are a number of anomalies and inconsistencies in the way in which His Honour dealt with this. So if I can just very briefly deal with how the Crown says that the trial Judge should have dealt with this. On the 14th of May he should have asked what is the purpose of adducing, attempting to adduce this evidence. If that question had been asked and clearly answered then His Honour would have appreciated that it didn't meet the standards for admission as an opinion on the 14th and certainly would never get off the ground as being the basis upon which somebody could cross-examine somebody on the basis of a massive extension of the learned treatise/are you

up to date concept of cross-examination. He would also have focused on section 8 and decided, as the Court of Appeal unanimously concluded, that unfair prejudice would be caused if this statement was adduced.

By the 16th His Honour should again have gone through the four step analysis of deciding whether or not this was relevant. What was said on the 14th of May, was it relevant. And this would have involved His Honour in asking if there was a logical connection between Professor Rode's statement and the cause of Charlene's death. In answering that question accurately the trial Judge would have had to have appreciated that at most there was only a conjectural connection between the 14 May statement and the cause of Charlene's death.

BLANCHARD J:

What do you mean by that? A conjectural connection?

SOLICITOR-GENERAL:

It's just a guess. Nothing more than a guess.

ELIAS CJ:

Well was there even that? I mean there has –

SOLICITOR-GENERAL:

That's the way it was used, as a guess.

ELIAS CJ:

Well there has to at least be an opinion that the two cases may be alike?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

The observed group and this case.

SOLICITOR-GENERAL:

Yes and there was not that.

McGRATH J:

By guess you mean really a possibility for further enquiry?

SOLICITOR-GENERAL:

Yes. As at the 14th, certainly, as at the 16th. The absolute most that could be seen is that there was some conjectural connection which falls well short of there being the requisite elements of relevance as this Court articulated the need for relevance 12 months ago in an appeal involving section 7 and what the Court has been invited to do now is to apply exactly the same test and standard as it did in *Bain* when this Court rejected as admissible the 111 evidence. There at least it was an opinion but this Court held that there was no logical connection between what the Crown was saying that opinion led to and what the evidence actually was.

So the *Bain* approach to what is relevant is taken, it is the most authoritative statement from this Court on assessing relevance. This Court needs go no further than ask, did the 14 May statement provide a logical connection between what Professor Rode was saying and the cause of Charlene's death, and it doesn't, it just doesn't get anywhere near that.

In relation to unfair prejudice – that's all I was going to say on relevance unless I can assist the Court further on relevance?

ELIAS CJ:

That's fine.

SOLICITOR-GENERAL:

Unfair prejudice, again I think it's very, very self-evident that by 16 May there was a very, very real doubt about this 14 May statement being able to be used as an expert opinion and there was real doubt about its relevance in view of the change in terminology that was quite important. Then His Honour should

have gone on to make the assessment on reliability. Clearly he focused on one element of reliability, namely whether or not the transmission was reliable but giving focus upon whether or not the content was reliable in the way in which the Crown says he should have and in light of the 16 May statement the Judge needed to reassess whether or not the 14 May statement was in fact reliable and satisfied the requirements of reliability particularly in light of the change in terminology about the alleged comparator group in South Africa and Professor Rode's very clear disclaimer about the reliability of this statement at all.

Then finally the trial Judge needed to go on if he was somehow convinced that this was admissible hearsay opinion, he had to go on then and decide whether or not the jury would be substantially helped by the admission of this and again the Crown's case is very succinctly summarised as saying it must have been very, very clear on the 16th that this 14 May statement was of no assistance whatsoever. It wasn't opinion. There was significant confusion about what was actually being said and it just simply didn't meet the requirements for being substantially helpful.

The Crown's submission is that had the trial Judge logically applied section 7, 8, 18 and 25 of the Evidence Act on 16 May, he would have been obliged to conclude that his earlier assumptions were misplaced and that it would be wrong for the jury to be told about the contents of the 14 May statements attributed to Professor Rode. In this respect the Crown does rely very substantially upon the analysis of section 7, 8, 18 and 25 in the Court of Appeal judgments.

Now I come onto the question of jurisdiction which is where the Crown's case was derailed in the Court of Appeal. It is very clear to the Court, I am sure, that in the Crown's submission, the correctness of the decision to admit Professor Rode's hearsay statement was a question of law. From the outset it needs to be stressed that the jurisdiction conferred by section 280 of the Crimes Act relates only to questions of law being referred to the Court of Appeal. As His Honour Chief Justice Spigelman has noted in the case of the

Attorney-General New South Wales v X (2000) 49 NSWLR 653 which is in the Crown's bundle of authorities and I'll just read it out Your Honours. Tab 17 at 677, paragraph 124. "The expression a question of law or a point of law is wider than an error of law." And His Honour the Chief Justice was entirely correct on this point. Section 380 infers jurisdiction to hear an appeal. Section 382 sets out the basis upon which that jurisdiction is to be exercised. The respondent normally conflates these two basic concepts in paragraphs 90 and 95 of his submissions when he argues that an Appellate Court cannot accept there is a question of law under section 380 until it is first decided that there is an error of law under section 382. The respondent in this submission is trying to argue that an Appellate Court must first determine the substance of an appeal before deciding if it actually has jurisdiction to do so and the Crown says that that approach is plainly not correct.

WILSON J:

Mr Solicitor, just in this area of the reservation of questions. I note that at paragraph 75 of the respondent's submissions, the submission is made, and I quote, "The jury had retired for approximately 5 hours before indicating verdicts had been reached. It was only then that the prosecutor asked to see the trial Judge in chambers and to formally seek to have points of law reserved." Does the Crown accept that that is a correct statement of what occurred?

SOLICITOR-GENERAL:

No it does not Sir and I raised it with my friend and my friend now accepts that that statement is wrong. My friend now accepts that the Crown first raised the – with the trial Judge reserving a question of law at 2.29 pm on the 16th of May straight after trial ruling number 4 was made and that is recorded in the Crown book and my friend accepts that.

I was going to make the following points about the drafting of section 380 and it's quite clear that the drafters of both section 380 and 382 of the Crimes Act envisaged that a ruling on admission of evidence is presumptively a question of law and there are three sources for that proposition. The first is the proviso

to section 382(2) which specifically refers to the improper admission or rejection of evidence as being a criteria that could give rise to a retrial if the trial Judge's decision caused a substantial wrong or a miscarriage of justice.

ELIAS CJ:

Is that a total answer though because there will be some – sometimes admission of law will clearly just depend on a legal category not requiring any evaluation?

SOLICITOR-GENERAL:

True. It's not the complete answer –

ELIAS CJ:

No.

SOLICITOR-GENERAL:

And I'm not purporting to say that it is.

ELIAS CJ:

No but it would exclude, particularly in the context of the Evidence Act, a lot of admission decisions.

SOLICITOR-GENERAL:

That are based solely on an assessment –

ELIAS CJ:

No, that are based on assessment.

SOLICITOR-GENERAL:

Of credibility only. I'm sorry I might not be understanding –

ELIAS CJ:

No, that are based on assessment more generally really because the Act is pretty replete with requirements of balance.

SOLICITOR-GENERAL:

Can I come back to that point if I may?

ELIAS CJ:

I don't think it's a point adverse to what you're saying at all.

SOLICITOR-GENERAL:

Yes. So –

ELIAS CJ:

I'm a little – I'm not sure why you don't take the – I know that the Court of Appeal thought that there was no functional distinction that was relevant in terms of what's a question of law and not. I wonder whether that view should be too easily abandoned because the structure of the Crimes Act, and indeed the internal references within these provisions, do seem to follow the different responsibilities of Judge and jury in a trial.

SOLICITOR-GENERAL:

The functional approach is part of an answer, it's part of the answer Your Honour, but it is, with respect, not necessarily the complete answer and that in addition to the respective functions of Judge and jury one needs to look at the actual decision itself and in this case what clearly was being or should have been involved was a careful appraisal of relevant provisions of the Evidence Act to the information that was presented to the trial Judge. That was a quintessential exercise in the Judge making decisions of law relating to the admissibility of the statements that were being referred to. It is extremely difficult to reach any other conclusion and indeed it is perhaps more than just a little ironic that the Judges of the Court of Appeal undertook a very methodical and thorough evaluation of the key provisions of the Evidence Act, explained what the trial Judge should have done, reached a conclusion that clearly he hadn't applied the Evidence Act appropriately yet two members ultimately concluded that notwithstanding all of that what he did was only make an error of fact.

McGRATH J:

Is the functional approach – are you saying that the functional approach is one of the four bases for admission of evidence presumptively being a question of law?

SOLICITOR-GENERAL:

No, no.

McGRATH J:

You're not.

SOLICITOR-GENERAL:

It is a factor that it is not one of the –

McGRATH J:

Not one of your four main points?

SOLICITOR-GENERAL:

No. And indeed I think that the questions that you've been putting to me be really very neatly into *Bryson v Three Foot Six* [2005] 3 NZLR 721 (SC) because there this Court of course –

ELIAS CJ:

Quite a different case because not against a context of separate responsibilities of fact finder and Judge.

SOLICITOR-GENERAL:

Yes but nevertheless extremely helpful to the Crown, with the greatest of respect, because there this Court undertook a very careful appraisal as to what could constitute an error of law in that particular case identified in what the Crown would say were three very key relevant factors that are directly transportable to the present circumstance.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.48 AM

SOLICITOR-GENERAL:

Thank you, Your Honours. Could I just deal with two matters. First, Your Honour the Chief Justice asked me specifically about when Doctor Dennis was giving evidence. And I was partially right and partially wrong. Her evidence was broken. She gave her evidence in chief on the 13th of May. And then on the 14th of May, Doctor Byard gave his evidence. Doctor Meates-Dennis returned to give evidence on the 16th of May, and her evidence concluded at five past one on the 16th of May.

ELIAS CJ:

So was the substance of what was contained in the statements of 14th May and 15th May put to her?

SOLICITOR-GENERAL:

No.

ELIAS CJ:

Not at all?

SOLICITOR-GENERAL:

No.

ELIAS CJ:

Well, doesn't the Judge say it was?

SOLICITOR-GENERAL:

Yes. And that's why I said it was very confusing what the Judge was saying. The second point, and I apologise to Your Honour Justice McGrath because I think I misunderstood Your Honour's question. Your question didn't quite fit with the format of my own thinking on this issue, and I therefore didn't answer it as clearly as I should have. That relates to the functionality aspect. I think

that the way I answered the Chief Justice on this point was the way I would have preferred to answer Your Honour, namely, that functionality is a good starting point, it's a presumptive starting point, but I think that the appropriate approach is to say that whilst it is a very strong indicator as to whether or not a decision is a question of law is not is not the complete answer, in itself, and that one needs to look at the substance of the actual decision to see if it does involve a question of law. That was my intended answer, but I don't think it came out quite in the way I intended, Your Honour.

MCGRATH J:

Thank you very much.

SOLICITOR-GENERAL:

Had the methodology in *Bryson* been applied in this particular case particularly by the Court of Appeal, the Court would have asked three questions which emerge from paragraphs 24, 25, 26 and 27 of *Bryson*. 3.6 which is at tab 11 of the Crown's bundle of authorities. In three categories of question of law, appealable questions of laws are identified in those four paragraphs of this Court's judgment. In adopting those three types of cases of questions of law, the questions that were relevant in this particular case were these –

ELIAS CJ:

Is there any significance in paragraph 26, an ultimate conclusion of the fact-finding body?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Is there an ultimate conclusion here that –

BLANCHARD J:

Admissibility.

SOLICITOR-GENERAL:

Yes, that's the third limb that I was going to come on to in a few moment, Your Honour. Can I invite the Court to come back to me on this point if I haven't adequately answered it in a few moments.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

There are three fundamental questions applying the *Bryson* methodology. Those three questions are these. Did the trial Judge misdirect himself as to the requirements of the relevant parts of the Evidence Act? And that is adapted from paragraph 24 in *Bryson*. The second question is, did the trial Judge fail to take into account any matters relevant to the proper application of the law? And that is deduced from paragraph 25 of *Bryson*. And then finally, did the trial Judge fail to reach the only "true and reasonable conclusion" available on the facts before him? And that is deduced from paragraphs 26 and 27 of *Bryson*. Now, I know Your Honours will know I mean absolutely no disrespect when I say that these were perfectly orthodox questions. There was nothing spectacular about these three questions, and with the greatest of respect, nothing spectacular about the way in which they were framed in *Bryson*. Had the majority of the Court of Appeal actually turned their minds to what this Court had said in *Bryson*, then they would have answered these three questions in the following manner. The trial Judge had failed to properly apply the relevant test in the Evidence Act. He failed to properly assess whether or not the admission of Professor Rode's statement raised unfair prejudice, section 8 of the Evidence Act. He failed to properly assess the reliability of the statement as required by section 18 of the Evidence Act. And he failed to properly assess whether or not the hearsay statements satisfied the substantially helpfulness test in section 25 of the Evidence Act. So the majority of the Court of Appeal would have realised, applying the first of the three questions that emanate from *Bryson*, that the trial Judge had erred in law. The majority should then have gone on to ask

the second question, by asking whether or not the trial Judge had failed to take into account matters that were relevant to the proper application of the law. And in answer to that question, it is also, in the Crown's respectful submission it is quite obvious that the two relevant matters that were not taken into account properly were Professor Rode's own concern that his statements not be treated as opinion, and secondly, Professor Rode's very significant change in terminology from alleged comparative group of HIV patients to patients that had full-blown AIDS that must have caused, or should have caused, a remarkable, a significant rethink in the assumptions that had hitherto been made. And had the majority asked the third question, which emanates from paragraphs 26 and 27 of *Bryson*, they would have concluded that the trial Judge had failed to reach the only true and reasonable conclusion available to him on the facts before him, namely, that Professor Rode's hearsay statements were inadmissible. Now, I think that answers the ultimate conclusion point that Your Honour the Chief Justice raised with me earlier. But if I had misunderstood the point, then I'm very happy to explore it further with Your Honour.

