IN THE SUPREME COURT OF NEW ZEALAND SC 80/2014

[2015] NZSC Trans 1

THE QUEEN

Appellant

v

TAWERA WESLEY WICHMAN

Respondent

Hearing:	12 February 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	A Markham and P D Marshall for the Appellant P V Paino and S M M Bolland for the Respondent

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CRIMINAL APPEAL

MR DOWNS:

Yes, may it please the Court. Downs and Mr Marshall for the Crown as appellant in the K appeal.

ELIAS CJ:

Thank you.

MR MANSFIELD:

Good morning. May it please the Court, counsel name is Mansfield, I appear together with Mr Bullock for the respondent.

ELIAS CJ:

Thank you Mr Mansfield.

MS MARKHAM:

May it please the Court, Ms Markham together with Mr Marshall in respect of the T W W appeal, for the appellant.

ELIAS CJ:

Thank you.

MR PAINO:

May it please the Court, Paino with my learned friend Ms Bolland for the respondent in T W W.

ELIAS CJ:

Well we've called both together, but we had thought that we would proceed first with T W W. Was that your understanding Ms Markham?

MS MARKHAM:

Yes Ma'am, thank you.

ELIAS CJ:

Can I just ask counsel about name suppression? There's name suppression continuing in both appeals from the High Court order but do you need me to make an order suppressing any report of the proceedings in this Court pending further order of the Court?

MS MARKHAM:

I had just discussed that with my learned friend, Ma'am, and I think we would agree that that would be appropriate, yes. There are also suppression orders in relation to some of the material, that that continue in force as well.

ELIAS CJ:

All right so the existing suppression orders will not be affected. Does any other counsel want to be heard on this?

MR MANSFIELD:

Yes, may it please the Court. I don't believe my client has name suppression. However, the lower Court decisions have been suppressed for obvious reasons.

ELIAS CJ:

Yes. Well you're not seeking a change in that?

MR MANSFIELD:

I'm certainly not.

ELIAS CJ:

No? No, thank you.

MR DOWNS:

The Crown doesn't wish to be heard if the Court pleases.

ELIAS CJ:

The suppression orders made in the lower Court continue. In addition there is a suppression order in respect of any report of proceedings in this Court until further order of the Court. Yes Ms Markham?

MS MARKHAM:

Thank you Ma'am. Just relating to that topic my learned friend also raised with me the possibility that there may be family members of the families concerned turn up today in Court. Many of those are Crown witnesses or proposed Crown witnesses and we're not in a position to know whether they're here or not. I don't think they are but that is a possibility and we were agreed it was appropriate to exclude them if the Court pleases.

ELIAS CJ:

If we can't identify them I'm not sure how we're going to but –

MS MARKHAM:

Perhaps an enquiry might be made if there are any Crown witnesses or family members present.

ELIAS CJ:

Are there any witnesses present? Those who will be witnesses in a Court?

MS: –

(inaudible 10:06:59)

MS MARKHAM:

This is for the T W W case.

MS: –

(inaudible 10:07:06)

MS MARKHAM:

Well that, in that case there's, she is a proposed witness –

ELIAS CJ:

You're seeking an order for exclusion?

MS MARKHAM:

Yes Ma'am.

ELIAS CJ:

I don't know what relationship and what this witness – do you want to make enquiries, Ms Markham? We can withdraw if you want to?

MS MARKHAM:

I understand she's the maternal grandmother.

MS:

The mother's mother.

MS MARKHAM:

The mother's mother in which case –

MS: –

I'm one of the main police witnesses.

MS MARKHAM:

Yes, one of the main witnesses in the trial.

ELIAS CJ:

Yes, all right, is that Mrs W?

MS MARKHAM:

Ms –

MS: –

I'm the mother's mother.

WILLIAM YOUNG J:

The mother's mother.

ELIAS CJ:

Yes, yes.

MS MARKHAM:

– is that right?

MS: –

Yes.

ELIAS CJ:

All right. Ms –, I'm afraid I have to make an order for your exclusion because you're a witness in the trial so you won't be able to sit through the hearing.

MS MARKHAM:

I'm obliged Ma'am.

ELIAS CJ:

We do, of course, have television coverage in the foyer.

MS MARKHAM:
I hadn't thought of that.

ELIAS CJ:
Perhaps your junior could go out and speak to the registrar?

MS MARKHAM:
Thank you Ma'am.

ELIAS CJ:
Yes Ms Markham.

MS MARKHAM:
There is, before the substantive appeal is dealt with, there are two applications before the Court to produce evidence. One by the Crown in relation to the now second affidavit of Detective Senior Sergeant Mackie. The first was found to have contained some errors of a transcription nature in relation to one of the operations and the second from the respondent in relation to the Coroner's inquest issue and I can indicate straight away that the respondent's application is not opposed by the Crown.

ELIAS CJ:
Thank you.

MS MARKHAM:
The Crown's application, however, does appear to be opposed. I think principally on the basis that the material could have been collated and adduced at the section 344A of the Crimes Act hearing or indeed in the Court of Appeal. The reason, if I can indicate, I'm sure the Court will want to hear from my friend, but the reason the material was tendered was not so much to advance any particular plank of argument, but really as background material that maybe of interest to the Court. Certainly in the Court of Appeal hearing I was questioned a lot about previous occasions in which the technique had been used –

ELIAS CJ:
And there was some information put before the Court from counsel.

MS MARKHAM:
From the Bar.

ELIAS CJ:
I'll ask Mr Paino what his, whether he wants to elaborate on his objection, but it did seem to me that obviously this material is not substantiated to the extent that it could be relied upon by the Crown as chapter and verse in terms of those operations. I had taken it to be simply that it's background really to supplement the submission, the information provided through counsel and probably could not be used by the Court in any more formal sense than that.

MS MARKHAM:
That was precisely how the Crown intended that it was used, yes Ma'am I'm grateful for that indication. Does Your Honour wish to hear from Mr –

ELIAS CJ:
Yes. yes thank you.

MR PAINO:
Yes thank you. Your Honours my position really was that if the material that was included in the affidavit was of no consequence and is not really going to be referred to, then I saw no point in therefore it being adduced.

ELIAS CJ:
Well it is background which was before the Court of Appeal in a different form. It's not information that we could rely on to any substantial extent, but it does indicate the scope of the similar operations that have been mounted by the police.

MR PAINO:
Yes, no I do appreciate. My principal concern was that it did contain material relating to the case of *R v Cameron* [2007] NZCA 564 and the Court of Appeal found that the technique used in this case was above and beyond the number of occasions –

WILLIAM YOUNG J:
I thought the Court said they didn't know what it had been involved in *Cameron*.

MR PAINO:

See the power in the Court said that there was no payments made to *Cameron* because I had made that submission based on the –

WILLIAM YOUNG J:

Oh I see, payment that you, sorry.

ELIAS CJ:

Yes the payment issue.

MR PAINO:

Yes but based on my research investigations I suppose with counsel for *Cameron* and putting the Crown on notice and then so for the Court to say there were no payments and for an affidavit to come in in this Court saying there were payments, it really, it puts the judgment under some, not risk, but it does, it's unfair for the evidence to be adduced at this stage, but if the Court is not relying upon the material –

ELIAS CJ:

Well I don't, I'm not sure it goes any further than I've suggested to Ms Markham that it's really just background material and if you say that you haven't had an opportunity to verify the question of payment, I don't think the Crown can rely on it to indicate any error in the Court of Appeal decision if that is indeed relevant.

MR PAINO:

No, fine. Then on that basis I'm happy to withdraw the objection on the ground I outline.

ELIAS CJ:

All right. Well we'll hear you further if you think that the Crown is seeking to make more of it than that.

MR PAINO:

Thank you.

ELIAS CJ:

Thank you. All right Ms Markham.

MS MARKHAM:

Thank you Ma'am. Just further to that to assist I can indicate I'm not proposing to make anything of the point that there may or may not have been money passing hands in the *Cameron* operation. I've also just been informed by my learned junior that the witness' mother and partner will be present in Court, having not been specifically excluded. I guess my objection is not as strong in that instance but I thought I should draw it to the Court's attention and I'm not sure what my learned friend's position is.

MR PAINO:

Sorry, who's going to be present in Court?

MS MARKHAM:

Ms –, who was the Crown witness who was just excluded, her mother and her partner.

MR PAINO:

I see, right.

MS MARKHAM:

Are present in Court.

ELIAS CJ:

Are they witnesses?

MS MARKHAM:

If I could just confer very briefly Ma'am?

ELIAS CJ:

Yes, thank you.

MS MARKHAM:

Yes, Mr Paino confirms that the partner is also a Crown witness or a proposed Crown witness, certainly he was interviewed by the police, I can confirm that much. So if the Court pleases I think both counsel would support excluding him from the courtroom as well.

ELIAS CJ:

All right, I think we should make an order excluding all witnesses at the trial from sitting through the hearing.

O'REGAN J:

And from observing it in the foyer.

ELIAS CJ:

And from observing it in the foyer. Thank you. It might've been kinder if some inquiries had, but you might not have had any intimation that they would be here, if they'd been told before they turned up.

MS MARKHAM:

Not until this morning Ma'am, I'm sorry. There was certainly no one turned up in the Court of Appeal.

ELIAS CJ:

So have they withdrawn at this stage do you know?

MS MARKHAM:

No.

ELIAS CJ:

Yes, thank you. Well we've made an order excluding them because they're witnesses in the case, so I'm afraid they'll have to withdraw. I think we shall take a short adjournment and Ms Markham you can ascertain whether it's necessary to exclude these people, and also perhaps you could indicate whether consequential order is made if they're sitting through the hearing, or whether you'll simply indicate to them some of the pitfalls. All right we'll take a short adjournment, thank you.

COURT ADJOURNS: 10.16 AM
COURT RESUMES: 10.21 AM

MS MARKHAM:

My apologies Ma'am for that interruption, I have clarified it with the people in Court and it's in fact a new partner, not the former partner who was indeed a Crown

witness or a post Crown witness, so neither person present in Court is a Crown witness. However, Mr – who is the gentleman here, his partner is the proposed Crown witness who was excluded earlier. So on that basis, having discussed it with my friend we have no difficulty with them being present, but we would seek an order that they don't discuss –

ELIAS CJ:
I'm just not sure really that it's appropriate for us to make an order like that Ms Markham. Presumably if they're Crown witnesses you'll explain the implications of discussion. Just hold on a moment. All right we won't make an order to that effect.

MS MARKHAM:
Thank you.

ELIAS CJ:
But if you, presumably you've spoken to the people in Court –

MS MARKHAM:
Yes.

ELIAS CJ:
And to the victim support person, so that they understand the position.

MS MARKHAM:
Yes.

ELIAS CJ:
All right.

MS MARKHAM:
And I'd like to Ma'am, well with that out of the way, we can turn then to the appeal itself. The crime scenario technique with which we are concerned has been described by the Canadian Supreme Court as being an indispensible investigative tool that has lead to and secured convictions in hundreds of cases in that jurisdiction. As with all confession evidence the Crown accepts that it is appropriate that the Court scrutinises the circumstances in which it was made but it is the appellant's

submission that in concluding that this confession was unfairly obtained, the Court of Appeal erred in principle in two primary respects. Firstly as I've identified in the submissions, in adopting a Bill of Rights based elicitation analysis in circumstances where the New Zealand Bill of Rights Act 1990, sections 23-25, is not engaged, which has the effect of extending the *R v Barlow* (1995) 14 CRNZ 9 (CA) analysis to the investigative stage or pre-arrest, pre-detention stage.

Secondly, the Crown submits that the Court erred in concluding that the confession risked being unreliable in the absence of any appeal against Justice Collins' finding to the contrary under section 28 and in circumstances where in the Crown's submission both on paper and orally in terms of the audio recording, the confession was a very compelling one, and the overall submission, standing back if you like, is that the Court's treatment of the fairness discretion as something of a catch-all or fill the gaps jurisdiction, has lead the Court into error. The Crown says that section 30 of the Evidence Act 2006 is not about unfairness in any colloquial sense of fair play, but that the ultimate sanction of rejecting what the Crown says is reliable and relevant evidence can only really take place where the admission of the evidence would bring the administration of justice into disrepute.

The facts are obviously before the Court in fairly comprehensive submissions on both sides, and I don't propose to take Your Honours through those other than to highlight a few salient points from the appellant's perspective. It's important in my submission to recognise that although there are features of the scenario technique that are common to all deployments, there's no uniform script if you like, and there are significant variations in the application of the technique in the cases that are in the examples that are before the Court in the bundle. And it's the Crown's submission that the deployment of the technique in this case was in fact quite conservative compared to those examples, and I say that because none of the scenarios involved violence, whereas if you take the Canadian Supreme Court's description of the technique in *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 it would appear that violence is very much part of the standard operational procedure in Canada or at least it was at that time. There's no suggestion that violence is some sort of boast worthy accomplishment within the criminal organisation. Again that contrasts with the other decisions. The officers involved in the scenarios themselves that proceeded the final interview were not briefed on the homicide investigation and there was no questioning during that phase, or no mention even of the circumstances of T's death during that phase.

And perhaps most significantly in my submission the final interview with Scott, the boss, compares very favourably with interviews in some of the reported examples. In particular there is nothing approaching unfair cross-examination in any Judges' Rules or Practice Note on Police Questioning sense, and there was no misleading about either the status or the strength of the prosecution case.

Then there are the features that are more inherent I suppose to the technique, which also merit in my submission some emphasis, of course all of the scenarios involved staged not actual criminal activity albeit that I accept that real cannabis and real fire arms were involved in the latter stages. The undercover officers interacting with the respondent during the preliminary scenarios reinforced at all times that there was no pressure for the respondent to become involved in the organisation and that he could leave at any time without any adverse consequence.

And finally of course there's the critical aspect if you like, of this technique, that it was hammered home to the respondent both during the preliminary scenarios and in the interview itself, the values of trust, honesty and loyalty, and the importance of telling the truth to the boss.

ELIAS CJ:
He wasn't going to, there was a, I'm sorry the distinction you draw is a fairly fine one isn't it, between saying that he would not be able to be a member of the organisation. You say there was no compulsion, no link, but it, that's pretty, that's a pretty fine distinction in the circumstances isn't it?

MS MARKHAM:
Well I guess there certainly were –

ELIAS CJ:
I'm just trying to remember the exact words that were used, but it was, it could easily have conveyed the impression that he'd be excluded from this association if he didn't confide.

MS MARKHAM:

Yes Your Honour is identifying that the precise inducements that were operating in terms of the confession, I guess my point was more in relation to his involvement with the organisation at the preliminary phase –

ELIAS CJ:
I see yes, yes I see.

MS MARKHAM:
And I will come to examine the nature of the inducements at that crucial phase.

ELIAS CJ:
Yes, I'm sorry.

MS MARKHAM:
At some point later. So just coming back briefly to the facts. The respondent certainly was relatively young I think, 21 and some months old, and had no significant criminal history that's accepted, but as against that, no particular circumstances of vulnerability and that the Court accepted. He wasn't an ingénue in any sense, and his evidence in the 344A hearing in my submission reveals a reasonably self assured young man who, on his own evidence, was happy to go against the wishes of the organisation throughout –

WILLIAM YOUNG J:
I think I may have missed it, I couldn't actually find the evidence given in front of the Judges?

MS MARKHAM:
There was a separate bundle put together for the Court of Appeal and I'm just hoping that found its way to Your Honours.

WILLIAM YOUNG J:
Well it didn't find its way to my attention. I was looking to see whether that evidence was around yesterday but I couldn't find it.

MS MARKHAM:
Well may I enquire if the rest of the Court have –

ELIAS CJ:

What would it be labelled?

WILLIAM YOUNG J:

Evidence of people for a hearing probably.

MS MARKHAM:

It's simply a transcript. It was circulated by the Court of Appeal as a sort of a supplementary part of its case.

ELIAS CJ:

No, we don't have it.

MS MARKHAM:

Well it does form quite a significant part of the argument and –

ELIAS CJ:

How long is it?

MS MARKHAM:

It is 61 pages including the index.

ELIAS CJ:

Madam Registrar can you arrange for one of the associates to get this photocopied for us, thank you.

MS MARKHAM:

My copy is quite significantly marked. I'm not sure if –

ELIAS CJ:

Has anyone got a plain copy?

GLAZEBROOK J:

You can probably get it from the Court of Appeal, it'll be electronic, will it?

