IN THE SUPREME COURT OF NEW ZEALAND SC 4/2015

[2015] NZSC Trans 17

TREVOR JOHN MOMO-WILSON

Appellant

v

THE QUEEN

Respondent

Hearing:	7 July 2015
Coram:	Elias CJ
	William Young J
	Glazebrook J
	Arnold J
	Blanchard J
Appearances:	K H Cook and G Ghahraman for the Appellant
	M D Downs and Z R Hamill for the Respondent

CRIMINAL APPEAL

MR COOK:

May it please the Court, counsel's name is Cook and I appear with Ms Ghahraman for Mr Momo-Wilson.

ELIAS CJ:

Thank you Mr Cook, Ms Ghahraman.

MR DOWNS:

Yes, may it please the Court, Downs and Ms Hamill for the respondent.

ELIAS CJ:

Thank you Mr Down and Ms Hamill. Yes, Mr Cook?

MR COOK:

May it please the Court. I intend to deal with the first question which really revolves around the correctness of the Court of Appeal's approach in *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806, and then Ms Ghahraman will deal with the second question which revolves around the entry of the guilty pleas and the evidence.

In terms of my structure, subject to any questions, firstly to go through the facts very briefly and outline how I say that that conduct is sufficiently egregious and then secondly I'd move to the submissions on the underpinning, or the rationale which underpins the stay jurisdiction, the residual category, and I submit that it shouldn't be rigidly approached or worded, and in this context I'm going to discuss *Moevao v Department of Labour* [1980] 1 NZLR 464, and the analogy that His Honour Justice Richardson drew with the philosophical underpinning of contempt, and then I'll move to discuss *Warren v Attorney-General for Jersey* [2012] 1 AC 22, and the analysis of the factors in relation to whether the stay should be granted. I will submit a response to the Crown's proposition that section 30 may be helpful, is that it's not necessarily always going to be helpful, given that philosophical underpinning of the stay jurisdiction and section 30 is a relatively confined rights based assessment. In that context I then turn briefly to the recent decision of the Canadian Supreme Court in *R v Babos* 2014 SCC 16, [2014] 1 SCR 309, just contrasting how they deal with it there, and then finally deal with the errors which I say the Court of Appeal committed in relation to the stay jurisdiction in *Antonievic*. It's a somewhat odd position that Mr Momo-Wilson is in because as you know he wasn't one of the appellants –

ELIAS CJ:

Well the Court's really put you in that position. I just wonder, Mr Cook, can you tell me, the appeal against conviction, was it actually abandoned? What do you say the status of the appeal is?

MR COOK:

I say it wasn't abandoned but I acknowledge that I wasn't going to win it because it had been, the issue had been decided by a permanent Court of the Court of Appeal and I was conscious, because the decision of this Court in *Lee* and *Jones* had come out, that there was no jurisdiction unless the conviction appeal was dismissed, and so I made it pretty clear, well hoped I did, that I can't promote it any further but there is an application for an appeal against conviction, that was filed pre that decision, and it was because the Court hadn't heard them contemporaneously that the matter couldn't be decided.

ELIAS CJ:

So you invited the Court to dismiss the appeal against conviction and you say that that's the formal order of the Court –

MR COOK:

Yes.

ELIAS CJ:

– and that's what you're appealing?

MR COOK:

Yes.

ELIAS CJ:

And that on the basis that you presented the case to the Court, are you inviting us to say that the Court dismissed it for the reasons in *Antonievic*?

MR COOK:

Yes.

ELIAS CJ:

Okay, thank you.

MR COOK:

If I could turn to the facts. My learned friend for the Crown says that the facts are well known, and they are, but they are extraordinarily important in any stay case because it's from there which everything else flows. I deal with them in my

submissions at paragraph 6 to 24. But with those in mind I just wanted to emphasise why I say that those facts to conduct sufficient to warrant a stay. The law should apply to everyone. If the law were not thought to apply to the executive then it's binding nature would be an illusion and it matters not whether the executive is motivated by noble cause or whether what they do is in pursuit of some otherwise lawful end, the ends can't justify the means and the law is the law and that is one principle of the rule of law and there is a public, an obvious public interest. Nothing I'm saying is going to be controversial or unknown to the Court but in my submission it's relevant to say it so that we know why what happened in this case was so bad.

Here the police acted without legal authority in drafting and executing a fake search warrant, and that's ordinarily a tidy, circumscribed process which allows the executive to intrude into the citizen's affairs. They then lied to the owner of the storage unit by telling him that they acted with judicial authority. They then illegally engaged the Court in their investigation by swearing false oaths and having someone appear before them for that Court and importantly in this case they attempted to embroil the late Chief District Court Judge into their investigation. The purported justification for this seemingly was that the judiciary could be utilized as an informal and malleable way of, a pre-approval process for the police investigation.

ELIAS CJ:
In the lower Courts, was there any explanation of the basis that the police thought they had? I know the protocol and the manual, but was there any authority cited in support of an application to the Chief Judge?

MR COOK:
No. And by authority I'm, in terms of I'm taking that as meaning some authorisation from somewhere. It was my understanding, the evidence from Superintendent Drew was that it was just based on the fact that they didn't want to mislead the Court, and he went there –

ELIAS CJ:
What status did the Chief Judge have in relation to this case? He wasn't seized of it?

MR COOK:
No.

ELIAS CJ:

All right, thank you.

MR COOK:

Probably more a matter for my learned friend –

ELIAS CJ:

Yes I will raise that with Mr Downs.

MR COOK:

The constitutional implications of that approach, in my submission, are extraordinarily serious when one leg of the Governmental tripod deceived the judicial leg, that's the executive. The consequences flowed that the citizenry will not trust law enforcement agencies, unless those agencies uphold the law themselves. Equally little trust will be given to those who are supposedly independent bulwarks against the State if they are able to be manipulated by other arms. If compliance with the law is reduced to a matter of optional police expediency then the rule of law isn't upheld and respect for and importantly confidence in the legal system is wounded. It has the potential to go beyond serious and deliver a mortal blow to the independence of the judiciary and the rule of law. There is a public right to a fundamentally independent judiciary and the police breached that and it's a public right and therefore it can't be waived unilaterally. My submission is that in this case the quantification of the value that the judiciary places upon its own prestige and cache and it's process, not being abused by the executive is a crucial determinant in the resolution. Justice Simon France acted in an entirely appropriate way to protect the esteem and authority of the judiciary as Professor Phillip Joseph has correctly stated in his text, it's not cited but it's para 21.3.1, "Confidence is likewise destroyed when right – " he's talking about the independence of the judiciary and confidence in the justice system, "Confidence is likewise destroyed when right minded people believe that the institution or independence of Judges is compromised." And the relationship between the executive and the judiciary is a special one. Whatever overlap there maybe under constitutions based on the Westminster model between the exercise of the executive and the legislative powers, the separation between the judiciary and the executive.

ELIAS CJ:

Are you reading from your submissions?

MR COOK:

No, Professor Joseph was a note that I wrote down.

ELIAS CJ:

Yes.

MR COOK:

The relationship between this, the judiciary and the executive is a special one and it is a characteristic feature of democracies and in this case there has been an unfortunate blurring of it. Now the Crown, in their submissions, say that there's no bad faith but an extraordinary feature of this case is that at no stage was there independent legal advice taken and it was in –

ELIAS CJ:

Are you running a submission that there was bad faith?

MR COOK:

No.

ELIAS CJ:

No, so –

MR COOK:

No, because the Crown say there's no bad faith but I'm just saying that doesn't cure all that happened. It was a sustained process of deceit without stopping to think of the extraordinary consequences, and it was in the face of all of that that the High Court was asked to act to prevent significant damage to the moral integrity of the justice system, which brings me to a submission about the underpinnings of the stay category. Had you not had the benefit to read the judgment which was just delivered, my submission is that Lord Kerr in *Warren* stated it unilaterally when he said, and I'll come back to this in a short moment, that the residual category is a general jurisdiction to prevent an abuse of power to protect the integrity of the criminal justice system. Lord Nicholls talked about in *R v Loosely, Attorney-General's Reference (No 2 of 2000)* [2001] 1 WLR 2060, that bringing the administration of justice into disrepute and Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, being an affront to the public conscience and the reason for acting, goes back to what Lord Devlin was saying in *Connelly v DPP* [1964] AC 1254,

that it can't be abdicated, it's the responsibility of the judiciary. It's highlighted by Lord Griffiths in *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42, when he said that it must be because the judiciary accept the responsibility for the maintenance for the rule of law, embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My submission is that the wording of the statement is important because there is an infinite variety of ways in which the integrity of the justice system can be harmed and the reason to keep it at that relatively general level is so that the Court doesn't feel as if they're the categories in which they have to put something in before they can take the extreme step of staying a proceedings and Lord Steyn at *Latif*, which is in the paginated bundle at 392 of the joint bundle of submissions.

ELIAS CJ:
The bundle of?

MR COOK:
The joint submissions. There should be a bundle of authorities, sorry, bundle of authorities. It's tab 11 and you'll see there's a single number right at the top, that's been noted in, and here in 392.

ELIAS CJ:
Sorry, 392?

MR COOK:
Yes.

ELIAS CJ:
Sorry, what were you taking us to?

MR COOK:
See in the middle of the page, it's page 113 of the report but it's 392 of the paginated bundle and Lord Steyn says there that, "An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful." And in my submission the reason His Lordship is

doing that is because of the many and varied ways that it can arise. He doesn't want, in my submission, to have it limited to categories.

Now the next proposition in relation to the general rationale I'd like to deal with is how far it extends and why the integrity is so important. In my submission *Moevao*, which is at tab 2 of that same bundle, is a very relevant decision and importantly it was the decision that Justice Simon France utilised when he made the decision in the High Court. Three judgments delivered, in my submission Justice Richardson elaborates on metes and bounds of the jurisdiction. His Honour's decision starts at page 31 of the paginated bundle and talking about some New Zealand authority at 33 he discusses *Connelly* which was the first point in – it's widely recognised as the first point in the English law where this ability was recognised and at the top of that page 33, you see between 10 and 20 he is talking about the existence of the jurisdiction and then page 35 he's quoting Lord Devlin's injunction and His Honour Justice Richardson agrees that the responsibility is seen to rest on the Court and it could not be abdicated. Now Lord Devlin's response there, "Are the Courts to rely on the executive to protect their process from abuse," was directly in response to the solicitor-general, Sir Peter Rawlinson's submission that executive control would be a sufficient overarching control. It was rejected in *Connelly* and in my submission it was rejected by the Court here. The reason, the quotes that follow from His Honour Justice Richardson are important and form the basis of the point that I'm trying to get across about the underpinning rationale. Just from line 30, "It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this."

Now those two related aspects are what in my submissions, they're two strands of the same rope. They are protecting the moral integrity of the Court and rather inaccurately in the submissions I talked about it being the macro focus, which is a phrase to capture the fact it's much wider than the case immediately at hand. His Honour Justice Richardson then draws an analogy, a very apt one in my submission, with contempt, and he quotes Sir Jack Jacobs seminal article, *The Inherent Jurisdiction of the Court*. That, "The authority of the judiciary is to uphold, to protect and to fulfil the judicial function of administering justice according – "

WILLIAM YOUNG J:

Are you at the top of page 36?

MR COOK:

Yes. Now the reason that I submit that the analogy with contempt is a very, very important one is because that is one of the main basis that the Court is acting, to curtail the right to freedom of speech in relation to contempt law. It's to protect the moral integrity of the Court and I quote in the written submissions from a decision of the constitutional court of South Africa in the decision of Justice Kriegler.

ELIAS CJ:

What page of your submissions, what paragraph?

MR COOK:

Page 22, paragraph 82. It bounces forward somewhat but…

ELIAS CJ:

Thank you.

MR COOK:

It's flowery language but it makes the point that it's what the Court's got.

ELIAS CJ:

I just don't know why you need the analogy with – nobody is denying that there is a jurisdiction, which might be why you'd need to invoke the analogy.