ELIAS CJ:

No, that's fine.

SOLICITOR-GENERAL:

Now, the consequence of the majority in the Court of Appeal's failure to conclude that the wrongful admission of Professor Rode's hearsay statements did not give rise to an appealable question of law cannot be understated. Applying the approach taken by the majority in the Court of Appeal, we now have the very unfortunate position where a trial Judge may now fail, or even refuse, to apply threshold tests for the admission of evidence set out in the Evidence Act, produce an outcome, namely, the reception of evidence that is irreconcilable with the correct application of the test set out in the Evidence Act, and yet, in doing so, apparently, not give rise to a question of law capable of being reversed on appeal. And such a conclusion, with the greatest of respect to the majority in the Court of Appeal, is one that shouldn't survive this Court's reasoning.

ELIAS CJ:

Well, it would certainly cut down a lot of appeals.

SOLICITOR-GENERAL:

It eliminates section 380.

ELIAS CJ:

It's just, it's unusual that this is a Crown appeal, but it would have quite an impact on defence appeals.

SOLICITOR-GENERAL:

Indeed. I now want to move on, if Your Honours are agreeable, to item number 9 in the synopsis which I made available to you earlier this morning, and answer why the admission of Professor Rode's statements caused a mistrial and a substantial or wrong miscarriage of justice.

BLANCHARD J:

Are those two expressions synonymous?

SOLICITOR-GENERAL:

Substantial wrong or miscarriage of justice. Are those the two expressions you're focusing on, Your Honour?

BLANCHARD J:

Well, actually, there are three. I'm not sure I understand any difference between them.

ELIAS CJ:

Well, is it not the case that it is, again, contextual, and "wrong" reflects the fact that we're dealing, in part, with errors of law. Miscarriage of justice is about outcome.

SOLICITOR-GENERAL:

Yes, and I think that that's consistent with the *Matenga* approach, as well, Your Honour.

ELIAS CJ:

Well, it may not be, because it was dealing with quite a different –

BLANCHARD J:

Matenga didn't have "mistrial" or "wrong" in it.

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

That is correct, Your Honour. It doesn't have –

BLANCHARD J:

Which one are you going to concentrate on?

SOLICITOR-GENERAL:

I want all three.

ELIAS CJ:

Well, have them all.

SOLICITOR-GENERAL:

I am being quite serious there. I think that all three are applicable. Now, both parties in this Court, rightly or wrongly, seem to be suggesting that there should be some attempts made to try and apply the 382 subsection 2 proviso as consistently as possible with the section 385 proviso as it was applied by this Court in *Matenga*. But from the written submissions, there's clearly a dramatic difference in approach as to how *Matenga* could possibly be applied in this case. The Crown's position is that using the approach taken in

Matenga, the appropriate approach is for this Court to ask and answer whether the potentially adverse effect on the result alleged by the Crown actually occurred. And that this would involve the Court reviewing all of the admissible evidence and deciding whether or not the verdict of not guilty was "inevitable in the sense of being the only reasonably possible verdict". And that's taken directly from *Matenga*. So it's the Crown's position that the test is whether or not the verdict of not guilty was inevitable in the sense of being the only reasonably possible verdict. The respondent argues that this test is for the Crown to convince Your Honours that the respondent is, in fact, guilty, before it can be said that there was a mistrial, a substantial wrong, or a miscarriage of justice. And the Crown's response to that is as follows. Firstly, that would involve an appellant Court usurping the function of the jury which ultimately must decide whether or not a person who is ordered to undertake a retrial is guilty or not. And, indeed, the Crown relies on what the Privy Council said in *Bain* where they emphasised the need for the appellate Courts not to usurp the ultimate function of a jury. The approach which the respondent urges would render a retrial otiose. The obvious difficulties with the respondent's approach are illustrated by his submissions in paragraphs 117 to 120, where he acknowledges that even if this Court finds that there has been a substantial wrong, miscarriage of justice, the Court must then exercise its residual discretion to order a new trial. Now, I accept there is a residual discretion. But the significant difficulty with the respondent's approach is to the threshold that needs to be satisfied before there can be said to be a mistrial, substantial wrong, or miscarriage of justice is this. What room is there for the exercise of a residual discretion if this Court has reached the conclusion that a respondent is guilty? It would be a very unusual decision for this Court, for an appellate Court, to conclude, on a Crown appeal, that this very high threshold that the respondent argues for, namely, that the respondent is, in fact, guilty, has been satisfied, yet then go on to exercise a residual discretion to say but notwithstanding we think that he's guilty of a very, very serious crime, he shouldn't have to stand trial again. And that, with the greatest of respect, really seriously undermines the whole value of that residual discretion. The preferable approach, and the one which is consistent with *Matenga*, is the one which the Crown urges, namely, this Court asking

whether or not it is inevitable that not guilty verdicts would have been delivered had the errors that occurred in this trial not occurred. Inevitable in the sense of being the only reasonable possible verdicts.

ELIAS CJ:

I'm not sure that section 382, which has to be read as a whole, not segmenting off the proviso, but reading it in context, really does pull you towards the appeal Court looking to the outcome, except maybe under section 382(2)(d). It's really about significance of the error on the mistrial.

SOLICITOR-GENERAL:

Yes. I, for my part, won't dispute Your Honour's proposition. What I do dispute is the notion that somehow a Court has to be satisfied of the ultimate outcome before it can be satisfied that there has been a mistrial, substantial wrong, or miscarriage of justice.

WILSON J:

If a prosecution were able, talking hypothetically for the moment, to survive a no-case submission, could it ever be said that a verdict of not guilty was inevitable?

SOLICITOR-GENERAL:

I think it could be, Your Honour. It will require a Court to examine, in context, the actual errors that took place, and what the impact of those errors was likely to be on the jury's decision. In other words, an error which might be a significant legal error, may not actually have, in the context of the trial, been all that important. So it's the importance of the error that I think is the point Her Honour the Chief Justice was making to me a few moments ago, which is of considerable importance. And it is for that reason, Your Honour, the Crown has been at some lengths to say that this was very significant, the Professor Rode's statement, that the trial Judge characterised it as pivotal, and then later, in his summing up, called it extremely important. He said it was pivotal because it gave rise to a reasonable doubt, and later, that it was extremely important. And it is because of this pivotal that the Crown says it is,

there has been a miscarriage of justice and a substantial wrong. And it is for that reason, also, Your Honour, that the Crown has been at some lengths to say that whilst the respondent in this Court may now attempt to minimise the impact and the use that was made of the Professor Rode statement, the reality is, as is seen from the way in which I've taken you to the trial Judge's two relevant rulings, the case stated, and his summing up, it was plainly pivotal. And all three members of the Court of Appeal had no hesitation in concluding it was – although they didn't use the word "pivotal" – they all concluded that there had, in fact, been a miscarriage of justice and a substantial wrong. So to summarise this part of the Crown's case, the Crown invites this Court to conclude that the respondent can not now diminish the significance of Professor Rode's hearsay statement. At trial, that statement was described as "pivotal" because it gave rise to reasonable doubt and was of extreme importance. It is quite apparent from the trial Judge's summing up that Professor Rode's evidence was considered at the trial as being very material, indeed, pivotal, because it was the only positive evidence – if we can characterise it as such – that supported the Crown's theory that there was a reasonable doubt as to the cause of Charlene's death. If Professor Rode's evidence had been excluded, then it cannot be said that verdicts of not guilty would inevitably have been returned. Verdicts of not guilty were not inevitable in the sense of being the only reasonable possible verdicts available. Indeed, the strength of the forensic evidence against the respondent and, now, the strength of the true evidence that Professor Rode wishes to give, should lead this Court to conclude that a verdict of guilty on a retrial is distinctly possible. I now want to move on to item 10, and make submissions as to why a new trial should be ordered. I want to deal, first, with relevant considerations, and to submit, again, orally, the point that has been made in the Crown's written submissions that neither the double jeopardy principle, nor the so-called spirit of the double jeopardy principle, is engaged when a trial Court states a case for an appellate Court, because the delivery of verdicts, while questions of law are reserved, does not constitute a final determination. There is no final determination until the procedures prescribed by Parliament in section 380 and 382 of the Crimes Act had concluded. The respondent in this case may have the interim benefit of not guilty verdicts from the trial, but those verdicts

are only steps in a legal process ultimately designed to ensure that after a fair trial there should be a true verdict. The learned President's introduction of the spirit of the double jeopardy principle into the application of the proviso to section 382 is inconsistent with the recognition that Parliament has already specified the criteria which justify the Court in ordering a retrial. For the Court to reach the stage of exercising the apparently general residual discretion presupposes that those criteria have all been met. The President's approach to that apparently general discretion was significantly constrained by importing a mandatory consideration that does not appear in the language of section 382. The approach of reintroducing the double jeopardy principle was specified considered and rejected very recently by the Court of Appeal in England and Wales in the case of *R v Andrews [2009] 1 WLR 1947 (CA)*, which is at tab 26 of the Crown's bundle, at paragraph 41, where the Lord Chief Justice, in the first three-quarters of that paragraph, made it very clear that the double jeopardy principle is not a relevant consideration bearing on the interests of justice. The true scope of the residual discretion conferred by section 382(2) was, with the greatest of respect to the Court of Appeal in this case, far more accurately identified in the earlier Court of Appeal judgment of *R v Stephens (CA 455/02 24 March 2002)*, at tab 13 of the bundle of authority, where the Court said, at paragraph 28, what factors might be appropriately taken into account in exercising the residual discretion under section 382. The Crown wouldn't take any issue with what the Court of Appeal said in paragraph 28 in *Stephens*. The penultimate matter I want to touch upon are some further errors in the respondent's submissions, where he identifies at paragraph 123 of his submissions eight factors which he says are relevant to the Court's exercise of its discretion to order a retrial. Those eight factors resemble the types of matters that might be urged upon the Court in a stay application based upon an argument that the Crown has engaged in an abuse of process. The points raised by the respondent can be very quickly addressed. Firstly, there was no flawed investigation. Indeed, the new evidence from Professor Rode is entirely consistent with what the Crown's evidence was at trial. Secondly, there can be no valid criticisms of the Crown's failure to speak directly with Professor Rode or Professor Beasley on 14, 15 and 16 May. It was the police who were properly tasked with that

responsibility. Indeed, it would have been potentially very difficult for a Crown prosecutor to speak directly with a potential witness whilst their evidence was being formulated. Thirdly, there was no failure on the part of the Crown to understand the 16 May jobsheet. Fourthly, undoubtedly as with most cases, the Crown could have advanced more detailed submissions on the 16th of May, but there can be no doubt about the essence of the Crown's concerns, and that they were conveyed to the trial Judge. I've dealt with the fifth point in response to a question from His Honour Wilson J. There was no delay in asking for a question of law to be reserved. The sixth point, there is a reference to a nine month delay. That needs to be carefully assessed, and my friend now accepts that, in fact, the Crown filed its draft case stated on the 23rd of September 2008. That was four months after the verdicts, and that four month delay was regrettable, but due entirely to the delay in waiting for Professor Rode to complete his report. There was a further five month delay, which was attributable to the trial counsel, the respondent's counsel, not being available for a number of quite legitimate reasons, and whilst delays were occurring in relation to legal aid issues being resolved. Four months are attributable to the Crown, not nine months. The appropriateness of referring to both the 16 May jobsheet and Professor Rode's has been, I hope, fully and adequately addressed in the submissions that have been made, and finally, this is not an attempt to have a second bite at the cherry. The Crown, as I said right from the outset, is simply wishing to ensure, on behalf of the community, that the respondent is tried fairly, without misleading evidence, so as to ensure that a true verdict – whatever it is – is obtained. And the key overriding factors will not surprise this Court. They are set out in the written submissions. In the Crown's submissions, the two key overriding factors are the seriousness of the offending, and secondly, the fact that Professor Rode's real opinion, supported by Doctor Eley, underscores the submission that the jury in the respondent's first trial was grossly misled. There can be no doubt that the respondent would not now be able to rely on the evidence from Professor Rode to provide support for his "natural causes" theory for the reasons for Charlene's death at his retrial. Your Honours, could I just make some enquiries of my fellow counsel, to ensure that I have covered all matters?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Thank you very much, Your Honours.

ELIAS CJ:

Thank you, Mr Solicitor. Yes, Mr Eaton?

