

[2015] NZSC Trans 3

**HELEN ELIZABETH MILNER**

Appellant

v

**THE QUEEN**

Respondent

Hearing: 16 February 2015

Coram: Elias CJ  
William Young J  
Glazebrook J  
Arnold J  
O'Regan J

Appearances: R G Glover, M I Sewell and A C Kelland for the Appellant  
M J Lillico and K J Basire for the Respondent

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**APPLICATION FOR LEAVE TO APPEAL**

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**MR GLOVER:**

May it please the Court. I appear on behalf of the applicant. With me my learned friends Ms Sewell and Ms Kelland.

**ELIAS CJ:**

Thank you Mr Glover.

**MR LILICO:**

May it please the Court, Lillico for the respondent along with Ms Basire.

**ELIAS CJ:**

Thank you Mr Lillico. Mr Glover?

**MR GLOVER:**

Your Honours will be aware from the original submissions that I filed in this Court on the 4<sup>th</sup> of September of last year that the applicant had sought to have the conviction overturned by the Court of Appeal on the basis that the dictum of Justice Turner in the case of *Thomas v R* [1972] NZLR 34 (CA) did apply in this particular case, that it be one of those rare exceptions to a rule where a point which is outside the actual elements of the offence allegedly committed by the accused at that point is so relevant that without proof of it to a reasonable standard – I apologise Your Honours. I had completely forgotten I had it. I shall turn it off.

**ELIAS CJ:**

We've had people on the Bench with phones ringing so we don't feel able to cast the first stone.

**MR GLOVER:**

I'm obliged Your Honour. I had actually seen that happen and I was very sympathetic so I am grateful. The Court of Appeal did not accept those submissions and as the consequence in the decision, that will be well known to Your Honours, as a consequence of that Ms Milner instructed us to file an application for leave to appeal for this Court in the hope that this Court might recognise her case as being one to which *Thomas v R* could apply. Suddenly, and quite unexpectedly by counsel, I received contact from Dr Carl Wigren in the United States, and I have recounted all this in my submissions that I just referred to that are at tab 2 of our bundle of documents, starting at paragraph 11. The application for leave to this Court was sent to the registry on the 28<sup>th</sup> of August of last year, and on that same day, quite unexpectedly, counsel received a message from a forensic pathologist in the United States who had somehow become aware of the case and expressed the view that there must be serious doubt as to whether it was, in fact, promethazine which caused Mr Nisbet's death, and the pathologist indicated that he had consulted a world expert toxicologist colleague, and that's Dr Karch, who agreed with him. I

telephoned Dr Wigren in Seattle, Washington, and listened to him for an hour on the telephone while he explained to me his position and his view on the scientific aspects of the matter and he and Dr Karch both offered their services on a pro bono basis because they were deeply concerned that there was a risk of serious miscarriage of justice here. As it turns out the Legal Aid people have come to their assistance to some degree and they are being paid for their opinions but they were so committed to this that they were prepared to act for no fee, perhaps with some assistance to get to New Zealand should that prove to be necessary, and I'll return to that point in a moment because I'm –

**ELIAS CJ:**

Mr Glover, this is in the application, which we have fairly tight time constraints under the rules on, and we have read your submissions so emphasise, of course, anything you feel you need to but you don't need to go into matters of background which we are familiar with.

**MR GLOVER:**

I'm obliged to Your Honour. Well the long and the short of it then, if I can cut straight to the chase and if you want to question me on any aspects of that I'd be happy to endeavour to answer the questions, is that the two American experts who have now been supplemented by a British expert in the submissions of the applicant have cast serious doubt on the cause of death of the deceased and have indicated that they need to examine all the original material assembled by Dr Sage and the ESR as a result of the autopsy and have proffered some speculative – well not speculative, that's not a fair word, they've offered some preliminary suggestions as to other causes of death which they cannot, of course, confirm until they have access to the documents and slides and other things that have been assembled by the –

**ELIAS CJ:**

Does that mean that the application really is premature because you haven't yet assembled the evidence which we would be required to look at and assess for its cogency?