MR COOK:

The reason that I'm invoking the analogy, and I pray it in aid, if I can put it that way, is because it shows just why it's so important when you're dealing with this moral integrity aspect, because it's almost come along to scratch just to say, oh that conduct seems extraordinarily bad and then it's to follow it through and to think it out and to break it down, to disaggregate it into why it's bad, it's bad because it attacks these foundational notions that are not often explained but they are so important. It's not an instance of an attack, it's attacking the foundations, it's really going to the heart of the matter, and to put it bluntly, that's what I quoted that. I thought it was a very good description about why the integrity is important, because it's what the Court relies on, and in this case the conduct was directly aimed at that integrity. Whether it was intended to be aimed at it, I accept that that's, it wasn't, but it affected it nonetheless.

WILLIAM YOUNG J:

Why isn't it enough just to denounce it? Why do you also have to stop prosecutions as well? I mean it's like shouting, isn't it?

MR COOK:

Well –

WILLIAM YOUNG J:

Making a point by shouting.

ELIAS CJ:

Maybe it's shouting if you don't do something about it.

MR COOK:

That's probably the point that I was – that is one response. Is it enough just to say it or is it enough – and that's where the balancing comes in, that's one of the fulcrum factors, is it enough just to say it or do you actually say, look, it's not going on any further, we're just not going to lend our processes to this occurring.

WILLIAM YOUNG J:

But it's not going to go any further. I mean I think it's reasonably clear the police are unlikely to obtain false search warrants or commence a fictitious prosecution again. So the denunciation had achieved its purpose.

MR COOK:

It might make them think, in my submission it would make them think twice when they start thinking outside the square again about what are the fundamental aspects that we have to confront and the disassociation in my case of staying the – in my submission of staying the prosecution, is the best way to uphold that moral integrity and it has the collateral happy effect of denouncing the conduct and also of ensuring that it doesn't occur again.

WILLIAM YOUNG J:

Why can't we denounce the conduct of the police on the one hand and your client on the other. Why can't we do it simultaneously?

MR COOK:

You can. But, my submission is that the way that moral integrity is best protected is by staying the prosecution and that means that my client obviously doesn't – windfall is the wrong word, I don't accept windfall, it's just a collateral benefit that he's getting for being involved in something that wasn't of his doing –

ARNOLD J:

But are these the only two options, a sort of oral denunciation or a stay. One of the points that is made in the, by the Supreme Court of Canada in the *Babos* decision, part of the analysis when you're thinking about the stay in the context of not an unfair trial but undermining the integrity of the system, one of the factors the Court identifies that you should think about is what are the alternatives available to the Court, and an alternative available to the Court of course is to exclude evidence which is exactly what happened in this case in relation to the minor offending. So why is an alternative such as staying in respect to minor offending, or excluding certain evidence and so on in relation to minor offending, not a sufficient marking of the wrongfulness of the behaviour?

MR COOK:

Well it can be Sir and the way that Justice Collins did it which was the decision that Your Honour is referring to, is that he, because of the balance he said, it is sufficiently serious that, you know, to draw a line in the sand and exclude the – which was effectively granting a stay on those prosecutions, it was just a different way of doing it, and I have, for myself, in my submission, have no issue with that because that is showing that the Court's taking into account and saying –

ARNOLD J:

Well having dealt with it in that way, how could the Judge then issue a stay? Because doesn't that resolution take proper account of all the various interests of play?

MR COOK:

I wasn't involved in that second aspect but I accept that there's a conceptual difficulty which arises in relation to that.

ELIAS CJ:

Isn't your point though, in your submissions, that you've made a distinction between improperly obtained evidence simpliciter, and something which compromises the integrity of the criminal justice system, and isn't the real problem in this case that the Court, which should have been aloof, was co-opted into the investigation in the particular prosecution. So that's the exceptional circumstance that you're really emphasising here, isn't it?

MR COOK:

It is, and the further point that I was going to make is that, and this was the reason I was saying that it shouldn't really be confined to categories, because this is one of those foundational attacks that hasn't resulted necessarily in the production of X, Y or Z piece of evidence, but has attacked a notion that is extremely important to the criminal justice system as a whole and that is why it's sufficiently serious that the Court should say, because we're not going to be able to say that X, Y or Z piece of evidence came from that, the best way to uphold that integrity, which is the overarching important aspect, is to say that it's stayed. As against that, we will look to see that very serious crimes, people are, that runs the ordinary course, but in this case it's not sufficiently serious to outweigh that. So you look at *R v Mullen* [2000] QC 520, terrorist offences; *R v Maxwell* [2010] UKSC 48 , murder; *Warren*, drug dealing on a grand scale, and these aren't that type of evidence, and the conduct in this was just so different. It is unique the conduct that occurred in this case in the way it attacks those foundational –

ARNOLD J:

What about the situation where the Court's process undercover officers under their assumed names when they're, you know, arrested in conjunction with a whole lot of other people? Does that raise a different set of issues or is there something different about this case from those?

MR COOK:

Well in this case ordinarily that arises from my understanding and it's in the evidence in a situational basis where there is a police arrest and it just so happens that an undercover officer is there. So it wasn't set out to deliberately engage those sorts of things, whereas this –

ELIAS CJ:

What's, also section 35 of, I think Mr Downs' cites, is that some sort of immunity?

MR COOK:

To do with the Misuse of Drugs Act 1975 I think.

ELIAS CJ:

Yes –

MR COOK:

There is an immunity in relation to that because, but I think that that came about because a lot of disgruntled people started lodging private prosecutions against police officers who were undercover in the 80s. I think that's right.

ELIAS CJ:

Oh yes.

MR COOK:

I think that's right. It's a little bit before my time but I think that's right.

WILLIAM YOUNG J:

It doesn't actually immunise them from liability but it just stops them being prosecuted, doesn't it?

MR COOK:

I think, yes, I think it goes to ability of the Solicitor-General so…

ELIAS CJ:

So when the question was put to you about processing them, they don't get prosecuted is the answer is it?

MR COOK:

No, not for those, not for that particular charge. But ordinarily it stops, in my understanding anyway, it doesn't go any further. Whereas this, not only did it go further, but it was actually utilised to build the cover further by saying, oh look he's got a warrant issued, that's what kind of a bad man he is, and that's why it does go to those really egregious aspects. And it's probably a useful time, because there's the

question, that breaks my order slightly, to talk about why section 30 is not necessarily apt to go through these. The factors in there can be relevant but section 30 is relating to a specific instance, usually it's always of an infringement of a right, whereas this is not necessarily a right, although it could be argued that everyone has a right to an independent judiciary, but another way to look at it is it's not a right aspect, it's a foundational attack. And though those factors can be relevant when there is a particular causative link between rights breach and evidence, it doesn't necessarily respond to this type of conduct, which attacks something that's not necessarily seen as a New Zealand Bill of Rights right, but is one of those overarching features of the rule of law.

I did just want to highlight a little bit more of *Moevao* because it does add some precedence in relation, or it does have some importance in relation to the approach that the Court of Appeal took in *Antonievic*. So again it's tab 2 and it's page 36 of the paginated bundle. That rationale that's been spoken about before in my submission places into context at line 21 when His Honour says, "The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purpose of the administration."

My submission, continuation there is not in the restrictive sense of meaning that the trial actually has to continue to constitute the abuse, but His Honour Justice Richardson is meaning quite properly that if the matter before the Court is not stayed, and therefore allowed to continue, is that contrary to the rationale which underpins the jurisdiction. There wouldn't be any point in staying a matter if it wasn't going to continue and in the case on appeal the Court of Appeal uses the word "perspective" which is drawn from the Canadian decisions, and in my submission that's an unhelpful word to use because it led, this is one of the points that I make in terms of the errors, it led the Court of Appeal to focus on whether the trial would be an abuse of the process, and that is too future focused with ignoring what has happened and what has been imperilled –

ARNOLD J:

I thought they were simply making the point that the jurisdiction is not a punitive one but rather it is there to protect the integrity of the system and one had to look at

whether the trial continuing would undermine the integrity of the system. So I thought they were articulating precisely the approach that you were talking about.

MR COOK:

The issue I had was when they used the phrase, "We accept Mr Mander's submission that the focus of the inquiry needs to be on the proposed trial in respect of which the stay is sought," and my submission is that that, because they saw the conduct having happened in the past, and the trial not leading to this conduct coming before the fact finder, that they could draw a distinction and say that –

ELIAS CJ:

Which paragraph in the Court of Appeal judgment are you –

MR COOK:

So that's in the case on appeal on page 45, paragraph 93. It does say at the foot of that paragraph 93, "This future focus ensures that the jurisdiction is not used for improper disciplinary purposes." And the, as the remedy perspective is back two pages, at page 42 of the case on appeal, the heading to paragraph 80.

ARNOLD J:

But isn't what the Court says at the end part of 93 the right approach, would the trial would harm the integrity of the criminal justice system or be contrary to the recognised purposes of justice.

MR COOK:

Yes, and I have no issue with the way that that's phrased, but then with prefacing it with that the focus of the inquiry needs to be on the proposed trial in respect of which the stay is sought, in my submission that moves the focus forward too much because it has to look at also the conduct that has occurred –

ELIAS CJ:

But the trial has to be tainted, surely. Do they say anything more than that? Otherwise stay is not an appropriate remedy.

MR COOK:

I accept that.

ARNOLD J:

And they come back to it at 102, and they say again, this is evaluated in relation to the future trial. The question is whether allowing that trial to proceed in the light of the misconduct will effect public confidence in the criminal justice system. So they're acknowledging this is not a case about whether the trial will be unfair, clearly it won't. The question is will it undermine public confidence in the system if it's allowed to proceed. It seems to that's exactly what you say they should be thinking about.

ELIAS CJ:

And indeed does it differ from what Simon France J said?

MR COOK:

No.

ELIAS CJ:

No.

MR COOK:

The point that I was trying to make was that by focusing too much on whether the trial itself would constitute the abuse of process it narrowed it slightly because then they do so at other points exactly what the jurisdiction is, that you're looking at whether allowing it would harm the integrity.

ELIAS CJ:

It seems to me that this submission really is attacking the submission that was made to the Court of Appeal which they rejected in that there's nothing wrong in the approach adopted, which is one of the reasons why I have a query as to whether there was any identified error of law, because one would have thought that the test applied, or the approach taken in the High Court was, in fact, what the Court approved.

MR COOK:

In terms of when – well, I agree with the proposition Your Honour that the High Court undertook the appropriate exercise in terms of identifying why the jurisdiction exists, and then applying it to the facts, and then on a very specific question of law the Court of Appeal, in my submission, substituted their own view on what those facts were in relation to the exact same test.

ELIAS CJ:

Well you're probably going to have to enlarge on that because it wasn't really developed in your written submissions.

MR COOK:

No. I'm happy to enlarge on that. My submission is that the Court of Appeal fell exactly into what *Grant* was criticised for doing, with the English Court of Appeal in *Grant*. The reason that *Grant* is criticised so much is because the first instance Judge said, identifying the test appropriately, that because there's not a causative link it's just not sufficient, it's just not bad enough to warrant a stay and then Lord Justice Laws and the Court of Appeal in *Grant* said that we believe that it does, and that was on a restricted aspect of law so they substituted their own view, not applying the appellate deference, which is exactly what the Privy Council in –

WILLIAM YOUNG J:

But that's not really why *Grant* is criticised, is it?

MR COOK:

It's one of the reasons.

WILLIAM YOUNG J:

Yes but it's more predominantly criticised on the basis it's wrong.

MR COOK:

And because they say that, that it was too much of a sufficiently punitive –

WILLIAM YOUNG J:

Yes.

MR COOK:

– response but there is, Your Honour, I can pull it up very briefly, I think it might be in *Warren*, where it's specifically said that, it was an option that was available to the trial Judge.

WILLIAM YOUNG J:

In *Warren*?

MR COOK:
In *Warren.*

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Emphasising that it's a discretion but it's the point on which different minds might come to different conclusions.

MR COOK:
And then –

ELIAS CJ:
That was a dismissal of the stay, wasn't it, in *Warren*?

MR COOK:
Mmm.

ELIAS CJ:
And the, yes. Stay, was it? Someone said – exercised it differently but he couldn't interfere because there's no error of law.

MR COOK:
But *Warren* is informative as well, not just because of the way that it, the stay jurisdiction is helpfully described, but because in *Warren* Lord Hope, for example, says look I probably wouldn't have decided it that same way.

ELIAS CJ:
Oh yes Hope, that's right.