MR EATON:

May it please the Court. As was the position the appellant took in its written submissions, the appellant, in advancing its case today, chooses to ignore what was, without doubt, the primary defence that was advanced at trial on behalf of the respondent, namely, that it was simply inconceivable that the offendings alleged could have occurred in the circumstances purported by the Crown, and in particular, such an horrific offence alleged to have taken place when the deceased lay just an arm's length away from his twenty year old daughter, who, on the Crown theory, had slept through it. Not just with his twenty year old daughter an arm's length away, but his wife in the adjourning bedroom and his son in the room, also, upstairs. And that was the key primary defence that was advanced at trial. It was how the defence opened. It was how the defence closed in terms of priority. And it was consistent with the position taken by the respondent when this admissibility issue arose, an issue, of course, which the respondent had no influence or control over, and, as I've said in the submissions, was simply a passive bystander as this issue arose and when this was dealt with by the prosecution over the following two days. But the bottom line for the defence at that time was regardless of whether the evidence is admissible or not, we do not want this trial aborted. We are content with the defences to be advanced based on the credibility and reliability of the key eyewitnesses, and the general issues as described by the President of alibi and motive, opportunity and character. And I urge on the Court the view that the President took, that there faced hurdles, real hurdles, for the Crown in achieving a conviction in this case. The primary argument

advanced on behalf of the respondent is that the trial Judge did not make an error in admitting the Rode hearsay, and the respondent's case is that the Solicitor-General's argument in this Court, and, indeed, particular factual findings made by the Court of Appeal in relation to what occurred at trial, are flawed in that they do not have due regard to what actually happened at trial. And this morning, this Court has heard my friend say, on so many occasions, that it was so very, very clear on 16 May that the Rode comments of 14 May were unreliable, that that was a very obvious error made by the Judge. And with respect, that is unfair to the trial Judge. I've addressed it in the written submissions. I don't need to go over it in detail. But the Crown record book confirms that the Judge had made a ruling at 10.46 on the morning of 16 May. He had ruled the evidence admissible. It was only thereafter that the prosecution contacted Beasley, obviously to inform him of the ruling. There could have been no other purpose. But the ruling had been made. When we convened at two o'clock, the Crown book confirms that the prosecutor then handed the Judge the 16 May jobsheet. At 2.03, His Honour delivered his decision, the reasons for his earlier decision. What my friend describes in this Court as a situation where matters must have become so very, very clear to everybody simply does not reflect what happened at trial. There was no suggestion made to the effect that there was a shift in terminology that was significant, a feature which the Court of Appeal picked up on, which my friend adopts here. Never suggested. And, of course, that's significant, because of course the information was still coming through Professor Beasley, who was the senior Crown expert at trial. He was the one who had passed on the information of 14 May. If he sensed there was a significant shift in terminology relevant to assessment of what had been said on 14 May, he would have brought it to the Court's attention. It didn't occur to him as being significant. It didn't occur to the prosecution as being significant. It didn't occur to the officer in charge as being significant. And, of course, it didn't occur to Chisholm J as being significant.

ELIAS CJ:

I'm not sure that I entirely follow this submission, because there was an evolving set of circumstances, and while the Judge may have given an

indication orally of a ruling, surely the reality was that the matter proceeded on a fresh basis, in part, at the hearing at two o'clock. And there would be nothing to impede the Crown from renewing its application.

MR EATON:

But it didn't. And certainly the case stated –

ELIAS CJ:

Well, it didn't inform. But in substance, isn't that what was happening?

MR EATON:

Well, what actually happened, in my assessment at the time, and I suggest that it comes out in Chisholm's J observations as well is that the Crown was simply reflecting their and Rode's disagreement with the Judge's decision. You've made a decision, and now, when you're about to give reasons, even the person who we're getting the hearsay evidence from isn't happy with what's going on. And that's how the Judge dealt with it, and that's how he expressed it. And that's how he dealt with it in the case stated.

BLANCHARD J:

But if the Crown was taking that objection, surely that was in substance an application for the Judge to reconsider.

MR EATON:

Well, there is nothing –

BLANCHARD J:

Otherwise there'd be no basis for the Crown making that kind of submission. It would be gratuitous.

MR EATON:

Quite. And that's what I've said in my written submissions. It's hard to see it as being anything other than being –

BLANCHARD J:

Well, why shouldn't the Crown ask for a decision on admissibility to be reviewed in the light of something else that had come in? It could do that at any stage up until the time when the evidence was actually given.

MR EATON:

It could do so. What I'm saying is, the way in which this matter is being dealt with is unfair to Chisholm J, because that is not what happened. And, of course, you go to the case stated –

BLANCHARD J:

Well, what was going on, then? Did the Crown not make any submissions at that stage?

MR EATON:

Well, there couldn't have been for more than three minutes.

BLANCHARD J:

Well, that's still a submission.

MR EATON:

Well, again, this is where, in my respectful submission, this appeal –

BLANCHARD J:

And the Judge records it.

MR EATON:

Yes, he records it, as expressing the not-surprising concern of Professor Rode, which was consistent with the – my assessment of the Judge's view, that is, I know this man wants time, which could be a matter of many weeks, to provide a full and well-considered opinion. That's simply not realistic. I understand, though, and respect his professional judgement in that regard, but I have other considerations. And, critically, because over the two

day period where matters had been adjourned for the Crown to make whatever investigations it saw fit, the Crown had never come back and suggested to His Honour that the content of the 14 May jobsheet was unreliable or needed to be reassessed or restated in any manner at all, notwithstanding the provision of additional information by way of a post-mortem report and some photographs. The Judge's primary concern was, I have what appear to me to be some pretty straightforward comments about this man's personal experience. Now, I'll adjourn, and you, the Crown, who have introduced this material into the Court, quite properly, and disclosed it to the defence, do what you think is appropriate and necessary, and the Judge talks about discussions directly with Professor Rode, to be sure that it is accurately recorded and reliable. And by 16 May, although there had been ongoing discussions with Beasley, there was nothing advanced to the Judge to suggest the comments of 14 May had been withdrawn, reassessed or needed to be reappraised in the light of further information. That is the reality of what occurred.

BLANCHARD J:

And yet, the Judge is recording at paragraph 4 that the police jobsheet indicates that Professor Rode is quite alarmed to think that his initial comments might be used by the Court in any prejudicial sense, whatever that means, before he had time to consult appropriately and come up with a definitive opinion.

MR EATON:

That's right. But not suggesting that these relatively straightforward comments about cases he's personally dealt with is inaccurate or unreliable. And reading between the lines, it is –

BLANCHARD J:

Well, that may be so in relation to those particular facts, but there's still the need for the linkage with this case.

MR EATON:

That, with respect, is a separate issue. I'm simply talking about what was before Chisholm J and how the matter was presented to him, because my friend's case is rested on this proposition that it was so very, very clear by 16 May that Rode had, effectively, withdrawn what he'd said earlier. And that wasn't – it's not fair to the trial Judge in terms of what actually happened. As I say, he's given a ruling, then there's a reproach which is questionable as to why it was being made after the ruling, and then a jobsheet is handed to him for a couple of minutes before he embarks on his ruling, and he then says I can see Rode is not very happy about this. I understand that. But I've got wider considerations. And, of course, it's also important, with respect, to look at the 16 May jobsheet because in the Court of Appeal, there were comments being directly attributed to Rode, which were, in fact, just views being expressed by Beasley. And I said in my submissions, when the phone call went through after the ruling had been announced at 10.46, Beasley and Rode were in Hong Kong and it was about seven o'clock in the morning there. And the timing of that jobsheet was 11.05. So it's 7.05 am in Hong Kong when the officer in charge calls Beasley. So obviously Beasley, in the meantime, hasn't spoken with Rode, and then he simply reflects what he, in essence, believes Rode would be thinking about it. And that's where you see in the body of the jobsheet, "I do not think he would expect that any of his comments so far should be used. I think he would be quite alarmed if he thought that his initial comments were to be used by the Court in any prejudicial sense". This is Beasley commenting on what he thinks Rode's view –

ELIAS CJ:

Well, that's the way it's all come in. Because it's not only hearsay, it's second-hand hearsay. The initial message is from Beasley also, and contains a summary of what – we don't have exactly what was said. It says "impression". And if he's supplementing it on the 16th, isn't that simply part and parcel of what he's already done? Why is it illegitimate?

MR EATON:

Well, on the 14th of May, they are relatively straightforward comments. Not about what Rode thinks –

ELIAS CJ:

But they may well be incomplete, and Beasley may be indicating that lack of completeness.

MR EATON:

Yes. And this is where Chisholm J has said to the Crown, don't just take the time over the next two days to verify the accuracy of what's been said. But if there's anything more that Rode wants to add, then, of course, that might eventuate. And he refers specifically to that. And this is where it was a slightly unusual situation – or a very unusual situation.

ELIAS CJ:

Very unusual.

MR EATON:

Because, of course, Mr Gwaze and his counsel are simply sitting on their hands for two days waiting to see what's going to happen with his evidence, saying, well, whatever the Court does, we want this trial to go on. We'll argue for its admissibility, but in terms of the investigations as to its reliability and to satisfy the requirements of the Evidence Act, we have effectively got our hands tied behind our back. We can't control or influence that. And so the Judge was obviously suggesting we should try and take steps to speak to Rode directly. The Crown, which the Judge said were for reasons which he thought were entirely appropriate, chose not to speak to Rode, but to continue to speak to Beasley. But the defence can do nothing but sit back and wait and see what occurs. And that Judge was in the same position. So when it comes to issues of reliability, particularly, this was so patently a situation where the evidence reeked of reliability, because you've got a senior Crown expert who's given evidence, gone off to a medical conference in Hong Kong,

discussing what's a case of interest, and then taking urgent steps to stop the trial in Christchurch because of information he's learned from a respected HIV expert in South Africa.

ELIAS CJ:

Well, you'll have to enlarge upon the reliability point, but just dealing with the jobsheet, or the information that was communicated on 16 May. The fact of the matter is, the Judge had it. He refers to it in his reasons in his ruling. What is the argument? I'm still grasping for why is there thought to be something wrong in the Court of Appeal relying on what's in the jobsheet when the Judge had it and referred to it in his ruling.

MR EATON:

If I take the particular example which has had significance, and that is the shift in terminology. Nowhere in the case stated is there any reference to this jobsheet containing a shift in terminology. On that basis, within the confines of the section 380 case stated appeal, it was illegitimate for the Court of Appeal to be referring to that. That's the submission for the respondent. The case stated was confined to the facts as signed in the case stated by the Judge. And there was no factual finding in relation to that issue. So it is a section 380 case stated argument.

ELIAS CJ:

Well, then, if that technical approach is being adopted, it's a bit hard to see why we're getting so much fact thrown at us.

MR EATON:

I absolutely agree.

ELIAS CJ:

Yes. But including from the respondent, Mr Eaton.

MR EATON:

Well, because the respondent has to respond. And of course, exactly – you'll see the history that I've outlined in the submission in terms of the additional material, which, again, went before the Court of Appeal, notwithstanding a ruling from the Court of Appeal that it won't be there, absent any further ruling, and we can see how it has influenced the approach of the Court, and Young J specifically recognised it, although he regarded it as being irrelevant to the issue of admissibility, he was conscious that it may well have impacted on his assessment of that issue. And when the material is advanced in the matter, again, in which it's been advanced today, it puts the Court in a very difficult position to draw –

ELIAS CJ:

But do you say that on the case stated, we can't look at the ruling?

MR EATON:

Well, no, because that's a matter of record.

ELIAS CJ:

Well, the ruling refers to the communication on the 16th.

MR EATON:

Yes, but really in no different terms to the case stated. It certainly doesn't refer to any shift in terminology.

ELIAS CJ:

Well, it's a bit of a bold – it's a bold statement to say that one is limited only to the face of the case stated, and that documents referred to in it, or by necessarily implication, aren't also to be referred to.

MR EATON:

Well, I've referred to the authorities in the written submissions which I think are well-recognised in terms of the confines of the case stated, but in terms of the references to the documents, as I understand the nature of a case stated is that it won't be for an appellate Court to be making factual findings as to

what occurred in the lower Court relevant to the issue of law for determination. Here –

BLANCHARD J:

Well, that wouldn't be making a factual finding.

MR EATON:

You'd have to be making a factual finding that the shift in terminology was significant, a matter which the Judge's note made no finding on.

BLANCHARD J:

It's not a factual finding about what occurred in a lower Court. It would simply be a view reached on the assessment of the document by this Court. Have you got any case that is anywhere close to this?

MR EATON:

No. The *Auckland City Council v Wotherspoon [1990] 1 NZLR 76* case, of course, was critical of the practice that it had adopted of simply annexing notes of evidence to a case stated rather than a Judge undertaking the task of stating what facts were found at trial. But that certainly reinforces the proposition that the confines of the 380 case stated are the facts as defined in the case stated.

BLANCHARD J:

Well, the case stated refers to the ruling. The ruling, it seems to me, incorporates the jobsheet, because it refers to it.

MR EATON:

And then in this –

BLANCHARD J:

So then we look at what was before the Court and say, "How should the Judge have assessed that?"

MR EATON:

Well, I, absent any factual – my submission on behalf of the respondent is that the legitimate extent to which the 16 May jobsheet can be referred to by an appellate Court is within the confines of the case stated and, in particular, it would be wrong for the Court to be engaging in the factual assessments as to what that document meant or did not mean, absent any ruling from the trial Judge. In fact, this is the view that Justice Baragwanath has expressed in the lower Court. He chose, he actually expressed a view that it was inappropriate to be going beyond the case stated but, because the other Judges were, he would engage in that same exercise.

BLANCHARD J:

Did he have any authority for –

MR EATON:

Yes, yes, he did. Paragraph 130 of the Court of Appeal's decision.

BLANCHARD J:

Yes, well, it's really back to *Wotherspoon* again.

MR EATON:

Yes, *Harrison* and *Wotherspoon,* two authorities in the respondent's bundle. It is, Justice Baragwanath notes, "The case stated contained no finding of facts by Justice Chisholm on the topic."

ELIAS CJ:

Well, what finding of fact could there be on it?

MR EATON:

Well, there could be –

ELIAS CJ:

What I accept and what I reject.

MR EATON:

Well, the way it should have been dealt with, to give credit to the submissions now advanced, the Crown are arguing this is a change in terminology which is significant, the Judge there making a factual finding as to whether it does amount to a change of terminology that is significant in terms of his assessment of the admissibility.

ELIAS CJ:

Why is it necessary for the Judge to make that finding before an appeal Court can consider it?

MR EATON:

Well, I guess, in the bigger picture of this case, how could it be an error of law not to take into account something that has not been referred to and has no evidential basis?

ELIAS CJ:

But it has been referred to him, it's before him, it's what he makes of it, it's what the appeal Court makes of it.

MR EATON:

Yes.

ELIAS CJ:

I'm not trying to be difficult on this, Mr Eaton, I think it is a point –

MR EATON:

Well, look, the argument –

ELIAS CJ:

– that does have implications which we need to test carefully.