O'REGAN J:

It's probably better to email it. Will you email it to the Registrar? Yes.

MS MARKHAM:

I can certainly push on without referring to it.

ELIAS CJ:

Before you carry on then on the fact while that's in tow, you jumped a little bit over the fairness discretion. You did indicate that – well you emphasise in your submissions the exceptional nature of the jurisdiction and you quote from *R v Shaheed* [2002] 2 NZLR 377 (CA) in which two different approaches, I think, are taken. Was there attention given to this in the Law Commission to the meaning of fairness because the fairness provision does the work of both the abuse of process ground of rejecting evidence and unfairly obtained evidence.

MS MARKHAM:

Yes.

ELIAS CJ:

Did the Law Commission consider that?

MS MARKHAM:

My understanding is –

ELIAS CJ:

Because your submission really takes it back to abuse of process effectively doesn't it?

MS MARKHAM:

Only in this context Ma'am. I wouldn't submit that the unfairness jurisdiction is limited to that in a general sense. My submission would be that once you don't have the Practice Note engaged and, which we don't here, and once reliability is peeled away as something material to section 28 now, that what we have left in this case is a concern about the nature of the police conduct, and that's where the test becomes one of bringing the administration of justice into disrepute or outrageous conduct that, I mean there's various articulations of the test. An affront to public conscience I think was the *R v Karalus* (2005) 21 CRNZ 728 (CA) description. So there is –

ELIAS CJ:

That's on the basis that reliability is not engaged because although the Court of Appeal didn't determine the matter on that basis –

MS MARKHAM:
Yes.

ELIAS CJ:
– it did indicate that I thought there were questions about reliability.

MS MARKHAM:
Yes.

WILLIAM YOUNG J:
In a way, a logical way of approaching the argument might be is the evidence to be excluded as unreliable under section 28, answer according to Justice Collins, no, not directly challenged by the Court of Appeal. Is the evidence, is the probative value of the evidence greater than its prejudicial impact given that it reveals a willingness to engage in offending, section 8, which doesn't really feature in the debate much. If not, then it's admissible and be subject to section 30?

MS MARKHAM:
Mmm.

WILLIAM YOUNG J:
And what you are saying, I guess, is that a near miss as to reliability or prejudicial probative balance doesn't warrant invoking fairness, or unfairness.

MS MARKHAM:
That is precisely my argument Sir.

ELIAS CJ:
Unless you get to section 8?

WILLIAM YOUNG J:
That's assuming section 8 is –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:
Well section 28, section 8, then section 30 seems a logical way to approach it.

MS MARKHAM:
Yes. Then of course we have the section 8 concern about the prejudicial impact of all of the scenario material being dealt with in terms of the unfairness discretion, but I would accept and – which follows the Canadian approach of course, that the prejudice probative calculus is the preferable heading for that examination. So, yes, Your Honour has, with respect, captured the essential point, which is that what the Crown submits has occurred here is reference to a number of different concepts, each from different exclusionary grounds, but in circumstances where the confession would not be excluded on a follow through of those exclusionary grounds, and really as this Court said – sorry, as the Court of Appeal said in *R v Ahamat* CA 143/00, 19 June 2000 the fairness discretion is not to be invoked simply because the circumstances approach but fall outside one of the recognised exclusionary grounds.

ELIAS CJ:
Is that a submission that you have to establish one of the recognised exclusionary grounds before you can run fairness?

MS MARKHAM:
Well, yes, if you're going to be, if your concern was reliability, and that was obviously the Court of Appeal's concern, and if your concern is an invasion of rights, which was similarly the Court of Appeal's concern, then my submission would be the appropriate approach is to follow those arguments through under their recognised headings and not to simply re-traverse those similar arguments in the unfairness jurisdiction in circumstances where the Bill of Rights Act is not engaged and this confession was found to be reliable. But that is my submission.

So if I can return very briefly to the circumstances of the respondent, and I won't detain Your Honours for much longer, but the evidence which hopefully Your Honours will have shortly at the 344A hearing, reflects a reasonably self-assured individual who on his own evidence said that he had lied throughout his dealings with the organisation and he did so by going against the secrecy and confidentiality that they'd reinforced and by telling his father and his partner

everything of what was taking place, and it's a feature of this case that, in fact, his family members were very supportive of what was, what he was up to in the organisation and they were kept fully informed and that follows from the intercepted conversations. We had an interception warrant and that ran alongside this undercover operation. So the, in his own evidence he used the organisation essentially for his own purposes. His evidence was that he was just in it for the money and he was happy to lie to the organisation. So it's not a case of someone who – well an ingénue, because he was, I suppose, completely overwhelmed and out of his depth and so forth. He saw himself as manipulating the situation for his own advantage and there were – the salient aspects of the intercepted conversations were put to him in cross-examination by the prosecutor and they're quite revealing, in my submission, because they indicate quite clearly that he wasn't intimidated by any of the quasi-criminal activity that was going on. In fact he was very excited by it. He described it as a buzz. He was, in fact, laughing about the Asian triad, guns, cannabis, transaction that took place at the latter stages of the scenarios. So in my submission a lot of the Court's concern, certainly in the Canadian jurisprudence, is with the effect of the operation on the particular individual, and my submission here is that, yes we have a young man with very limited, if any, criminal experience, but he was a relatively robust individual and as I've said fairly self-assured, seeing himself as manipulating the situation for his own ends.

ELIAS CJ:

Well I'm not quite sure how you say he was manipulating the situation, he was getting something out of it?

MS MARKHAM:

Yes, his evidence was that he didn't do what they wanted him to do, i.e. keep everything secret, because he was telling his partner and his father throughout, and he said he didn't do what they wanted him to do because he just, he was just using the situation for money. He was in it for the money, that was the import of his evidence. Now there were other dynamics at play, he did indicate that he was afraid of Scott and that fear of Scott played some part in his confession.

WILLIAM YOUNG J;

That's in his evidence or in the intercepts?

MS MARKHAM:

That's in the evidence, yes.

WILLIAM YOUNG J:
That's his evidence?

MS MARKHAM:
That's his evidence, yes. Now that suggestion, that proposition that he confessed because he thought that was what the organisation wanted to hear and he felt he had to, what was specifically rejected by Justice Collins in His Honour's pre-trial ruling. So I don't intend to deal with any other aspects of the facts unless Your Honours have any questions of me.

ELIAS CJ:
So are you going to take us to the transcript or will we get a copy of it?

MS MARKHAM:
I certainly can do that Ma'am.

ELIAS CJ:
Well was that what you were intending to do?

MS MARKHAM:
Well I've made my submissions about it, I can give Your Honours the key page number is page 43 of the notes of evidence and the surrounding questions, and the cross-examination was where the intercepted conversations were put.

O'REGAN J:
So what is your submission in relation to unreliability; that the trial Judge – the first instance Judge's decision should be accepted by us that you, that we shouldn't go behind it is that what you're saying, or –

MS MARKHAM:
Essentially yes. I mean it's threefold I suppose. Firstly, that yes we object to the fact that there was no appeal against the section 28 ruling, and yet the decision undermines that ruling in not some insignificant degree.

GLAZEBROOK J:

Sorry the Court of Appeal decision you mean?

MS MARKHAM:

The Court of Appeal does. I mean it's interesting, the Court doesn't baldly state, "We consider this confession is unreliable." It talks in terms of risk of unreliability and dangers of unreliability and there's areas of concern that they identified at the outset of the judgment. And in fact that –

ELIAS CJ:

That ties in with the Canadian approach though doesn't it?

MS MARKHAM:

Well the Canadians don't have an equivalent to section 28 obviously, but –

ELIAS CJ:

No, but they do analyse these cases in terms of the tendency towards unreliability.

MS MARKHAM:

But they'd always in relation to the facts of the given case. So my submission would be, and it was in the Court of Appeal, that if the statement is reliable, and has been found to be reliable, then you can have all the risks of unreliability that you like in a way, because where does it take you? It's not a distinction in my submission that it's a workable one and certainly the Canadian analyses are very fact specific, hence you have the statement excluded in *Hart* for all sorts of fact specific reasons admitted in *Mack v R* 2014 SCC 58, [2014] 3 SCR 3 for all sorts of fact specific reasons.

So to come back sorry, to Your Honour Justice O'Regan's question, the other criticism that the Crown advances in relation to the Court's analysis of reliability, the Court of Appeal's analysis, is in its analysis of the nature of the inducements that operate in this technique and that's something I'll come back to, but the third ground of appeal under this heading would really be that if you put everything aside and put the process complaints aside, and accept that this Court is entitled to examine the reliability of the statement, then it was on any analysis, a reliable and compelling confession, supported by some extraneous and circumstantial evidence, but perhaps more significantly intrinsically compelling, accompanied by tears in fact, and expressions of gratitude that were quite effusive, and yes as Justice Collins found it was a genuine catharsis, the burden of guilt has obviously been weighing on the

respondent, he said he hadn't even admitted it to himself, let alone to his partner and he was only able to because of the trust that he felt in dealing with Scott. So in answer to Your Honour's question that's –

O'REGAN J:
It's not quite right, the Canadian, well the cases where you know, for example, someone's confessed to a murder and said, "I buried the body somewhere," and they go and find the body. I mean that's, it doesn't have that degree of support from other evidence does it?

MS MARKHAM:
That's quite right Sir, but as against that of course the issue was very narrow to begin with, I mean he was in Baby T's, he was the sole caregiver at the time that the fatal injuries were inflicted, so it was never an identity case in that respect, although there were identify aspects in relation to the older injuries that she sustained. So the issue was whether it was a genuine resuscitative manoeuvre or whether he shook the child out of anger and frustration that she was crying. And we have the evidence from Ms T A T his partner, that she was crying uncontrollably in the period leading up to her death, and we now know that that was likely because of the earlier injuries which would've caused considerable pain.

WILLIAM YOUNG J:
The best you've got in a way is, in terms of congruence with the facts, is that his explanation to Scott is that he did it because she was crying all the time, and that lines up with what the mother said to the police.

MS MARKHAM:
Yes.

WILLIAM YOUNG J:
Although I suppose that probably is the reason why these, this sort of offending normally occurs anyway.

MS MARKHAM:
Mmm.

WILLIAM YOUNG J:

So it's not earth shattering, but it is, there is an element of congruence there.

MS MARKHAM:
Well there's complete congruence really, because of course his account to police was not, he denied that she'd been crying, said she wasn't particularly difficult to settle –

WILLIAM YOUNG J:
Oh, I see.

MS MARKHAM:
And said she was asleep on the night the fatal injuries were inflicted, and that she'd spontaneously choked.

WILLIAM YOUNG J:
It was sort of choking or –

MS MARKHAM:
And it was in panic in response to the spontaneous choking that he shook her to revive her essentially. So the confession to Scott was earth shattering in that sense that it discounted his explanation.

If I can turn then Your Honours to the Bill of Rights ground, if I can call it that, was –

ELIAS CJ:
It's still not congruent though, that was the question –

MS MARKHAM:
Yes.

ELIAS CJ:
That was being put to you. It simply makes it more significant. I don't understand the congruence point.

WILLIAM YOUNG J:

Well his confession is entirely, is of actions which are exactly the actions which the police say he was guilty of, that is two assaults, at least two assaults caused by his irritation at Baby T crying.

ELIAS CJ:
Well I understand that, but what was being probed is congruence with other evidence and Justice O'Regan put to you the findings of a body or something like that, and we don't have anything in that category here.

MS MARKHAM:
I'll accept that Ma'am, obviously, but yes, as I say that the issues here were very narrow anyway, it was always going to be a question of his intent and it is his intent that the confession has established. Not only in relation to the fatal assault but also the earlier assaults where of course the medical evidence was completely inconclusive as to the timing that those injuries were inflicted. Baby T had a number of different caregivers as the respondent was well aware that follows through in his transcript with Scott, so the police were not in a position to charge anybody or even consider charging anybody in relation to those earlier injuries, and it's interesting that it was those injuries that he admitted to first in his interview with Scott. Again the Crown would submit that was a plausible pattern of disclosure if you like, in the circumstances.

There was also in answer to the learned Chief Justice's question there was of course the medical report which, in which Dr Kelly expressed the view that this was child abuse, as opposed to some sort of resuscitative manoeuvre although he couldn't exclude that as a possibility, and it was on that basis, fairly finely balanced basis that the Crown solicitor gave the advice that there wasn't sufficient to –

O'REGAN J:
He once they tried it, if the evidence remains excluded, is that the end of the case or not?

MS MARKHAM:
It is, it is Sir yes. As I've said in the submissions, the decision not to charge was finely balanced I think on the evidence, but that was the decision made and it was following that advice from the Crown solicitor that the police then launched this undercover operation.

GLAZEBROOK J:

So can I, it's because the pathologist could not exclude a resuscitative attempt, combined with the difficulties of the earlier results, the identity of the person who had committed the earlier assaults.

MS MARKHAM:

Yes, and obviously there were no witnesses, it was only, he was the sole care, Baby T was in his sole care at the time and yes, that was Dr Kelly I should add wasn't the pathologist, he was the specialist paediatrician who –

GLAZEBROOK J:

Sorry.

MS MARKHAM:

He examined Baby T prior to her death yes.

WILLIAM YOUNG J:

I suppose it's the sort of thing, you could call all the other caregivers who will presumably say, "Well whoever it was, it wasn't me." But how that would play out would depend a bit on what I presume are quite complex family dynamics.

MS MARKHAM:

Yes, I think that would be a fair comment Sir. It's not in –

ELIAS CJ:

Well there's, but there's still even if you get over the hurdle of identity as you say, identity doesn't seem to be the critical thing, it's a question of intent.

MS MARKHAM:

In relation to the fatal injuries, yes.

ELIAS CJ:

Yes.

MS MARKHAM:

Yes.

O'REGAN J:

But your concern about the Court of Appeal decision is that it effectively overturned the High Court decision on reliability without specifically addressing it, but it seemed to me it was really more saying, "This technique is a technique that could lead to unreliable results." So it was dealing with it more an abstract level.

MS MARKHAM:

It was doing precisely that Sir, and that was what –

ELIAS CJ:

Which is what the Canadian said in *Hart* was it? That there is a risk if one adopts this sort of technique, which will have to be assessed in the particular case.

MS MARKHAM:

And I would fully accept that there is a risk of unreliability but in this case it was answered, because we went through the appropriate process under section 28 and the Judge heard the audio tape and made his findings. So –

WILLIAM YOUNG J:

Can only approach our section 8 approach, although perhaps with the onus reversed.

MS MARKHAM:

Reversed. In which case it's quite similar to section 28 because the prejudice probative Canadian test was specifically to meet the unreliability concerns. Under section 28 of course, once there's an evidential foundation laid, the onus does effectively go on the prosecution to show that this was an unreliable statement. So a very similar sort of –

WILLIAM YOUNG J:

And then you go to section 8, because look at the cogency of the evidence, and balance it against the prejudice.

MS MARKHAM:

Yes.

GLAZEBROOK J:

The whole thing is slightly complicated because we don't have a person in authority under section 28 –

MS MARKHAM:

Requirement any longer.

GLAZEBROOK J:

So, because we don't have that under section 28, you can actually take into account the coercive effect of this technique if it is used in assessing unreliability under section 28, and you can do the Canadian test then by looking at section 8.

MS MARKHAM:

Yes.

GLAZEBROOK J:

And then would you accept that the last part of the Canadian test, i.e. where the police conduct is just beyond the pale would be unfairness?

MS MARKHAM:

Yes.

GLAZEBROOK J:

But in an extreme case as it would be in Canada, is that sort of the analysis?

MS MARKHAM:

Exactly Ma'am, that that captures it exactly with respect, the abuse of process it's called in Canada, as applied to the "Mr Big" technique in Canada, is very similar to what I would submit the unfairness jurisdiction is concerned with, and there the Supreme Court in *Hart* identified coercion as the primary concern under the umbrella of abuse of process, and whether there were particular circumstances of the suspect that were unfairly exploited.

GLAZEBROOK J:

Although that would come under section 28 to a degree and 29.

MS MARKHAM:
It could as well.

GLAZEBROOK J:
But beyond the pale might move, or that abusive process might move it into, not quite on the either 28 or 29 but–

MS MARKHAM:
Mmm, yes I think the abuse of process analysis of the Supreme Court of Canada was on the assumption that it already passed the prejudice probative reliability, yes.

GLAZEBROOK J:
Yes, yes, that was my understanding, yes.