MR COOK:

And, but in an appellate function here, and it was an option that was open so I'm going to leave it be, and…

ELIAS CJ:

It's not because it's an appellate function, it's because it's a discretion.

MR COOK:

Yes. It's page 519 of the bundle and it's Lord Dyson's opinion and it's at paragraph 36, and it's the final sentence, it's the tail end, "In these circumstances surely the trial Judge was entitled to decide in the exercise of his discretion to refuse a stay and the Court of Appeal should not have held that his decision was wrong."

WILLIAM YOUNG J:

But he goes on at the end of para 37, "But it is difficult to avoid the conclusion that in *R v Grant* the proceedings were stayed in order to express the Court's disapproval of the police misconduct and to discipline the police," and unarticulated and for that reason was wrong.

MR COOK:

Yes. I don't have the reference but there is a criminal law review article by Professor Ormerod which talks about *Grant* and he supports the decision but as I say I don't have the reference but it's a criminal law review.

WILLIAM YOUNG J:

So it supports the *Grant* decision?

MR COOK:

It does, Professor Ormerod does support it, and he highlights why Lord Justice Laws was entitled to take a different view.

WILLIAM YOUNG J:

I suppose what slightly bugs me is that *Grant* was effectively not followed by the Court of Appeal but then it's front and centre stage in the decision to stay the proceedings.

MR COOK:

Yes –

WILLIAM YOUNG J:

Plus what did strike me as being the wrong part of *Maxwell*.

MR COOK:

Yes. I think my submission can be more simply put than the Court of Appeal did not find an error of law and then proceeded to substitute their own view of how the conduct sat –

ELIAS CJ:

Well they say they do find an error of law.

ARNOLD J:

Yes, what do you say about what they say at paragraph 102 on page 49 of the first volume case on appeal? Do you say that –

MR COOK:

"The Judge's starting point of historical serious misconduct meant that his focus was on the fact that the impugned conduct itself involved an abuse of process," rather than –

ARNOLD J:

Yes.

MR COOK:

I say that that's the perfect place to start because you have to look at the conduct to see how egregious it is to then decide whether it's going to attack the integrity of the justice system.

ARNOLD J:

The Court of Appeal doesn't disagree with that. It's how you use it analytically that they're talking about and that's where this forward looking perspective comes in. What they're really saying is the Judge has used it punitively and that's the wrong approach.

MR COOK:

On the basis they say because if there's no significant connection to any misconduct in the future trial, it must weigh against that of a stay and His Honour Justice France makes that –

ELIAS CJ:

Well your answer to 103, because that's really where they say where the Judge went wrong, your answer to that is that is not what Justice Simon France did.

MR COOK:

Yes.

ELIAS CJ:

And so what passage of Justice Simon France's would you contrast with 103?

MR COOK:

Firstly there's a –

ELIAS CJ:

What passages.

MR COOK:

Yes, well that's the, that's probably the first thing His Honour correctly identifies the basis for it at paragraph 3 but then in the balancing exercise which he starts at – so it's the case on appeal 235, he then goes through balancing exercises. At paragraph 67 he talks specifically about there being no strong causal link, which is if you compare with what the Court of Appeal is saying at 102, "If there is no significant connection… that while not fatal must weigh against the granting of the stay," which is exactly what His Honour Justice Simon France is doing there.

WILLIAM YOUNG J:

He does say at the end of 66, "it is not there to be used as a convenient investigation aid. A firm response is appropriate." So I suppose in a way like a lot of elements in this case it's really a matter of opinion or categorisation. I mean you can –

ELIAS CJ:

Or evaluation.

WILLIAM YOUNG J:

Evaluation, no but you can read Justice Simon France's decision as involving a desire to discipline the police. For instance that last sentence in 66.

GLAZEBROOK J:

But what is the difference between deterrence and discipline? I mean it's very elusive, isn't it?

MR COOK:

And the Chief Justice says in *R v Shaheed* [2002] 2 NZLR 377 (CA) that it's an elusive concept to define during – the President in the Court of Appeals Sir Robin Cooke –

WILLIAM YOUNG J:

But deterrence isn't – what one might be saying is does this allowing this trial to continue involve effectively an approbation of the conduct which we regard as unacceptable. I mean that, I suppose, would be the sort of thing that might make me thing that the trial is an abuse of process as opposed to saying well we need to deter the police. Well the police probably are deterred. I mean it's not very likely –

ELIAS CJ:

Well it's not just the police that need deterrence here. How do these police officers get to see a Judge informally in these circumstances? I just don't understand it. And Justice Simon France, with his substantial experience of criminal justice, that was his reaction.

MR COOK:

And the point that Your Honour Justice Young is making was balanced specifically by His Honour Justice Simon France at paragraph 73.

WILLIAM YOUNG J:

Doesn't 74 just suggests that it's deterrence. Denunciation isn't enough.

GLAZEBROOK J:

But isn't that the point about the residual discretion in any event, it's to maintain the processes of the Court, because otherwise you would never have a residual

discretion if it was, if it didn't affect the trial in some way and it's clear you do have that discretion.

MR COOK:

There could never be a stay –

GLAZEBROOK J:

There could never be a stay in those circumstances.

MR COOK:

Integrity is the wider and it's got a deterrence aspect to it. In my submission deterrence, the remedial category also comes within the integrity, it's just so encompassing, because how do we protect the moral integrity, we deter people from attacking it.

WILLIAM YOUNG J:

But he doesn't think deterrence is required, and again it's all perhaps, you know, angels on the top of a pin, but para 73 he suggest it's not deterrence because it's not required.

GLAZEBROOK J:

But is it an error of law, that's the issue that we're looking at just at the moment, isn't it?

MR COOK:

It is, it's open and –

WILLIAM YOUNG J:

Well we're open to all sorts –

MR COOK:

– no, in my submission it's open to him but he's also saying it's not my primary reason for doing it. That's not the sole reason I'm doing this, is not to deter. My sole, my primary reason is that I am protecting the integrity and so as recognised in *Warren* different views can reasonably be held. He's exactly talking about what Lord Hope was saying when Lord Hope was saying, gosh I –

WILLIAM YOUNG J:

Can I just ask you, I mean we've got two judgments on this, well we've got three really. We've got Justice Simon France, we've got the Court of Appeal with Justice Collins. Does the case turn on whether the Court of Appeal was wrong to find an error of law in Justice Simon France or do we just look at whether their conclusion on a standalone basis was right? I mean it's a pretty dry debate if it turns on –

ELIAS CJ:

Well you might need to have that debate with others on the Bench. I certainly don't see it as dry at all. It might not be as sexy but it's a matter of great moment as to what the proper approach of the Court of Appeal is to exercise of a discretion.

MR COOK:

In a Crown appeal –

ELIAS CJ:

Yes.

MR COOK:

Which is a very limited basis.

ELIAS CJ:

With a limited basis of appeal.

WILLIAM YOUNG J:

Just moving forward, really to put this a little context, my take on the authorities is that if the proceedings were an abuse of process then your entitlement to have the police set aside is probably reasonably clear?

MR COOK:

Yes, and Ms Ghahraman will deal with that.

WILLIAM YOUNG J:

But if it's not then it's far from clear?

MR COOK:

Yes, subject to the intervening aspect of the further evidence which came out.

WILLIAM YOUNG J:

Yes, yes, but so do we just deal with de novo, as between the Queen and your client, whether there's an abuse of process, or are we stuck with what Justice Simon France says, the Court of Appeal said or Justice Collins said?

MR COOK:

In my submission it's probably the same issue, different way, it was just articulated. It's – so my response is that the Court of Appeal decision, they didn't have the ability to do that because it was an error of law so we deal with it on the basis of Justice Simon France and if I'm wrong about that –

WILLIAM YOUNG J:

But why don't we just deal with it on the basis of what we think? I mean that's –

ELIAS CJ:

Because it's not our jurisdiction.

GLAZEBROOK J:

But wouldn't the answer be that there's only an appeal on a question of law if the Court of Appeal got it wrong and there wasn't a question of law Justice Simon France's decision stands for your client.

MR COOK:

Yes well –

GLAZEBROOK J:

Is that the argument, because your client, your client as I understand it was part of Justice Simon France's decision, is that right?

MR COOK:

No. He pleaded guilty –

GLAZEBROOK J:

No? He was there on, he's there on the –

WILLIAM YOUNG J:

He pleaded guilty part way through the proceedings.

GLAZEBROOK J:

Oh, part way through.

MR COOK:

Yes. I wasn't acting for him at that point.

GLAZEBROOK J:

Okay. Because he's there on the decision itself that's all. I'd forgotten that.

WILLIAM YOUNG J:

He'd pleaded guilty before the decision, hadn't he?

ELIAS CJ:

Yes, there was a substantial burden for him to overcome in vacating the guilty plea and we'll hear argument on that.

WILLIAM YOUNG J:

Can I just – the judgment of Justice Simon France did not directly engage all clients so this is why, are you really bound by what he sees, by what the Court of Appeal says or by what Justice Collins says, or can we just look at, is this an abuse of process, deal with it free of what some might regard as technicalities, others not, as to whether the way the Court of Appeal categorised Justice Simon France's decision was appropriate.

ELIAS CJ:

Well that makes the first question post in the leave application inappropriate. You're saying that the issue for us is should the guilty plea be vacated on the basis that he should be able to argue that the prosecution against him should be stayed.

WILLIAM YOUNG J:

Well it maybe the first question, it maybe elliptical.

MR COOK:

And then you've got that overlaying complexity of this new evidence which might then answer it in itself because we're in a new position entirely then because his guilty plea was –

WILLIAM YOUNG J:

I am far from persuaded there ever was any new evidence actually but never mind.

ARNOLD J:

Can I just ask, Justice Simon France didn't look at the question of an alternative response, did he, in his judgment?

MR COOK:

I thought there was a comment, I'm just looking for it, if my memory is correct, that he did look and he thought that there was no other response that would sufficiently vindicate.

ARNOLD J:

Well I won't take up time now, you can refer to it later, but as I mentioned earlier, the Supreme Court of Canada in *Babos* certainly thought that was an important element of the analysis and perhaps the Judge mentioned it in passing, I'm not sure, but I don't recall, but there's certainly no detailed discussion of an alternative response. Isn't that an error in approach.

MR COOK:

Because of the way in which the conduct has directed it, the Court, and the Courts conduct, the Chief District Court Judge's conduct, in my submission, potentially no other alternative response that was available and if –

ARNOLD J:

Well that's going to the merits of whether another alternative would have made sense or not. all I'm really asking is do you accept that that is part of the analysis as the Supreme Court of Canada indicated?

MR COOK:

They must always look to see whether there is an alternative response that will sufficiently vindicate the attack on the integrity.

ARNOLD J:
So one would have expected to see some analysis of that?

ELIAS CJ:
Is there any in the Court of Appeal?

ARNOLD J:
No because they didn't do it either.

ELIAS CJ:
No, but I'm not –

ARNOLD J:
But I mean they were looking at the question of whether the stay should have been granted.

ELIAS CJ:
Yes, but I'm not sure, for my part, that the concession just made is one that I necessarily go along with because I'm concerned about the extent to which these discretions which are necessary for the administration of justice are being hedged about by words and approaches and I really wonder whether appellate Courts would do better to leave well enough alone, and the original principles, in cases like *Moevao* may be sounder.

MR COOK:
The reason that I gave concession is because intuitively there must be at least, if it flicks through for a mere moment –

ELIAS CJ:
Yes, yes.

MR COOK:
– then you'll make, well, but I, I do not deviate from my position that there was no remedy, short of what occurred in this case, that could have been properly given, given the direct attack on those fundamentals.

ELIAS CJ:

Yes, and you must be right that as a matter of logic, if there is an alternative remedy it must be considered. I suppose I was reacting at the formalistic approach that if it isn't mentioned there's been an error of law.

MR COOK:

Yes, I accept that.

ELIAS CJ:

And I had understood you to accept that there has to be consideration of it. But it's only a contextual consideration, where the circumstances prompt it.

MR COOK:

Yes, and this case, as I said before, this case is unique in what occurred.

WILLIAM YOUNG J:

But they're all unique. When *Warren* was unique *Maxwell* was unique, *Grant* was unique.