MR EATON:

Yes, and the alternative argument, of course, for the respondent, is the Crown argument, as really initiated by the President of the Court of Appeal, that there was a shift in terminology that was significant, is that one that is a reasonable finding. And I come back to the point that it seems odd, with all due respect, that on what is a medical issue, that there's been a change in terminology which has consequences. It is the President who has embarked on that assessment, and yet Beasley did draw it to the Court's attention, the Crown didn't draw it to the Court's attention, it didn't occur to the Judge, who had heard two weeks of evidence about HIV, it didn't occur to him that it was significant. It wasn't significant and, indeed, there's –

ELIAS CJ:

It's significant to any reader.

MR EATON:

Well, it wasn't to Beasley, who was passing on this information, obviously, now.

ELIAS CJ:

Well, from Hong Kong, not –

MR EATON:

But, yes, the Crown are communicating with Beasley from 14 May to 16 May. They speak to him over –

ELIAS CJ:

Are we talking here about the full-blown AIDS reference?

MR EATON:

Yes, that's the terminology which Justice Young's referred to as a significant shift in terminology.

ELIAS CJ:

Well, is it not significant?

MR EATON:

On the face of what was before Justice Chisholm, obviously not, otherwise Beasley would have been saying, "Previously he was talking about HIV, he's now talking about –"

ELIAS CJ:

On the face of what's before us, and was before the Court of Appeal and was before Justice Chisholm, is it not significant shift in terminology when the issue is an HIV-positive child and the reference in the 16 May statement is to full-blown AIDS?

MR EATON:

Well, it may or may not be.

ELIAS CJ:

Do you mean it has no reality until the Judge calls it?

MR EATON:

No, what would be the evidential basis to conclude that it did mark a significant shift, relevant to the admissibility.

ELIAS CJ:

It's just not the same terminology, it doesn't meet.

MR EATON:

Yes, but if that is not an issue, who the medical communicator of the information has identified as being significant, then it ought not to be given any significance.

ELIAS CJ:

Well –

MR EATON:

If this Court was to conclude it was significant, as the Court of Appeal did, then, relying on what evidence because, you know, Beasley was aware of this shift in terminology because he's communicated both times, and he hasn't suggested it was significant. The Crown didn't consider it significant. It's an assessment made, many might say, but in fact in the Crown's submissions on the Court of Appeal, the written submissions, it wasn't referred to at all, it was simply the Court of Appeal scrutinising the material, knowing what's in the additional materials, prepared post-trial, reaching a quite different view, on a factual matter.

ELIAS CJ:

Well, it need not have, it could have blinkered itself, and it's still, it's still a significant change. If the discussion has been about HIV-positiveness and then the statement is made about full-blown AIDS, surely, without going further, that's a significant shift.

MR EATON:

Well, as I say, Ma'am, not to Beasley, not to the Crown, not to defence counsel, not to Justice Chisholm, and the only thing that's changed since then is we have additional reports prepared post-trial, which were available to the Court of Appeal. And one can only – if I take you to, if we try and work out how this has occurred, Justice Young's decision, paragraphs 17 and 18, at 17 you'll see he's referring to the post-trial reports and accepts they're irrelevant as to whether the Judge erred in law about admitting the evidence, that subjects have been verified on oath they're irrelevant and admissible to remedy. And then he goes on to acknowledge that he's going to refer to them and he's conscious of the possibility that his knowledge of what is in the reports may have contributed to his scepticism as to the value of the hearsay evidence that was led at trial, which was a very, in my respectful submission, proper acknowledgement to make, because it seemed somewhat inevitable. But you go down to 18, and he refers to the post-trial reports and, in the middle of that paragraph, he says, "They also provide rather more

information than was available at trial about Charlene's HIV status," and that is the only reference which suggests to the respondent that in fact, by reference to the post-trial statements, Justice Young has become more focused on the distinction between HIV and AIDS. But of course it's through the improper process of referring to inadmissible material. Otherwise, how did it just happen to come about from the Court of Appeal, when it hasn't been raised by anyone prior to that as being a significant factor?

And can I just say and, again, this is because there is, in the respondent's submissions, so much material being used and crossing the boundaries of these issues of admissibility and of remedy, the evidence at trial about Charlene's HIV status came from Meates-Dennis – excuse me, I'll just get it. This is in volume 5 at page 1102, and she referred – so it starts at 1101 – to the World Health Organisation clinical staging system for HIV infection in children. So it's under tab 74.

ELIAS CJ:

What page again?

MR EATON:

1101.

ELIAS CJ:

And she notes, too, and this is really the only evidence distinguishing HIV and AIDS that was led at trial, she talks about the four stages, 1 to 4, "The most severe, stage 4, which itself contains diseases that have been referred to as 'AIDS-defining illnesses'," and she goes, over the page, to say that 4 is the most severe. She says Charlene didn't have that, talks about what Charlene did and said that, "She fulfils the criteria for stage 3." Then additional evidence was led from her, in chief, and that's at 1109. So, she said, "Not 4," she assesses as 3 and then, page 1109 at line 7, asked in which category did Charlene fit of the four categories she was –

ELIAS CJ:

Sorry, what page? 11…

MR EATON:

1109.

ELIAS CJ:

Yes.

MR EATON:

In which category did Charlene fit? Of the four categories, probably 2, possibly 3. So that might have been relevant to Justice Young's assessment. But if we go to the materials that have been produced as the additional materials, there's a report from a Dr Eley, volume 6 of the case, and Eley is under tab 82, page 1245, and he qualifies himself as being a person who is a paediatric infectious diseases specialist, and he's been specifically asked by Rode, post-trial, to comment on Charlene's HIV status and related disease severity – you'll see that reference under his description of brief – and he deals with this particularly at page 1249 and he expresses a quite different view to Meates-Dennis. He talks about it, at the top of that page, "The presence of the widespread LIP at autopsy, indicating that she's at least WHO stage 3." And then in the next paragraph, beginning with the word, "Although," – you'll see the third line down – "there was some evidence from the CT scan and autopsy reports of a possible HIV brain involvement or encephalopathy," suggesting that her HIV status was highly advanced, i.e. WHO clinical stage 4, and at the bottom of that paragraph, "Children with stage 4 qualify for treatment with anti-retroviral therapy," and she wasn't receiving that, so he concludes the evidence was to suggest her infection was advanced, she was either stage 3 or stage 4. And in his conclusion, the section at the bottom of 1250, he talks about the consequences of children at that stage, "That is at the high-risk stage for opportunistic infections." And if we go back to the Meates-Dennis evidence, where she talked about children at stage 4 –

ELIAS CJ:

He does say that the genital and anal findings suggested a non-natural cause.

MR EATON:

Oh, yes, yes. I just – still then, because –

ELIAS CJ:

This is all post the whole determination.

MR EATON:

That's right, yes, but of course Meates-Dennis has said that stage 4 contains diseases that have been defined as “AIDS-defining illnesses”. The reason I refer you to that is because it rather suggests that the Court of Appeal’s approach that the shift in terminology from HIV to full-blown AIDS might not be as significant as they thought it was because, indeed, we now learn, post-trial, that she probably was, that she could well have been in stage 4, which is a much more serious stage. So –

ELIAS CJ:

Isn’t the significance of it the effect on reliability, because different terminology is being used and there’s no evidence available as to what is intended by this, because Dr Rode is not available?

MR EATON:

Well…

ELIAS CJ:

I mean, it’s not really whether you can drawn the conclusion that the symptoms could not have been caused by the condition that she had, that's not it. It’s really the use that can be made of the statement attributed to Dr Rode.

MR EATON:

Yes. And at this stage of the argument we're simply dealing with the Court of Appeal's approach, which said that there was a significant shift in terminology which, in their view, the majority's view, meant it wasn't reliable and, indeed, not relevant and not substantially helpful. But it relies critically on this shift in terminology. My submission is that was not a finding available either because of the confines of the case stated or a reasonable finding based on the evidence as to what that shift in language may or may not have meant.

ELIAS CJ:

But there is a shift in language.

MR EATON:

Yes, which may or may not have significance.

ELIAS CJ:

Admitted, yes.

MR EATON:

Well, I think I've probably exhausted that point.

WILSON J:

Mr Eaton, can you recall whether, before the Judge, there was any discussion about section 7 or section 8 of the Act?

MR EATON:

No, there wasn't, no. And, indeed, I think my friend's argument this morning is that this was, the 14 May comments were not an opinion and, really, it's contrary to the way, the argument was about in the Court of Appeal, that it was an expert opinion and section 25 applied. But, no, there was no reference to 7 or 8. And so if we look at the 14 May jobsheet it seems pretty clear that what the Judge was saying was, his instinctive reaction was, "This is clearly relevant, because of the eminence of Professor Rode, the fact that the

defence have been introducing HIV as of some relevance and the Crown experts have been saying, no, they don't acknowledge that, but they have limited experience in dealing with HIV cases, and, of course, the similarities between those symptoms and Charlene's symptoms." But it was also apparent from that jobsheet that Rode was duly doing no more than offering a comment to Beasley about cases he's personally dealt with, and that's what the Judge was anxious to ensure was the case and had been accurately and reliably reported. And, in fact, in the Court of Appeal the respondent was arguing that this didn't amount to an opinion, it really amounted to some comments of personal experience and –

ELIAS CJ:

Well, what relevance do they have, if that's all they were? They're only relevant, surely, if they're linked to the particular issue at trial, and that means there has to be an opinion that they're comparable.

MR EATON:

Yes, well, my friend's quite wrong when he says that for the first time, in this Court, the respondent's arguing that they were relevant to testing the expertise of the Crown witnesses, that was what was argued before Justice Chisholm and it's in the written submissions in the Court of Appeal. And that's how it was put to Justice Chisholm that, at the very least, it's a permissible tool for the defence to cross-examination the experts who are purporting to give evidence on a very complicated case involving a factor with which they have no experience, to undermine their reliability as experts. And, indeed, it was specifically referred to Justice Chisholm that this was really no different from putting to any expert a text or a journal that counsel wished to use as a tool in cross-examination.

ELIAS CJ:

Well, it is different, because here you didn't have any published reference to this syndrome, in a medical journal, which might be peer reviewed, which has some standing. You had an apparently casual conversation, which has to be linked to the case to make it relevant. How was it linked to the case?

MR EATON:

Well, it was linked to the case in the sense that, as I say, the New Zealand experts did not have extensive experience dealing with HIV cases. The New Zealand experts were purporting to give compelling evidence that Charlene's injuries, her condition in which she presented, were unrelated to her HIV status.

WILSON J:

Hadn't Dr Meates-Dennis specialised in London in a clinic for children with HIV?

MR EATON:

Ah, yes, she had, yes.

WILSON J:

She had some specialist background, didn't she, in the area?

MR EATON:

Yes, she – of the Crown witnesses, she was, yes, she was the one who had, yes. And, of course, what we now see post-trial is that there's some strong difference of opinion as to the assessment of this particular case, but that's perhaps for another day. But on the basis the relevance was it permissible for the defence to say, are you aware of a category of cases that a South African expert has had first-hand experience with? Because in his personal experience he's dealt with cases that have symptoms that are similar to this.

ELIAS CJ:

That are similar to this.

MR EATON:

Whether they're similar or not –

ELIAS CJ:

That's the opinion.

MR EATON:

Well, my friend's saying it's not an opinion, it's simply a comment, and the way it was expressed, in my submission, it wasn't an opinion, it was simply a statement of experience.

BLANCHARD J:

Well, what's its relevance to the case, then?

MR EATON:

Its relevance, at the very least, in my submission, was to undermine the reliability of the New Zealand experts.

BLANCHARD J:

That doesn't make it relevant.

MR EATON:

Well, the New Zealand experts were giving very forthright opinions about whether HIV had any relevance at all to this case. Their experience, their qualifications to give an opinion in relation to HIV, was a relevant issue at trial.

BLANCHARD J:

Well, they're giving an opinion about this case.

MR EATON:

Yes, and –

BLANCHARD J:

This information is –

MR EATON:

Is to do with H – is just to test what they do or don't know, what's within their experience in terms of dealing with these types of cases, with HIV cases.

WILSON J:

Well, why wasn't Dr Meates-Dennis recalled then, to enable this testing?

MR EATON:

Because the Judge had sat through, whatever it was, a day of Dr Meates-Dennis's evidence and had reached a predictable view that, "We know what she'll say, she'll say exactly as Sage is going to say, and that is, 'I reject it'," and that was how it was dealt with by Sage.

BLANCHARD J:

And she was never given the opportunity of saying that.

MR EATON:

No, but it didn't disadvantage the Crown at all because, of course, Sage said that on behalf of the Crown.

BLANCHARD J:

But Sage wasn't the person with the particular expertise that Meates-Dennis had.

MR EATON:

That's right, but – well, in my respectful submission, the Court of Appeal thought it was a trivial issue, whether – the Judge's ruling was whether I was obliged in cross-examination to put it to her. In fact, Justice Young expresses the view in his decision that it didn't bar the Crown from actually applying to call her in rebuttal. It was really, the issue was, "Am I obliged to put it to her or not?" But Sage dealt with this evidence and dealt with it very forcefully on behalf of the Crown, as he is wont to do. I am conscious of the time.

ELIAS CJ:

We'll take the lunch adjournment now, thank you.

COURT ADJOURNS: 1.03 PM
COURT RESUMES: 2.14 PM

ELIAS CJ:

Sorry. We are just getting used to the courtroom. I was being asked if I like the sun.

MR EATON:

From this angle, Ma'am, you're glowing.

BLANCHARD J:

Wait until she gets angry.

ELIAS CJ:

I shan't.

MR EATON:

I'm grateful. We were discussing the relevance of the 14 May comments, and I had indicated that, from the defence perspective, both before the Judge and the Court of Appeal, the argument had been advanced that it was relevant as a tool to cross-examine the experts as to the true extent of their experience and knowledge of HIV cases. And as Baragwanath J said at paragraph 176, described the defence as using the evidence to "educate the jury as to the advanced symptoms of HIV". And to that extent, Rode was able to give evidence. Have I given the right reference there? Sorry, 166 was the paragraph I was referring to.