**MR GLOVER:**

Well, in one sense that could be the case, Your Honour. I can see that argument. You'll be aware that Dr Sage talks about hot-tubbing and I think it would be extremely useful if Drs Karch, Wigren and Allen from the UK could come to New Zealand and

sit down with Dr Sage and Dr Russell and have access to all the materials that they collected in the course of the autopsy and relied on for the Coroner's inquest, and in the best of all worlds if that could be funded in some way I think that would be –

**ELIAS CJ:**

Well, I'm not sure if the Court could get into that. What I was thinking of was that it might be preferable for this application not to proceed at this stage without prejudice to a fresh application on this ground if you are able to shore up some of the speculative nature of the material you've put before us.

**MR GLOVER:**

Well, I'd be very happy for that course of action to be taken. I think it would give us a far more solid platform to argue on behalf of the applicant and it may well be, of course, that the alternative outcome could be that the application would have no merit at all because it may well be that the overseas experts would come and have a look at what had been collected and simply say, "No, there is no evidence of anything other than the influence of promethazine in that death," in which case I think the whole thing would become a moot point literally. So if Your Honour's suggesting that perhaps we should adjourn the application to a later date or –

**ELIAS CJ:**

No, I wasn't really suggesting it. I was wondering whether the application itself is premature and as long as it was flagged that a fresh application might not run into time constraint issues it might be preferable to simply proceed on your other leg which is actually inconsistent with this alternative hypothesis.

**MR GLOVER:**

Well, that might be a very sensible course of action.

**WILLIAM YOUNG J:**

Can I just raise an issue before you depart from the new evidence? I'm just looking at Dr Karch's affidavit and para 1. Now as I understand the case, and if I'm wrong please correct me, the evidence you rely on doesn't impeach the conclusions of the jury that on two occasions Mrs Milner administered promethazine with the intention of killing her husband.

**MR GLOVER:**

I don't think I could argue with that, Sir, no.

**WILLIAM YOUNG J:**

So the assertion that the charge of homicide, and he refers to it as "coronial" but I think this must be the case at trial, was based on its entirety on the absence of other possible causes of death and the high post mortem blood concentration. But that's not really true, is it? I mean, the cause – the case that Mrs Milner murdered her husband was based very substantially on the evidence that she was trying to kill him with promethazine.

**MR GLOVER:**

Yes, that was, that was common ground between the defence and the Crown at the trial.

**WILLIAM YOUNG J:**

Well, that's quite a big gap between – there's quite a big gap between that and what Dr Karch is saying, then effectively they're saying, "Ignore the rest of the evidence."

**MR GLOVER:**

Well, I don't –

**WILLIAM YOUNG J:**

"Just look at the medical evidence and the toxicology evidence as to promethazine."

**MR GLOVER:**

I understand what Your Honour is saying but with respect I don't think it's quite correct because the basis of the Crown case and of the defence was that promethazine was the cause of death. The other evidence that the Crown assembled, and a lot of it was circumstantial and quite powerful circumstantial evidence I would concede from the outset, set Ms Milner up in a context where she was alleged to have had a motive, namely the insurance money, for disposing of Mr Nisbet, but at the end of the day it was common ground between the Crown and the defence that promethazine was the only cause of death because we have no other scientific suggestion of anything else and none of us was qualified to suggest anything.

We each got our experts, in the case of the Crown Dr Sage and Dr Russell, and in the case of the defence Professor Whyte from New South Wales. There was some dispute about what quantity of promethazine would be required to cause the death and indeed what quantity of promethazine was ingested by the victim, and at the end of the day the Crown's assertion that it could be as few as 14 pills against the assertion of Professor Whyte that it was more likely 45 to 50 pills, can't have particularly swayed the jury one way or the other in the light of all the other evidence. But what Dr Karch and Dr Wigren have done, and Dr Wigren was actually the initiator of this, and he then contacted Dr Karch, is to say that –

**WILLIAM YOUNG J:**

Yes, I understand that. I understand the sequence of events. Dr Wigren recruits, or gets in touch with Dr Karch.