MR COOK:

I think *Warren* and *Maxwell* have got similarities, between the two of them.

WILLIAM YOUNG J:

But they're all, I mean, they've all got similarities.

MR COOK:

But they didn't go to, in *Maxwell* they didn't go to a Judge and say, hey, is it okay if we can put forward this fellow as having, we're going to give him all these benefits and he's going to be a super grass and come along, they didn't go to a Judge and talk about that, it was directly there. This is unique in the way that it's gone to an institution which is meant to decide these things and be independent, that's what I, when I say "unique", that the way I mean it. There is an unfortunate, a thematic refrain, when you're looking at the other cases about themes of that it's misleading police or various things like this, but this is different.

BLANCHARD J:

Did anyone else in the Court system know anything about the conversation between the Judge and the police officers?

MR COOK:

No, there's no evidence that…

BLANCHARD J:

So it didn't really go anywhere other than giving the police officers the feeling that it was alright for them to do what they were doing?

MR COOK:

They thought that –

BLANCHARD J:

It didn't impinge on the integrity of the Court, as it would have done had the Chief Judge communicated with a registrar or another Judge and said, I've just given this permission.

MR COOK:

Well, my submission is that it did impinge the moment that they went to the Chief Judge, who was the titular head of that Court, but I accept that they didn't then go and involve other Judges in the approval of the deceit, they didn't involve them in the deceit by appearing before them.

BLANCHARD J:

Well, in a sense it didn't go anywhere.

MR COOK:

That's because they thought they had the tick.

BLANCHARD J:

Mmm, but –

ELIAS CJ:

And they didn't reveal to the Judges in front of whom they appeared that this was a deception –

MR COOK:

No.

WILLIAM YOUNG J:

But they –

ELIAS CJ:

– they relied on fact that it had been revealed to the Chief Judge presumably?

MR COOK:

If –

WILLIAM YOUNG J:

But I was going to suggest that had they consulted, the Judges before whom Wilson appeared, there would have been further complaint or further conscription.

MR COOK:

Oh, I agree. I mean, that's just getting worse and –

WILLIAM YOUNG J:

I mean, they couldn't win either way.

MR COOK:

– that's getting worse and worse, or a Judge might have said, “No.”

ELIAS CJ:

No, no, that's simply disclosure, yes, it’s a different, different stage, the investigative stage.

MR COOK:

A Judge might have said, no, not happening.

WILLIAM YOUNG J:

Well, they might well have said, no.

MR COOK:

Mmm. So –

WILLIAM YOUNG J:

Say, I don't want to be engaged in a charade.

MR COOK:

Yes, and that's the, that would have harmed what the police wanted to happen. So they went to the Chief District Court Judge, said – well, they didn't promote the evidence, they said, if you've got any questions we're here to answer, and then they utilised that.

ELIAS CJ:

I just don't understand how they got to see him.

MR COOK:

Well, that's probably for Mr –

ELIAS CJ:

I mean, as Richardson J says, "The Crown is just another litigant." Anyway, I'll have to ask Mr Downs that.

MR COOK:

There's just a couple of points just really in response to some questions. If you turn to, of the bundle of authorities, loosely which is tab 12, and it's line, sorry, page 405, so tab 12 page 405, and it was just about the difference between the decision to stay and the determination of the forensic fairness in admitting the evidence, and if you look at between (b) and (c) on the page 405 there, Lord Nicholls is talking about that there are different tests applicable to those two, and –

ELIAS CJ:

Ah, yes.

MR COOK:

– that was, Your Honour Justice Arnold was talking about exclusion of evidence and a stay…

ARNOLD J:

Sorry, which was the paragraph you were talking about?

MR COOK:

It's paragraph 18.

ARNOLD J:

18, thanks.

ELIAS CJ:

Where do you want to take us now?

MR COOK:

Just –

ELIAS CJ:

Have we covered almost everything?

MR COOK:

Yes, I'm –

ELIAS CJ:

Yes.

MR COOK:

– getting very close to the end, but it's just this point because it arose. You don't need to turn to this, Sir, but in *Babos* Justice Moldaver at page 548 notes that, "Where the residual category is invoked, however, the prejudice complained of is prejudice to the integrity of the justice system. Remedies must be directed towards that harm. It must be remembered that for those case which fall solely within the residual category the goal is not to provide to an accused for a role that has been done to him or her in the past, instead the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned State conduct going forward," and that, in my submission, is the same effect to –

ELIAS CJ:

Sorry, I missed the paragraph number.

MR COOK:

Page 548, paragraph 39.

ELIAS CJ:

Thank you.

MR COOK:

Justice Moldaver in *Babos.* And it just brings me to the, which is in response to my learned friend's submission about the use of section 30, it has the potential, it's outlined at the start, to make the Court focus more on the rights of a defendant to the exclusion of other things. This case, in my submission, has shown us that egregious conduct's not limited to conduct which strikes at the rights of a defendant. Now in section 30 there's also the reference – I don't have it in front of me but it is there too – the need to take into account a credible system of justice, but it still is rights based, it's at the rights, whereas unless you categorise every individual, including the defendants in these cases and the appellant, as having a right to an independent judiciary, then it's not necessarily a rights attacked.

I think we've largely covered a lot. There's just a couple more minor points in terms of the errors of the Court of Appeal, because we have discussed, just in the context of other issues, I just wanted to highlight that point that I was making in response to Your Honour Justice Young that, in my submission, when the Crown's talking about the three potential rationales, so the integrity rationale, the remedial and the deterrence, the integrity rationale encompasses the other two, and the Crown say that the integrity rationale is the proper approach, and I agree, and the Crown suggest there's a blind spot regarding the need, or in relation to the breach of an individual's rights. My submission is that breach of rights is not a prerequisite, and even Andrew Choo in his book talks about potentially a third party's rights, and that's the whole reason why, when talking about the jurisdiction, it's left at a general level. So when Justice Simon France was criticised for disciplining, my submission is that there might have been some subjective discipline felt by the police, but his primary goal was upholding the integrity of the justice system and that was a collateral effect, and it is an elusive distinction, as has been made clear in other cases.

The final aspect is the failure to make an individualised assessment of each case and each appellant before the Court. Whereas Justice Simon France said that, "Mr Jones is very serious," so he took the person who was at the top of the chain in terms

of the seriousness of the offences and made an assessment about whether that was sufficient – sorry, or whether that, in the context of the balancing exercise, could result in a stay. The Court of Appeal did not do that. Whereas they even had one appellant who appeared before them charged with possession of methamphetamine simpliciter, so a six month maximum. There's no individualised assessment there. In my submission the case of the appellant in this Court is, the charges are relatively less serious and do not involve violence or a victim and compare that with the crimes in some of the other cases.

WILLIAM YOUNG J:
One of the other defendants pleaded guilty, I think, Thompson.

MR COOK:
I actually think there's two, two others from memory.

WILLIAM YOUNG J:
So what's happened to them? Did they just sort of accept it phlegmatically or…

MR COOK:
Well no, I can happily tell you. One phoned and has just moved on with life and the other is, no one's heard from. But the one who's moved on with life has just moved on –

WILLIAM YOUNG J:
Right, called it quits.

MR COOK:
– significantly. That really, that's the conclusion in the terms of my submissions and then there's the second aspect from my learned friend. Unless there are any other questions really about…

ARNOLD J:
This question of the distinction between excluding evidence and staying proceedings that we were talking about before. Justice Collins deals with this in his third judgment and there was, one of the bases for the distinctions that he drew troubles me a little bit so I just wanted to raise it with you, it's on page 317 of the second volume of the case on appeal at paragraph 65, and in the preceding paragraphs the Judge talked

about the two different remedies as it were, the section 30 excluding evidence and a stay and it seems to focus on the seriousness of the alleged offending as being the critical difference. So at 65 it says, "My understanding of the purpose of s 30(3)(d) of the Evidence Act is that it aims to give primacy to the desire to bring the most serious offenders to trial." But that's not true in the stay context. I was a bit troubled about that description of the section 30 discretion.

MR COOK:
So section 30(d) is the, the Court may, among other, have regard to the seriousness of the offence with which the defendant is charged.

ARNOLD J:
Right, but its' not really – is it accurate to say that the discretion aims to give primacy to the desire to bring the most serious offenders to trial? It's just one of the range of considerations.

ELIAS CJ:
It could cut both ways. I don't know that it's been authoritatively decided that it –

MR COOK:
It's the classic criminal law paradox.

ELIAS CJ:
Yes.

ARNOLD J:
Yes, and I was just a bit worried that this was seen as the fundamental distinction that your objective, as it were, under section 30 in relation to a serious crime was to let it go ahead, and have a different view under…

MR COOK:
By happy chance, totally unrelated to the case that we're discussing, I was reading something last night which might deal with this, which talks about, it's the classic paradox which we're talking about, and it was Justice Albie Sachs in *State v Coetzee*, which is –

ELIAS CJ:

I was going to say Sachs answers it.

MR COOK:

It's serendipitous that I have no social life, and was at the hotel and was reading this. It's [1997] 2 LRC 593 and he says, "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become." And then he goes on, but it's the exact point that Your Honour is addressing. In the State context, it is one of the few things that all of the Judges across all of the various jurisdictions agree with, that the offence with which the person is charged, and the fact that there is a public interest in seeing those charged with serious offences are brought to trial, those are factors that must be taken into account. In fact in *Warren* when Lord Kerr is talking about the need to keep it right he says, that is the one that we also must take into account on the other end of that balance. So that's probably the best way I can attempt to answer that.

ARNOLD J:

Thank you.

ELIAS CJ:

But he goes on to say that human rights protections can't be withheld from serious offending –

MR COOK:

He does.

ELIAS CJ:

– otherwise they'd be pressed into service only in trivial cases.

MR COOK:

It's exactly what he says, it's the exact quote, and he expands upon it in his book *Alchemy and the Law* which is where I was reading it.

ELIAS CJ:

Oh right. Thank you. Yes, Ms Ghahraman.

MS GHAHRAMAN:

I will be addressing the Court on the effect of the appellant's guilty pleas and including the effect of the new evidence that's come to light since those pleas were entered. I'll not repeat any of the submissions made by my learned friend Mr Cook on the seriousness of the abuse in this case but I will accept that my submissions on the effect of the guilty pleas are predicated on the Court accepting the exceptional circumstances in this case place the case into a certain category of cases where the integrity of the justice system was undermined rather than that fair trial rights were affected.

WILLIAM YOUNG J:

We're going to have an adjournment soon. No, I'm just asking someone to clear the decks. Do you have a copy of the indictment?

ELIAS CJ:

Yes, I was going to ask that too.

WILLIAM YOUNG J:

I would like a copy after the adjournment.

MS GHAHRAMAN:

Would Your Honour like to have –

WILLIAM YOUNG J:

I'd like to see a copy of the charges that your client faced.

MS GHAHRAMAN:

So shall we take the morning adjournment?

ELIAS CJ:

No, after the adjournment. So carry on.

MS GHAHRAMAN:

I will be asking the Court to adopt the approach of the English Courts in their application of the standard of affront to justice being where appeals against conviction are entertained even after guilty pleas. So to discuss the breadth of the discretion, and New Zealand obviously will have a very broad discretion, the standard

being the miscarriage of justice, which is actually broader than the English standard on appeal, the starting point for the appellant is that miscarriages can occur following imposition of guilty pleas. The appellant accepts that as per *R v Le Page* [2005] 2 NZLR 845 (CA) appeals following entry of guilty pleas will be entertained only in exceptional circumstances and I think the appellant and the Crown are in agreement that this category doesn't, the particular case doesn't fall into any of the categories of *Le Page*. And I think we're also in agreement that the English cases are a useful application here. But I do argue that a broader approach needs to be adopted in New Zealand and that if the *Le Page* categories were applied strictly then it would – the situation would be that no miscarriage of justice would be entertained, even though no matter how grave the impropriety and the attack on the justice system which I can't see being a proper position.

This would be particular egregious in this class of case as the present, where the abuse of process is not in the category of abuse where an unfair trial is possibly been occasioned but the entire integrity of the justice system is undermined.

WILLIAM YOUNG J:
Can I just ask you one question too, which you may want to get some facts on. Your client pleaded guilty in September – sorry, in July 2012, towards the end of July?