ELIAS CJ:

176 is still relevant, however.

MR EATON:

Yes, 176 is relevant as well, ma'am. And to that extent, what Rode was able to say in that relatively brief statement about the cases he had had personal experience with was relevant to that issue about the effects of HIV. But that was really the extent of it, because he really was not able, in the time available, to give an opinion specific to this case. Where the opinions specific to this case were first introduced was as a result of the prosecutor's discussion with Professor Beasley on the evening of 15 May. And it was in that exchange where Beasley passed on the observation from Rode that he was of the view that this may be a case of sexual assault and suffocation. And of course, those, that evidence, that hearsay, went before the jury. So in terms of what was now a comment on the case itself rather than a comment on a group of cases with which he has familiarity identifying certain symptoms, in that passage, Rode was expressing an opinion. And indeed, one that was favourable, not disfavourable, to the Crown. Where I suggest things became slightly derailed was because in closing, the Crown said, well, that had marked a change of position from Rode, suggesting that he had initially said this was a case of HIV injury and death, and he was now, having reviewed some further material, changing his position and saying it may be a case of sexual assault and suffocation. Now, defence counsel and the trial Judge both, in their addresses to the jury, indicated that wasn't what Rode was saying at all, because he was simply indicating that he wasn't able to give an opinion on it specific to this case, because he hadn't had time to do so. And there was no change in opinion from what was said on 14 May. And I made that plain to the jury, and you'll see the Judge made it plain, as well, that he didn't understand that to be the effect of what Rode was saying. So in terms of whether 14 May was an opinion as to cause of death and injury, that first suggestion came, really, in the Crown closing suggesting that the subsequent development marked a change. So the matter in which the defence dealt with it, the Judge has described counsel as calling it pivotal. Yes, I don't doubt that that word was used if that's how the Judge attributed it. But counsel specifically said to the jury that Rode has not given an opinion on this case and he hasn't had time to do so, and I'm not suggesting he has done so. But what is certainly relevant about this evidence is that it raises question marks about the purported experience and reliability of the Crown experts. But of

course, I was making a closing address on behalf of a man facing charges of the most serious nature, and the evidence was referred to throughout the closing in different places. And, of course, I referred to the way in which Doctor Sage had dealt with it. And when you see the references in the cross-examination, Sage had elected not to mention it, although it was clearly going to be raised with him. And so when I put it to him, I think it took about three occasions before he would effectively acknowledge it. Indeed, the Judge became involved to ask him directly, was he aware of this category of cases that Professor Rode has described. But Doctor Sage, in his forthright language, I think, immediately said, oh, are you talking about the third-hand hearsay? So he was dismissive of it. And he was dismissive because it wasn't in the literature, the point Your Honour was making before lunch. So in terms of its weight that the jury ought to attach to it, he came out guns blazing on behalf of the Crown. And so the jury, having been directed that this was hearsay evidence and a matter for them to assess what weight they give to it, and the Judge saying they'd be bold to give no weight to it, was really, I submit, a not surprising direction from the Judge, given that the Crown had taken the unusual stance of saying, you know, just ignore it, as if it wasn't there, it's irrelevant, when it hadn't been retracted. The statement of experience of these particular cases had never been retracted. So the issue which we now deal with in terms of alleged errors made by the Judge, in my submission, if there were errors made, and that is to say, if the Court concluded that it was properly before the Judge and he ought to, of his own volition, have his attention drawn to the HIV AIDS distinguishment, and he ought to have treated it as some form of retraction, although it wasn't couched in those terms. In my submission, any error that could be attributed to the Judge was, as the majority in the Court of Appeal have concluded, was an error of fact. That is to say, what inferences might an appellate Court draw from the material, and what inferences did the Judge draw or not draw. And in reality, the Court of Appeal developed a different hypothesis about what this document meant in terms of the overall relevance and admissibility of the 14 May jobsheet different from the one that the trial Judge concluded. But simply because that Court, and this Court might disagree and conclude that the Judge was wrong in the inferences that he drew, that won't convert it into

an error of law making it susceptible to review. And that raises this question of whether it does give rise to an issue of fact or law if the Court was to conclude that there was an error, and I think my friend makes the point in his written submissions, in fact this wasn't the argument advanced by the respondent in the lower Court. In the Court of Appeal, we were arguing there was no error as opposed to distinguishing between an error of fact or law. And so, I naturally adopt the approach taken by the President, Baragwanath J. And it really does come down to a narrow or broad interpretation of assessing the issue of fact or law in the context of a 380 and 382 Crown appeal against an acquittal, with Hammond J favouring a more expansive view, and the majority favouring a narrower view. But in my submission, by reference to the *Bryson* questions, this was not a situation where there was only one true answer, to summarise those steps. This was not a situation where the material permitted only one reasonable conclusion. These were matters of subtle inference to be drawn, and –

ELIAS CJ:

What?

MR EATON:

As to whether the 16 May jobsheet was such to cause a Judge to conclude that the statements were either irrelevant, unreliable, or otherwise not substantially helpful, because the basis upon which that's now advanced, and was advanced in the Court of Appeal, was that the change in terminology and the protestations attributed to Professor Rode that he didn't think his comments would be used evidentially, were the key factors which the Judge did not draw appropriate inferences in relation to.

ELIAS CJ:

Will you come on to discuss whether, even in its own terms, the statement of 14 May was admissible? Because you're relying very much, then, on the shift notion as undermining the opinion.

MR EATON:

That's right, and because that was really the only basis on which errors were identified in the Court of Appeal. I think Young J commented that it was hard to see that the 14 May jobsheet on its own without anything else wasn't admissible.

ELIAS CJ:

I think you are going to have to address us on that, however. I don't think you should assume that we've necessarily accepted that point without argument.

MR EATON:

Yes. Well, as to relevance, and I think I've dealt with that issue, and the facts in issue, the matters in issue at trial.

McGRATH J:

So can you just encapsulate that by telling us what fact and issue is made more probable if that evidence is admitted?

MR EATON:

The reliability of the New Zealand experts in relation to HIV or AIDS cases, and secondly –

McGRATH J:

Was made less probable?

MR EATON:

That was the issue, yes, what is the reliability of those New Zealand experts.

ELIAS CJ:

But what was that reliability directed to accept, the likelihood of death having been caused by natural causes?

MR EATON:

Well, that was ultimately – well, the defence was seeking to undermine the reliability of the Crown experts.

ELIAS CJ:

But not as an end in itself.

MR EATON:

Well, and in particular in relation to their experience in dealing with cases involving HIV or AIDS.

ELIAS CJ:

They would only have been undermined in their evidence, however, if the statement could be taken to be an indication that the conditions observed in other patients were comparable to this case.

MR EATON:

Well, no, with respect. If one is purporting to give expert evidence as to a case involving HIV, and that expert is not aware of a category of cases involving particular symptoms, then that is a legitimate tool to undermine reliability.

ELIAS CJ:

But it still has to be logically probative of something initial in the case, and that can only be death by natural causes, surely. So there has to be some link between the observed category of cases and the present case.

MR EATON:

As a legitimate tool to cross-examine the expert?

ELIAS CJ:

No. Yes. That as well.

MR EATON:

Because I don't accept, with respect, that an expert could have been – that their reliability could have been attacked in relation to previous evidence that had been given and rejected in relation to a case not involving HIV at all is a legitimate tool without having a link to the ultimate issue in the trial to hand.

ELIAS CJ:

That would gauge the reliability of the witness.

MR EATON:

The reliability of the witness' testimony, yes. Which is what the attack was here.

McGRATH J:

But the basic fact which has to be connected is whether the injuries were or were not caused by the HIV condition, is that right?

MR EATON:

That's the ultimate fact.

McGRATH J:

And it's to that end that you say the evidence can properly – if it bears on that fact, then it can properly be used to cross-examine, is that the point you're making?

MR EATON:

No, it doesn't have to bear on that fact. My proposition is that if a person purports to be an expert in a certain category of medicine and is cross-examined about evidence as to a group of cases overseas where that particular aspect of medicine is prevalent, and they're not familiar with those types of cases, that's a legitimate tool, whether or not it's related to the ultimate fact in issue in the trial or not, to undermine reliability.

ELIAS CJ:

Isn't this really – I'm just reminded of the famous question in cross-examination about the co-efficient of grass. I'm not sure that – I mean, do you have any authority on this point that you want to take us to? The Solicitor-General have given us a Canadian case, which I haven't looked at. And I'm not sure whether it bears on this, but it seems to, because you do seem to be saying that it's permissible to discredit experts by cross-examination irrelevant to the issue on which they're giving their evidence.

MR EATON:

Yes. Well –

ELIAS CJ:

Or not necessarily relevant to the issue on which they're giving their evidence.

MR EATON:

Or not directly relevant to the ultimate issue. As I said at the start, there are two aspects to it. One, do you know of this group of cases. No, I don't. Well, if you are an expert in this field, you ought to know about them, and if you don't, that's relevant. Secondly, what can you tell us about the advanced symptoms of advanced HIV, do you know about these symptoms? No, I don't.

BLANCHARD J:

But you used the jobsheet of the 14th of May for more than that purpose when you cross-examined Detective Johannsen.

MR EATON:

Just remind me what I –

BLANCHARD J:

Well first of all the jobsheet says, "Beazley advised me over tea last night he'd been discussing the case with his colleague Professor Rode and he'd been advised by this colleague that the symptoms portrayed to him were consistent

with a group of HIV patients he had dealt with in South Africa." So there's a comparison, an opinion. You cross-examined Detective Johannsen, this is at page 1173, "Did Beasley tell you that he'd discussed this case with Rode over tea the previous evening and that Professor Rode had said that the symptoms portrayed to him by Beasley were consistent with a group of HIV patients he had dealt with in South Africa."

MR EATON:

Yes.

BLANCHARD J:

Now there it's being used as if this is an opinion and the jury must have seen it as such.

MR EATON:

Well they were expressly told he hadn't given an opinion. But I appreciate the point that Your Honour is raising and it's a question of the subtleties I guess it's why this case has caused difficulty but the jury were not told by the defence that Rode was expressing an opinion on this case. But –

ELIAS CJ:

Well why was it necessary to deal with it in terms of hearsay at all then? A hearsay statement is one admitted as to the truth of its contents.

MR EATON:

Yes.

ELIAS CJ:

Well you're saying it wasn't admitted as to the truth of its contents.

MR EATON:

It was. That he had personal experience of this category of cases. That is to say there's a group of cases that are recognised that have these symptoms and that's relevant because to reliability of experts and educating the jury

about what the symptoms of HIV can be but, and it was where I think Dr Sage said it's tantalising, we don't actually have an opinion from Rode as to whether this is one of those cases or not. We simply have Rode saying, having looked at the post-mortem report and some photographs, this may be a case of sexual assault and suffocation, and that went before the jury. So this isn't a case where counsel or the Judge were telling the jury that Beasley's saying this case is one of mine. ….. It sounds like we're about to broadcast internationally.

ELIAS CJ:

We might hear the news soon or something, carry on.

MR EATON:

"We interrupt this submission …." …. So anyway I was dealing with Your Honour's proposition that if contrary to the Court of Appeal this court might take the view 14 May was inadmissible on its own –

ELIAS CJ:

Yes.

MR EATON:

– but looking at the issue of relevance and then there's a question mark over reliability in terms of hearsay but the Court of Appeal weren't troubled by that and my friend, I think, described it as being the Judge only focusing on the transmission of the information but the way it developed I think realistically it was pretty clear he having heard from Professor Beasley, being very impressed by Beasley, the circumstances whereby Beasley causes the trial to stop because he's concerned within days of having given evidence, the two day period of grace to make whatever enquiries you want, the fact that the Crown then directly communicated with Beasley but Sage then directly communicated – with Rode, sorry no with Beasley, Sage had communicated with Beasley and then we come back on 16 May I'm not being told that he is withdrawing what, those comments. He's simply wanting more time to give a full considered opinion. Then on that basis the Judge was quite entitled to say

well there's reasonable assurances to the reliability of the circumstances in which the statement came to be made, in terms of section 18, and as I say the Court of Appeal had little difficulty with that and in my submission this Court ought to take the same view. Then you've got the issue of substantial helpfulness which is again – answer to my friend's submission this morning to say well this wasn't an opinion and therefore, well section 25 wouldn't arise at all. But the Judge was, the only statutory provision he was referred to by the prosecutor was section 25(3) which implicitly assumes section 25 is the, is a test that the Judge is applying and although there is no specific reference to it then inferentially obviously an experienced trial Judge ought to be regarded as having considered the issue and he, the various comments that he made throughout the course of the week on 14, 15 and 16 May indicate his view as to the relevance of the evidence and the unfairness of proceeding without it being, the crux of it being put before the jury and in my submission it's, although not specifically referred to, it's a matter that the Judge has obviously taken into account and in terms of section 25 the Judge was entitled to find that it was going to be substantially helpful for the jury to learn of this particular category of cases given –

ELIAS CJ:

Did, were we taken sorry, I might have just forgotten this but were we taken to the part of the summing up where the Judge says, this is not opinion?

MR EATON:

Ah –

ELIAS CJ:

I've taken it from your submission that the jury were instructed that this was not opinion.

MR EATON:

No I think the Judge's language was, this is not a full opinion or I think he might have – I'll see if I can find it.

BLANCHARD J:

Well he starts paragraph 32 by saying, "The next point is patently obvious, isn't it, that Professor Rode hasn't expressed any final view."

MR EATON:

Yes.

BLANCHARD J:

So he's really suggesting that this is a provisional opinion.

MR EATON:

Well of course by that stage it's complicated by the fact the, there is an opinion that has gone into evidence and that is that he thinks this may be a case of sexual assault and suffocation. That's what he deals with at 34.