WILLIAM YOUNG J:
And they were looking for something other than what's inherent in the "Mr Big" technique?

MS MARKHAM:
Yes.

WILLIAM YOUNG J:
They're looking at threats of violence, looking at exploitation of a particularly vulnerable suspect?

MS MARKHAM:
Yes.

ELIAS CJ:
This technique would however only be used against those who are vulnerable wouldn't it?

MS MARKHAM:
Well in a sense it would only work in relation to those that are vulnerable to it.

ELIAS CJ:
That's what I mean.

MS MARKHAM:

But vulnerable to the technique working is distinct in my submission, from having special characteristics of vulnerability that are exploited such as well the authorities –

ELIAS CJ:

What about wanting to belong?

MS MARKHAM:

Well you could describe it as that, or you could describe it as greed, he wanted the monetary rewards that this organisation offered just like the burglars in the UK case as *R v Palmer* [2014] EWCA Crim 1681 wanted the money from the selling the stolen goods to the police undercover second-hand goods store, I mean he applied himself willingly to the tricks, certainly he was, there was inducements, but ultimately are we protecting someone from their own greed, and self interest, which on T W W's own evidence was the motivating factor.

ELIAS CJ:

But we don't know what the psychological input was in terms of identifying the appropriate triggers in this case do we?

MS MARKHAM:

Well –

ELIAS CJ:

There was the involvement of a psychologist presumably that was to identify areas of weakness which could be exploited.

MS MARKHAM:

I'm not sure that I would accept that necessarily follows Ma'am and that wasn't explored in the evidence.

ELIAS CJ:

Well what was it for?

MS MARKHAM:

Well all I know is what the record says, is that the psychologist was consulted at various stages.

ELIAS CJ:

Well why would a psychologist be consulted?

MS MARKHAM:

Well possibly the reverse, to make sure that there wasn't any undue influence being brought to bear on this man, I mean we simply don't know, that avenue wasn't explored at the 344A hearing, we don't have it. And so to surmise that there must've been some weakness that the police were focused on, is really unsupported by the record.

ELIAS CJ:

I would've thought it was pretty plain that there must have been, for a technique like this to be –

WILLIAM YOUNG J:

It's a very standard technique because they almost always seem to involved starting off with repossessions of cars and then leading onto, I mean this is sort of vanilla version of the "Mr Big" technique.

MS MARKHAM:

It is Sir, yes.

WILLIAM YOUNG J:

There's nothing specialised about it is there?

MS MARKHAM:

No, but the scenarios are standard scenarios.

ELIAS CJ:

Yes, but the people who are targeted in them, must have some, there must be some assessment that they would be ripe candidates for this sort of technique?

MS MARKHAM:

Well having said that, the technique has been used in relation to very hardened criminals, and successfully so. So I'm not sure I would accept that there's some profile –

ELIAS CJ:

Well I'm not sure what hardened criminals means though, so I mean they too have needs perhaps. It's hard not to feel a sense of unease at the fact that this is clearly a manipulative technique in which expert assistance is obtained. The process has obviously been refined in a number of jurisdictions, and presumably everyone's learnt from each other. We don't really have much before us about that, how it's been developed. What sort of people it is thought to be efficacious for.

MS MARKHAM:

Well Your Honour's right, we simply don't know, but certainly I can submit that a fairly wide range of different individuals have been the target of these operations and in this case there wasn't any substantial departure from the script, all that I could say is that to some extent we have learned from overseas jurisdictions and this was a conservative model of a standard technique.

GLAZEBROOK J:

There are articles that have been referred to which for some reason we weren't given copies of from Canada, in particular on the technique.

MS MARKHAM:

Yes, there have been some criticisms, including from a psychological perspective, and I have read a number of articles, they weren't included really because they tended to criticise particular cases which were quite different to the present case.

GLAZEBROOK J:

I understand that they were on a different context.

MS MARKHAM:

Yes. And all I can come back to is the Supreme Court's finding, I mean this was a decision in which the Supreme Court decided to take a hard look as it said, at this technique and certainly there's nothing there about it being, it targeting psychologically vulnerable individuals. In Mr Hart's case he was psychologically

vulnerable and that contributed to the confession being excluded but in Mr Mack's case that wasn't, that wasn't the case.

WILLIAM YOUNG J:

There are four cases and two *Tofilau v R* [2007] HCA 39, (2007) 231 CLR 396 and they didn't seem to be particularly vulnerable people?

MS MARKHAM:

No, that was I mean the description "hardened criminal" was perhaps not apt, but certainly they were experienced criminals and middle age I think, at least one of them in the *Tofilau* decision. So if could address then the, yes the Bill of Rights solicitation issue, it was common ground in the Court of Appeal that the Bill of Rights Act wasn't engaged as it is in this Court. Really it's the appellant's submission that by adopting the elicitation test which as we know is the Bill of Rights *R v Broyles* [1991] 3 SCR 595 test that applies after arrest, the Court of Appeal has essentially skewed what I would submit as a carefully calibrated relationship that exists between the State and individual in this context, that the Bill of Rights, the Judges' Rules and latterly the Practice Note and the rules of evidence all represent a very carefully balanced relationship and by essentially applying a Bill of Rights test, although the Bill of Rights doesn't apply, that has the effect of extending the rights into hitherto unchartered territory, being the investigative stage of the process, and it would be clearly contrary to Canadian authority. *R v Herbert* [1990] 2 SCR 151, and *Broyles* made it quite clear that the right to silence recognised by the section 7 of the Canadian Charter of Rights and Freedoms is simply not triggered at a pre-arrest stage, and that's also made clear in *Hart* that the "Mr Big" Canadian scenario technique doesn't engage the right to silence at all. And that's because the Court analyses the rationale of the right as being designed to shield an accused from unequal power of prosecution once the uniquely coercive power of the State is engaged. And a similar analysis is made by the Court of Appeal in *Barlow*.

ELIAS CJ:

If you're accepting that those are the distinctions that have been drawn in the cases, it may be because the power of the State has only just been mobilised in this way relatively recently with the adoption of this technique. I'm just wondering, the law has to keep abreast of what is happening. Is it sufficient simply to say, "Well cases haven't applied it before?"

MS MARKHAM:

Well I certainly accept that this is a recent invention, at least in New Zealand, although Canada not so much, but in terms of –

ELIAS CJ:

So when are the first Canadian cases, just remind me.

MS MARKHAM:

There's a discussion in *Hart* apparently there was some version of the technique 100 years or so ago, but it's only in the 1990s that the modern version of it has been employed, so its from the 1990s on essentially.

WILLIAM YOUNG J:

Oh in something like, I think in *Hart* it said 350 occasions.

MS MARKHAM:

Yes, that's correct Sir.

GLAZEBROOK J:

Of course we have got rid of the person in authority requirement, so the cases overseas is slightly skewed anyway because the whole issue is whether it's a person in authority who has caused unreliability, otherwise open slather really.

MS MARKHAM:

Yes.

WILLIAM YOUNG J:

I think that certainly the Australian case, *Tofilau* deals with what they call basal voluntariness -

GLAZEBROOK J:

Oh yes, yes.

WILLIAM YOUNG J:

That is irrespective of whether there is, the fact that the uncover officers weren't persons in authority, didn't preclude an analysis of voluntariness.

MS MARKHAM:

That kind of equates to oppression in our case law, that basal involuntariness. But yes Your Honour, Justice Glazebrook is quite right with respect, I mean the reason the Canadians had to invent this new presumptive rule of inadmissibility, was because their hands were tied under the involuntariness common law rules, because of the person in authority requirement.

WILLIAM YOUNG J:

But they could've said it was involuntary. I mean they didn't mean – if an inducement or a threat was made by a person in authority, then that was the end of the story, it was safe it was involuntary and it was inadmissible. But you could still show it was involuntary otherwise than as a result of threats or inducements offered by person in authority.

GLAZEBROOK J:

But I don't think it was ever excluded, because if it was reliable involuntary wasn't an issue because you didn't have the right to silence, so it had to be shown to be unreliable I would've thought, because of it being involuntary rather than just merely involuntariness.

WILLIAM YOUNG J:

There's quite a lengthy discussion of it in *Tofilau* and I'm pretty sure that there was this in behind the person of authority rule, there was a general voluntariness –

MS MARKHAM:

In Australia there was Sir.

WILLIAM YOUNG J:

And was there not here?

MS MARKHAM:

Here or in?

WILLIAM YOUNG J:

Here in New Zealand.

MS MARKHAM:

Well the oppression aspect of involuntariness, there were two limbs of involuntariness common law, there was the oppression aspect, which has found its way to section 29 where there wasn't a person in authority requirement, and then there was the ordinary inducement rule which where there was a person in authority requirement but which would then be able to be saved by section 20 of the Evidence Act 1908.

WILLIAM YOUNG J:

If it wasn't likely to induce a false confession?

MS MARKHAM:

A false confession exactly, so it was a reliability test really that the touchstone was reliability in that respect. But to come back to Your Honour's question, I accept that this is a new technique but as against that the police have been in the business of deploying the resources of the State in investigations, including undercover investigations, for decades, so while this might be a new manifestation of that, the principle is nothing new and I think that was a point that His Honour the Chief Justice Gleeson in *Tofilau* made, and my submission would be that because we're in the investigation stage there isn't enough to charge, and the machinery of the State hasn't been engaged. What is so objectionable about the police using their full resources to detect and prosecute crime, it is in my submission an error of principle to seek, or to strive to obtain some sort of level playing field in the investigation stage, and that's where the ineptness of the sporting metaphors comes in, and that's a flavour of a number of the authorities in the bundle it's not about –

ELIAS CJ:

But are you suggesting that the Court of Appeal had that flavour about it?

WILLIAM YOUNG J:

They deny it.

MS MARKHAM:

They deny it.

WILLIAM YOUNG J:

But you say they then do it.

MS MARKHAM:

I think, well my submission would be in relation to its analysis and scale of the operation, there were concerns that entered into the judgment that this was –

ELIAS CJ:

What if you create a virtual world –

MS MARKHAM:

Yes.

ELIAS CJ:

One can see that that's of a scale in terms of its impact on the individual that perhaps the law has to respond to, that's really the question. It's not that the police have so much more in the way of resources to put into crime fighting, because there's nothing wrong with that, it is tinged with the tendency towards unreliability. Your submission is you either have to be satisfied in the particular case that the confession is unreliable, or you leave alone.

MS MARKHAM:

And my submission would also be that it's not carte blanch to the police in the investigation stage, obviously the fairness jurisdiction does apply notwithstanding the inapplicability of the Bill of Rights Act albeit that it applies in a sense in my submission in a different sense to which it was employed in this case. We also have section 8 and we also have sections 28 and 29 operating as protections for the suspect in the investigation phase, so this – my point is simply that it's wrong to apply the Bill of Rights when it doesn't apply essentially, and dress it up as fairness.

ELIAS CJ:

No, but it's directed at, yes all right.

MS MARKHAM:

And I would accept that there is a common law recognition of the right to silence if you want to call it that, privilege against self incrimination and so on, and this was a point that His Honour Justice Collins addressed in his decision. That's recognised in cases like *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) long ago but the concern there is a different one. It's not the Bill of Rights' concern, the concern is

protecting the individual right to refuse to answer questions. So the analysis becomes one of coercion.

Here we have an interview which was voluntarily attended, albeit that there were inducements and self-interest and things involved but there was no element of compulsion in the interview with Scott. That the tone of the interview was conversational, he was asked if there was anything he was unhappy with. It was emphasised that any stage he could walk away and they would part as friends. There would be no grudges and when the critical part of the interview came and Baby T's death was touched upon, Scott ironically, in a role appropriately fashion, in fact cautioned him. He said, "It's only if you are comfortable talking about this, you don't have to if you don't want to." So there was no element of compulsion here such that would raise concerns about any common law right to silence.

ELIAS CJ:
Well not the direct compulsion, only the compulsion from the whole word that has been created, that this man is now living it. And in that context, is it not a relevant consideration that this technique is directed at eliciting a confession, the most potent form of evidence that is available, because he can be convicted simply on the admission. Does that enter into this?

MS MARKHAM:
I fully accept, as I did at the outset that in a confession case it is appropriate that you examine and scrutinise the circumstances – that is why we have Bill of Rights which operates to protect suspects in the coercive environment of a police interview, that's why we have the provisions of the Evidence Act 2006.

ELIAS CJ:
But I guess they know their peril in that case, if they are being interviewed by the police.

MS MARKHAM:
Yes, well that is part and parcel of the Bill of Rights aspect of the right, not in my submission in the investigative stage. There is no duty on a police officer to tell a witness that they are about to interview what peril they may be in. That only kicks in, if you like, once the Practice Note applies or the Bill of Rights applies. The police have a duty to investigate crime and under the Practice Note and under the Judge's

rules, rule 1 is, of course that the police are able to ask any question of anyone that they think might be able to provide helpful information, so long as they don't suggest that there is a compulsion to answer. And there was no suggestion of a compulsion to answer in this case, in my respectful submission.

GLAZEBROOK J:
Well I suppose apart from the, "You have to be totally honest" and the corrupt police officer aspect to it. But I know what your submission is on that, but it is still an inducement to talk when otherwise you might not talk.

MS MARKHAM:
Well only if we can examine then the nature of the inducement here and this is more under the reliability heading.

GLAZEBROOK J:
Yes I understand.

MS MARKHAM:
The Court of Appeal essentially disagreed with Justice Collins and said "We find that there were incentives to lie, membership of the organisation and avoiding the spectre of prosecution." The nature of the inducements in this scenario, in this technique in my submission, operate at a much more indirect and attenuated level than the Court of Appeal's analysis would suggest. These issues were examined by the second Court of Appeal *Cameron* case in a judgment delivered by Justice Hammond and His Honour made the point that because of the role that truth and honesty play, and because of the way the interview unfolds, there isn't an incentive to falsely confess. The respondent wasn't told that he could only join the organisation if he admitted to a deliberate assault on Baby T. It's almost the reverse in a way, because the baggage that the police suspicion is hanging over him is presented as an obstacle to him joining the organisation.

Then we have this lifeline offered of the corrupt officer, CJ in this case. Now again the respondent is not told that CJ can only help you if you admit to assaulting your daughter; he's told that CJ can fix your problems with the police and as the prosecutor put it to T W W at the hearing, if he was genuinely falsely suspected of deliberately assaulting Baby T, then that was the problem that he was faced with and

that was the problem that CJ could fix. So really the Court of Appeal's analysis with respect does tend to –

GLAZEBROOK J:
What did T W W say in response to that, we haven't had the –

ELIAS CJ:
We have now got it. You can take us to it.

MS MARKHAM:
Well it was quite a lengthy exchange towards the end of the cross-examination. And I think he was a bit confused by the question to be fair and the prosecutor came back to it. It's at page 52, the top of page 52 is when the exchange starts. And she asks him, "Why when Scott raised that didn't you say, well Scott my problem is that I'm going to be falsely charged by the police" And his answer was, "Well I think, you know that was part of the conversation." And it sort of continues, so there wasn't really an answer as such and I'm not suggesting that he was deliberately avoiding the question. It reads more as though he didn't quite follow what she was suggesting.

GLAZEBROOK J:
Yes I follow the point.

MS MARKHAM:
So trust and honesty do play such a central role in the technique, from beginning to end and as I think Justice Hammond made the point in the second *Cameron* case, to falsely confess would be to fly in the face of those very values that the organisation has emphasised to the point of over emphasis. It would be inimical to the values of the organisation to confess to a crime you haven't committed.

And sure I accept that the technique isn't beyond scrutiny or that it won't sometimes perhaps result in false or unreliable confessions but the cases where that would be, those concerns would be particularly acute, would be in my submission where violence is presented as a boast worthy accomplishment by the members of the organisation and there is a risk that the suspect might want to appear to be a tough guy by admitting to something he hadn't done. Or conversely where the interview with the boss proceeds in a very different fashion to how it proceeded here and there

have been examples in the authorities of the boss introducing the topic by upfront, saying, "Well look you did it" and dismissing everything that the suspect says as lies and I mean the interrogation in Mr Clarke's case, who was one of the *Tofilau* four, was described as a harangue by the undercover officer and likewise the Canadian Supreme Court refers to pointed interrogations where denials are dismissed as lies, as being part of these operations in that jurisdiction.

Contrasted completely with this case in my submission where, sure Scott presented the medical evidence, but in a completely non-misleading fashion. It was evidence that the respondent was well aware of.