MS GHAHRAMAN:
10 August was the plea.

WILLIAM YOUNG J:
Okay, 10 August, so there was a sentence indication hearing on 30 July. Now the evidence had already started on the abuse of process case in front of Justice Simon France.

MS GHAHRAMAN:
That's right, yes. That's right Your Honour.

WILLIAM YOUNG J:
So have we got an explanation or is there some sort of context for this chronology?

MS GHAHRAMAN:

What we do have is the affidavit of the trial counsel, or counsel at the time, which was neither I nor Mr Cook, and he did receive legal advice it seems that told him that the stay application didn't have much prospect of success and as I understand it the causative linkage –

ELIAS CJ:

Is that before us by the way? I haven't roamed through the whole…

MS GHAHRAMAN:

I thought it was part of the case on appeal.

WILLIAM YOUNG J:

I haven't seen it. That might be my fault.

ELIAS CJ:

There was an affidavit from his counsel to that effect or did he depose it to that effect?

MS GHAHRAMAN:

There was an affidavit from his counsel to that effect. Who was Mr Zindel.

WILLIAM YOUNG J:

But he, I mean it's an unusual feature of the case if he pleaded guilty at a time when the abuse of process issue was being litigated.

MS GHAHRAMAN:

It is unusual. If it's best we could take the adjournment now and I can find both the affidavit and –

ELIAS CJ:

Well it is time to take the adjournment so we'll stop now, thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.52 AM

MS GHAHRAMAN:

Just by way of housekeeping, Your Honours, I understand the documents are now on the keyboards that we, so the indict, that's the indictment and –

ELIAS CJ:

Oh, yes.

MS GHAHRAMAN:

– the notice of appeal, which has the information I was referring to with regard to the circumstances of the appellants' plea. But just before I move on to my submissions, just in response to a question put by Your Honour Justice Arnold with regard to whether Justice Simon France took account of any other remedies or the appropriateness of any other remedies in this case, it's at page, the casebook at page 242, paragraph 74, three lines down. So that's, "Anything other than a significant response runs the risk of being seen as rhetoric."

ELIAS CJ:

Could you just pause while we have a – because I had intended to ask for the notice of appeal too, but there's quite a lot of information on it.

GLAZEBROOK J:

And did you say there was – because there is a waiver of privilege – did you say there was an affidavit by the solicitor?

MS GHAHRAMAN:

There was, but I think I'm mistaken, that was on the case that was not on this case file, but what I'm referring to is the affidavit of the, or the information provided in the notice of appeal with regard to the advice that he received, so…

GLAZEBROOK J:

So that ultimately there wasn't an affidavit or there…

MS GHAHRAMAN:

Ultimately no.

GLAZEBROOK J:

So effectively he's saying what the advice was in the notice of appeal?

MS GHAHRAMAN:

Yes, we're limited to that information on this occasion.

GLAZEBROOK J:

Right, thank you. So that's (f) on page 4.

ELIAS CJ:

Well, it's sort of brutally frank.

WILLIAM YOUNG J:

He also, I see, he refers to it as the, "Disciplinary ruling of Justice France."

ARNOLD J:

Yes.

ELIAS CJ:

Oh, it's just words.

WILLIAM YOUNG J:

Of course all the charges against him relate to events that follow the false search warrant and arrest.

MS GHAHRAMAN:

That's right, Your Honour, they do.

WILLIAM YOUNG J:

And he is charged with, he was charged with selling LSD to Wilson?

MS GHAHRAMAN:

He was, so that's at, that, with respect to that particular charge is directly to the undercover officer who, we say, would not have even been in that position had it not…

WILLIAM YOUNG J:

But there must have been quite a lot of charges like that, aren't there, or not?

MS GHAHRAMAN:
Well…

WILLIAM YOUNG J:
I mean, were there other charges of people convicted, charged with supplying drugs to Wilson?

MS GHAHRAMAN:
I'm not sure about the facts, Your Honour, but I understand that all other charges arose, or were found, by Justice Collins in a later decision to have arisen as a direct result or with a causative link to the undercover officers' operation. So either through observations through their –

WILLIAM YOUNG J:
Well, for instance, there's, I'm looking at count 14, Hayley Joanne Kirkwood supplied methamphetamine to Casey Robinson, well, that's the undercover officer.

MS GHAHRAMAN:
That would be right, Your Honour, yep.

WILLIAM YOUNG J:
I mean, you're going to come on to this later, but it must have been obvious to Justice Simon France that the charges post-dated the false search warrant and that Wilson played a, and Robinson, played a part in what had happened.

MS GHAHRAMAN:
That's right. But what we have with the new evidence – and I will come to that later – is that kind of the direct link that the police also make with their ability to continue with the operation at all. For example, that it's admitted that the undercover officers were probably going to be pulled from that operation had it not been for their ability to secure their position through the impropriety. It's just a more direct link that we have now, but, other than just a temporal following of events.

And to answer Your Honour's earlier question, yes, so the appellant did plead or enter his guilty pleas between the time that evidence was being heard with respect to the stay application and before that process ended, so, and that is unusual, but I would respond to that by saying that in my submission the guilty pleas are – or rather

that that might be a bit of a red herring in that where the system of justice has been undermined and the stay is justified on that basis and it has become an affront to justice for the defendant, or now the appellant, to have been tried at all, that his guilty pleas, whenever they were entered, can be appealed or can be the subject of an appeal against conviction.

ARNOLD J:

It does appear though from that subparagraph (e) on page 4 or 5, whichever number you take, that counsel on sentencing certainly made a virtue of the fact that your client was aware of this challenge and used that as a basis for a generous discount.

MS GHAHRAMAN:

Yes, that, and I accept that, but –

ELIAS CJ:

Sorry, where's that?

GLAZEBROOK J:

Page 5(e) of 5 or 4, depending on the notice of appeal

ARNOLD J:

That's at (e) of the notice of appeal…

ELIAS CJ:

Yes.

ARNOLD J:

It's from the sentencing – submissions of counsel on sentencing.

MS GHAHRAMAN:

Yes, and his sentence has since been appealed and he's, he has been benefited from a very generous sentencing process on be sentenced to home detention. And we accept that it's just that, the jurisdiction to allow conviction, conviction appeals after guilty pleas relates, we say, to this particular type, or the nature –

ARNOLD J:

Yes.

MS GHAHRAMAN:

– of the impropriety and in that case, and I think I'd make the point by saying that in essence it's a public interest that we're asking the Court to protect, so it's not a private interest, and in that way, just as the particular fairness of the processes within the particular trial are less relevant, so too are other interests or the rights of the particular defendant as against the broader public interest, especially in the type of cases this one is, where the integrity of the justice system is undermined or the, even the judicial nature of the Court might be under attack so, so, you know, the particular circumstances of this appellant are less relevant. And actually what I would do in that regard is I'd like to direct the Court's attention to Lord Lowry's speech in *Bennett*, which is at 374 of the bundle of authorities, and it's the last paragraph before the quoted passage, tab 10, where His Honour said that, "It may be said that a guilty accused, finding himself in the circumstances predicated, is not deserving of much sympathy, but the principle involved goes beyond the scope of such pragmatic observations and even beyond the rights of those victims who are or may be innocent, it affects the proper administration of justice according to the rule of law." So, that being the starting point, and if in this particular case the abuse is found to be of that nature, I would invite the Court to find that guilty pleas are not relevant to the jurisdiction of the Court to grant an appeal against conviction.,

So, and going back to the English authorities and their application, which I say should be adopted, I would draw the Court's attention also to *Mullen* at 489, which is I think at tab 14 at about (e), which is the marker, where the Court found that, "Where it would be offensive to justice and propriety to try the defendant at all it's different both from the type of abuse which renders a fair trial impossible and from all other cases where an exercise of judicial discretion is called for." So, again, I'd say that this case, in both the seriousness and nature of abuse, falls within that category.

And also then there is *R v Early* [2002] EWCA Crim 1904, [2003] 1 Cr App R 19 and, which applies the "tainted beyond redemption" standard, but I say is not different to the *Mullen* standard, it's, as I think the Crown might be suggested, I disagree specifically with the Crown's submission at paragraph 65 where it's said that the determinative factor in *Early* appears to be the length of the sentences already served by the appellants. I say that in fact the length of the sentences were the determinative factor in the Court's decision not to order retrials, but not in its decision to allow the conviction appeals.

And then that's followed by *R v Togher* [2001] 3 all ER 463, if that's how we pronounce that particular case, *R v Togher,* where they again –

ELIAS CJ:
Where is that?

MS GHAHRAMAN:
That's tab 15.

ELIAS CJ:
I see, *Togher*, yes, I see.

MS GHAHRAMAN:
So again, the standard being that it's an abuse for the man to be tried at all, because the system of justice is under attack, and that was because the Court found a flagrant executive, results, the prosecution had been the results of a flagrant executive misconduct and so guilty pleas could not be a bar to conviction. The standard was not met though in that case because the impropriety in fact only went to the ability of the appellants to successfully defend against the charges, which it of course is not the case in this particular instance.

GLAZEBROOK J:
Sorry, what page were you on there? I –

MS GHAHRAMAN:
That was just the general finding in *Togher*.

GLAZEBROOK J:
Okay.

MS GHAHRAMAN:
So they agreed overall that the standard, that where the abuse goes to whether or not the accused should have been tried, that that is the standard and that guilty pleas would not be a bar, but they ultimately, that case wasn't one where that standard was met, and then there was the differentiation which the appellant agrees with in this case should apply between cases where the impropriety only goes to the ability of the accused to defend the charges more successfully versus the kind of impropriety

that structurally undermines the system of justice or, you know, points to a prosecution not being proper.

So next I would – and of course I agree with the Crown that the, that the next public interest that needs to be balanced is the public interest in prosecution of those convicted of serious crime. But again I would point to the starting point in this type of abuse case being the nature and quality of the abuse and the public interest that's being protected where the justice system itself is being undermined. The English jurisprudence again makes it clear that the balance must always be struck between the public interest and ensuring serious criminal offending is prosecuted, but also that the public interest in protecting the justice system itself is a very strong one.

In the present case we now have the indictment of course – I would say that the offending of the appellant is of moderate level of seriousness, it involves some supply of a Class A drug, which is LSD, and some cannabis offending. By contrast, in *Mullen* the Court undertook the balancing exercise in the context of organised and systematic acts of terror and rightly pointed out that there was immense public revulsion properly directed toward the activities of the IRA. However against even that arguably most serious of crimes the Court found that the blatant and, "Extremely serious failure to adhere to the rule of law," as they called it, still meant that the balance came in favour of allowing conviction appeals. In *Mullen,* the convictions had actually been entered after a proper trial that there was no issue with, so, and so, you know, and so I would say that once the essential feature of this kind of abuse has been established that the balance would, it would be very hard and in only very, very serious types of criminal offending, perhaps the most serious, that the balance would actually tip in favour of letting the convictions lie and not allowing an appeal.

And finally I would turn to the public interest in the finality of convictions, which in this case involves some discussion of the new evidence. So the public interest principle of finality does apply, because of course convictions were entered after guilty pleas –

ELIAS CJ:
I have some query about that. You're not challenging that? I've just –

MS GHAHRAMAN:
No, I –

ELIAS CJ:

– not heard of the principle of finality looming large in criminal law.

MS GHAHRAMAN:

No, I don't agree –

'ELIAS CJ:

There are a couple of Court of Appeal decisions that are cited in support of it but…

MS GHAHRAMAN:

I don't agree that it's a significant consideration, I agree that it arises in this case because there have been guilty pleas. So there is an interest in considering that appellants who have pleaded guilty, with all of the information and proper advice, should perhaps be considered to have been convicted properly, but I don't agree that in this particular –

ELIAS CJ:

Well that's really why there's a substantial hurdle to overcome.

MS GHAHRAMAN:

That's right. And I would argue that that is, that it's probably the lesser of all the public interest considerations in this type of case because –

ELIAS CJ:

Well apart from those, I think there's one or maybe two Court of Appeal decisions. Is there any other authority – oh, maybe I should ask Mr Downs that since he emphasises the principle.