BLANCHARD J:

Yes.

MR EATON:

So it's not – that is the – he describes it as not being a concluded opinion. By that I – he's referring to this extra snippet that's come through the Crown prosecutor which is favourable to the Crown and for which the Crown has suggested a change in position. You see when you look at the way the Judge dealt with and described the 14 May jobsheet, he was, he was really describing it as being pretty straightforward comments about some personal experience so he saw it as being quite simplistic in those terms. And he –

ELIAS CJ:

But it's certainly not tied to, it's certainly not tied to discrediting the Crown's expert witnesses, this direction?

MR EATON:

No. No it is tied to opinion about this case because an opinion has been admitted that this may be a case of sexual assault and suffocation.

ELIAS CJ:

And the rest.

MR EATON:

Yes, yes, dealing with both aspects of Rode's evidence. One which might be seen as favourable to the defence and the other that might be seen as favourable to the Crown and so he's anxious to ensure the jury proceed on the basis that Rode's not expressed any concluded view.

ELIAS CJ:

But they would be extraordinarily bold if they gave them no weight at all.

MR EATON:

Yes. Well you know Judges are entitled to express a view about those types of issues and it was a bold submission for the Crown to make in that regard.

ELIAS CJ:

Yes, thank you.

MR EATON:

So my submission is that it was on an assessment of the 14 May jobsheet alone that it was admissible and so the issue of fact or law I think I can deal with quite briefly. In the written material of course the respondent submitted that a function test would be too broad as being determinative of whether an issue raised is one of fact or law and indeed by reference to *Bryson* it's really the test that the respondents developed in the arguments and that is a question of whether on the material before the Judge there was only one conclusion permitted and as they say broadly my submission is, as the Court of Appeal found, that this really does turn on the Court of Appeal having a different hypothesis, a different assessment of what these documents meant read together. But of course they have undertaken that assessment so long

after the event, the Judge had them for three minutes remember, so long after the event and when you have the post-trial reports which undoubtedly influence one's approach to this case.

ELIAS CJ:

Mr Eaton, I continue to be bothered about the functional division of responsibility under the Crimes Act and how that influences contextually what's a question of law and what's a question of fact and I'd be interested in anything that you wish to say on that point.

MR EATON:

Yes well I think –

ELIAS CJ:

In other words there does seem an argument that all questions of admissibility, according to this division of function, are properly characterised as questions of law.

MR EATON:

Yes and I think superficially it's an attractive argument because it avoids the long standing historical arguments over whether an issue does raise questions of fact or law but in my submission it would, it would run close to giving the Crown a much broader right of appeal than could ever have been intended under section 380 because effectively every evidential ruling would be amenable to review.

ELIAS CJ:

But thinking of it the other way where we have an inscrutable verdict and the corresponding appeal provisions it would also cut down on the scope of appeals traditionally brought by defence.

MR EATON:

Yes well –

ELIAS CJ:

Quite significantly.

MR EATON:

380 itself –

ELIAS CJ:

Oh perhaps, perhaps not actually, now I think about it a bit more, perhaps not because it's not limited to the –

MR EATON:

No the general right – that's right, the defence –

ELIAS CJ:

Well the error of law has been construed in that wide sense as one of the grounds of appeal.

MR EATON:

Yes but within the wider ambits of 385.

ELIAS CJ:

Well it's an easier –

MR EATON:

Yes.

ELIAS CJ:

– place to go than miscarriage of justice.

MR EATON:

Yes. See the –

ELIAS CJ:

So I think it does have ramifications.

MR EATON:

The, it doesn't in the context of the 380 appeal because in reality it never gets utilised by the defence although 380 and 382 are conceivably open for the defence but one of the authorities, I don't have the name off the top of my head, talked about it being only rare cases when that could be envisaged. I can't envisage any scenario where the defence would choose to go down a 380, 382 appeal rather than a 385 appeal.

ELIAS CJ:

Directed verdict or acquittal?

MR EATON:

Well that's the, that's a Crown appeal. I'm talking about whether defence might take it, be seeking to utilise those provisions.

ELIAS CJ:

Mmm.

MR EATON:

So the – yes I think, I was just refreshing my memory from the written submissions, the primary argument on behalf of the respondent is to whether a divisional, a functional division is an appropriate means of distinguishing between a fact or law issue is, is that ultimately it opens the door for so many more appeals and effectively comes close to granting the Crown the right of general appeal which is certainly, is not intended. Effectively every decision then, evidential decision, there would be an automatic right of appeal and in my submission when one tracks the –

ELIAS CJ:

Well there has to have been a mistrial so it's quite a significant level.

MR EATON:

Well –

ELIAS CJ:

It's not enough just if there's an error and then that gets compounded.

MR EATON:

I'm talking at the first stage of 380 to get it off the ground. So every permissibility decision was of itself classified as an error of law then 380 could be utilised in that case to have that decision tested in an appellate Court. But, and again it's a question of interpretation, recognising that a Crown appeal in circumstances such as the present seeking to set aside a jury acquittal, the Courts ought to be taking a narrow and confined approach to it and therefore in my submission properly narrowly interpreting whether in fact an issue gives rise to a question of law or not and recognising that many decisions made by trial Judges are essentially questions of fact. Resolving issues of fact and then simply applying a legal principle or legal construction to those facts as found and properly, in recognition of there being no general right of appeal against such a finding, section 380 ought to be construed narrowly.

WILSON J:

But at the point at which the Act is applied to the facts as found, isn't that a question of law?

MR EATON:

Only if the facts that have been found are essentially irrational or simply not founded on the material i.e. to say highly unreasonable. And when you come to this case, although the Court of Appeal and perhaps this Court takes a different view than Justice Chisholm did as to what the 16 May jobsheet meant or even the 14 May jobsheet meant, his decision could not be described as being wholly unreasonable given Beasley didn't draw his attention to these matters, the Crown didn't draw his attention to these matters. On that basis one could hardly say that the facts before him permitted only one conclusion and for him to not draw that conclusion was unreasonable.

ELIAS CJ:

What's the policy of requiring an appellate Court to be as hands off when section 382 is a section concerned with trial integrity?

MR EATON:

Well 382 is the second stage of the process of a 380 appeal.

ELIAS CJ:

Well I'm talking about a 380 appeal because it leads, I think you have to read the two together.

MR EATON:

Well the policy of 3 – is to confine the circumstances in which the Crown can appeal against an acquittal.

ELIAS CJ:

It's enabling –

MR EATON:

Yes, but confining.

ELIAS CJ:

Well there's no general right of appeal.

MR EATON:

That's right and that's – so that's the starting point and that's the policy is that the Crown has a right of appeal but only in limited circumstances.

ELIAS CJ:

It does seem to me that it's capable to read this as indicating that the section 380 route is concerned with proper trial, with the integrity of the trial and that the general appeal is concerned rather with the outcome and one can quite understand why in the case of, the verdict of a jury, which is

constitutionally given the ultimate findings of fact at trial, an appellate Court is not to substitute its own view but I'm struggling really for the policy rationale why if a Judge gets a matter of evidence wrong and the evidence is excluded so the jury doesn't get the opportunity to come to grips with it, what the policy is for saying that an appellate Court is being warned off?

MR EATON:

Well I, I would suggest that it's a policy of confinement to avoid in effect a general right of appeal being given to the Crown by reconsideration of factual determinations. It's a wider policy that a Judge at first instance making factual decisions won't – that decision won't be amenable to review absent an irrational decision and, and that's –

ELIAS CJ:

Well that's the, that is the policy determination in cases like appeals from the Employment Court or other appeals where there's an appeal only on question of law. The legislature has taken the decision that the first instance Judge or Tribunal is wholly responsible for the facts unless the decision is irrational. That doesn't really seem to me a parallel with this case.

MR EATON:

Well I'm, in terms of the overarching policy I don't think I can properly advance it further than I have in terms of the distinguishment between a general right of appeal for a convicted person and a far narrower right of appeal on behalf of the Crown.

McGRATH J:

Mr Eaton, the Crown says its argument finds some consistency in the section 382(2) proviso and the language that some evidence was improperly admitted or rejected. Do you have anything to say on that?

MR EATON:

Well that's – I – it clearly envisages that an admissibility ruling might be addressed under section 382, that's undoubtedly –

McGRATH J:

Not that it will be?

MR EATON:

No but that is a category of case where it may be considered. But I don't read in the written submissions, I carried out the analysis before and I won't repeat it, I don't read the Crown's cases that they've referred to where the general proposition has been advanced at some, in some part of the judgment to in any of those cases be a statement of general application that an admissibility ruling of itself is a question of law and I can point to the particular provisions, the particular sections of our submissions where we've addressed that issue. But the Crown cases have been analysed and in fact on the facts of those cases, in my submission, doesn't support that proposition. If –

ELIAS CJ:

Has anyone looked at any evidence texts to see whether there's been any discussion of whether rulings on admissibility are questions of fact or law?

MR EATON:

No but my junior has written a text on evidence and I'm happy to invite him –

ELIAS CJ:

You're inviting him to give expert opinion evidence.

MR EATON:

And Mr Gallivan has been instrumental in preparing the submissions relating to the fact/law divide and I'm happy to, and I'm sure he's happy to –

ELIAS CJ:

I'm sure it's been looked at.

MR EATON:

Yes well I'll ask him to address that particularly.

ELIAS CJ:

Have you finished or do you want to complete your –

MR EATON:

If you want to reserve that point?

ELIAS CJ:

Yes, yes.

MR EATON:

Yes well I'll carry on then. We then move on to this issue about 382, it's meaning and the discretion and application to this case and again as with every aspect of this case it's far from straightforward. *Matenga* didn't loom large in the Court of Appeal, I haven't quite worked out the timing of it, but you'll see Justice Hammond referred to it, the majority did not. If *Matenga* is regarded as being applicable in principle, having regard to the general similarity of language between section 385 and section 382, and I just interpose there to respond to an issue that was raised with my friend this morning and that is the words in 382 substantial miscarriage or wrong, must add something to the word mistrial in 382 itself otherwise they appear to be superfluous. But on an application of *Matenga* you'll see from the written material –

ELIAS CJ:

Well isn't the big point of distinction the "actually" in 385?

MR EATON:

Yes, yes. Well the word "actually" is in 385.

ELIAS CJ:

Yes and isn't in 382.

MR EATON:

No and so really –

ELIAS CJ:

So it's pointing to result or –

MR EATON:

Yes.

ELIAS CJ:

Yes, yes to impact.

MR EATON:

Yes. Yes that's right. the position on behalf of the respondent is broadly that whatever ultimate threshold test is applied to the application of the proviso under 382 and the application of discretion it must set the bar significantly higher for the Crown to achieve a retrial than requiring, as it does, the overturning of an acquittal than it does for a convicted person under 385. That's the base position and of course in the Court of Appeal you'll see that the defence – the respondent had referred to the UK Law Commission's recommendation of a distinction between terminating and non-terminating rulings and that was really floated as just to understand what other jurisdictions had been looking at in terms of trying to deal with this complicated issue. But as my friend says the application of *Matenga* to this case does involve some mental gymnastics. My friend, as I understood, said well the Crown approach to *Matenga* which would require the Court to simply form a view as to whether a not guilty verdict was otherwise inevitable, avoids the need for the Court to undertake a assessment of all the evidence but indeed under *Matenga* it presupposes that before applying the proviso under 385 that the Court will be advised to engage in that very exercise. So here if *Matenga* in principle was to be applied the defence position is that, was there an error that was capable of affecting the result and if so then the Court

engages in the exercise of assessing whether it actually did but only if the Court was to conclude that a guilty verdict was inevitable then the Court would apply the 385 proviso and order a retrial and in my submission that interpretation is consistent with the fundamental difference between 385 and 382 and 382 will almost invariably be dealing with a Crown appeal against an acquittal whereas 385 won't be. It's consistent with, really, *Matenga*'s approach to strengthening a convicted or an accused person's rights. It's consistent with applying a test of recognising the Crown obligation onus to prove a charge beyond reasonable doubt as consistent with the otherwise presumption of innocence and with Bill of Rights Act principles.

BLANCHARD J:

So what do you say the test is?

MR EATON:

Well under *Matenga* this Court would have to assess whether there was an error that was capable of affecting the outcome and then engage in an exercise, having regard to the admissible evidence, to determine whether in fact it actually did. That is to say, a guilty verdict was otherwise inevitable.

BLANCHARD J:

But you wouldn't want the Court doing the latter part in an appeal of this kind?

MR EATON:

Do you mean –

BLANCHARD J:

Because you'd end up with the Court expressing an opinion which would be read by inference as being an opinion of how the jury should conclude the matter with its verdict of the second trial if the evidence is the same.

MR EATON:

Yes. Yes, that's right and that shows the difficulty of –

BLANCHARD J:

I wonder whether it's just the first part of *Matenga*. Something that went wrong and which was capable of affecting the result of the trial but then the, then you go back to the overall discretion.

MR EATON:

Yes. Well that's –

BLANCHARD J:

Because that would mean that the Court wouldn't be put in a position of expressing a view which might later be an embarrassment, not to the Court but to the trial Court.

MR EATON:

Yes.

BLANCHARD J:

I'm sure defence counsel wouldn't like it.

MR EATON:

Well, and my friend is right in that if this Court concluded that a guilty verdict was otherwise inevitable, then any respondent is going to struggle to have the discretion exercised in his favour.

BLANCHARD J:

Well, again, it's shouting again about prejudice at a second trial, as well.

MR EATON:

Yes.

ELIAS CJ:

Surely, though, in the mix, in terms of exercising the discretion, it's rather to the opposite effect, that if the Court were convinced that the only result was likely to be an acquittal, it wouldn't be justified in ordering a new trial.

MR EATON:

No, in terms of the discretion.

ELIAS CJ:

Yes.

MR EATON:

Yes, that's right.