GLAZEBROOK J:
Which he says, he agrees.

MS MARKHAM:
He agrees that there was nothing new that was put to him and he's told, we need 100% honesty here. Then I think there is a bit of a break and after the break the topics return to and he admits shaking Baby T on the first occasion which as I have said he was never in jeopardy of prosecution there so the Court of Appeal's analysis of the incentive to lie as being concerned with the spectre of prosecution, doesn't sit with those facts very comfortably because he wasn't in danger of being prosecuted for that first assault.

And then he's asked very gently, "Is that what happened on the night in question?" "Yes boss, I'm really sorry for lying to you." So it was hardly a pointed interrogation where he was called a lie, it was a very gentle interview and –

ELIAS CJ:
But he wanted to be in. He wanted to be accepted and he was being probed as to whether – and he had to give up something. He had to give of something important to indicate trust. That's the technique that's being adopted, isn't it?

MS MARKHAM:
Well, I'm not sure I would accept that. It's the baggage, the police suspicion, that's presented a potential obstacle. "We don't want the police heat on you in this organisation. We've got a corrupt officer to sort it out and fix it." It's not, "Tell me your secrets and then you can be part of an organisation."

ELIAS CJ:

Well, it's pretty close to that really. We've got a trust here.

MS MARKHAM:

Well, there's certainly a very strong element of trust and I would accept that but that is, in my submission, a powerful indicator of reliability.

ELIAS CJ:

Well, not if you want to be in and you think the only way you're going to be admitted to this gang is if you acknowledge something that they've obviously got some suspicions about and are putting to you.

MS MARKHAM:

With respect, it wasn't put to him in those terms. I mean, it might be useful to contrast it with Mr Clarke in the *Tofilau* case where, as I've said, the interview itself was described as hectoring and –

ELIAS CJ:

Yes.

MS MARKHAM:

-- haranguing to a significant degree, but also in that interview there was a much more explicit demand that he confess to the crime in order to join the organisation. The boss told him he was lying and then said, "Well, look," and then I'm quoting. I think this passage appears in Justice Kirby's judgment. "This isn't going to go away. You can deny it till the cows come home. I can't have you hanging around with us." So a much more explicit linkage of joining the organisation and confessing to the crime. Here, that doesn't, that doesn't bear out on the facts, in my respectful submission.

ARNOLD J:

Well, in fact, I think in – when Mr T W W was asked by Scott to sort of tell him about himself he talked about going to school in Upper Hutt and meeting his partner and having the twins, and then he says his daughter got sick and she got hurt –

MS MARKHAM:

Yes.

ARNOLD J:

– and he talks about it.

WILLIAM YOUNG J:

Someone hurt her.

ARNOLD J:

So he actually raises the –

MS MARKHAM:

He did.

ARNOLD J:

– issue first as part of the –

MS MARKHAM:

Part of the conversation.

ARNOLD J:

Yes.

MS MARKHAM:

He did.

ARNOLD J:

And Scott doesn't pick it up immediately at that point at all.

MS MARKHAM:

No.

ARNOLD J:

The conversation just goes on.

MS MARKHAM:

Yes, exactly, Sir, and I'm grateful to Your Honour. I mean, albeit that he raised it in an exculpatory sense. He was seeking to blame, I think, his in-laws, but yes, Your Honour is quite right that the topic was first raised by Mr T W W himself and then returned to during the course of what was a very conversational and relaxed exchange.

ARNOLD J:

Just on that, the trial Judge listened to the tape –

MS MARKHAM:

Yes.

ARNOLD J:

– and did the Court of Appeal listen to it?

MS MARKHAM:

Not to my knowledge, Sir, and I should add that the trial Judge listened only to the material parts of the exchange, I think, towards the end where –

ARNOLD J:

Is that right?

MS MARKHAM:

Yes, not the full audio tape. But certainly that played some role in His Honour's findings about the tears and the catharsis that was evident on tape albeit that the respondent sought to deny that and said that he was simply play acting in the interview and they weren't real tears and he wasn't really upset.

GLAZEBROOK J:

Well, so if you encapsulate the submission that the confession may not have been voluntary in the sense that it was by inducement but it was reliable because the inducements were to tell the truth rather than to tell lies, and that's putting it relatively starkly, but is that – that the way the technique was employed in this case was not going to elicit an unreliable confession even if it mightn't have been voluntary in the sense that there were inducements to it and confidentiality promises and deception in terms of those confidentiality promises and the –

MS MARKHAM:

Yes.

GLAZEBROOK J:

– deception in terms of who he was confessing to?

MS MARKHAM:

Yes, Ma'am. I would certainly accept that there were those inducements and that they played a role, as did Justice Collins. As to whether I would accept that it was involuntary, I wouldn't go that far.

GLAZEBROOK J:

Sorry, I was – in inverted commas –

MS MARKHAM:

Yes.

GLAZEBROOK J:

It's not involuntary in a sense of he –

MS MARKHAM:

There were inducements that operated.

GLAZEBROOK J:

– he obviously wanted to do so but –

MS MARKHAM:

But, of course, at common law you needed more than simply inducements. They had to overbear the will of –

GLAZEBROOK J:

Absolutely, absolutely.

MS MARKHAM:

– of the suspect and that factor isn't present here, in my submission.

O'REGAN J:

But your submission really depends on our accepting that the pressure that was on him was a pressure to tell, give a truthful account, rather than a pressure to say something which would trigger the ability of Scott to fix a prosecution for it, because I think he's really saying, "Well, in order to belong I had to come up with something that would then allow Scott to engage CJ to do something on my behalf," and that meant come up with something that would expose him to a risk of prosecution that Scott could then fix with.

MS MARKHAM:

But there already was that, that risk of prosecution in relation to the fatal injuries.

O'REGAN J:

Well, a long time had gone by though.

MS MARKHAM:

It had, but that –

O'REGAN J:

I mean, it must have –

MS MARKHAM:

That brings us to the Coroner's issue which my learned friend is no doubt going to address the Court on but there was that deliberate, I accept, contact with the respondent's parents and also a message left on the respondent's phone, which I don't think he got, to the effect that there was an inquest coming up and that was designed to sort of place the spotlight again on the offending and so forth. There was a Coroner's inquiry so it wasn't something that was a complete deceit but certainly the timing of it was part of the design, if you like.

To come back to the question, I mean, if the Court accepts that this was an inducement that worked to tell a, to make a false confession, then essentially that's finding that this is an unreliable and untrue confession, but, as I say, that's not what Justice Collins found having heard the evidence and it was precisely the respondent's case that he only confessed because he was intimidated and he thought that that's what Scott wanted him to say. That was rejected as implausible by His Honour.

So unless the Court has any other questions of me, those are the appellant's submissions.

ELIAS CJ:
No, thank you, Miss Markham

COURT ADJOURNS: 11.27 AM
COURT RESUMES: 11.49 AM

ELIAS CJ:
Yes Mr Paino.

MR PAINO:
I just want to start where I finished off in my submissions really was how I indicated that this technique in this case was ill conceived because when one was making a decision about whether to engage it, and one has to bear in mind that there is no evidence before us about any structure within the police, or the undercover operation –

GLAZEBROOK J:
In your evidence what, sorry –

MR PAINO:
There's no evidence of any structure within the police force, or within the undercover operation part of it, about how these are authorised, and who authorises it and when, and whether – and what's taken into account and whether the respondent's or the suspect's rights are looked at and how, but in engaging this technique in this case could only ever be the case that it was designed and only designed to achieve a confession, not to achieve any information that might be used to convict such as the Canadian cases where the teeth are found in the firepit and in other cases where the body has been buried and the person shows where the body has been buried. So everything that occurred here was pointed towards placing psychological pressure on the respondent so much so that it was almost designed at the start to say, how can we get this man to confess, and everything then transpired from that intention. So what then happened, of course, as we know was this approximately four month engagement where effectively he became very close friends with the operative, and

with some of the operatives. Saw a lot of time with them, had drinks with them, they text a lot, so on and so forth, and when it eventuated, and in the end through the various scenarios which are consistent with most of the scenarios from the Canadian and other cases, the ultimate in this scenario technique is this interview with "Mr Big" and sometimes along the way there maybe a confession, which hasn't been extracted as a result of a "Mr Big" technique, and I'm not dealing with that today, but in the end when there is a "confession" in inverted commas, and I'll refer to it as a confession, the pressure that's placed on the suspect to confess takes a variety of ways. Now in this case the, Mr T W W, said to Scott on three occasions that he shook the baby essentially for resuscitation purposes, and that occurred not in anger. At page 76 of the Court of Appeal casebook, preparing its pre-trial ruling, DVD interview transcript, pages 20 to 89 –

O'REGAN J:
Sorry, page 76 did you say?

MR PAINO:
Page 76, casebook page 76. So that's where the break is taken by Scott at the top in the second line, so I've drawn a line there in my casebook to say that's where he left the room, and it was strategically done so that Mr T W W was left with the parting comments by Scott before Scott left the room. And those comments are on page 74 of the casebook. Up until page 74 there'd been all the comments that were referred to earlier, when my learned friend was addressing you, about honesty and so on, but also about I can fix it and so on. Page 74, half way down, Scott says, "The stuff that Craig, CJ, has given me today, amongst them there is a report from a doctor and one of the doctors that had a look at the baby after it died." And then he says, "And look those doctors they do this day out and they're experts, you know, they know what they're talking about and they've got no reason to make stuff up." Third to last line. And then he says on page 75, at the top, "Couldn't have been accidental." And then Mr T W W then says he gave the baby a good shake, maybe five seconds, to wake her up, whatever, and then Scott repeats five, six lines from the bottom, "That's what I'm sort of trying to do, dig in a little bit about what I need to know so I can make it go away." And then he leaves the room.

So my submission here is that this is a direct, but subtle, confrontation by Scott to Mr T W W saying, "I've got a report here that's been obtained by CJ, a paediatric report, and you are lying to me because this report tells me these people are experts, they

know what they're talking about, and they're telling me that the baby had some brain injuries and so Mr T W W then, and then he leaves the room, and he leaves the room deliberately. So Mr T W W then has two options. Option number 1, is to say, is to maintain what he had said earlier on three occasions, and consistent with this police statements, broadly; or option number 2, was to say, all right, I'll say what you, if you like, want me to say because otherwise you'll think I'm a liar, and I can't get into the gang. If you think I'm a liar, I can't get into the gang. So he says what Scott has put to him. He then says, "Yes," and the he changes his tack. Now as a result of that –

ELIAS CJ:

Has he come back in? Sorry, where is the coming back in?

MR PAINO:

Um –

ELIAS CJ:

Oh it is that later?

MR PAINO:

Casebook 76, "Back in a second, okay. So you just know give it some thought. Truth and honesty brother." " Okay." (Background noises.) And he says, "Sorry I forgot to say, you can use the toilet just there." Now I've actually got the advantage that Your Honours don't have of hearing the door open and shut on the audio so he actually leaves the room and there's quite a gap.

ELIAS CJ:

So he leaves –

GLAZEBROOK J:

He supposedly goes to the toilet, does he, is that what –

MR PAINO:

Yes, you can hear the flush Your Honour, and he's away for, I don't know how long it is, but minutes, leaving Mr T W W there to ask himself the question, you know, he wants to get in a gang, he's come down from Dunedin. And then when he comes back in he says, you know, tell me it so I can fix it. So the doctor's report, he then repeats the report half way down –

ELIAS CJ:
So where are we?

MR PAINO:
76, half way down the page.

ELIAS CJ:
I see, yes.

MR PAINO:
"So the doctor's report, as I said, talks about brain injuries from shaking". "So correct me if I'm wrong, you've given the baby a fairly good shake, like quite a shake?" "Yeah the baby's head was backwards and forwards." So the easiest thing for Mr T W W to do here, without any question in my submission, is to say yes I did that. Because once he said that Scott would no longer accuse him or think he was a liar and then he would get entry into the gang, and that's what happened. Because at the end of it he said, "Welcome, welcome to the gang."

So my submission is that the entire technique was designed to gain this confession at the end, not to uncover evidence, not as the witness said in the lower Court hearing to get to the truth of the matter, and in fact if we do get to the truth of the matter sometimes someone could be deemed innocent and not prosecuted, the only purpose of this scenario was to get that confession and everything led to it.

So when Mr T W W was told of the existence of a paediatric report, this is not some obscure report he knows nothing about. The evidence in the case is littered with the parents being talked to by paediatricians about the injuries. Don't forget he went to the Hutt Hospital, he went to the Starship Hospital. They were waiting in the waiting room while doctors were discussing the injuries, and the paediatrician – and there were the social workers who were talking to them and quizzing them about how the injuries happened, there'd been two interviews, so when the paediatric report was produced, or when the medical report, I think is probably better, I can't say that Mr T W W knew much difference between medical and paediatric, but when the medical report was produced, it was clear that what was in the report was not consistent with what Mr T W W was saying had happened and so all he had to do was to say, yes, the medical report is right and what I've said is wrong, and he got into the gang. So

that's why the Court of Appeal, in my submission, said that his "admission" in inverted commas, was costless and beneficial, and it was costless and beneficial because, and this is referring to paragraph 22 of my submissions, confessing was costless because first of all it was confidential. No one would know anything about it. He didn't have to have the spectre of discussed and making a confession of that nature because "Mr Big" had made it clear throughout and he never told anyone what happened in any of the interviews. He said he had the same interview with Ben and he had had the same interview with some of the other operatives.

ARNOLD J:

Can I just be clear? The point of this submission is to say that the confession is not reliable or is it to say that even if it is reliable it is fundamentally unfair?

MR PAINO:

Both. The point of the submission is to say that the very high risk of an unreliable confession because of the fact that it is costless and beneficial to make an admission and underpinning this, this was always going to be the case and so the whole deployment of the technique was fundamentally flawed because this was always going to happen. There was always going to be a situation –

WILLIAM YOUNG J:

But it always happens in a "Big" case doesn't it?

MR PAINO:

Yes, yes.

WILLIAM YOUNG J:

So what you are saying is you cannot have a "Mr Big" operation.

MR PAINO:

I am saying in New Zealand, I mean if a Court of Appeal said there were situations where it could happen.

WILLIAM YOUNG J:

But they did not say what they were?

MR PAINO:

No. It is hard to say what they were because, you know, it is difficult. I mean I've, myself, thought about what happened if, along the way, there was a "Mr Big" operation and the person actually confessed, not at the "Mr Big" interview but prior to the "Mr Big" interview. Would that be admissible or would that be deemed to be unfair, and I don't know that I can answer that questions. I don't know that I have to.

WILLIAM YOUNG J:

Well you – put it another way, a sensible police officer couldn't authorise a "Mr Big" operation in the face of the Court of Appeal decision because the police officer wouldn't know what was wrong with this one that could be sorted out with a slightly differently calibrated operation.

MR PAINO:

Well I think a good start would be to back off on the extent of the inducement. Don't cross-examine the witness, don't put to him reports if he actually are you sure when the golden moment happens as to entry into the gang, "I didn't do it," then – and he says it three times, then you have to take what you get. Don't actively elicit a confession, perhaps not have anywhere near the inducements, like in one of the other operations where the person wasn't going to gain a status in the gang. He was going to stay down below, therefore the incentives weren't, the financial incentives weren't great.

So I do agree that the Court of Appeal judgment doesn't set the parameters as to when the deployment can operate. My submission is that if the purpose of it is, in the end, to obtain a confession and everything is designed to achieve that purpose then it shouldn't have been deployed. That's my submission. That's coming really from a, I suppose, a defence perspective if you like, you know, for the same – probably – we have heard about the Canadian cases and the Australian cases but, I mean, it's not used in the UK and it's not used in America. They obviously would use it to its limits if they could but they don't. So I think it's –

ELIAS CJ:

Sorry, what's the UK position?

MR PAINO:

I don't think the UK use this technique. I haven't seen any cases.

ELIAS CJ:

You haven't seen any cases on it.