**MR GLOVER:**

Yes, and what the two of them agree about, and independently I'd spoken to Dr Anna Sandiford from Auckland who'd contacted the UK expert, and that's how he comes to be included in the equation, but the combined evidence of the three of them casts serious doubt, in my submission, on whether or not promethazine was the cause of death and whether or not the tests that were used by Dr Sage and Dr Russell were adequate to deal with that particular aspect, and the expert, the overseas experts seemed to think that they were far from accurate and that other causes of death, notwithstanding Dr Sage's remark that he couldn't find anything else, have not been properly investigated, and that's where I think the hot-tubbing idea with these people all getting together and discussing it might resolve the matter one way or another. I'm attracted by the Chief Justice's suggestions in that respect. The practicalities of it leave me a little concerned, because we'd have to get these people here, but –

**ELIAS CJ:**

I'm not sure that you've really sufficiently answered Justice Young's point –

**MR GLOVER:**

I'm happy to address it further.

**ELIAS CJ:**

– because here's a threshold you really need to meet, isn't there, and you do need to explain how the new evidence fits in, if it doesn't undermine the jury verdict as you acknowledge in terms of the attempt.

**MR GLOVER:**

Well as I understand, and obviously I'm not a trained pathologist or toxicologist, but as I understand the evidence that these experts are purporting to think significant, they are saying that whether or not promethazine was administered, the amount of promethazine (a) might not have been sufficient to cause death because it is below the published levels, with the exception of one study, all the other studies indicate that even at 45 tablets of promethazine the result would not necessarily and it not reported as being fatal, and that's based on the .7 milligrams per litre of blood which was extracted from the autopsy, and –

**ELIAS CJ:**

There was the Crown suggestion of smothering.

**MR GLOVER:**

That was not pursued in the closing at the trial –

**ELIAS CJ:**

It was in the closing, the suggestion was made, wasn't it, or have I got that wrong?

**MR GLOVER:**

No, I think it was made in the opening, Ms Basire might be able to assist on that.

**ELIAS CJ:**

Right.

**MR GLOVER:**

I think Mr Stanaway expressly stepped back from that at the end and told the jury not to concern themselves with it. But if I'm wrong I'm happy to be corrected by my friend.

So trying again to address the threshold that Your Honour, both Your Honours have raised, I think that the issue is whether or not the blood sample was suitable for proper establishment of the amount of promethazine that was delivered and whether

or not it was indicative of the promethazine being the cause of death. That is where the real problem lies because at Crown, sorry, at the trial the Crown and the defence were ad idem on the point that there was no other explicable cause of death and it was only the out of the blue contact from Dr Wigren that raised any of these questions, I am not at all qualified to take Your Honours through the finer points of their affidavits and, while I'm on the subject, I should apologise for the fact that Dr Karch's affidavit has been reproduced four times in our bundle of documents. I don't know how that happened. It must have been the printers who did that, but it's not to give it four times the weight, I should say.

But the experts are quite clear on the fact that it seems to their distant view of this, without having had a chance, and this is one, I think, of my friend, Mr Lillo's criticisms that they haven't – what they're basically doing is simply offering possible alternative views but that is all they can do until they've had access to the materials that remain, till they've had access to the slides, the hair samples, cardiac tissues and the various other things that enable them to do the analyses they need. Dr Karch is sending me on almost a daily basis learned articles which are quite beyond my competence to assess on proper methods of analysing the possibility of having insulin in the body and they need to have access to these raw materials, if I can put it crudely that way, in order to assess whether or not the procedures carried out were satisfactory, and I've made this point in my written submissions that this, while it's obviously very important for Ms Milner, has wider implications as well for the whole autopsy system in New Zealand because if there are some faults in the systems that are being used they should probably be highlighted and this case may be quite significant in terms of the future of scientific procedures in that part of our justice system.