ELIAS CJ:

I mean, that's only one factor, however, –

MR EATON:

Yes.

ELIAS CJ:

– but I would have thought it's, it's that, particularly if section 283 is directed at trial integrity considerations, the jury really has been deprived of the opportunity to have before it the material it should have had.

MR EATON:

Yes.

ELIAS CJ:

You might nevertheless say that the case looked too weak to justify running a further trial, even if you came to the conclusion that there had been an error capable of affecting the trial.

MR EATON:

Yes, I accept that, Ma'am, and that's really how Justice Young approached it in terms of taking those types of factors into account and the exercise of the discretion. The other jurisdictions that have been referred to in the written material demonstrate a different body, phraseology that's used to apply the test, and it's all at variance, and indeed, Justice Hammond embarked on his own test, I don't know if he intended it to be taken literally, but talked about the interests of justice and there being, I think, was it, relatively – sorry, "the prospects of conviction at retrial were very respectable." That's to say, the Court shouldn't send a case back for retrial where the prospects of conviction, even with an egregious air, were minimal or only passing. As I say, the fundamental submission on behalf of the respondent, being a person who has been acquitted at trial, is that whatever the threshold test to be applied, it must be one which requires the Crown to pass a far higher hoop than it would be for an accused person to overturn his conviction. And the reality is that that can be achieved either at the stage of assessing whether there's been a substantial wrong or miscarriage of justice or, alternatively, in the exercise of the discretion.

Whatever the Court concludes is the appropriate means of applying the proviso under 382, there obviously is the residual discretion, and whether *Matenga* is applied in the manner promulgated by my friend or in the manner advanced on behalf of the respondent, it's my submission that the Court, in this case, would not exercise its discretion to order a retrial, and I listed several factors in the written material that go to that. But one of the key factors must be recognising that this man has been through trial and has been acquitted by a jury. The Court inevitably will have to have some consideration as to the evidence, and this case comes back to the submission I made at the outset about the dispute as to the strength of the defence case, with the Crown effectively adopting what Justice Hammond described as, "the bounce of the ball" and "a godsend" and essentially implying Mr Gwaze went to trial with no defence and then just happened to have Rode fall into his lap through extraordinary circumstances and that was a saving grace, with the defence saying, "No, not at all, we went to trial with a defence that said no jury will accept that this was a case of suffocation and sexual assault, no jury could

buy into the theory the Crown must rely upon that it's happened effectively with the family being co-conspirators in terms of this offence, it's so inherently implausible, therefore the defence will rely on a submission that you will accept the reliability and credibility of those family witnesses and you'll accept the inevitable direction from the trial Judge that it's not trial by expert and the experts do not have to grapple with the full evidence that the jury had to grapple with, that is to say, 'We've heard from the people who were in the very room where it's alleged to have occurred'," and that was the first and foremost defence advanced on behalf of Mr Gwaze.

Secondly, in terms of priority of defence, it was undoubtedly the case that the only evidence that implicated this man and led to his arrest was the ESR evidence, and you'll see I've broken that down in the written material, and no doubt the Court will have regard to that evidence. But, in my submission, it is not overstating it to say the ESR evidence was fatally flawed in this case and, indeed, this morning my friend fell into the trap that the Crown have been in ever since they arrested Mr Gwaze, and that is to say that his DNA was found in the crotch of the underwear. The evidence did not support that, the experts said, "The jury are being invited to guess where the DNA was on the underwear." And I've talked in that submission about the Crown theory about concentrations in the crotch and the balance of the underwear and that theory was completely undermined when you have regard to the minute amount that was found and the processes that were undertaken. There was nothing else to implicate Mr Gwaze. In fact, I'd be so bold as to say if this Court directed a retrial it wouldn't survive a 347. So that was a very strong secondary defence to be advanced after the commonsense defence. And it's only then you turn to deal with issues of cause of death and injury, which invoke Professor Rode. Cause of death, we had Sage still saying at trial that sepsis remained a plausible explanation for death. There was no signs of suffocation, it was simply a theory based on a finding that the anal-genital injuries were caused by blunt force trauma. Absent those, there would be no evidence to conclude that this was a case of homicide.

And, can I just finish by referring to the post-trial reports, because obviously the Crown placed significant weight on those and saying, "Well, that's the true evidence," and it's only when that evidence goes before a jury, can there be a true verdict in this case. And you would have seen through the written material that there was a real issue that the defence focused on as to what Charlene's injury to her anal-genital region really was. Because the Crown opened and said, "You're going to hear evidence of a seven centimetre laceration," and that was based on the Meates-Dennis evidence, and I encourage the Court to read the cross-examination of Meates-Dennis because although Beasley with a proctoscope examined twice at least this injury and confirmed the small radial tears, although at post-mortem Dr Sage confirmed the small radial tears measuring three up to five millimetres in length, at trial Meates-Dennis maintained a view that what she saw was a seven centimetre laceration. And then, ultimately, when she was cross-examined about mistakes that had been in an affidavit filed in the Family Court and in her brief of evidence, which described it as seven millimetres, she said, "Well, there was seven centimetres of," I think she called it, "disturbed tissue." So there was a real issue, because the defence said this little girl was being treated for sepsis because all her symptoms, the diarrhoea, the very high temperature, the very low blood pressure, were all consistent with sepsis, and no wonder that was the differential diagnosis. And remember, she had been through After Hours, there'd been blood noticed on the tip of the finger, and inspection, albeit brief, was made, but an inspection for the source of the blood, and this injury, which was later described as "gaping" and "so obvious" was not noticed. And then she went into the ER, where she was for a long time, for hours, and she was subjected to examinations but no injury was noted, and then it was at 1 o'clock, some six, seven hours later, an injury is noted. And it is interpreted, by nursing staff and by Meates-Dennis, the first people to look at it, as being multiple centimetres long, and that causes a rethink on the differential diagnosis. But –

ELIAS CJ:

I interrupted the Solicitor-General when he –

MR EATON:

Yes, I had a point.

ELIAS CJ:

– went through this sort of material –

MR EATON:

Yes. What I wanted to –

ELIAS CJ:

– because we have read what was in your written submissions on it.

MR EATON:

The point I want to raise is this, that the Crown now say, "Well, the true evidence, the true verdict can only be relied upon by looking at what Rode now has to say about it in his post-trial report, prepared some months after trial." The defence have always said there's complete confusion about what this injury actually was, and I take you to Rode's opinion, which is at volume 6 under tab 84. And if you go to page 1261, at paragraph 7.8, you'll see Rode then describes what he understands to be the injury. And he says, "There were multiple radiating fresh tears measuring approximately 305 millimetres." Now, that's 30.5 centimetres, and you'd look at that and say, "Well, it's probably a typo and that zero is supposed to be a hyphen, meaning three to five millimetres," and when I first read that I took the view, "Well, that must be a typographical error, it's not worth raising." But one goes over the page to 1263, where he under the comments section addressing the genital-anal-rectal pathology, and you'll see halfway through the bottom paragraph he then gives his second and only reference to these injuries and he describes them as, "The picture of multiple three to five centimetre lacerations," et cetera, et cetera. So even post-trial, after this issue was so clearly aired before the jury, and the defence so critical of the Crown and Meates-Dennis having wrongly described this injury, the person who is now

described as the king hit for the Crown, it seems, does not understand what in fact was the injury Charlene suffered.

BLANCHARD J:

Didn't he have photos?

MR EATON:

Yes, he had some photos.

BLANCHARD J:

I mean, there are some photos in here.

MR EATON:

Yes.

BLANCHARD J:

They don't make any sense to us, because they're very blurry.

MR EATON:

No, and the photos, they were I think being used by Doocey to explain why Meates-Dennis might have made the mistake, because the photos can mislead you in your view of what the injury is, that's effectively what Doocey said as to why she thought Meates-Dennis might have got it so wrong. So, on the material you now have upon which the Crown critically rely to say that you ought to exercise the discretion and order a retrial, A, it's a, as the Court of Appeal noticed, an unsworn statement that has never been tested, B, there is no, there's a valid basis to say, "This man prepared his report on a flawed assumption as to what the nature of the injury was." And, as I say, if there was only one mistake there you might think it's typographical, but they're two quite different descriptions and, in my submission, the –

WILSON J:

You mentioned a few minutes ago a section 347. Did you make a section 347 application prior to or during trial?

MR EATON:

No, no, I didn't, Sir. So, the issue about the actual injury and therefore just how credible the Rode opinion is now, and whether this Court would direct a retrial on the basis of a report which is not only unsworn and untested but clearly wrong, in my submission, is a very real one. And, with that, I'll just ask Mr Gallivan to address you on the earlier issue now.

ELIAS CJ:

Mr Gallivan, only if you've got anything that you wish to add.

MR GALLIVAN:

Thank you, Your Honour. Just addressing Your Honour's question about the origins of the law-fact divide. Unfortunately, most academic discussion is revolved around trying to differentiate as to the question of whether it's a question of law and a question of fact. There is actually an article that has been referred to by the Court of Appeal and is included in the appellant's bundles, by Timothy Endicott of Oxford University, which can be found at tab 30 of the appellant's authorities.

BLANCHARD J:

He does go on a bit.

MR GALLIVAN:

He does go on a bit. Mr Endicott certainly likes the sound, some may say, of his own voice, and some of his points may seem a little esoteric. At core it starts, unfortunately, from the presumption, again, that questions of fact are not sufficient for a Crown appeal or even a defence appeal, and he advances a theory as to a Court trying to differentiate within the public law sphere, and Your Honour has pointed out to my learned senior that the issues of the application of the law-fact divide are perhaps clearer in the employment jurisdiction or in civil jurisdiction or in the public law jurisdiction but what are the principles it ought to apply with a Crown appeal in the criminal jurisdiction? It's my submission that the law-fact divide has essentially come from a

public law background, and it reflects the pragmatic reality of the Court or the decision-maker in the first instance being in the best position to be able to come to a determination of the facts. So –

ELIAS CJ:

That's where there's a conferral of substantive of jurisdiction, but surely in evidence law so much of the law of evidence arises out of the Judge-jury divide.

MR GALLIVAN:

There is, Your Honour, and that is, as my learned senior has said, is a superficially attractive way of defining whether we have a question of law or a question of fact. I know it's not necessarily an answer to Your Honour's questions to say that –

ELIAS CJ:

That it's superficial?

MR GALLIVAN:

That it's superficial, or that other jurisdictions, such as Canada and Australia, have recognised the difference between the law, a question of law and a question of fact, and a mistake of fact or an error of fact that the Judge may actually make, although it occurred within the context of the question of law. Just merely because it occurred within the context of the question of law doesn't make it a question of law, or an error of law, that the mistake may, in essence, when actually, when delved down into what the mistake has been. But that doesn't really answer Your Honour's question as to whether there's a normative analysis that can be conducted. Well, I submit that not only has it developed from the public law and the deference from a pragmatic point of view that's to the decider of fact in the first instance, but it's also developed from notions of double jeopardy within the context of criminal appeals. And it may be, although a very different jurisdiction and very different reforms in the last few years, but in the United Kingdom there has been much debate over incursions into the double jeopardy rule in relation to new evidence, very

similar in some sense to the developments in reform that have occurred in New Zealand over the last few years. But interestingly, under the Criminal Justice Act 2003, there is now a part 9 that deals with prosecution appeals. And under section 67 I have extracts available if Your Honours wish to peruse this immediately.

ELIAS CJ:

Why is it relevant, sorry?

MR GALLIVAN:

Section 67 has a definition of, the Court of Appeal may not reverse a ruling on an appeal under this part, unless it is satisfied, A, that the ruling was wrong in law or, B, that the ruling involved an error of law or principle or, C, that the ruling was a ruling that was not reasonable for the Judge to have made. Now, a greater incursion that would have seen, for example, sine qua non, because the Judge made the decision therefore it is an error of law as opposed to the jury making the decision. Your Honours, the reform in England didn't go that far, simply because they would have seen that as too great an incursion on the principle of double jeopardy. They recognised that this was an incursion, the reforms that have gone through, but it was a legitimate and justified incursion., but that would be going too far. And discussion of those principles can be seen in the UK Law Commission reports that have been included in the booklet of authorities from the respondent. So we see there that, unfortunately I can't necessarily say to you that there is a broad policy decision that has unified common law jurisdictions around the world, either as a matter of criminal procedure or as law of evidence, as to the division between law and fact, but the reality is, Your Honour, that, it is perhaps a little bit more mundane, the reality is a little bit more mundane as to the explanation for the approaches of the various jurisdictions, and that is that deference is paid to the original decision-maker, unless that decision is so grossly irrational so as to not have a foundation, and we can see that in *Bryson*, with the development of three circumstances there, the latter two, in particular, was a non-consideration or a consideration of an irrelevant or relevant fact and then, finally, that it was so unreasonable. So there is scope,

but if it is merely a decision that the trial Judge or even, for that matter, on a defence appeal, the jury was able to come to, then that is not to be interfered with. And only where that has, that decision was one that was not able to be reached, that it was irrational or unreasonable, only in those circumstances could it be said to be an error of law.

McGRATH J:

Seeing you've raised *Endicott*, it's the case, isn't it – I'm just looking at page 294 of his article – he does speak of the most common use of the notion of questions of law as, "Being to distribute decision-making power," and cites as the obvious example the jury trial, "Judges answer questions of law and juries answer questions of fact." That notion of distribution of decision-making power was clearly one of the prime bases for using the idea of a question of law, isn't it?

MR GALLIVAN:

It was, Your Honour. He then goes on to then differentiate and say that that is not an adequate test in and of itself, and the solicitor for the appellant has –

McGRATH J:

He's not saying it's an absolute answer.

MR GALLIVAN:

It's not an absolute answer.

McGRATH J:

He is, I think, suggesting that at times it can be an indicator, is he not?