MR PAINO:

No, and I'm sure there would be, you know, with the terrorism threat, for example, having existed since 9/11, I'm sure that this technique, if it was able to be used in the UK would have been. It just seems – I mean I've looked at the research in the UK and some of the articles and I can't see any cases anywhere where this technique is used, the "Mr Big" technique, which I characterise as the interview at the end, not just having someone an undercover operative working along gangs, working beside them, who may hear them talk and may even introduce a few subjects. Not the "Mr Big" technique but along the way they might say, "Oh, what have you done?" like the Wilson case with the armed robbery where he went into a bar and someone said, "Oh, what have you done? We were looking for someone to recruit," and he said, "Well, I've done a few robberies," and then that was held admissible because it was a very short operation it wasn't really a "Mr Big" operation. But with the "Mr Big" there's always going to be this interview at the end and there's always going to be all these pressures and psychological pressures put on and there's always to be the incentive to join the gang and my submission is that if, to turn the question I was asked, is that if you tone down all of the things along – many of the things along the way, such as the inducements, shorter operation and you had to end up taking what you'd got in the interview without actively eliciting, then based on the Court of Appeal judgment there might be situations where it could be employed or deployed.

So the costless and beneficial which Justice Arnold asked me about, about where it was going, I think the real point about the costless and beneficial is this seems to have been ignored.

WILLIAM YOUNG J:

But it's not the case that the cogency of an admission depends upon it being recognised by the maker as being contrary to interest.

MR PAINO:

Did you ask me is it the case?

WILLIAM YOUNG J:

I'm asking about – I'm putting it to you. The fact that it's anticipated it would be costless doesn't deprive the admission of its cogency.

MR PAINO:

No, but if there's no reason not to confess and there is every reason to confess not, for an example, because you just feel like getting it off your chest, but if you were in a situation – I mean the analysis Your Honour's referring to is usually when someone's in custody –

WILLIAM YOUNG J:

No I'm not. I'm saying, I mean there's a fairly strong suggestion in the Court of Appeal judgment that a confession is really only cogent because it's made by someone who knows it's against interest.

MR PAINO:

Yes.

WILLIAM YOUNG J:

Now there's a very lengthy discussion in *Tofilau* in the judgment of the Chief Justice there which really explores that as a fallacy that there are many circumstances where admissions are very cogent, even made by someone who thinks it's risk free and cost free and there's no disadvantage going to flow. So I don't see why you're emphasising the cost free nature of it so much.

MR PAINO:

What was the advantage? I guess my question is, what was the advantage for this defendant to say – for the respondent to say what he said? What are the competing advantages? On the one hand there's not saying what's got his moving towards you saying and then facing the challenge that he's lying and, therefore, he'll be ejected from the gang or he won't be able to join. The other advantage is to say you did it and then you get all the benefits. You get the gang benefits, you get the membership, you get a flight home from Dunedin, you get all the other benefits, casinos and trips to Melbourne and all the things the members get. So they were the two issues. They were the two. They were the two advantages or disadvantages, and here it was laid out for him that the biggest advantage of all was to say yes

because he got the benefits. As I say, costless in the sense that no one would think badly of him. It would never be used outside the room and he would get entry to the group and otherwise he was going to be, it seems, by the approach Scott was taking when he had this medical report and he'd suggested that he wasn't telling the truth, possibility that because he didn't tell the truth, which was a fundamental nature of the group's entry and its code, that he was to be accused of a liar. And what would happen to him would be what happened to CJ, which was ejection in Dunedin with no money, chosen to be as far away from Auckland as possible where your family lives, ejection and, you know, in the background triads and gangs with guns, real guns, military guns and 33 pound of cannabis doing drug deals in Dunedin. So he's on his own if he doesn't admit it. That was why the CJ scenario was there, AJ I'm sorry. I'm sorry, AJ.

AJ was a scenario where he didn't follow the code and then so he was ejected from the gang and there's always an AJ just to show what happens if you don't comply. So here – and that was the purpose of doing the AJ scenario, scenario number 7. I'm only doing it for reference purposes. So there he was in Dunedin.

So my submission on this, about being costless and beneficial, was that the Court of Appeal found that this was fairly important in the sense that it's what the Court really said made it the high risk of it being unreliable, and Justice Collins effectively didn't go through that analysis at all. Justice Collins, if I can just refer to that, Justice Collins in casebook materials – this is the index, this is the first casebook of the Court of Appeal with the notice of appeal in it, at page 99 of the casebook – said three lines from the bottom, page 99 [34], "I have reached this conclusion because the scenario during which Mr T W W made his admission did not provide a context or incentive for him to falsely admit the injuries he caused." Now I – and the Court of Appeal just could not accept that as a rational basis for making a finding of fact.

WILLIAM YOUNG J:

Well, he's being particular, I guess. What he's saying is that the incentives offered were not calculated to produce a false confession but rather were calculated to produce a true confession. Now, of course, there is a risk that you might get a false positive, I suppose, and that's what the Court – that's the element the Court of Appeal focused on. But he – I think the Judge here is referring, isn't he, to the particular way in which the interview panned out, the absence of overt pressure?

MR PAINO:

But the subtle pressure is powerful here and I've got a medical report here. These people don't lie.

GLAZEBROOK J:

Well, isn't the obvious answer to that if this is what occurred that maybe, "Maybe I shook her a bit more but it was in my desire to wake her up. She wasn't breathing. I was panicking" –

MR PAINO:

He said that –

GLAZEBROOK J:

– you know, "But I said to the police, 'I gave her a little shake.' Well, you know, maybe I gave her a bit of a bigger shake than I said but it was because I panicked and wanted her to wake up."

MR PAINO:

But he does say that in the interview with "Mr Big" three times.

GLAZEBROOK J:

No, but when he's pressed on it was bigger, that it wasn't a little shake, was it? "Well, no, maybe it wasn't but it was to wake her up. Maybe, maybe I did it just a bit more but I was panicked."

MR PAINO:

But he'd already heard and knew the paediatric, the medical findings which were that this was substantial to the heavy shake and repeated and effectively abuse. I mean, he knew that because this is a rather unusual case where the person knows all the evidence. Usually it –

GLAZEBROOK J:

But you're suggesting he made a false confession. If it was a false confession then his story is correct and he gave her possibly –

MR PAINO:

Yes.

GLAZEBROOK J:

– a larger shake than he was prepared to admit to but not for the purpose of hurting her.

MR PAINO:

Yes. I'm sorry, I misunderstood. Yes.

O'REGAN J:

But, I mean, this isn't really about the confession not being against interest. It's about the process creating an incentive to tell this story rather than the one he says is actually the true story. So it's not so much that it's not against interest, it's that he had an incentive to do it, isn't it? I mean, it doesn't really matter whether it's against interest or not, does it?

MR PAINO:

No, I don't regard that –

O'REGAN J:

Yes.

MR PAINO:

– as essential, and that is why really I submit it's a section 30 argument, you know. It's actually looking at the technique and what was done on this occasion and why it was done and what was elicited to – that's the concentration really of my argument, is that (a) it was flawed from the start because you were never going to get any more than this. You were never going to get other reliable indicators. I call them corroboratory, corroboration, but you weren't going to get things such, you know, where the body is, which most of the scenario techniques, although I do agree there are some where identity is not in dispute, but most of these techniques are sort of, to use the TV phrase, cold cases where, you know, they find out where the body is and then they regard that as a measure of reliability in terms of –

WILLIAM YOUNG J:

Can I just put to you to see, get your response? There's an element of congruence with the Crown case as to the reason for the shaking, being that the baby cried all the

time. Now did he deny that at interview, that the baby was – that Baby T used to cry a lot?

MR PAINO:
He admitted that the baby cried.

WILLIAM YOUNG J:
Did he admit that at interview?

MR PAINO:
In one of the police interviews, I think.

WILLIAM YOUNG J:
Did he?

MR PAINO:
Can you just bear with me, Your Honour? He actually said, can I just say this, just before I finalise this, he actually said in the evidence, that's not before you, but in the evidence in the hearing, and I've got the job sheet here, that the baby on the night that it happened, the baby was grizzling, and then went into this, and then basically went and fell asleep. Excuse me.

My colleague has drawn my attention to a Supreme Court casebook, Ma'am, 2, I think it is. Page 11 of his interview at the top, where the mother of the child, and by the way they're together but the mother of the child says –

ELIAS CJ:
Sorry, so page…?

MR PAINO:
For page 11 – page 45, sorry, of the casebook, 11 of –

ELIAS CJ:
I'm just not sure I've got the right casebook. I see.

O'REGAN J:
45 at the bottom.

MR PAINO:

45 of the casebook.

WILLIAM YOUNG J:

Okay, so he says, yes, she did sometimes cry but he says that Ms T A T is wrong in relation to crying all the time?

MR PAINO:

Yes, so the question was put to him the crying by Baby T happened for a period of hours and went on up until the 4th of March and he said he didn't agree, but he said, "I did observe her crying for 20 minutes but not hours."

WILLIAM YOUNG J:

You go back a page where he is playing down the crying.

MR PAINO:

Yes.

MR PAINO:

Yes.

ELIAS CJ:

So what – can we… I can't find it.

WILLIAM YOUNG J:

It's here. 1, 2.

O'REGAN J:

Page 45.

WILLIAM YOUNG J:

It's at page 44 and 45. And then – so when he is spoken to by Scott the explanation for the shaking is because she's crying. Now that's probably the high water mark of, I suppose, the extent to which his admission to Scott is, as it were, consistent with the Crown case. But he didn't have to say that to Scott.

MR PAINO:

Yes, but it's not much of a high water mark, with respect.

WILLIAM YOUNG J:

No, I agree, because presumably most shaken babies –

MR PAINO:

It's low tide.

WILLIAM YOUNG J:

– are shaken because they're crying.

MR PAINO:

Yes. You know, it's – I mean, just talking of this issue with a child who's crying or waking and crying or grizzly when asleep, partially asleep, basically he said effectively that he shook the baby because the baby had stopped, it appeared to him the baby had stopped breathing. That was essentially what he said to the police. When he was spoken to by Scott and he was asked about, you know, he was told about the paediatric report he did say that the baby was – he shook the baby and crying was referred to, I agree, but I don't, with respect, regard that, well, Your Honour refers to it as the high water mark, I would not regard that, I suggest, as anywhere near the type of corroborative evidence that you get from –

WILLIAM YOUNG J:

Well, it's nothing like finding a body obviously.

MR PAINO:

Yes, no.

WILLIAM YOUNG J:

And then he does go on quite a lot later in – being the bursting into tears and the other stuff. It does go on more than was necessary just to tick the box, done a crime, admitted it, join the gang.

MR PAINO:

But –

WILLIAM YOUNG J:
If it contextualises it.

MR PAINO:
I guess, you know, he's there, I mean, he's been given a haircut, given new shoes, he's met the boss, and he's subjected to this interview maybe 40 minutes before this happens and he says what he says and, yes, he just adds comments at the end of that.

I don't know that that's, with respect, cogent evidence to say that the confession is truthful, because if he undermined his confession then he's not doing – if he confessed and then undermined it by backtracking on it or something then he's not doing what Scott had asked him to do, which is to be truthful and honest and that sort of thing. So he's in a way, by making a confession he has to make it convincing so that Scott believes him. So I don't know that adding to the bald confession necessarily adds weight to it being genuine.

You know we're dealing with some fairly heavy psychological pressures on someone in the build up and, you know, it's, conventionally one might argue something like that, if you made something up you wouldn't develop it and add to it.

WILLIAM YOUNG J:
So he was crying or not?

MR PAINO:
I'm sorry?

WILLIAM YOUNG J:
He was crying?

MR PAINO:
Yes. He had, during this interview, during this process there was an interception warrant and it was listening to what he was saying at night to his partner, and his father. And there is evidence, and it's in the case, there is evidence that he was, he was told by "Mr Big" never to say anything to anyone, that he must not say anything to anyone, and this was reinforced throughout the whole technique, for four months, don't ever say anything to anyone. And he was openly saying to his father for two or

three nights during the interception warrants, about what was happening, about what these guys were doing, so much so that his father rang him up one day and said, “Is that you crim?”

WILLIAM YOUNG J:
Is that you?

MR PAINO:
Crim.

WILLIAM YOUNG J:
Right.

MR PAINO:
Because he was telling them about what he was doing and of course that was an absolute no-no in this group.

WILLIAM YOUNG J:
What does this lead to though?

MR PAINO:
No, I’m just saying that he was not taken entirely by the concept that he wasn’t able to trick them by making, by doing things. He was capable of saying to, I mean my learned friend called it manipulative. He was capable of doing what he needed to do in that interview to gain entry to the gang, and if it meant a slight embellishment then it did. I guess that’s the context of that.

I’m quite happy to leave a line in the active elicitation argument unless there’s a question about it.

I’ll move on now to the fill the gaps criticism. I mean to me, in my submission, the unfairness discretion is designed precisely to fill the gaps that might not be there in an analysis of each one of the rights that are given in the Bill of Rights Act in the Judge’s rule, and this is a perfect case, I submit, for the unfairness discretion under section 30 because what’s wrong with filling the gaps, is my argument. The first issue really about this is the Bill of Rights Act and their right to silence and I, you have a right to silence when you’re prosecuted, or when you’re in police custody, but

you do have a right to silence if you like a privilege against self-incrimination or a right to silence if a policeman knocks at your door or comes to you and asks you some questions. You don't have to answer the question. Now it's not a right to be tried in the Bill of Rights Act but it is a right with a small r that you have. You don't have to answer a question. You don't have to say anything. So this technique really does, and the Bill – the significance of the Bill of Rights Act is you have to be told of those rights on detention and you don't have to be told of these rights prior – of your right not to answer questions, prior to detention, or prior to there being a case sufficient to your arrest. But this choice that you have about whether to answer police questions or not essentially is undermined by the technique, naturally, and so although it's not a breach of a right under the Bill of Rights Act, it is a, you know, by its very deceit and its deception. It is a breach of your right not to talk to the police if you don't want to.

GLAZEBROOK J:
Is that because you don't know it's the police or is it some feature of this because, of course, you don't know an undercover cop is the police, you don't know when they knock at your door and say can I have some cannabis, that it's a police officer.

MR PAINO:
No.

GLAZEBROOK J:
So what exactly is it that it is a breach of, in this case?

MR PAINO:
Well this is only one aspect of –

GLAZEBROOK J:
No, no, I understand. I'm just trying to understand what the submission is. Is it just because there's questioning – or just perhaps can you just explain to me what –

MR PAINO:
I guess my, the purpose of making this submission was to say that this happened in the context of two police interviews, where there had been a first interview, there'd been a lawyer present; the second interview there'd been a caution, and so the respondent had the right not to speak to the police again and they undermined that

by doing this. I guess I take Your Honour's point that in an undercover operation I mean you don't know it's a, if you don't know it's an undercover policeman then I guess it's not really a serious breach of the right. I guess here the context of it is that there'd been two previous interviews and the police undermined the process of a third interview and breached his right not to speak to the police.

WILLIAM YOUNG J:
That would be the case in virtually every "Mr Big" operation, wouldn't it?

MR PAINO:
Yes it would. I mean a lot of what I'm saying I do accept is the case in almost every "Mr Big" operation, although peculiar to this case, and every case, is the pressures that come on to the individual by the various methods and, you know, in *Cameron*, the first Court of Appeal decision, basically said it depends on the nature of the, and extent of the operation, and this is, in my submission, a to use a colloquial phrase "full on" "Mr Big" operation.

WILLIAM YOUNG J:
How could it be less full on? I mean it doesn't have the characteristics of the Australian and Canadian cases where the criminal organisation is one of violence and the final interview was not a harassing interview. Obviously there's pressure, he's being pushed, but it's not, nothing like the ones that were involved in the *Tofilau* case.

MR PAINO:
I'd say more subtle. More subtle. The design is more subtle. Deliberately done, I suspect, to not fall within the, some of the ones overseas where they've been – where there was a risk that the confession wouldn't be, a high risk, it wouldn't be allowed because of those overt threats and so on. But, you know, these subtle pressures are, in my submission, as effective and the question is whether by operating subtly it's any worse than operating overtly. Now I've taken threats out of it, I can see a far more benign "Mr Big" operation than this. I can see it happening far less occasions. I can see no inducements, not many inducements. I can see not removing the man from Auckland to Dunedin where he has no contacts. I can see it happening where, for example, the suspect is more a gang member, whereas pretty well worldly, or a criminal, living in a criminal lifestyle, and where the "Mr Big" is not – where the incentives to join are less, and where "Mr Big" doesn't have a document in

front of him that's been obtained from the police file which basically makes you out to be a liar if you don't agree with it.

GLAZEBROOK J:
In relation to the Dunedin, did he not have a ticket back, I just can't –

MR PAINO:
There's no evidence of a ticket –

GLAZEBROOK J:
Because you said he was going to be stranded there. I didn't remember there being any evidence on that.