MS GHAHRAMAN:

That's right. I would argue that it shouldn't arise in this type of abuse case in any case because the abuse doesn't – if we're protecting a greater public interest in protecting the system of justice from being undermined overall, then finality of – and we've considered that the seriousness of the offending didn't tip that balance, then finality really doesn't, to my mind, wouldn't come close as a public interest consideration that would be, that would seriously threaten the Courts ability to grant appeal rights.

But I would say that this in this case there is new evidence and so it would be artificial to just, if finality was going to be discussed, to discuss it outside of that context especially with respect to any criticism of the appellant for his failure to bring a legal challenge, or to joint that legal challenge at the time, considering that he wasn't privy to all of the evidence that's now being considered to establish the causative link. The causative link was a live issue from the start in this case I would even argue that perhaps there's a touch of further impropriety in the failure of the police to properly disclose all the information that went directly to what would have been an important factor in all of the defendant's ability to bring proceedings on the basis of legality or abuse of process. Justice Collins has since obviously had the benefit of hearing that evidence and considering affidavits that were not disclosed and His Honour has found that causative link and all proceedings have been stayed.

The Crown submission I just wanted to note at paragraph 44 states that while the finding of Justice Collins has the benefit of the evidence not before Justice Simon France or the Court of Appeal, doubt attaches to whether it is correct. I just wanted to note that Justice Collins' decision has not been appealed.

WILLIAM YOUNG J:

Yes but, it just gets a bit, with a crux in it though, because wasn't the evidence in front of Justice Simon France reasonably clear that the purpose of the exercise was to enhance the criminal credibility of Wilson, in light of a challenge that had been made to him by a man called Tulouna?

MS GHAHRAMAN:

Yes, that's right, but His Honour didn't consider that he had, I guess, enough evidence to go even further than that and –

WILLIAM YOUNG J:

But isn't it just a matter of how you categorise the evidence? Isn't the evidence that, yes, it enhances credibility, and it enabled him to go on gathering evidence?

MS GHAHRAMAN:

Yes, but-for example we now know that the operation would have actually been pulled, likely to have been pulled without that –

WILLIAM YOUNG J:

But didn't they know, wouldn't that have been obvious that if they couldn't enhance his credibility they would have had to do something else?

MS GHAHRAMAN:

I don't know that the defence would have been able to make the submission properly that it's obvious that the operation would have stopped had there not been –

WILLIAM YOUNG J:

But they acknowledge, the police acknowledge that this facilitated evidence gathering?

MS GHAHRAMAN:

Facilitated but we now know that it was determinative of the survival.

WILLIAM YOUNG J:

Well looking at page 81 of the case, volume 2, I think this is Detective Superintendent Drew.

ELIAS CJ:

Sorry, what page?

WILLIAM YOUNG J:

Page 81. So, "You would agree, wouldn't you, that this whole orchestrated scenario was designed to enhance the apparent criminality of the undercover constable?" Answer, "To enhance his criminality, to enhance his cover, to enhance his safety, they were all linked." And a little further on, "And thus have access to evidence gathering, to support charges against those targets?" "Evidence gathering, or intelligence gathering, absolutely, that was the purpose for being there." Now it's not that different from the position that was put to Justice Collins, is it?

MS GHAHRAMAN:

It may be one, only one step away Your Honour, I accept that, it's just been, it's been fortified I guess beyond attack now, that there is a causative link. It's, I mean –

ARNOLD J:

That wasn't actually the only evidence before Justice Simon France either because at an earlier stage at page 73, line 5, where this deception was being talked about, the police officer acknowledged that it benefited the progression of the inquiry. Then later in the –

GLAZEBROOK J:

Which line sorry?

ARNOLD J:

That's at line 5 on page 73, so then you get the passage that Justice Young has referred to, and then in the second hearing there's the brief of – this is the second hearing, I think, before Justice Simon France.

GLAZEBROOK J:

Sorry, is it 73, which numbering?

ARNOLD J:

It's the volume number, not the transcript number.

WILLIAM YOUNG J:

It's the top right corner.

GLAZEBROOK J:

Right.

ARNOLD J:

So we've got is said there, what is said at 81 that Justice Young has drawn attention to, plus you've got what is said at 169 where the officer explained that the whole point of these arrangements was to provide evidence, to gather evidence. So that was the evidence before Justice Simon France.

MS GHAHRAMAN:

That's right. Nonetheless though if I can turn Your Honours to the judgment of Justice Simon France at page 241 of the same volume, at paragraph 69, where His Honour did nevertheless find that the lack of, that there was a lack of any strong causal connection, and that that's significant. He says that, I was not –

WILLIAM YOUNG J:
Sorry, that's just an opinion isn't it?

MS GHAHRAMAN:
Yes –

WILLIAM YOUNG J:
I would say, I mean you can look at these facts and say, in reality this is just a side issue to do with the credibility of the detective, it's just like putting a tattoo on his arm to show that he's, you know, one of the boys, or – which is perhaps what Justice Simon France meant, or you can say, but-for this deception the police would have had to pull him and therefore everything else wouldn't have happened in which cause it's causative, but which way you look at it is just a matter of opinion, isn't it?

MS GHAHRAMAN:
Well the fact remains that the High Court Judge who heard the case didn't think the evidence went far enough and then a later hearing of the matter, with the new evidence, did push it over the line.

WILLIAM YOUNG J:
But it's practically the same evidence, isn't it?

MS GHAHRAMAN:
Well it did affect the outcome.

WILLIAM YOUNG J:
I know, what's the crunchiest bit of evidence at the hearing in front of Justice Collins?

MS GHAHRAMAN:
I believe we had summarised that in the appellant's submissions at paragraph 129.

WILLIAM YOUNG J:
Of those 1, 2 and 4 were all in evidence before Justice Simon France and 3 was implicit anyway.

GLAZEBROOK J:

Well 107 and 108 of the Court of Appeal decision certainly says there was no causative link and that that's what Justice Simon France found.

WILLIAM YOUNG J:

But that, the core facts were before the Judge apart from perhaps the view the police might have pulled the officer.

GLAZEBROOK J:

Well they say all that misconduct did was help Mr Wilson maintain his cover.

WILLIAM YOUNG J:

But they knew he'd be gathering evidence because the police conceded that.

GLAZEBROOK J:

There is no but-for element in this case.

MS GHAHRAMAN:

And I would argue the but-for element comes into it at point 3.

WILLIAM YOUNG J:

But that depends on the counterfactual.

MS GHAHRAMAN:

Well if a defendant is deciding whether to argue a case based on the fact that the causal matter is implicit versus having hard evidence of it, it would make a difference.

WILLIAM YOUNG J:

Sorry, where is Detective Wormald's evidence, the hard evidence that you rely on?

ELIAS CJ:

The new evidence.

WILLIAM YOUNG J:

The new evidence.

MS GHAHRAMAN:

The new evidence where, at point 3, where it's summarised from Justice Collins' decision –

WILLIAM YOUNG J:

Yes, I'm interested in what he actually said.

MS GHAHRAMAN:

But I'm –

ARNOLD J:

If you look at page 218…

ELIAS CJ:

Sorry, do we have it in front of us, so do we? Is that one, what you're referring to?

ARNOLD J:

There's a section of questioning –

ELIAS CJ:

Page…?

ARNOLD J:

– of the detective inspector by the Court, which I think is the basis for the finding.

WILLIAM YOUNG J:

What page is it?

ARNOLD J:

218.

WILLIAM YOUNG J:

218.

ELIAS CJ:

This is before –

ARNOLD J:

Justice Collins.

ELIAS CJ:

Oh, I see, okay.,

ARNOLD J:

But just one other point. I mean, one of the reasons that, or the reason that Justice France gave for saying there was no causal link is that intercepted communications subsequently to all of this indicated that there was still suspicion about the undercover officers, particularly Mr Wilson, and so that seems to have informed the Judge's view that this ruse was not effective, or completely effective.

MS GHAHRAMAN:

That's right. I would just like to say before we get too far into analysing the new evidence that the fact that there's new evidence to, in my submission, goes only to mitigating against any criticism of the appellant in this case for not bringing the challenge or otherwise, in terms of the finality argument, but my core argument with respect to that principle, if we can call it that, is that it shouldn't, it's either not applicable in cases where the abuse is of the nature that it is in the case or the ex-parte *Bennett* nature, or that if it is of any application it's very minimal and the new evidence only really mitigates against any criticism of the appellant for not bringing that challenge to, in my submission, it's not, but I wouldn't, I wouldn't argue that the finality principle properly applies to this kind of case anyway.

WILLIAM YOUNG J:

I suppose my interest in it is on what may in the end be something of a sideshow, and that is that we're got these three judgments, Simon France, Court of Appeal, Justice Collins. What troubles me a little bit about Justice Collins' judgment is that I don't think the new evidence was new evidence, I just think he's re-categorised evidence which Justice Simon France and the Court of Appeal saw in one way in another way. Can you find me the bit where the police say they would have pulled the detective?

MS GHAHRAMAN:

That would just be one minute, we're finding that on the computer.

WILLIAM YOUNG J:

I mean, it's quite clear from what they said in front of Justice Simon France that they were concerned about the threat made by Mr Tulouna because he was a man with, of violence who was unpredictable.

MS GHAHRAMAN:

Yes, that's…

WILLIAM YOUNG J:

And that he'd made a challenge in a gang headquarters.

MS GHAHRAMAN:

Yes, that…

WILLIAM YOUNG J:

So they weren't playing it down at all.

MS GHAHRAMAN:

That may be a couple of minutes, just finding the exact reference. I would say, if I might move on while we're finding –

WILLIAM YOUNG J:

Sure.

MS GHAHRAMAN:

– that particular reference, I would turn the Court's attention to *R v Early* where, I think it's at page 338 of the bundle and that's at tab 9, where the Court that, "A defendant who pleads guilty at an early stage should not, if adequate disclosure has not been made by then, be in any worse position than the defendant who, as the consequence of an argument to stay proceedings as an abuse has the benefit of further disclosure which leads to abandonment of the proceedings," which I would say is the case in this case, noting Justice Collins' decision. And the Court in *Mullen* goes further in finding that the failure to disclose, "Material that would have assisted the appellant in challenging the proceedings against him gave rise to further public interest in encouraging voluntary disclosure before trial of material and information that hands the prosecution relevant to the defence," and that actually was identified

in *Mullen* as a further public interest consideration which the Court attached great weight to in finding that the standard was met despite safe guilty verdicts in that case.

Yes, so my submission on the point of, overall but also on this point, is that taking into account the special nature of the abuse in this particular case and where it is offensive to justice to proceed, and combining that with the effect of the lack of disclosure at trial, that it cannot be considered that the failure to seek a trial Judge's ruling or the guilty pleas are fatal to the appellant's ability to bring an appeal.

BLANCHARD J:
What was the purpose of the swearing of the affidavit by Detective Sergeant Mackie, do we know that?

MS GHAHRAMAN:
I don't think I do know that. It was in the context of a phase report, so internally within the police system, it was going up to his supervisor. And when it was disclosed it wasn't disclosed in full, as I understand it.

BLANCHARD J:
Well, according to your submission, paragraph 126, they turned it into a brief of evidence but left some out.

MS GHAHRAMAN:
That's right, so it was disclosed by way of a brief but it wasn't disclosed in full, and an important part was left out, if you will.

WILLIAM YOUNG J:
Well, you know, 125, I did take you to a passage where in the evidence before Justice France where the detective said, Detective Superintendent Drew, said exactly the same thing.

MS GHAHRAMAN:
Well, if – I guess I would say that if Your Honour is minded to see the new evidence as not bringing anything particularly new, I would, my submission would be that that has, that essentially the new evidence may not have an effect at all on our argument, which is that the primary consideration in applying the broad standard of appeal after guilty pleas should be the consideration that the nature of the abuse in this case went

to undermining the system of justice, that the public interest overrides the public interest in people not challenging on abuse of process at trial stage. So either way it's –

WILLIAM YOUNG J:
Right, well, let's put a second, another proposition to you, and that is that to the extent to which the police's conduct resulted in evidence being able to be gathered, that's the sort of conduct that falls reasonably neatly within section 30.

MS GHAHRAMAN:
That's right, and I think that's why it's not particularly important to this assessment, because the breach in this case went far beyond just the admissibility of the evidence or, you know, whether or not the police were able to, for example, obtain warrants to intercept information, whatever else, it doesn't, we don't consider that that causal link is necessary because of the nature of the above.