The material provided by Dr Karch in particular and I think to a degree Dr Wigren who has already worked in New Zealand – he was I think an assistant to the Coroner in Auckland at one point. He certainly worked in Auckland in the hospital system for a while and that is possibly why he picked this up because he was probably interested in what was going on in New Zealand and just generally looking at it and he saw this case and stepped in. Their views are such that, in my submission, it would be highly beneficial for them to step in and come here and look at the remaining materials. They have repeatedly asked me to get them a copy of what they believe would be guidelines for the conduct of these kinds of analyses in New Zealand and at last report I think Mr Lillo was going to endeavour to assist with



that. I haven't yet seen the documents but if he is able to get those for me I'll be able to send them to these –

**ELIAS CJ:**

Mr Glover, really what you're saying is that what you've got at the moment is a line of inquiry.

**MR GLOVER:**

That's true.

**ELIAS CJ:**

I'm not sure that, I'm not sure that there's anything that the Court can get a handle on if that's so. You're not able to say that really the experts are doing other than raising hypotheses which they think should be looked at.

**MR GLOVER:**

I accept that submission, Your Honour. I mean, that is my submission. I accept Your Honour's comment.

**GLAZEBROOK J:**

But doesn't the evidence perhaps go a bit further than that because doesn't the evidence say that there was no way that you could be sure from what was there that that was the cause of death? Because levels rise up afterwards and even at those higher levels it – so that even if you couldn't find an alternate cause of death there was no way that there was, that the jury could be sure that that is what had caused death even if those had been administered. I thought that that's what the evidence was saying, so – because clearly Crown has to prove cause of death beyond reasonable doubt.

**MR GLOVER:**

Well, that's been the position of the defence throughout, Your Honour, and at trial it came down to the point where effectively our expert, Professor Whyte, said that 45 pills would be required to produce the blood level that was found. The Crown had Dr Sage and Dr Russell saying that as few as 14 pills would be enough. But, at the end of the day, because of the lack of the input that we've now had from these overseas experts, neither side was in a position to say that we could find any other ascertainable cause of death. So I think, while I accept what Your Honour's saying is

accurate in one sense, I don't think that was in the forefront of the minds of counsel on either side when we addressed the jury.

**GLAZEBROOK J:**

Well, not at the time. I'm just saying what the new evidence supposedly says.

**WILLIAM YOUNG J:**

I suppose the issue really, and it's a reasonably familiar one, is, is this an issue that falls to be determined by reference to what in the end is indecisive medical and toxicology evidence or do you look at the whole context where it can be – and effectively that's what the Court of Appeal has said, we can be satisfied that she murdered her husband, we don't necessarily have to be satisfied as to each step in the mechanics, and the evidence as to whether promethazine killed him is – it can't really be assessed in isolation from the fact that on the jury's finding she administered promethazine with the intention of killing him. I mean, that's the – putting it rather bluntly.

**ELIAS CJ:**

That's the ultimate question for an appellate Court but isn't there – I must say I'm still struggling to take from the expert evidence any clear position because they say they need to do further assessments.

**MR GLOVER:**

Your Honour is completely correct in that point. They do say that, and unless they are able to do those further assessments I don't think that we're going to get a clear answer, but certainly it's my submission that if Ms Milner had every intention of killing her husband and endeavoured to do so by the administration of promethazine but it can be shown that promethazine didn't kill him then perhaps –

**WILLIAM YOUNG J:**

But it can't.

**MR GLOVER:**

– perhaps an attempt but –

**WILLIAM YOUNG J:**

Pause there. It'll never be shown that. What – I mean, that's – I don't think they're ever going to say promethazine didn't kill him. All they can say is there are other possibilities that haven't been excluded on the pathology or the toxicology.

**MR GLOVER:**

Well, until they do the pathology and the toxicology that, that is true, I think, Sir, but if –

**WILLIAM YOUNG J:**

Sorry, okay, well, I guess that it is possible, it is conceivable that they might say that but not very plausible.

**MR GLOVER:**

Well, there are serious suggestions by both of them that it could be some kind of heart condition that killed him –

**WILLIAM YOUNG J:**

Yes.