MR PAINO:
From my recollection of the evidence there's no ticket back. What there was, at its high point, a sum of money that he had been given for "expenses" prior to the "Mr Big" interview had been sent to Queenstown with a credit card to spend up large, to give one of the operatives doing the drug deal an alibi, a false alibi, and he did have some cash on him but with the Air New Zealand prices on it, if you buy a ticket on the same day, there's certainly not enough –

GLAZEBROOK J:
Especially from Dunedin, yes.

WILLIAM YOUNG J:
Where did Scott, where was it that Scott purported to live?

MR PAINO:
I'm sorry?

WILLIAM YOUNG J:
Where was Scott meant to live?

MR PAINO:
I have no idea where Scott is meant to live. I can't recall from the scenarios references to where he was based but certainly the drug deal was in Dunedin, the

arms and cannabis exchange was in Dunedin, and deliberately chosen to be away from the base in Auckland by the police, admitted to in their evidence.

WILLIAM YOUNG J:
Was that what the Detective Sergeant –

MR PAINO:
Mr Mackie said. "To be away from," I think he put it slightly more benign, probably away from the home base in case they saw anyone they knew.

ARNOLD J:
Your approach to fairness is a broader approach than the Crown's. I mean what we are assuming at the moment is that the confession doesn't come out under section 29, oppression. It doesn't come out under 28, reliability, coupled with a consideration of the prejudicial sort of section 8 things. So it is not caught by any of that so we are looking at the sort of residual ability under section 30 to say, well nevertheless it was obtained unfairly. And you are arguing for quite a broad notion of unfairness whereas the Crown is saying, that residual unfairness aspect is really reserved for the extreme abuse of process type cases, the ones that shock the conscience, that type of thing. Is that a fair summary?

MR PAINO:
It is but what I would say to that Your Honour is that section 30 does not preclude considerations under section 8 and section 20. You know, this is not a slot where you go into one slot or the other. If you, which has happened here, develop your argument under section 30 and the Crown agree with this in their submissions that reliability falls to be considered under section 30. The Crown doesn't say, just as it is under section 28. But reliability, the nature and quality of the evidence is one of the factors that comes into account under section 30. And not just the fact that it's an oral confession and it's reliable because we have a recording of it. But in my submission, all of the section 28 factors come into section 30 as well.

GLAZEBROOK J:
But if in fact under section 28, there's a, I can't remember the wording but it is excluded altogether and not able to be bought in, so one has to assume therefore that reliability is actually dealt with definitively under 28 so it must be a lesser form of unreliability that you are suggesting is dealt with under section 30 because if it is

unreliable it goes. If it is under section 30 it can be brought in under the balancing test, so you couldn't circumvent section 28 absolute exclusion by bringing it under fairness could you?

MR PAINO:

No but in a case like this, this is probably a case in point where there had been a section 28 hearing and a finding that it was reliable. But that wasn't unreliable by Justice Collins.

GLAZEBROOK J:

Well how can you bring in reliability under section 30 if it has already been deemed reliable?

MR PAINO:

Well the first way is to say the technique is designed to produce a higher risk reliability confession. So you look at the technique rather than the result and you say, this technique should not be deployed because by its very nature it's likely to produce an unreliable confession. So it's concentrating really on the nature of the technique rather than focusing on the, an evaluation of the actual answers, and I think that's what the Court of Appeal did here, with respect, what they did look at. That's why they called it – they didn't say that the answers were a finding of fact that it was reliable. They basically said that by this very technique and by the way it operated any answer that was given would have to be, in the circumstances, unreliable. In this case, not generally.

WILLIAM YOUNG J:

But it must – I suppose what bugs me, it must apply generally because – I think. I mean, you would say, well, you can design a "Mr Big" technique but it's not going to be very effective, and that's probably true, so that there's no pushing, no challenge and you spend five months and in the end, "Did you do it?" "No." "Okay." Well, that's great and we'll fold our tents and disappear into the night. Now, but leaving as – I can see that is a bit implausible so an operation that is intended to get a result simply can't be devised in terms of the Court of Appeal judgment.

MR PAINO:

Well, I just – I hold to my submission but you could devise a technique but if you –

WILLIAM YOUNG J:
It's just that it wouldn't work.

MR PAINO:
– colour – well, it might. It might, and if it doesn't work, so what, with respect.

GLAZEBROOK J:
Well –

MR PAINO:
I mean, is the whole focus to get the confession at all costs?

WILLIAM YOUNG J:
The whole focus, I suppose, is to bring an investigation to a successful conclusion and, of course, if after all the pressure is applied there isn't a confession, well, then that may help the police. I mean, it may be a clearance. Who knows?

MR PAINO:
Yes, but –

WILLIAM YOUNG J:
I agree they don't – I mean, they would only deploy this sort of very resource-intensive technique where there's a high level of suspicion about a particular person, so that outcome is not that likely, I imagine. But it must be possible.

MR PAINO:
I don't see anything wrong with asking the man with all these pressures whether he did something and then asking him again and asking him again and calling it quits. Sure, it's a waste of resources, but, you know, you can't just do it and, with respect, you can't just do it and just – and then design it with the whole intention and put pressure on during the interview, pretend you've got a report and so on, just because you want that answer.

GLAZEBROOK J:
I think you said to me there were two ways. One, it's just a general unreliability by the technique. Did you have another way that reliability could be taken account or

did I misunderstand you? I thought you said there were two ways it could be taken into account under section 30 just because it's a bad technique and could elicit unreliable confessions, and was there another way reliability could be taken into account, in your submission, or was that the only one?

MR PAINO:
Well, no, I think that was the only one. If I said two, I was thinking ahead of myself.

GLAZEBROOK J:
I might have misheard.

ELIAS CJ:
But your point is that section 28 is to do with unreliable confessions which could be obtained in any way. Section 30 is concerned with improper, improperly obtaining confessions and what is improper may well entail assessment of potential unreliability.

MR PAINO:
Yes. I mean, I really think section 30 is designed for this sort of case because, as I said to Justice Glazebrook, it focuses on the technique and focuses on what is likely to come from it and the deployment of the resources and the inducements and so on –

ELIAS CJ:
But you could –

MR PAINO:
– simply saying –

ELIAS CJ:
You could legitimately conclude, as the Court of Appeal arguably did in this case, that the technique was improper because among other things it had a risk of inducing unreliable confessions, and then you go into your section 30 balancing.

MR PAINO:
Yes.

ELIAS CJ:

But you can determine that it's an improper technique within the meaning of section 30.

MR PAINO:

In this case, yes.

ELIAS CJ:

Yes.

MR PAINO:

I say, you know, from sort of, I suppose, a defence perspective, I say that this technique is flawed for the various reasons. It's bound to produce, you know, it's constituents are such that an unreliable confession is highly likely but, you know, backing off from that I don't need to make that submission in this case because what I'm saying here is in this case it was. Now I take Justice Young's point that it wouldn't always – it would always be the case. If you water it down a bit you probably won't get much, but in the end this is not – this is only about whether the evidence is admissible. It's not about whether the technique can be deployed. It's only about whether the evidence from it is admissible. Now if, for an example, you got some corroborative evidence, such as the teeth and the skull material from the pit in the, not *Mack* the other case, Canadian case, yes *Mack* sorry.

GLAZEBROOK J:

That could be fruit of the poison tree though, couldn't it? I mean if it directly came from an improperly obtained confession then I suppose it might come in under a section 30 balancing but it would be, that direct link would be a bit of a difficulty, wouldn't it?

MR PAINO:

It is, it does come under, I agree it does come under section 30.

GLAZEBROOK J:

The balancing aspects.

MR PAINO:

It does come into the balancing act, I agree with that.

GLAZEBROOK J:
Yes.

MR PAINO:
And it's listed as one of the factors, I suppose the seriousness of the crime and the probative value of the evidence but, and I do agree with Justice Young, that it is, you know, this comes at the end, you know. I mean it's, what's the guidance for the police along the way? Is it only just if they get that that it's admissible, I understand that argument but the Court of Appeal, I suggest, did provide the criticism of the way the technique was deployed to provide some framework and I've submitted a way in which it could work even although I don't agree with it but I've provided some framework by just backing off a bit.

O'REGAN J:
Do you say that *Cameron* was wrong or were there aspects of *Cameron* that brought it across the line into being a permissible use of the technique?

MR PAINO:
In *Cameron* of course counsel for the appellant, the defendant, appellant conceded the technique was lawful and so there didn't seem to be much issue on that in the case so it didn't really go into that part of it.

O'REGAN J:
Sorry, I'm not saying the decision was wrong but just the use of the technique in the circumstances of *Cameron* was wrong. In other words, are you trying to distinguish what happened in *Cameron* from this case or are you saying it shouldn't have been admitted in that case?

MR PAINO:
Well all we've got really in *Cameron* to tell us what happened in *Cameron* was the affidavit of Mr Mackie because in the *Cameron* decision which I read and read the casebook there was absolutely no evidence in the decision about the detail of the technique.

WILLIAM YOUNG J:
Was that because the evidence was led in a deliberately limited form?

MR PAINO:

I actually don't know to be frank. I don't know why there was no reference in *Cameron* to the detail of the technique and as I indicated in my submissions, I actually rang both counsel for the Crown and defence, and told the Crown that I was concerned about there was no evidence about the technique and made the submission that it was fairly limited, contrasting this case because the Court of Appeal decision in *Cameron* said it depends on the nature and scale of the technique. So Justice O'Regan, just to return to your question, with respect, is it that that, if you like, finding by the Court of Appeal that it is permissible depending on the nature of scale, am I agreeing that is –

O'REGAN J:

All I'm really trying to establish is you're not saying that there is some specific thing, difference between *Cameron* and this case that tips this case over, you're just saying your submission is the technique could in some circumstances be okay, you don't know enough about *Cameron* to know whether that was within your bounds, that's really what you are saying, isn't it?

MR PAINO:

Yes, sort of protecting the Court of Appeal judgment, the Court didn't outlaw the technique. So I have to concede that in those circumstances just protecting, if you like, the judgment that the Court did envisage certain circumstances but as Justice Young has said, what are they?

WILLIAM YOUNG J:

Well I think the real difference with *Cameron* was that the operation took place over a much shorter period of time otherwise it was pretty similar. There were a similar number of scenarios, not dissimilar amount of money, but the money takes place over two or three weeks.

MR PAINO:

I mean I – this is where we rely on the affidavit evidence from Mr Mackie only which I objected to and which we sort of, I thought acknowledged it wouldn't be part and parcel of the hearing.

WILLIAM YOUNG J:
Well we're looking at it in a sort of, I mean I am looking at it in a sort of systemic issue because it is an issue of some significance.

O'REGAN J:
But also Justice Young sat on *Cameron* so he's probably not having to rely on the affidavit.

MR PAINO:
You might, with respect, be the missing link because I don't know anyone that knows anything about *Cameron*.

ELIAS CJ:
We've often thought that about him.

MR PAINO:
I'm pleased I said, "With respect," because –

WILLIAM YOUNG J:
I confess to relying on the affidavit.

MR PAINO:
Because there's nothing in the casebook in *Cameron.* I mean, I've read the casebook, I got it sent to me by the Crown. There is nothing in the casebook that indicates the number of scenarios and the amount that was paid, and I have to say, even in Mr Mackie's affidavit I just can't see how you can say between three and four thousand, you know, it's either 3680 or it's – but there's no mileage in undermining the detail of the affidavit for me but –

GLAZEBROOK J:
Well you'd say anyway if it wasn't challenged in *Cameron* then they had no need to go into that, it was only a question of –

MR PAINO:
Yes and I think really it was dealt with on the basis of the argument which was the techniques permissible which was conceded for the first time in New Zealand by Mr Sharp who was counsel for the appellant and I don't know why the concession

was made, certainly no argument on its lawfulness. It has to be seen in that light obviously.

ELIAS CJ:

What about the argument that, just thinking in terms of the statute that section 30 in fact allows the police to undertake this sort of technique at their risk if things work out and if on the balancing test, it's not black and white in other words, that section 30 might in fact be opening things up to allow the Court in a particular case to decide that evidence can be admitted, notwithstanding that it might be thought to be unfairly obtained. Which wouldn't be a mile away from the presumptive approach in Canada but with a much stronger, with much stronger authority for the Court to admit it if it passes the balancing test. There might be some virtue in the balance.

GLAZEBROOK J:

I think that was a bit like Justice Collins, his preference would have been to do it that way, I think he said.

WILLIAM YOUNG J:

The problem, however, it's pretty difficult for the police to deliberately put in place an operation which they know will be characterised as unfair.

ELIAS CJ:

Well they don't know that it's going to be unfair.

WILLIAM YOUNG J:

No because if you're relying on the balancing.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Then the logical first premise of that is that the operation is, by definition, unfair. Well I don't know that I'd, if I were a police officer, would be prepared to authorise an operation on the basis that it was unfair but that with a bit of luck the results might be admitted under the balancing test.

GLAZEBROOK J:
Well that's sort of what the presumption does in Canada, isn't it, you presumptively say this is an improper technique and then balance.

WILLIAM YOUNG J:
I'm not sure they do say it's improper. I don't think that –

GLAZEBROOK J:
No they don't use that terminology but presumptively will give, well what they say is that presumptively there is a risk of unreliable or false confessions and therefore you have to show reliability. So it is – and what has been edged on us by counsel is that presumptively it's unfair because it has a risk of unfair confessions and then you look at balancing. Have I understood that?

MR PAINO:
Yes, yes, I mean I –

ELIAS CJ:
It might in fact be the safest way forward rather than being too absolutist about these things, anyway.

MR PAINO:
No I see the attraction in that. But just on this point of giving the guidance to the police and how are they supposed to know. I guess the suggested outcome I would offer is that if they're going to engage in the technique on the basis that it hasn't been outlawed then they should do so conservatively and try not to push the limits because it's the pushing of the limits that can sometimes create the problem, that is, the extent as I mentioned earlier of the incentives and the pressure during the interview and relating in evidence and so on.

One matter which I think is different in this case that I haven't seen in any of the cases, including the Canadian cases and the Australian cases, is the use by the police of important Crown witnesses to convey a dishonest message as part of the deceit. So the – in this case what happened was Detective Miller, Senior Sergeant Miller, rang the mother of the respondent and falsely informed her that there was going to be a Coroner's inquest and wanting to set dates, and then rang the father, and the reference to the father's phone call is in the additional

material that I put in the job sheet. It's only one line. I won't take you to it. And so they then informed the respondent's mother, the respondent's partner, of the Coroner's inquest and whether by design or otherwise it got extended to a belief that there was going to be a prosecution or a charge. So what ended up happening was that they told – this is part of the plan to put the pressure on the respondent to confess in the interview because there's going to be a legal process. So there's a little bit of dispute about whether they were told there was going to be a charge or not, but just leaving that to one side the Crown witnesses, who are the mother of the respondent and his partner who – it was designed for her to be informed to tell him because he was away in Dunedin, at this gang – at this triad cannabis arms deal with the group. The three witnesses were corrupted. The respondent's mother, his partner and his father. Now by "corrupted" I mean the police knew by what they did it was a lie, and so they now believe that this is a lie and, and they've actually said in the job sheet to Miller when the father rang him, "You've set my son up." So these are Crown witnesses who the police used. Now I don't know the police have used Crown witnesses in any other case and I just make the point –

WILLIAM YOUNG J:

They quite often, in electronic interception cases the police will quite often push the suspect a little bit when the operation, around the time the operation commences.

MR PAINO:

Yes, but are the people who – but they don't have the witnesses here. In the electronic operation it's usually just the electronic phase.

WILLIAM YOUNG J:

No, but they may summon the suspect in for another interview. They may put, arrange for material to be in the newspaper saying police are now following a very promising lead. Arrest expected –

MR PAINO:

I –

WILLIAM YOUNG J:

– soon.

MR PAINO:

So my criticism is not so much that this was a deceit or dishonest technique to plant in the mind of a suspect that he's going to be possibly arrested and therefore make it advantageous for him to not want to be. My point is –

WILLIAM YOUNG J:

Well, conscription of the family members.