ARNOLD J:
Did Justice Collins deal with the point that Justice France made about the subsequent intercepted communications indicating that the ruse hadn't worked that, the suspicions that the gang had?

MS GHAHRAMAN:
No, from memory he didn't address that point, but he did find that there was a causal link between the intercepts anyway. I know that's a separate point but he just, the focus was on the new evidence determining that there was a causative link and he applied that standard, which we don't say our appeal is dependent upon anyway. But there is a situation where all of the defendants have now been stayed so that – it's just contextually relevant I guess is my point. Those are my submissions if there are no more questions.

ELIAS CJ:
No, thank you Ms Ghahraman. Yes, Mr Downs.

MR DOWNS:
Yes, may it please the Court. In *R v A*, which was a decision of the House of Lords concerned with the extent to which the executive may act based on material obtained directly or otherwise from torture, Lord Hope made the following observation.

"Condemnation is easy. Finding a solution to the problem is much more difficult." With respect to His Lordship, that statement maybe thought to be apt to this case as well. I say that because whilst it's beyond dispute, and it's not disputed, that the police impropriety was grave, the fact remains that all of the defendants in this case have received a windfall by virtue of what has occurred, and it's material on the respondent's case that although there is grave impropriety, as found by the Court of Appeal, no human rights of any of the defendants were actually engaged.

Now a situation such as this maybe thought to raise yet again the true conceptual basis for the exercise of the stay jurisdiction. Now I acknowledge the point of view that the distinction between a jurisprudence that seeks to deter or discipline, and that seeks to vindicate rights, maybe described as elusive, but the mere fact that the distinction is difficult doesn't meant to say it's not real and in my respectful submission we need only look to the United State of America to recognising jurisprudence that actively seeks to deter executive misconduct in the context of law enforcement with the result that there are distinct shapes to it by virtue of that rationale. So for example in *US v Leon* 468 US 897 (1984) the Supreme Court famously held that police acting in good faith, on the basis of an apparently valid warrant, provides a complete answer to a breach of the fourth amendment. Now that's merely a homily example of a situation in which the rationale does shape the Court's response and so it's in my submission important to enquire exactly what that rationale is and more particularly what it ought to be, given that this case is now before Your Honours.

ELIAS CJ:
Well why can't it be both?

MR DOWNS:
Well we have no quarrel with that proposition depending upon which two are selected. The respondent's case, however, is that there is a difficulty in selecting deterrence, or discipline, as the appropriate rationale.

ELIAS CJ:
Well the cases are, and I don't have any problem with the cases that say that there will be, someone says, you know, improprieties happen in police investigations, and that in those cases you don't take too punitive a view, but we're not in that area of evidence. We're in the question of abuse.

MR DOWNS:

Well except that, and I posit this as a proposition, the gravest cases of abuse, I mean in the abuse jurisdiction –

ELIAS CJ:

Well they will overlap.

MR DOWNS:

Yes and –

ELIAS CJ:

Yes, with breaches of rights, of course.

MR DOWNS:

And that's very much the respondent's case.

ELIAS CJ:

Yes.

MR DOWNS:

So for example if we look at the jurisprudence, and analyse what are described perhaps colloquially as the rendition cases, *Mullen* is a great example, *Bennett* is perhaps the more famous, they involve not only illegality but also a profound breach of a person's human rights. Now where does this take us? It takes us to the proposition that the clearest case, in my respectful submission, for a stay will be where those two rationales overlap and this case, of course, doesn't involve a human rights breach. I say again, yes it involves impropriety that was grave, but it remains the position that none of the defendant's rights were breached in this case. That's why we describe the moral integrity rationale as having something of a blind spot. It's not because the rationale itself is wrong, plainly it's not, it's just that in a jurisdiction that has a Bill of Rights and that places appropriately significant weight on rights breaches, it maybe thought that the two interests should ordinarily allied, in order for there to be a stay. Now we don't wish to be prescriptive. We're not submitting to the Court that a stay requires both to be present, but it maybe a useful example of the clearest case for a stay.

ELIAS CJ:

But think about the sort of case where a more extreme version of this case where there is gross breach of natural justice, so that if, for example in this case, a Judge seized of the matter had had some private communication with the Judge who had dealings with the police, surely –I suppose you'd say there's a breach of human rights in that as well, but surely there is a question where there's such an affront to our idea of the integrity of the judicial system, that it doesn't matter if the individuals rights have not been breached, that's the case that's being put up here. Now you can quarrel about the degree but I'm not sure why it matters that there is no breach of human rights.

MR DOWNS:

Well in my respectful submission it mitigates against the case for a stay, for that very reason.

ELIAS CJ:

Because that would be something that the appellant would be entitled to claim as a remedy whereas in the abuse case that we are dealing with here it's the Court imposing some – it's not a remedy, the Court refusing to be co-opted into what is wrong.

MR DOWNS:

Yes, and again we take no issue with any of Your Honour's propositions, but we do push back with that which we've already advanced, namely that clear cases for a stay, to our mind, will almost invariably involve both a breach of human rights, obviously a serious breach at that, and illegality or executive misconduct. This case is unusual in that whilst it has serious illegality, it doesn't have any conduct that engages the rights of any of the defendants.

GLAZEBROOK J:

Do you accept it's causative in the sense of the but-for or? I'm sorry, I just can't remember what you said in your submissions.

MR DOWNS:

No, we've disputed that proposition but I have to confess not without some trepidation and I should explain what I mean. But-for causation, indeed causation in law, maybe thought ultimately to disguise a policy choice. Indeed with the utmost

respect to the Courts causation is a policy choice. Now this set of facts can lead itself to the –

ELIAS CJ:

We should also ban the words "but-for". Lord Hoffmann did us a huge disservice. Everyone seems to be running scared of them.

WILLIAM YOUNG J:

The other words that you can also use, "set the occasion for" –

MR DOWNS:

Yes.

WILLIAM YOUNG J:

– which is sometimes used as an alternative to but-for.

ELIAS CJ:

Yes.

MR DOWNS:

And so for example Mr Wilson could be heard to say, and it would be a respectable argument we acknowledge, that but-for the officers engaging in this misconduct and shoring up confidence in their identity, none of this would have been revealed. Well, that's true of course, but there are –

WILLIAM YOUNG J:

But possible.

MR DOWNS:

Well, on the finding of Justice Collins that is the position. But the difficulty with that is the conduct was the conduct of the defendants, and the observation of the police at all times remained lawful, and with great respect to everyone below the significance at this point seems to have been lost. The police were doing no more or less than observing the defendants committing, it seems, reasonably serious criminal offences. It was the defendants' own conduct that brought the evidence into existence and so, yes, whilst on one line of thought "but-for causation" would capture it, on another line of thought, and that which we would endorse, the defendants' own conduct could be

seen as either breaking the causative link, as was the view of Lord Mance in *Maxwell*, where the defendant of course confessed after he'd been wrongly convicted, or it could be seen as being within the situation identified by Your Honours Justice Young and Glazebrook at 102 of *Williams,* where defendants by virtue of their own conduct continued to attract the attention of the police, such that causation is either interrupted or sufficiently attenuated so that it's no longer improperly obtained. And it follows, in the Crown's respectful submission, that this isn't, to use a phrase that may provoke ire, a "but-for" case, it's not a "but-for" case.

WILLIAM YOUNG J:
Well, it's not a helpful way to look at it probably.

MR DOWNS:
No.

WILLIAM YOUNG J:
Because you can twist it around and get whatever answer you want.

GLAZEBROOK J:
Well, it didn't bring the evidence into existence –

MR DOWNS:
No.

GLAZEBROOK J:
– is the point that you're –

MR DOWNS:
Yes.

GLAZEBROOK J:
– suggesting, it enabled the observation of the evidence but it didn't bring it into existence, is that…

MR DOWNS:
That is the submission. And perhaps it's best put in the way that Justice Gault captured the idea in *Shaheed* when His Honour identified that it created the

opportunity for the evidence to be discovered, but it did no more than that. And His Honour was of the view that that was insufficient in terms of causation to give rise to a breach.

Now pausing here, we've already covered –

ELIAS CJ:
I'm just wondering whether that's a inadequate response. It will be in some cases, particularly cases where you're concerned with, just – but is an illegal search simply an opportunity? No, it's not.

MR DOWNS:
No, I'm not seeking to suggest that an unlawful search is –

ELIAS CJ:
Yes.

MR DOWNS:
– that there's anything…

ELIAS CJ:
I'm just wondering how…

MR DOWNS:
Well…

ELIAS CJ:
Doesn't it depend on what the impropriety consists in?

MR DOWNS:
Well, necessarily it must.

ELIAS CJ:
Yes.

MR DOWNS:

But I'm seeking to highlight, perhaps awkwardly, that in this particular case the observation of the defendant's conduct was at all times lawful and they were, that is the police, were doing no more than essentially watching crimes unfold. The illegality went to the means by which they entrenched themselves as apparent members of the enterprise, but it didn't give rise, in the respondent's respectful submission, to the obtaining of the evidence.

GLAZEBROOK J:

It may be slightly elusive distinction…

MR DOWNS:

Mmm.

ARNOLD J:

But it is a distinction that Lord Brown makes, actually, in *Warren* at paragraph 76. Because Lord Brown was in the minority, I think, in *Maxwell,* but agreed with the majority in *Warren,* and he seeks to explain –

MR DOWNS:

Yes.

ARNOLD J:

– his different view at paragraph 76 on 528 of the case.

ELIAS CJ:

That's what you quoted in your submissions, is it, is that the, you did –

MR DOWNS:

Yes, to recapitulate. *Warren* is the decision of the Privy Council –

ELIAS CJ:

Yes.

MR DOWNS:

– in relation to very serious drugs offending. The officers in that case, from Jersey, knew that no fewer than three jurisdictions, France, the Netherlands, and I think

possibly also Belgium, but there was a third, would not permit them to use audio surveillance, and notwithstanding that the officers did so and misled their counterparts from those agencies, and against that backdrop Lord Brown goes on to draw the type of distinction that we've been inviting the Court to examine this case with, namely a fundamental situation where, as in *Maxwell*, but the police's misconduct the confessions would never have occurred, whereas the present case is a "but-for" case only in the sense that but-for the unlawfully obtained evidence the appellants would not have been prosecuted or convicted, that is a fruit of the poison tree case.

GLAZEBROOK J:
So really the submission you're probably making is that it's tied to rights and breach of rights in any event, so it's really a parallel submission to a degree to the primary submission you're making?

MR DOWNS:
It could be considered in that way and that, with respect, wouldn't be wrong to do so, but we are also seeking to make the point that causation in the abuse context is important.

GLAZEBROOK J:
Oh, no, I understand that, it's just that it possibly turns on the same, on the same view, in that there were no rights breached here so any illegality didn't go to the breach of rights and in fact there was no, there was a perfectly lawful observation.

MR DOWNS:
Yes, it may be no more than an augmentation of the point already made. It's just that we underscore the observation of Her Honour the Chief Justice in the course of argument earlier that the trial itself must be tainted in order for there to be a stay and, with respect, we endorse that proposition, that it must be right.

Now that, I acknowledge, has brought us a considerable distance in little time. The extent to which section 30, or more particularly the criteria within it, could be helpful has in one sense been answered by the discussion of whether breaches of rights is an important, if not determinative, consideration. But to the extent that that issue hasn't been dealt with the respondent does advance section 30 as providing a possible framework for these types of cases, and in doing so we acknowledge it

could never be a panacea, because of course, as Her Honour the Chief Justice points out, there may be, to use my language, grotesque illegality or impropriety that doesn't engage your human rights. But nonetheless, section 30 would still appear to be of assistance –

ELIAS CJ:

Or that doesn't involve evidence.

MR DOWNS:

Yes. Yes, I accept that. It's just that it appears to us that section 30 does capture many of the considerations identified by both the Supreme Court of the United Kingdom and also the Privy Council in *Maxwell* and *Warren* and, perhaps more importantly, it provides a structure that it may be thought the jurisprudence currently lacks.

ELIAS CJ:

Of course you need to response when you have done that to the dissenting opinion of, in the *Babos* case, of Justice Abella, where he says you can't balance once you've concluded that there's something that's a total affront to the system.