**MR GLOVER:**

– which is completely, was completely unknown to him or anybody else at the time and they explain that in some detail in their affidavits, and should it be that the heart condition did in fact kill him and promethazine was shown to be below the level which all the reported studies indicate to be fatal then one might have to draw the conclusion that it wasn't the promethazine that killed him, rather it was the heart condition. But as Her Honour, the Chief Justice, rightly says, that is a point for further investigation and I can only offer it on the basis of what these people have told us.

**O'REGAN J:**

But are you saying that whatever happens there won't be any appeal against the attempted murder conviction? Is the – are you only concerned about the murder conviction, is that the position?

**MR GLOVER:**

Essentially I think it is really. I'd have to concede that. I think it is, Sir, because she could very well firmly believe that giving him a quantity of promethazine would kill him. It didn't but she intended to do it and she attempted to do it and failed so I don't

think I could argue on a consistent level with that proposition. And there were, of course, two attempted murder counts in the indictment, as it was then called, and she was acquitted on the first one. But, that said, Dr Wigren in particular does assess the information that was put together by the hospital, both on the morning of the 15<sup>th</sup> of April and on the night of the 15<sup>th</sup> of April when he was taken there on those two separate occasions and has some criticisms to make and, in particular, he says that the electrocardiogram showed that there were some heart abnormalities which were either glossed over, because the promethazine was the primary concern, or because there wasn't an experienced registrar who didn't really appreciate the significance of them and a cardiologist should have been consulted at that point and wasn't.

**GLAZEBROOK J:**

But that doesn't still help the attempted murder charge though, does it?

**MR GLOVER:**

Not really, no.

**GLAZEBROOK J:**

Well does it, or doesn't it, because I can't see that it does at all.

**MR GLOVER:**

No.

**GLAZEBROOK J:**

Right.

**MR GLOVER:**

So unless there's anything specific that you'd like me to adduce further –

**ELIAS CJ:**

No, thank you Mr Glover.

**MR GLOVER:**

– I simply rely on the written submissions to support...

**ELIAS CJ:**

Yes Mr Lillico?

**MR LILLICO:**

May it please the Court. Just initially seizing on Justice Young's query of my friend in relation to the, Dr Karch's affidavit and his inadvertence in relation to the wider context of the Crown case and the other evidence that the Crown had called upon in relation to proving that Ms Milner poisoned her husband with promethazine rather than the suicide theory that was being promoted by the defence. That seems to be the case in my submission that one of two possibilities. The Court have asked for submissions in relation to *R v Smith* [2003] 3 NZLR 617 (CA) but the more tenable possibilities, in my submission, seem to be either reference to the Governor-General under section 406 or the matter may remain in this Court for Mr Glover to perfect his case in relation to the enquiries he's embarked on.

**ELIAS CJ:**

Well I wasn't, in fact, suggesting that. I was suggesting that maybe the application is premature with the result that the application wouldn't be entertained but without prejudice to a fresh application if substantiation eventuates.

**MR LILLICO:**

Yes, and that seems to be the difficulty because the material that is available to the other experts, the US based experts, hasn't been seized upon. We received a request from Mr Glover for, for instance, the ESR notes. Those were disclosed in mid-January, so material such as that, such as the slides of the, of Mr Nisbet's tissue and so on can be considered. The hot-tubbing idea that Mr Glover has put forward, that could take place –

**ELIAS CJ:**

Or indeed a section 406 application might be considered instead of seeking leave to appeal.

**MR LILLICO:**

And that would be the Crown's preference given this Court's decisions in other leave contexts. The references are in the Crown submissions to two cases, *A v R*, a case called *Currie v R* [2012] NZSC 19, where usually recanting type evidence has been put forward. Unable to find one involving expert evidence but certainly the case is where complainants have recanted, or said to have recanted. *Currie* involved some

expert evidence in the form of a graphologist's report. That was a case involving alleged blackmail and some documentation. So those cases have really highlighted the avenue of 406 as an alternative to applications for leave where there's –

**ELIAS CJ:**

You can understand why that's so in perhaps cold cases although even so we've had *Lundy* recently for example. But this is a case where we're still in the appellate process, it's not really complete. I'm just wondering really about how – about recourse to section 406 in that sort of context.