MR GALLIVAN:

It can be an indicator, but that doesn't, in my submission, prevent the Court or, or the Court is not to stop there, that it really has to delve deeper into the question. And, in fact, over in page 300 of Endicott's article, he rather disparagingly says that the notion of a mixed question of law and fact is actually a bit of, "An unhelpful low voltage metaphor," he says, and that

actually that once you delve into the decision that has been made in identifying the error, because he –

McGRATH J:

Talks about it as, "A baffling turn of phrase."

MR GALLIVAN:

He does. Because he says, basically, that once we actually look in detail at the error that has occurred, and he looks at it from the perspective of an error, he assimilates questions of law with errors of law. He says once we actually get in to see where the problem is we should be able to define whether that is an error of law or an error of fact, and therefore this fusion of a mixed law or fact, which gives the impression that there will be some decisions that are made that it is unable to be determined whether it is a question of law or a question of fact. He ultimately says that is unhelpful.

ELIAS CJ:

Well, I really wonder whether the law's ever been as tidy.

MR GALLIVAN:

I think Your Honour is correct and, simply, the evidence for that is the numerous amount of case law that has sprung up over the issue of the question of law or a question of fact, but I would suggest and submit that it has been made clear, at least in the New Zealand jurisdiction, and also in the Canadian and Australian jurisdiction, that there the clear situation of a pure error of law, is where a Judge, His or Her Honour, has misdirected themselves as to the requirements of the law. The other two are the inferences, as it were, of the facts, or the identification of the facts or the consideration of the facts, and that the law of fact and divide reserves a sphere of influence for the Judge or the decision-maker beyond which the unreasonable irrationality element or the failure to consider is quite an extreme threshold that must be met in order for there to be an error of law. There was an analogy given by, or an example, given by the President in the Court of Appeal of the question of fact over an involuntary statement that may have been made, and an

involuntary statement, and a trial Judge determining whether that was admissible would have to make a decision on fact of whether it was actually involuntary or not. And His Honour said that that determination by the trial Judge, if perhaps there may have been another conclusion, a conclusion that a Court on appeal may have reached, is merely a question of fact rather than a question of law.

ELIAS CJ:

Well, I remember Justice Cooke, or Mr Justice Cooke I suppose as he then was, telling me very firmly in a case when I appeared in front of him in the High Court that inferences from fact were questions of law. I suspect that's very much in the eye of the appellate Judge, some of these things.

MR GALLIVAN:

Well, that's an argument that Endicott makes, and his argument is that inferences may be questions of law or may be questions of fact, it depends on the circumstances. If they are irrational or if the inference – in other words, the inference is one that just simply cannot be sustained from the facts that are before the Court, or it has been reached on the basis of the non-consideration of a relevant fact or the consideration of an irrelevant fact and, yes, there can be an error of law, but the pure inference itself merely because an appeal Court may sometimes later reach another conclusion, have another hypothesis of the case, does not render an inference of law, or an inference from the facts, a question of law. So, Your Honours and His Honour were correct in saying that, in some circumstances, an inference may be a question of law, or it may be a question of fact. So, I submit the question that Your Honours is potentially faced with is asking oneself whether Justice Chisholm in reaching his inferences, whether they were so illogical and so extreme as to render them unreasonable or irrational from the circumstances which were before His Honour in order to render them issues of a question of law or errors of law in relation to categories 2 and 3 or B and C in *Bryson.*

WILSON J:

If, hypothetically, a ruling did not comply with a provision of the Act, that would be a question of law, wouldn't it?

MR GALLIVAN:

If a ruling did not …

WILSON J:

Yes.

MR GALLIVAN:

That would be, that could be, Your Honour, come under the first category of being a pure question of law, if His or Her Honour has misdirected him or herself as to the requirements of law. So, again, it's not a case that the application of facts to a legal standard will always be a question of law, that is not, that is, I submit, an unsustainable proposition. It may, under some circumstances, but we again have to identify exactly where the error has been, and that may be the case, there may be an error of law where His or Her Honour has misdirected himself as to the legal requirements. An easy example is where excess breath alcohol, Your Honour, the facts may be that somebody has a breath alcohol level of 500, and His Honour says, "Well, it's your lucky day, because the legal requirement is 600 and you're under it, so there is, you know, I'm going to discharge you." There's been an error of law, a pure error of law, because His Honour has misdirected himself as to the legal standard, which is 400, of course. So, in those circumstances the application of facts to a legal standard may give rise to an error of law. If, however, His Honour said, "Well, I see that you have a breath alcohol level of 500," or, sorry, 300, "and it's your lucky day because the standard, the legal standard is 400," then that may be a question, an error of fact, especially if it wasn't 300 and it was five or six hundred. It may be an error of law if that finding of fact was irrational, unreasonable, or was based on facts that he or she ought to have considered or vice versa. I hope that that is of some assistance.

ELIAS CJ:

Yes, thank you very much.

MR GALLIVAN:

I'm obliged.

ELIAS CJ:

Yes, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you very much, Your Honours, I hope to be very brief. I'll just run through a number of points which were made, which I wish to respond to.

The first concerned the question as to whether or not a trial Judge, even if he has made or she has made a ruling on evidence, is under any duty to reconsider that ruling when further materials come to light which impact upon the validity of the ruling if it's been made. And this Court really answered that question in a case I call *Qiu*, but I'm constantly told is *Qiu* [pron. Shoo], and it's –

ELIAS CJ:

We've always called it *Qiu* too, but that's our ignorance.

SOLICITOR-GENERAL:

That's in tab 7 of the Crown's bundle and at the last paragraph, or the second to last paragraph, paragraph 31, where His Honour Justice Anderson points that trial Judges have to be alert to changing circumstances and be willing to revisit earlier rulings when circumstances change.

The second point I wanted to make was this. My friend continues to argue that at trial he really wasn't trying to advance the 14 May statement from Professor Rode as some form of opinion that could be used by the jury to discount the Crown's witnesses as to cause of Charlene's death. And as I said this morning, that submission is at odds with what the trial Judge

appeared to be understanding, understand the defence counsel's use of that material was, as evidenced in rulings number 3 and 4. It's certainly inconsistent with the paragraphs in the summing up, which I took Your Honours to this morning and which I won't return to, and it's certainly inconsistent with the case stated and it's inconsistent with what the Court of Appeal seemed to understand to have been the way in which the case was presented by the respondent.

Yesterday my friend very kindly made available to me a transcript of his closing address. It's not complete so I will not tender it at all because it's not complete but my friend tells me that the parts which are made available are accurate. Within about 90 seconds of him addressing the jury he talks about Professor Rode's evidence being a bombshell because in this case through him you now know there are a group of cases where children in this age group with HIV from birth, they deteriorate and die quickly and their symptoms of death include brain injury, that we have here; tears radiating from the anus, that we have here; and the passing of green watery diarrhoea, that we have here; strikingly similar features but the Crown says, don't worry about that, ignore that, it's really not helpful to you. Within a few moments later he goes on to talk about Professor Rode's expertise. He says Professor Rode, someone who has real and not theoretical expertise in dealing with children in Charlene's state of health, children who have died suddenly. Over the page he then says, about two thirds of the way down the page, the transcript that I have, and thank goodness for Professor Spencer Beasley, thank goodness for that man, because you'll recall he gave his evidence slightly out of order and he was off to a conference in Hong Kong but obviously the case was of such interest to him he took the files with him and other Professors of paediatrics there, paediatric surgeons, and they've come to discuss this case. This is the man who twice advised the Crown earlier on and gave an opinion from a South African expert but they didn't for whatever reason. So he discusses this case with a Professor from South Africa. He's obviously described the symptoms. Professor Rode's response, he recognises these symptoms. They seem to match a group of cases that he has clinical experience with, cases where children with HIV since birth died quickly. That there's brain

injury, radial tears in the anus, green watery diarrhoea, strikingly similar features, so rather dramatically in the last minute in the middle of this trial it got evidence that conflicts with the other experts. Then my friend did go on to say, but Professor Rode hasn't been asked to give an opinion. It just goes on to show how the Crown witnesses are wrong. But you'll see that that comment was preceded with a very, very detailed comparison of the 14 May statement with the symptoms that were said - that with Charlene's symptoms.

The third point I wanted to make was why the defence didn't want the trial aborted. Well it was quite clear. They were on, they were in a win-win situation. They either progressed and they got not guilties or if they got guilties and the Professor Rode statements were factually correct as it transpired then the Crown would not have been able to resist a retrial so there was no great logic in the fact that they wanted to progress when this matter came to light on the 16th of May.

Some questions were asked about whether or not sections 7 and 8 were discussed with the trial Judge. It is quite obvious from the ruling number 3 that the trial Judge had considered relevance. His statements were that, in his view, the trial Judge's view, it would not be possible for the defendant to get a fair trial unless the crux of the Professor Rode statements were put to the jury. In fact I think he reversed it and said he wouldn't get a fair trial if the crux of the statements were withheld from the jury and so that, with respect, must be a strong indication that relevance was being considered.

Similarly the decision to, on the 15th of May, to permit or to require the defence counsel to cross-examine on the 15 May statement in order to provide " balance" indicates that the trial Judge was trying to think of a way in which he would minimise the prejudicial impact of the 14 May statement. So whether he expressly directed himself to it or not we don't know but certainly there seems to have been some consideration of the requirements of section 8.

The next matter I wanted to mention was *Wotherspoon*. It's a very, very readily distinguishable. That was a case stated appeal where there was a clear –

ELIAS CJ:
Which case?

SOLICITOR-GENERAL:
Wotherspoon.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:
One of the cases my friend relied upon. Credibility finding by a District Court Judge, case stated in very, very general terms and the notes of evidence simply annexed and the High Court quite properly said, well, no you've got to in future please make sure that you actually tell us what the facts are in the case stated rather than just simply annex the notes of evidence. The – my friend when talking about the Crown's submissions in relation to *Bryson* focused only on the third question that arises from *Bryson* and said that the Crown's case was, well this case hinges on whether or not the conclusion of the trial Judge was the only reasonably available conclusion while as my friend's junior pointed out there are in fact three questions, three alternative questions in *Bryson* and the first of those questions is, has there been a failure to apply the law and this is I would have thought beyond any doubt that this is a case where there has been a failure to provide, to apply for relevant provisions of the Evidence Act.

The second question is, was there a failure to take into account material facts for material that was relevant to the decision and again that is satisfied. Then thirdly we don't even need to rely on this, we also say that the third question in *Bryson* is satisfied, namely the conclusion which was reached with what – well

the conclusion was the wrong conclusion. It was not the only conclusion that could reasonably be reached in the circumstances

My friend then went on to say that the purpose in wanting to cross-examine the New Zealand witnesses was because, as he put it, they present themselves as being experts in HIV and he needs to be able to question them on whether or not they know about this group of cases in South Africa with HIV. Well there was only one New – one Crown witness who professed to have any expertise in HIV. That was Dr Meates-Dennis. She wasn't recalled and all of the Crown witnesses said, no, HIV is not actually the case of Charlene's death and we don't have any expertise in this.

My friend seemed to suggest that if this appeal succeeds that somehow the Crown is automatically going to have a far wider right of appeal. Well the fundamental answer to that is that section 380 of course requires a Court to state a case and I would expect the Courts of this country to continue to be extremely vigilant in ensuring that only appropriate cases are the subject of case – questions stated for the Court of Appeal.

My friend then went on to say, and to characterise the Crown's analysis of *Matenga* as involving the Court and not examining the evidence, well that was the complete contrary to what I actually told this Court this morning when I had made my submissions on that point. I said that the Crown's analysis of *Matenga* involves the Court having to actually understand and consider it and weigh all admissible evidence before deciding whether or not there has been a miscarriage of justice or substantial wrong.

My friend made reference to DNA in the crotch of Charlene's underwear. In fact the Crown's case is that it was the respondent's sperm in the crotch of the underwear that Charlene was wearing on the night of the 5th of January and that his DNA was found in other places on the underwear.

My friend says that suffocation was not supported by direct evidence. To an extent that is correct but he overlooks the Crown witnesses who said that

suffocation was the only plausible explanation for all of the symptoms which Charlene presented with.

He makes something of the seven centimetre laceration which one of the witnesses referred to and that error, and it was undoubtedly an error, was very fully explained during the course of the evidence. It was Dr Doocey and Professor Beasley who explained why that error occurred. It was because the persons who were making that observation had seen Charlene when she was lying on her side and the effect of her lying on her side was that the anal area was compressed and that the only true way in which to undertake anal-rectal examination is when the patient is lying on their back and their legs are elevated and then the proper visual examination can be made of the anal-rectal area and that was explained, and it's explained in quite some detail, by both Professor Beasley and by Dr Doocey and I can give the notes, can give references to the notes if that's required.

My friend again raised the issue as to when injuries were discovered and I thought that I had covered that in some proper detail this morning and I'm happy to go back to that if it's necessary.

Can I say in conclusion the following? There are only two possible theoretical ways in which the 14 May statement could have been adduced. One is as an opinion and I would like to think that the possibility of it being considered an admissible opinion has been thoroughly tested in this Court and that there is only one conclusion that can be drawn. The second possibility is this idea that somehow it can be used as a significant extension of the learned treatise/are you up to date concept to try and impeach persons who have expertise in an area of medicine other than the area which my friend says they purported to have, namely expertise in HIV. Well I again respectfully submit to this Court that to admit that evidence on that basis would involve this Court taking steps that no Court in any jurisdiction has been willing to take and the very firm notations on the learned treatise exception referred to in the Supreme Court of Canada, just simply do not get anywhere near a learned treatise example in this case. Simply because there were no published instances of these types

of cases at all. I'll just pause to make sure I've covered everything. That's all I wish to say by way of response Your Honours.

ELIAS CJ:

Thank you Mr Solicitor. Well thank you counsel for your very thorough submissions. We will reserve our decision.

COURT ADJOURNS: 3.43 PM