MR PAINO:

Not – my point is only that they used family members to do this, and these family members are critical witnesses, you know, like, for an example, the respondent's partner who's basically there on the day of the incident and his mother who was a caregiver and there regularly. And so not so much the father, he's not as critical, but these are Crown witnesses who have a major part to play. Now they believe that the police have deceived their son and that they were part of a deception. I make the point that I submit that Crown witnesses –

GLAZEBROOK J:

Sorry, how did they deceive? I'm not sure I quite understand the submission.

MR PAINO:

Yes. So they lied to them. They lied to the mother, the police, that there was going to be a Coroner's inquest.

ARNOLD J:

So did the – is that accepted? I know you put in some material from the Coroner's –

MR PAINO:

I think the Crown accept that, yes.

ARNOLD J:

Yes, okay.

GLAZEBROOK J:

Let's just –

WILLIAM YOUNG J:
No, I don't think they do, actually.

GLAZEBROOK J:
Let's just assume that but what's happened to corrupt their evidence or to – sorry, I just want to understand what the submission is.

MR PAINO:
I guess in the nature of doing trial work one of the most important things about a witness quite often is just how they feel about their role in the case. They've been used and they turn anti-police so that may or may not be beneficial to the defence and it may or may not be beneficial to the Crown but –

GLAZEBROOK J:
So because – you mean now they know that they were lied to earlier –

MR PAINO:
Yes.

GLAZEBROOK J:
Is that –

MR PAINO:
Yes.

GLAZEBROOK J:
Okay, that's fine.

MR PAINO:
Yes.

GLAZEBROOK J:
I just wasn't quite sure what the –

MR PAINO:

Okay. I'm sorry for not explaining it as well as I should've, but they've effectively been manipulated and if they, if they turn in the way that they – and I – there's no evidence they have but –

ELIAS CJ:

It's just speculation, isn't it? You've got this in your written submissions and I must confess I didn't quite understand the significance of it and I still am struggling a little. They're just used as the conductors of this information to – on the submission you're making. They're just used as the conductors of this information and it's just part of the overall deceit.

MR PAINO:

Conduct – I agree, I agree, conductors, been used as –

ELIAS CJ:

But they're not being –

MR PAINO:

But they're –

ELIAS CJ:

They're not being –

MR PAINO:

But they are crucial witnesses, you see, that's the difference.

ELIAS CJ:

I don't see why that matters.

MR PAINO:

You don't see that as being important?

ELIAS CJ:

Well, I'm struggling on the –

MR PAINO:

Yes, well, I guess they may well be against the police now, you know, whereas they weren't, and now they've been lied to and deceived by the police and are part of a deception. They may not like what's happened and then that may affect their co-operation, their demeanour in the witness box and so on, and I just think if you're going to – my submission is if you're going to use the technique just don't use as a conduit the Crown –

ELIAS CJ:

Don't get too close to the trial –

MR PAINO:

– Crown witnesses.

ELIAS CJ:

– you mean?

MR PAINO:

Yes, leave the Crown witnesses out of it, the principal ones. Just don't try to affect their – don't do anything that's going to effectively make them turn on the police because Mr W W turns on them and says, "You set my son up," highly critical, and didn't co-operate with the police.

WILLIAM YOUNG J:

But help me, was that a reference to the whole "Mr Big" operation which I'd rather assumed it was rather than the telephone call?

MR PAINO:

I don't know.

WILLIAM YOUNG J:

I mean, the real set up was the "Mr Big".

MR PAINO:

It probably, it probably was the "Mr Big" operation –

WILLIAM YOUNG J:
Yes.

MR PAINO:
– with Mr W W but with the – I just say, I suppose, really there's a high risk that you will, once you use key Crown witnesses as part of the deception you run the risk that they may become alienated from the police and it may transit into their co-operation as witnesses and their demeanour. But I can't put it any higher than that and if it's not –

ELIAS CJ:
No, no.

MR PAINO:
– attractive then –

ELIAS CJ:
I now understand.

MR PAINO:
Yes, yes, I regard it –

ELIAS CJ:
It's a dangerous technique to use a system of deception which could taint the trial.

MR PAINO:
I'd go one further and say by the tainting of the trial is it could taint the witnesses –

ELIAS CJ:
Well, that –

MR PAINO:
– who have been used.

ELIAS CJ:
Yes, I see. Mr Paino, what else do you want to cover with us?

MR PAINO:

I was going to cover section 8 considerations. That's the prejudiced by bringing – by introducing the technique and its effect during the course of the trial. It's a relatively narrow point which I think has some importance and really I wasn't going to go much further than that.

GLAZEBROOK J:

Well, you would have to deal – if we're only under section 30 won't you have to deal with the balancing test?

MR PAINO:

Yes.

GLAZEBROOK J:

And are you going to deal with that as well?

MR PAINO:

Would you – I mean, I'm –

GLAZEBROOK J:

Well, it's just that if we are under section 30 and we've accepted that it wasn't unreliable – and I'm not entirely sure whether you accept it wasn't unreliable in this case. I think your primary submission is that it was actually unreliable.

MR PAINO:

Yes.

GLAZEBROOK J:

But let's assume that's not accepted and you're only looking at the technique being a risk of it being unreliable, then we're right into the balancing test, aren't we?

MR PAINO:

Yes, we are. I mean, I'm quite prepared to go through the balancing test in terms of specific matters referred to by the Court under section 30 and go through each one and make points on each one and then also cover the point of the other matters which is, in inverted commas, which is referred to in subsection (3), but I couldn't do that before the lunch break.

GLAZEBROOK J:

No, no, I understand that. It just seemed to me that if your primary submission was rejected then you're not home and hosed by – and yet your submission on it being unfair is accepted, then there's a missing link that we've got.

MR PAINO:

Yes. No, I do recognise that, I do.

ELIAS CJ:

So is that a convenient time for us to take the adjournment?

MR PAINO:

It is, thank you.

ELIAS CJ:

You'd expect to be what, another half hour?

MR PAINO:

I wouldn't expect to be that much longer.

ELIAS CJ:

No, no, that's fine, thank you. We'll take the adjournment.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.18 PM

MR PAINO:

So proceeding now, as we are gathering the threads of what I have submitted in the written submissions and orally, I will proceed to outline the section 30(3) balancing act considerations and I will do it under the –

GLAZEBROOK J:

Can I just get your reaction to a proposition. Your proposition was it was unfair under section 30, in section 30 terms because there was a risk of unreliability.

MR PAINO:
Yes.

GLAZEBROOK J:
And I think you also sought to make something of the fact that it was circumventing the normal caution procedures et cetera. I just wanted to discuss with you whether it is also circumventing in a way the right to silence in the sense that Scott was really saying, "You have to tell me this" and implying a compulsion, that if he wanted to remain in the organisation, which he would not have been able to do if he had his true persona as a police officer.

MR PAINO:
Yes. So it was effectively an interrogation by an undercover officer in the same format and nature as if it might have been, if it was a police officer, it was almost an identical format of an interview and the police knew they couldn't do that. The police chose not to do that after two interviews and chose this technique instead which would have eventuated inevitably in this particular interview, with this particular technique.

GLAZEBROOK J:
With the compulsion to speak effectively.

MR PAINO:
Yes with a compulsion to speak so this was what I think the Court of Appeal decide, a circumvention of an invasion effectively, of his rights because what he did was. They set up a police interview, I mean this is what this is about, this technique, it is the setting up of a police interview with a police officer not in uniform and effectively putting the carrot in front of him to force him to eat it effectively by its design and saying all the way along, "Oh you don't have to if you don't want to." Basically trying to ensure that what he is saying is, he doesn't have to. But when the incentive is placed in front of him in the way it was, saying he didn't have to say anything is effectively not giving him a right to silence. It is just more of a platitude than anything.

So my submission is that it is a breach of his right to silence. The question I wonder is whether the right to silence exists without being in detention and without there being sufficient evidence to charge you. So no right under the Bill of Rights Act is

necessarily a breach, or in under the Judge's rule. The question then is, whether there is a general right to silence.

GLAZEBROOK J:
Well the proposition I was putting was that this was essentially a compulsion to speak or an indication that there was a compulsion to speak and if he had been a police officer he wouldn't have been able to do that. He would have been able to question but not to imply there was a necessity to answer in the way that Scott did here.

MR PAINO:
And my submission is that is why the technique was effectively deployed.

GLAZEBROOK J:
Right.

MR PAINO:
Or that's why that aspect of the technique in the confession was adopted, because they couldn't do it.

GLAZEBROOK J:
Yes.

MR PAINO:
In the conventional sense. And just on that, I'm sure Your Honours are aware that there were two interviews. On the first interview, he had counsel, the second he had counsel and there was never a question to do a third interview. He never declined a third interview, he was never given the chance and the police may well have thought that if there was a third interview, they may not have been able to get a confession out of him. So instead they did a third interview "in drag" in my submission. Is that –

GLAZEBROOK J:
Thank you.

MR PAINO:
So just section 30. I just wish to go through the statutory listings. So I was going to go through them relatively quickly if I need to and I am more than happy, of course, to be interrupted but section 30(3)(a). So just before that we get to, "The Court may,

among any other matters have regard to the following." Now some of what I say may well be not necessarily specific under this numbered section but if it's not, it still may come into account, under "any other matters." And the seriousness of the intrusion on it. So the question there, I don't necessarily regard that as a Bill of Rights, only issue or a Practice Note, Judge's issue; I think the point Justice Glazebrook made as to whether it is a deliberate evasion of his rights by the interview in the way it was done is of significance; (b) "The nature of the impropriatory in particular, whether it was deliberate, reckless or done in bad faith." Now I just want to briefly indicate what I said in the Court of Appeal on this because at that stage, of course, although the *Cameron* had said the technique could be used depending on the nature and scale, at that point we didn't know the nature and scale or I thought the nature and scale was pretty low key. So just to indicate what I said there, "It involved large scale planning and significant use of public resources. Police considered the technique to be a valid investigatory technique although the ordinary New Zealander would not expect the police to engage in lies, deception and blatantly misleading the conduct of the kind that occurred in this place."

ELIAS CJ:

Do you want to adopt that test, the ordinary New Zealander test?

MR PAINO:

I think really it is undermining the justice of the trial. That was a test that, yes I do think the ordinary New Zealander test is fine, and then I said in counsel submission the –

ELIAS CJ:

Well, there is a distinction, isn't there, between the High Court on this and the Court of Appeal, or am I thinking of the other place?

MR PAINO:

The High Court said –

ELIAS CJ:

No, sorry, I'm thinking of the other case, yes.

MR PAINO:

Yes, the High Court I think said whether the ordinary, the person would regard the police technique as, whereas the Court of Appeal focused on not the police technique but the whole justice inquiry rather than just the inquiry confined to the police.

I then said in counsel submission the extent of this operation rendered it improper, the length of the operation, the providing of progressive financial inducements and other criticisms referred earlier must have been known by the police to be perilous. Nevertheless the police continued, so the conduct was reckless in the sense they took a conscious risk that the conduct might be found to be unlawful, and that was a submission –

WILLIAM YOUNG J:

Well, I mean, it was conduct that had been upheld, and Canada upheld and Australia, and upheld in the Court of Appeal twice, and that's a bit rich, isn't it?

MR PAINO:

It's a bit rich if the same conduct had been upheld in the Court of Appeal, but if –

WILLIAM YOUNG J:

But we know it was pretty much the same conduct – I know you don't like the affidavit –

MR PAINO:

Well, we now know –

WILLIAM YOUNG J:

Yes.

MR PAINO:

– but that's why I said that was a submission I made to the Court of Appeal, and, you know, I think the police always sail close to the wind in all undercover operations, and in these ones, they do sail close to the wind, and in my submission why they could have done in this case was to put before the Court, by way of evidence, the steps that they took before they introduced this technique, what advice they got from psychologists, what, not necessarily chapter and verse of the legal advice, but some

detail about what advice they got from, on the legal aspect of it, they said they made investigations with people overseas, but we've got absolutely nothing before us to say how this technique commenced and what chain of command it went through the police to authorise it, and if there was some sort of system whereby it could be scrutinised as to whether it was right to adopt it then –

WILLIAM YOUNG J:
But, sorry, Mr Mackie gave evidence –

MR PAINO:
Yes.

WILLIAM YOUNG J:
– and you were able to cross-examine him.

MR PAINO:
Yes, I got this, I got Mr Mackie's brief of evidence incidentally not very close to the trial, and then there was no disclosure of any, not even the usual disclosure we get, we said, "Not able to be disclosed, information withheld," so I didn't, I had no idea what Mr Mackie – he gave oral evidence to say that he'd talked to people overseas, that he'd got psychological evidence, that he'd taken into account police legal evidence, but none of this was before the Court and I hadn't seen any of it, so, well, I think the Court of Appeal found that it perilous for me to commence, unfair, I guess, for me to commence cross-examination when nothing was there. As it transpired, when I found out afterwards, I wrote to the Crown and got, to get the disclosure of what psychological evidence they said they got, they said it was oral and none of it was written. So, I'm saying here that there is a responsibility to, under (b), to provide information to show that it wasn't reckless. I mean, I accept it wasn't done in bad faith, but I think I mentioned that earlier, that there needs to be some evidence before the Court, or should be some evidence before the Court, as to how this was implemented and why and the structure, it's not just, in my submission, sufficient to say it's been overseas so you can do it here without the safeguards that it had been properly deployed, from the police perspective. Now I don't know whether, for an example, a senior police officer approves this, or whether it's done by the officer in charge, a sergeant in the, undercover, who justifies the finances and so on. So it's an unstructured technique that – so my argument really is that under (b) it was clearly deliberate. I said in *Cameron* that it was sailing close to the wind and I repeat,

notwithstanding what the *Cameron* affidavit says, that every time the police do commence this they do go close to the wind, and they could back off on some of the intensity of the programme.

I must go now to (c), and this probably fairly important, and that is that (c) does, in my submission, include reliability. And the Court of Appeal and the Crown at page 44 of the Crown's submissions concede, or agree, that reliability falls to be considered under the nature and quality of the evidence. So, nature and quality, in my submission, covers, (a), the fact that there's an oral recording, which gives it some, which is relevant to the quality of the evidence, because it's evidence that's oral and taped, so it's Crown-focused in that aspect, but it's not just that, it is, I say, the quality of the evidence goes to its reliability as well. So all the arguments for reliability that have been outlined in my submissions and in the Court of Appeal's judgment falls to be considered under (c) as well, it's not excluded because it's not under section 28, it's included in subsection (c). (d), it's pretty –

ELIAS CJ:
Well, it cuts both ways, (d), as has been said.

MR PAINO:
It's generally Crown-focused, because these operations aren't usually deployed unless there's a serious offence. (e), other techniques. This comes to this possibility of a third interview argument, where the police could have interviewed the suspect in a third interview, and I've said in my submissions that they could have put more of the material that they had from the, the medical material, and I opposed the number of questions which could have been asked in that interview and chose to do it, but not in a formal sense, in sort of, in the underhand way that it was done.

If there are no alternative remedies available to the suspect, I'm not sure whether you can get civil damages for the tort of deceit or, and whether it applies here, but I don't think there are any other remedies. The only remedy, really, in my submission, that's available in the context of a criminal prosecution is a determination as to whether or not the evidence should be permitted –

ELIAS CJ:
Breach of confidence – sorry, I'm just thinking out loud, quite interested in this area of tort remedies. Carry on.

MR PAINO:

I meant before I came in to look at the – I found the index of tort remedies – before I came in, but I didn't, but I must say when I do look at that sometimes I find remedies that I've never heard of.

ELIAS CJ:

So do we.

MR PAINO:

And, really, (g) and (h) are not factors.

So returning to subsection (2) and adopting the last words of subsection (2)(b) of the proportionality issue, giving appropriate weight to the impropriety, but also takes proper account of the need for an effective and credible system of justice. You know, I acknowledge entirely that the credible, a credible system of justice is for the detection and prosecution of crime and to convict the guilty, as the cases he said. Also though, there, it must hold the respective citizens and the police and the Courts, so it's justice rather than police focused. What we've been used to in New Zealand are undercover operations where they have been tolerated and permitted because they strike at the organisations who cover crime up, and it has been held, everywhere really, that these sort of undercover operations are permissible, but apart from *Cameron*, which has received no publicity that I can see, and I don't know if the New Zealand public have ever understood that this scenario technique occurs, but it is a big step up from the undercover operations to corrupt a person, basically, psychologically, over this extended period, paying him money and putting the pressure, psychological pressures, on him on the number of occasions and using corrupt police – I mean officers to feign corruption, who have access to the police file and can uplift exhibits. My submission is the lies and tricks and deceit inherent in such – in what happened here went beyond the pale and is not consistent with a credible system of justice but inconsistent with it.