**MR LILLICO:**

The Crown's position in relation to that really is that not so much that all accused in this case, or all appellants, have a right, of course, to go through two layers of appeal right up to the senior appellate Court, especially in cases where the appeal is only fresh evidence based, and the submission simply is that there are two apparent exceptions to that, or at least two rather, there's probably more, but the fresh, the counsel competence type exception, *Fairburn*, or where the new evidence shows that a facet of the Crown's case is simply inadmissible and the suggestion in the submissions was that *Barlow* was an example of that, but of course *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273, as Your Honour says, would also be another aspect of that. And it's my reading of the counsel's case that in that situation, Ma'am, is that 406 did give the Council some pause and the Privy Council considered whether that might be the better avenue but *Lundy*, of course, was much delayed. The conviction, I think, was entered in 2006, so the Privy Council was mindful of that length of time having passed.

**WILLIAM YOUNG J:**

It's also partly, I suppose, explicable on the basis of the completeness of the case for a new trial is advanced.

**MR LILLICO:**

Yes and here we have a situation where he's going to have to be a, the wording of this Court in *A v R* and *Currie* was full investigation and as the Chief Justice has said with Mr Glover, that is, has started on a line of enquiry if you like. We haven't fully investigated it.

**GLAZEBROOK J:**

What are the abilities in terms of funding for the sort of further investigation that's needed, because that's one of the issues that Mr Glover raised, and I think it is a practical issue. So what you have here is I would have put it higher to say that there is a doubt over the cause of death that's been raised, just on toxicology, and the doubt over the cause of death isn't really helped by the fact that she was trying to kill him with promethazine, is it, promethazine.

**MR LILLICO:**

Yes, so the question –

**GLAZEBROOK J:**

Because it's like you could be trying to kill someone by hitting them over the head with a brick but if, in fact, they die of somebody shooting them with an arrow –

**ELIAS CJ:**

Or a heart condition.

**GLAZEBROOK J:**

I mean I was going to say of a heart attack but in fact it could have been brought on by being hit in the head with a brick which is why I didn't continue with that.

**MR LILLICO:**

Because of the other circumstances of the case, it's a very real possibility that, given the other circumstantial strands, the witnessing of the crushing of the pills in the kitchen –

**GLAZEBROOK J:**

But she could be trying – she definitely was trying to but the Crown has to prove, for murder, that she succeeded in that, don't they?

**WILLIAM YOUNG J:**

So if they can, so ultimately on the basis that it's a coincidence because most cases in the end turn on coincidence

**GLAZEBROOK J:**

I'm not saying they couldn't, it's just that the jury would have had to have considered that and obviously it'll be stronger if, in fact, another cause of death, another tenable

cause of death, can be found with the other investigation. But there's probably enough here now to raise some issues about the cause of death. So the issue is who's going to fund these extra...

**MR LILLICO:**

Yes, and Legal Aid at least did fund applications under 406.

**GLAZEBROOK J:**

Does Legal Aid apply to 406?

**MR LILLICO:**

Yes Ma'am, that's what I'm, it has done in the past.

**GLAZEBROOK J:**

It has done in the past, right.

**MR LILLICO:**

Yes, and just in relation to Your Honour's other point earlier which is about the doubts having been raised about the mechanism if you like. There was no glossing, if you like, by the Crown about the state of the literature, if you like, about promethazine poisoning, the studies, there are few studies. They dealt with quite a small pool of data and you will have seen in the evidence from Dr Russell, who was the Crown's toxicologist, she said, "Well, you can't," because the debate was about whether Mr Nisbet could have ingested large numbers of pills, and you will have seen Dr Russell said, "Well, we can't just extrapolate from a blood reading how many tablets there were," and Dr Sage showed a bell curve to the jury to show this problem of peak/flow which Your Honour mentioned earlier. So these difficulties in caveats on promethazine were before the jury.

The references for those would be page 935, that's Dr Sage I believe, and page 948 which is Dr Russell.

**GLAZEBROOK J:**

But that was in the context of an agreed cause of death but merely whether it was suicide or –

**MR LILLICO:**



Yes.

**GLAZEBROOK J:**

– or murder?

**MR LILLICO:**

Yes, and of course that was the defence theory at trial.

**GLAZEBROOK J:**

Yes.

**MR LILLICO:**

And although we have, particularly in the affidavit of Dr Allen, a great deal of amplification of that sort of criticism, Your Honour, the highest that he puts it is that the promethazine concentration, this is 36 of his affidavit, found, very likely represents an overdose that probably falls below the range that's been reported for fatalities for the drug and the points being made there really is that all of the experts in the end can't offer, and this is Justice Young's point, can't offer an alternative explanation and the agreed fact, if you like, is that promethazine was present in Mr Nisbet's system and Professor Whyte said that that meant, given the limited data set that we have, that Mr Nisbet's death then becomes an outlier. So he becomes the new low tide mark, if you like, and that's at page 985 of the evidence, Professor Whyte, who's the defence expert.

**O'REGAN J:**

Sorry, what was that page again?

**MR LILLICO:**

Page 985, Sir.

**O'REGAN J:**

Thank you.

**MR LILLICO:**

Those are the matters I really wanted to address, unless I could assist. I did have a matter in answer to the smothering question. That was – because promethazine, and again this is not disputed, depresses the central nervous system, Dr Sage gave

in evidence the idea or the hypothesis that if the drug, if the promethazine was fed to Mr Nisbet over time, his central nervous system became depressed, then the process of killing him would have been sped up, if you like, by smothering him. It wasn't closed on by the Crown but it was a matter it was suggested might have happened –

**ELIAS CJ:**

It was –

**MR LILLICO:**

– by the experts.

**ELIAS CJ:**

Thank you.

**MR LILLICO:**

Those were the matters I really wished to raise.

**GLAZEBROOK J:**

But there was no, no other evidence to suggest that had taken place, is that...

**MR LILLICO:**

No, Your Honour.

**GLAZEBROOK J:**

All right.

**ELIAS CJ:**

Any other questions? Mr Glover, do you have anything that you wish to say in reply?

**MR GLOVER:**

Just some very brief points I think my friend – I think my friend really conceded the second one, which is that Dr Sage, when he was referring to smothering, said that there was no evidence either way so that there was nothing to suggest that Mr Nisbet was or was not smothered, no physical evidence that he could ascertain. The only other thing I wanted to mention is I was thinking when I was listening to Justice Glazebrook's very lucid analysis of the situation about being hit on the head

with a brick or something, I was thinking of what I believe was a Privy Council case called *Thabo-Meli v R* [1954] 1 WLR 228. I haven't looked at it for a long time but *Thabo-Meli* I seem to recall was a murder from somewhere in Africa that went to the Privy Council on the basis that the victim, well, the accused was convinced that he had murdered the victim and put what he believed to be the dead body of the victim in the boot of his car to drive it away and throw it down a bank or something and, in fact, when he threw it down a bank the body was still alive and was killed by the action of the fall. Now I may not be entirely accurate on my recall of the facts of that case, but I see Justice Young smiling a bit so he probably remembers it.

**WILLIAM YOUNG J:**

Yes, I've got a feeling it didn't turn out. There was a similar case in New Zealand called *Ramsey* I think. Neither case turned out very happily for the defendant.

**MR GLOVER:**

I think that's right, but it does illustrate the situation where a person may believe that they've killed somebody and haven't in fact and that could be relevant here perhaps peripherally but I can't develop that any further. So unless there's anything else you would like me to address I have nothing further.

**ELIAS CJ:**

No, thank you.

**MR GLOVER:**

Thank you, Ma'am.

**ELIAS CJ:**

Thank you, Mr Glover. Well, thank you, counsel, for your submissions. We will consider our decision in this matter and reserve it.

**COURT ADJOURNS:10.45 AM**