ARNOLD J:

I must say I have some difficulty understanding that distinction between undercover work while the offences are being committed, the normal sort of undercover thing and this sort of investigatory technique, as you rightly say, they both involve deception. There's no doubt, in the ordinary undercover operation, that the suspects would not act as in fact they've acted if they realised the people they were interacting with were

police officers. It's only because they think they are fellow offenders involved in an enterprise together.

MR PAINO:

My answer to that is the undercover operation is not designed to – it's designed to detect crime and to catch people committing crime, it's not designed to provide confessions in a formal –

WILLIAM YOUNG J:

Is that right? I mean I agree the standard, I mean there are a whole variety of undercover operations, from going to a tinnie house and buying cannabis to being infiltrated into a criminal organisation but wouldn't sometimes a purpose of the – wouldn't the purposes of such an infiltration include obtaining confessions in relation to historic offending?

MR PAINO:

Yeah I think there possibly have been one or two that that's happened in but really, I mean the suspect's defence to undercover operations is entrapment. That's a defence to say, "Well, you know, you've gone too far." Well what's the defence here with respect? What's the defence where you've been induced into confessing?

WILLIAM YOUNG J:

Well there may not be a defence.

MR PAINO:

Well this is the defence I suggest. Now one thing Justice Arnold is to be amongst and I take the point that there are a large number of undercover operations, so just using that term as can encompass a lot of things but the general undercover operation is to observe crime. Now we haven't got to the stage except in that case of *R v Smith*, as I recall the Court of Appeal decision where you're actively involved in dealing methamphetamine. That's not permitted. So it's more observation and opportunity. The paua poachers for an example is a classic, you know, people drop paua poachers off at Makara, police or the Fisheries and they pick them up and I've often said well what happened if you went round Oriental Bay and dropped a whole lot of car thieves off and they went and broke into the cars, would that be permitted? On the basis that you're collecting all the people's radios and on selling it in a receiving operation and I don't think it would but undercover is really about observing

crime and sometimes being in the position of doing it and as I say the defence is entrapment but here it's about confessions, it's about – and so I see this as a step up, a marked step up, where you're putting the emphasis on tricking someone to confess.

ARNOLD J:
Yes I accept, certainly accept that the context is difference but, well it's just the fact that, well indeed the Evidence Act explicitly accepts undercover police officers, doesn't it? It has provisions about how they give evidence and so on.

MR PAINO:
Yes.

ARNOLD J:
So it is accepted that deception of people involved in offending is a legitimate technique of at least law enforcement.

MR PAINO:
Yes, so in my submission the only commonality is that it's undercover.

ARNOLD J:
Yes okay.

WILLIAM YOUNG J:
And they all involve deception and deceit.

MR PAINO:
Yes, yes deception and deceit. So as I say this is a step up from undercover work and of course I make the point that whilst the statutory reference to undercover permits undercover operations, I don't think when they did that and enacted that section, together with section 30, that these police undercover techniques were even considered.

ARNOLD J:
No, well those, yes those provisions do seem to be directed at the more traditional.

MR PAINO:

And, you know, this is 2006, the Evidence Act and this is sort of *Cameron* kicking off.

ARNOLD J:

Yes.

MR PAINO:

Planned beforehand by the look of it. Another matter which under section 30, and I was going to deal with this just before the luncheon break is this question and this is really my last point, is this question of prejudice resulting from admission, which I referred to in paragraph 86 of my submissions. So what I said there was that this scenario involves stand-over tactics, receiving and moving stolen property, collecting debts from prostitutes, dishonestly obtaining truck loads of cigarettes, handling cash, passport fraud, conspiracy to pervert the course of justice and I referenced the scenarios there, passport fraud to facilitate a paedophile's departure from New Zealand, receiving 33 pounds of cannabis. It's not just in some nebulous concept, it's actually cannabis that's actually being traded and trading 12 military style firearms with Asian gang members for jewels and cash and I refer in paragraph 86 to each scenario where those activities took place. I don't accept, in a strict sense, that no criminal offence was committed because if you do commit the criminal, in my submission of being a conspirator to a drug deal or being a party to a drug deal, the fact that the principal may have a – may not have an unlawful motive or maybe is different, there doesn't seem to be too many protections at law for the police who have 33 pounds of cannabis and are selling it to the Chinese, for someone who was involved as a party and who believes it happening, I mean the likelihood is he wouldn't be prosecuted but I'm not convinced that there's no offence there.

WILLIAM YOUNG J:

I'm sorry this is a bit of, it's in effect a red herring, but there cases on fake conspirators as to whether it is a conspiracy?

MR PAINO:

Most of them say that – well almost all of them say that no offence has been committed but personally I'm not convinced that if you willingly, you know, the Misuse of Drugs Act 1975 has clear defences for possessing and selling drugs and I can't see in the Misuse of Drugs Act, a defence to say that it's part of a fake gang and the

police were doing it and therefore you're immune but I just make the point, I don't wish to dwell on it.

So in order, you know, to get to the trial scenario, in order to get to the situation where the police introduce this evidence, for example in this case it's a two page brief. I went to Dunedin, I spoke to this man and then here's the audio and that's it. So the defence has to do all the running to say, "Well why did he confess?" Well he confessed because and it's inevitable in my submission that almost all of the scenarios would come up to show and illustrate why he wanted to join the gang and what were the incentives and what would he have thought if the gang didn't accept him and so bringing all that up, which has been when he's been corrupted by the police to behave like that, in my submission section 8 considerations come into it, as to whether or not he can offer an effective defence to say that, "I only did this for this reason" when in fact by offering that defence its efficacy is undermined by his dishonest associations, motives and his corruption.

O'REGAN J:
Is this a section 8 argument or a section 30 argument or both?

MR PAINO:
I don't see them as slots, just like reliability is a section 28 argument. I don't see it confined only to section 28 and the Crown concede that in their submissions and the Court found that. I see reliability as being relevant under section 30 and I section 8, because it says "any other matters" but it doesn't say "any other matters not contained in any foregoing provisions."

O'REGAN J:
But you're not saying this is an issue that goes to whether unfairly or improperly obtained evidence should be admitted, you're just saying this evidence, however it was obtained shouldn't be admitted because of the prejudice that's involved in having to explain what he did in order to undermine the police argument that his confession is true.

MR PAINO:
Yes and I refer to section 8 because section 8 actually does recognise that, as a – as having an unfairly prejudicial effect on the proceeding. So section 8 was referred to and was a ground of objection at the High Court hearing. But in my submission

section 8 is, “any other matter” that’s referred to in section 30. Does that answer Your Honour’s question?

O’REGAN J:
Yes.

MR PAINO:
Well I have finished, unless there are any more matters.

ELIAS CJ:
No, thank you. Yes Ms Markham.

MS MARKHAM:
Thank you Ma’am and very briefly in reply in relation to this Coroner’s inquest issue. That the difficulty began with the unavailability of Detective Senior Sergeant Miller at the 344A hearing. He was overseas at that time and so was unable to give evidence and be asked about what he, in fact, told Mr T W W’s parents. We now have his job sheet detailing those discussions and that is annexed to the affidavit of Ms Walker which is tendered by the respondent. We also have Detective Senior Sergeant John Mackie give evidence and he was asked about this at the hearing but he was in the invidious position that he wasn’t present when obviously Detective Senior Sergeant Miller made the approaches and so he was answering largely –

ELIAS CJ:
Did he know about the approach. Was it part of the overall?

MS MARKHAM:
It was yes. As I indicated earlier, yes it was part of the operation, the timing of it but having said that I certainly don’t accept that the Crown witnesses were lied to or corrupted as has been alleged. The situation was, there was a Coroner’s inquiry that was on foot. There had been a report to the Coroner and an inquiry was underway but under the Coroner’s Act, the inquiry is essentially put on hold while there is an active police investigation. So the Coroner’s office was seeking regular updates from the police as to the status of that investigation and in fact there was an approach or a question raised by the Coroner’s office in April which is the same April 2013, I think, the same month that Detective Senior Sergeant Miller made the approaches to the parents.

ELIAS CJ:

But that is not why he made the approach?

MS MARKHAM:

No, not well, no it is not. But it doesn't mean that he was lying to the parents.

ELIAS CJ:

No but it is part of the overall deception.

MS MARKHAM:

Well I accept that the timing of it was.

ELIAS CJ:

Yes.

MS MARKHAM:

But certainly the prospect of a Coroner's inquest was not a fabrication, that was very much on the cards. The only reason that it wasn't held, well it was, in all likelihood about to be held. The reason that the Coroner's inquiry had to be put on hold was because this undercover operation was under way. So I mean I accept that the parents weren't told that the inquest isn't happening right now because there's an undercover operation, so to that extent they weren't fully informed.

ELIAS CJ:

Were they weren't making enquiries. Look I think that it is sufficient that you have acknowledged that the phone calls were for the purposes of the undercover operations.

MS MARKHAM:

Yes. And yes, I certainly, I don't accept that there was any lies. There was a difficulty in the sense that John Mackie in his evidence referred to the possibility that DSS Miller had told the parents that there were dates that had been set for the hearing, that certainly did emerge in evidence but that is not reflected in the job sheets and I don't accept the fact it was conveyed to the parents that there were dates that had been set and nor do I accept that it was somehow conveyed that he was likely to be charged, as I think my learned friend intimated.

WILLIAM YOUNG J:

He and his partner were certainly of the view that they were likely to be charged.

MS MARKHAM:

Yes that comes through quite clearly in the intercepted conversations and it seems the message has got garbled as it's being passed through the family members.

ELIAS CJ:

Although the mother wanted them to get a lawyer so obviously had got the impression that something was happening.

MS MARKHAM:

Well the evidence is an unsatisfactory state and I accept that. But I certainly don't accept that it was conveyed to them that there was going to be a charge.

O'REGAN J:

But the reason for the call was to make it seem as if there was some imminent steps and therefore it was not something that he could put behind him.

MS MARKHAM:

On the back burner, yes. I would accept that Sir, yes. And ironically this whole thing in fact, nearly derailed the operation because we will see, as you see in the transcripts, the intercepted transcripts. Mr T W W became very suspicious because he had just given his name and address to Ben in order that the corrupt officer could undertake the background enquiries and then he gets this message from his parents that he is going to be charged and he assumed that that may have had something to do with Ben.

WILLIAM YOUNG J:

He was suspicious of Ben.

MS MARKHAM:

He was suspicious and telling his partner that he may well fly home and not have anything more to do with him. So it was a rather twisted end to the operation.

Unless I can assist in any other respect, that's all I wanted to say in reply thank you.

GLAZEBROOK J:

Did you want to make a comment on the proposition that I put to your friend?

MS MARKHAM:

I am sorry Ma'am, in relation to?

GLAZEBROOK J:

Well effectively that if Scott had been a police officer, he wouldn't have been able to imply that there was a necessity for the appellant to answer his questions. Now Scott did say there was a necessity to answer the questions. There was obviously the out. The appellant could leave at any time but nevertheless if he didn't leave, there was an implication that he had to answer the questions. Now police officers, while they can ask what question they like, they can't pre – in the investigation phase, say that a person has to answer. Unlike Scott who said, "You have to answer; you have to tell the truth."

MS MARKHAM:

As to whether I would characterise the interchanges as a requirement that he answer, I am not sure I would go that far. Certainly in relation to the subject matter at Baby T's death, Scott was quite explicit that he didn't have to answer those questions if he didn't want to and that was reiterated. I accept that he said at various points, "It's important for you to tell the truth, we need 100% truth here" and exhortations to that effect but as to whether that amounts to a compulsion or would, even in a police interview, I wouldn't accept that Ma'am.

ELIAS CJ:

Did you want to comment on the discussion that was held about section 30 and the fact that because of the balance in assessment, that unfairly, that it is not an overlap with section 28 and that the product of conduct which might tend to produce unreliable evidence, is something that could be unfair.

MS MARKHAM:

Well that was –

ELIAS CJ:

Because your submission has been that there is a bit of a dichotomy between, if you are in unfairness territory you are really in section 28 and the Judge found that this wasn't section 28.

MS MARKHAM:

Yes the Court of Appeal certainly put it on the basis that Judge Collins' finding didn't preclude them from talking about the inherent risks of unreliability in the technique and my answer then and now would be that if you have a confession that is completely reliable, yet he is inconsistent with that to talk about risks of unreliability in the unfairness context because you can have all the risks that you like, if the confession is found to be reliable then that is the end of the matter. It is undermining of section 28 to then re-traverse those rounds under the unfairness umbrella.

ELIAS CJ:

Well, but the unfairness is directed to the improper obtaining rather than to the result of an unreliable statement.

MS MARKHAM:

Well, I would accept that there is a risk of unreliability as there is with a police interview, but as to whether there is such a risk as would give rise to unfairness, we have a finding that this is a reliable confession.

ELIAS CJ:

But if we had a police – if we had a breach, say, of the Bill of Rights Act, it's no answer that the statement is – it's no complete answer that the statement is reliable. Why should it not be the case that with these enhanced techniques the Court should similarly be vigilant to have a prophylactic purpose in this?

MS MARKHAM:

Well, I fully accept that vigilance is very much appropriate and I'm not suggesting that the Court under section 30 can't look at the same conduct in determining unfairness but that they are separate questions and if – yes, certainly the circumstances in which this confession was obtained need to be scrutinised under section 30 but that comes back to the point that I made at the outset, that in my submission what we're looking at there is improper conduct of an outrageous standard and beyond the pale and so forth. Unreliability is something that's dealt with under section 28.

ELIAS CJ:

And what, remind me again, what's your basis for saying it has to be outrageous, that standard?

MS MARKHAM:

Well, there are various articulations of that standard but the outrageous expression is found in *Barlow*, in particular in the judgment of Justice Richardson, dealing with the unfairness aspect of the arguments in *Barlow*. The affront to the public conscience is the *Karalus* test and I think the Canadian case of *R v Oickle* 2000 SCC 38, [2000] 2 SCR 3 talks about appalling conduct. I mean, they are all various expressions that amount to much the same thing, in my submission. So certainly the police conduct needs to be examined but –

ELIAS CJ:

It's just that those standards against the legislative language in section 30 with unvarnished unfairly –

MS MARKHAM:

Mmm.

ELIAS CJ:

– may jar a little.

MS MARKHAM:

Well, the unfairness finds its place in section 30 alongside breaches of the Bill of Rights which –

ELIAS CJ:

Which may be quite technical.

MS MARKHAM:

Which can be and that's when the balancing test comes into play. I mean, it's interesting that the authors of *Mahoney* talk about the unfairness jurisdiction as being, you know, of great importance because, you know, it is the catch-all, if you like, but in fact it's got a lot less work to do now than it did, certainly in the pre-BORA days when unfairness was the jurisdiction that dealt with search and seizures and so

forth, and we also now have breaches of the practice note referred to explicitly and we have unlawful conduct that's been separated out as its own head of improper conduct under section 30, if you like, so the scope, not so much the scope but the ability of section 30 to really influence the laws has narrowed in recent times because there's recognition under separate provisions in the Evidence Act of matters that used to fall within the unfairness jurisdiction. Similarly, Ma'am, the interviews conducted where accused persons have some sort of internal psychiatric problems that aren't manifest to the police, those also used to be dealt with under the unfairness jurisdiction. Now they are dealt with explicitly under the reliability section. So it follows, in my submission, that where you do have no question of the Judge's Rules Practice Note being infringed that unfairness will be of a high threshold because all of the other bases have been covered.

ELIAS CJ:

Thank you, Miss Markham. Yes, Mr Downs. I suppose we should – Madam Registrar, call the case. We've taken our appearances. We called it all, that's right. I'm sorry, yes. We took appearances anyway so we must have.

O'REGAN J:

We should excuse counsel if they want to go.

ELIAS CJ:

Yes, yes. Counsel in the T W W matter may leave if they want to.

MR PAINO:

Does that give permission for our equipment and gear to leave as well? I mean, I'm quite happy to leave and – but would it be best if we leave and gather our equipment in the break? I'm quite – I'm going to stay –

ELIAS CJ:

Is that all right? We'll take a –

GLAZEBROOK J:

No, no, why don't we take five minutes now?

ELIAS CJ:

Yes, we'll withdraw for five minutes.

COURT ADJOURNS:3.01 PM