MR DOWNS:

Well, I suppose that may be really to beg the question, what is a total affront in what circumstances does that occur, and I can't help but wonder whether –

ELIAS CJ:

But how can you get to that by balancing?

MR DOWNS:

Well, I'm not – the mistake is mine, Your Honour. I'm not advancing section 30 as a balancing test in the sense in which it's currently understood as simply going through the criteria, I'm advancing it in the sense that it provides criteria that appear to overlap with existing jurisprudence but which also has the advantage –

ELIAS CJ:

What, as a useful checklist, do you mean?

MR DOWNS:

Yes.

ELIAS CJ:

Yes. So, I understand.

MR DOWNS:

Yes, because it appears to the respondent that one of the difficulties in this area, and it may be the difficulty that Lord Hope was expressing when he made that statement that I commenced my case with, that this is an area in which necessarily Courts speak in matters of generality and high principle, so for example Lord Steyn in *Latif*, that a stay is appropriate when proceeding with the trial would be an affront to the public conscience or, to use the expression of Justice Moldaver in *Babos*, "When it shocks the community's conscious by proceeding with a trial." Now the respondent takes no respectful issue with either of those utterances, but insofar as workable principles and their translation to cases it may be thought, with the utmost respect, they're a little aloof.

ELIAS CJ:

Well, maybe it's illusory to look for anything too specific and, really, what you have to have is something which is pretty overwhelming, as the cases require, and sometimes there will be commonly recurring examples, but you wouldn't want to be too prescriptive.

MR DOWNS:

No, well, Your Honour is of course right in the sense that it may prove to be a futile exercise, but I can't help but wonder whether that's self-evident yet. It seems to me, with respect, that having a series of considerations that are ordinarily regarded as being relevant, not always determinative but relevant nonetheless –

ELIAS CJ:

But that's for admissibility.

MR DOWNS:

Well, yes, of course it was created for the purposes of admissibility. But we don't see any reason in principle, given the commonality of many of the factors to those identified by cognate Courts of, like seniority, why it couldn't be adopted. Ultimately

of course it's a matter for the Court, but it may be thought to give the advantage of providing some structure to an inquiry that at the moment is largely, on one view at least, governed by, well, rhetoric's not the right word, but linguistics. And it has another advantage in that because section 30 is concerned with human rights abuses it links to the respondent's proposition that a useful commonality here.

That, I think, unless there were further questions, may take us to the issue of guilty pleas, subject to one matter –

WILLIAM YOUNG J:
Can I just ask you one question before you get to that? I take it the Crown was not appealing against the judgment of Justice Collins?

MR DOWNS:
No, and I can give reasons if Your Honour wants to hear them.

WILLIAM YOUNG J:
I would quite like to hear them.

MR DOWNS:
Yes, there are two, if the Court pleases.

WILLIAM YOUNG J:
What, delay?

MR DOWNS:
Yes, that was the second of the two or, to put it more fully, that it was considered that the public interest did not require an appeal, having regard to the delay in the case. And the other consideration was that it was seen by the respondent as this provided an opportunity for both this case and the principles more generally to be examined.

WILLIAM YOUNG J:
This appeal?

MR DOWNS:
Yes. Now –

WILLIAM YOUNG J:

Right.

MR DOWNS:

– of course the Court doesn't have to accept that as a proposition, but that is the reasoning of the executive.

BLANCHARD J:

Can you explain that again?

MR DOWNS:

I'm sorry?

BLANCHARD J:

I don't understand that as a reason for not appealing.

MR DOWNS:

Your Honour, when the Crown comes to consider an appeal it always considers the extent to which the case raises a matter of principle and whether that, whether the case requires it to be brought in order to, for that to be ventilated and decided, and so in this particular case, because this appeal had been, leave had been granted, it was considered that issues of principle could be considered by the Court if it considered it appropriate.

BLANCHARD J:

Bizarre.

GLAZEBROOK J:

The trouble is it's in exactly the same case, so you have a situation where probably, where definitely more serious offenders have had their charges stayed against them and the potential that in this case that won't occur –

MR DOWNS:

Well…

GLAZEBROOK J:

– which does have an element of unfairness and unease in respect of the criminal justice system generally, certainly to my mind.

MR DOWNS:

Well, our reasoning may be imperfect, it was just that I understood –

WILLIAM YOUNG J:

That's the, that was the answer to the question. Whether it's a good answer –

MR DOWNS:

That was the answer –

WILLIAM YOUNG J:

– or a bad answer is for others to determine.

MR DOWNS:

That was, those were the considerations, such as they are. I've overlooked addressing one question from the Bench. Your Honour the Chief Justice asked how it was that the officers came to see the Chief District Court Judge. The answer, to the extent we find one, is at page 61, line 26. It's not informative, I should add, it simply says that they –

ELIAS CJ:

This is evidence or is it – yes.

MR DOWNS:

Yes, this is Detective Superintendent Drew. He simply says that they arranged to see the Chief District Court Judge, and then the next passage they're in His Honour's chambers, so.

ELIAS CJ:

Well, there is no jurisdiction that the Chief Judge has, is there?

MR DOWNS:

No.

ELIAS CJ:

There is no basis…

MR DOWNS:

No, and we can add that the officers needed a statutory jurisdiction –

ELIAS CJ:

Yes.

MR DOWNS:

– to do this sort of thing, plainly.

ARNOLD J:

So what happened? They gave the Chief Judge an envelope of some sort?

MR DOWNS:

Yes, they gave His Honour the envelope and that contained, amongst other things, the true identity of the officers – sorry, the officer. And according to the evidence, His Honour asked one or two, a small number of questions, but very little was said.

ARNOLD J:

And this envelope was never opened, is that right?

MR DOWNS:

That I think is correct. I can check that if need be. Justice Simon France in the High Court concluded that although the officers came away genuinely believing that they had authorisation, it may well have been a miscommunication.

ARNOLD J:

Right.

GLAZEBROOK J:

Well, they also put it there as if this was just the general procedure in any event, which was untrue.

ELIAS CJ:

Well, it's just that if there is any lingering misapprehension that this is an inappropriate way to proceed – well, is there any lingering misapprehension?

MR DOWNS:

Your Honour, I can give the Court a categorical assurance that there is no lingering misapprehension.

ELIAS CJ:

Yes.

MR DOWNS:

And indeed, for it to happen again there would need to be parliamentary sanction. So that's accepted. Now that brings us –

ELIAS CJ:

Would you like to take the adjournment now, because you're going to go on to deal with the change of play?

MR DOWNS:

If the Court pleases.

COURT ADJOURNS: 12.57 PM
COURT RESUMES: 2.19 PM

ELIAS CJ:

Thank you. Yes, Mr Downs.

MR DOWNS:

Yes, may it please the Court. We were at the point where we were discussing or about to commence our case in relation, we were at the point where we were to discuss the issue of guilty pleas and their effect.

The appellant's case, as we apprehend it, is that this Court should essentially adopt the approach adopted in England; the respondent is obliged to point out that, insofar as we can tell however, this precise issue hasn't arisen, by which I mean if we examine all of the English cases it appears that critical information that gave rise to

the ability to mount our challenge as an abuse of process arose after the person had been convicted. So all of the cases appear to be distinguishable.

ELIAS CJ:
Should that matter in principle?

MR DOWNS:
Well, it may be a consideration, it may be a consideration that's relevant, depending of course on the nature of the abuse. But perhaps before I respond to that more fully I should observe, by reference to the English case law, what we understand their effect to be.

The relevant starting point is probably *Mullen.* *Mullen*, as will be recalled, is or was a rendition case so –

ELIAS CJ:
A…?

MR DOWNS:
A rendition case.

ELIAS CJ:
Ah, yes.

MR DOWNS:
So Mr Mullen was connected with the IRA and he was brought from Zimbabwe to England to face very serious criminal charges which resulted, from memory, in a 30-year sentence. But the significance of *Mullen* is that the key information that gave rise to the ability to challenge the conviction as an abuse of process came to light only years after he had been convicted, and this is made clear at page 488 of the bundle – that was page 488 and the relevant paragraphs are (f) into (g) – so the Court of Appeal noted that, "The need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure clearly is a matter to be taken into account on the exercise of this Court's discretion following a conviction," and the exercise of the discretion is of course that to stay the case. "In these circumstances

we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was proceeded by an abuse of process which, had it come to light at the time, as such would have been done had the prosecution made proper voluntary disclosure, would properly have justified the proceedings then being stayed."

Now the subsequent decision of *Togher* was drugs offending, again we are before the Court of Appeal. Now in this particular instance the Court concluded that there had been no abuse or no relevant abuse, but the reason for referring to Your Honour's consideration is at page 473, it is made clear that the relevant information hadn't come to light at the point at which the defendant had been convicted – so this is page, forgive me, this is page 503, my mistake, 503 of the bundle at paragraph 36. The paragraph commences with the Court not wishing to question the passage in the judgment of Lord Justice Auld, where His Honour had essential said that, "A plea of guilty is an obvious barrier to a successful conviction appeal." However it cannot be applied to the situation which exists here, where the defendants were unaware of the material matters alleged to amount to an abuse of process. So we respectfully return to the proposition that no English case appears to have directly confronted the sequence that appears to be before this Court in which all relevant facts were before the appellant at the point in time in which he entered his plea of guilty.

ELIAS CJ:
Sorry, were you going to conclude there? No.

MR DOWNS:
No, Your Honour, you obviously have a…

ELIAS CJ:
Are you going to address the circumstance that the co-offenders are ending up in a different position because over the adjournment I was wondering whether it wouldn't be relevant to look at other cases where appeals have succeeded where someone has entered a guilty plea, not necessarily in cases –

MR DOWNS:
Yes.

ELIAS CJ:

– of abuse of process?

MR DOWNS:

Well, may I preface my response by saying Your Honour is of course quite right, with respect, to be concerned about the position of other defendants. But if we reflect on the jurisprudence one suspects that we'll find a very confined set of cases where, for example, the proceedings have been a nullity –

ELIAS CJ:

Yes.

MR DOWNS:

– or where there was a complete and obvious defence such that maintenance of the conviction would be improper. Now I'm paraphrasing necessarily the effect of the jurisprudence, but that to the respondent's mind is its likely state.

ELIAS CJ:

But that may be the, those may be the cases in which matters of equity, if you like, between co-offenders have arisen. But do the Courts, in deciding those cases, articulate any principle that it is an affront to justice to have very different results? Because a stay is pretty close to a determination that the proceedings are a nullity. If the proceedings are stayed it is because the Courts have decided that no trial should have taken place because of the irregularity.

MR DOWNS:

And we do find that type of sentiment in the English cases, the most obvious is *Mullen* itself, but that of course was a rendition case which the case law appears to conclude is one of the most serious instances of abuse.

Paragraph 36 of *Togher*, we were at previously, perhaps addresses Your Honour's question, because the Court of Appeal goes on to say this, and this is following on at paragraph 36, "If they could establish an abuse then this Court would give very serious consideration to whether justice required the conviction to be set aside. We would however emphasise that the circumstances where it can be said that the proceedings constitute abuse of process are closely confined." Now just pausing there, that appears to the respondent's eye to note a discretion to quash the

conviction. In other words, the mere fact that there had been an abuse of process would not necessarily require the Court to set the conviction aside. And if we go on, the rest of the paragraph appears to cement that conclusion because the Court goes on to say that it has to be a situation where it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand.

ELIAS CJ:

But the problem here is that it's not a question of, that the co-accused, the cases against them have been stayed for abuse –

MR DOWNS:

True.

ELIAS CJ:

– and so the question here is whether that circumstance of itself should enable the Court to agree that the conviction should be set aside.

MR DOWNS:

Well, the answer on the face of this judgment, that is the *Togher* judgment, appears to be that the fact of an abuse of process gives rise to a discretion on the part of an appellate –

ELIAS CJ:

But it's been exercised in the case of the co-offenders here and the Crown hasn't –

WILLIAM YOUNG J:

Some of them. Two of them pleaded guilty.

ELIAS CJ:

Two, yes, I know –

WILLIAM YOUNG J:

Two others have pleaded –

GLAZEBROOK J:

But they are, the ones who care about it are –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– Mr Wilson and…

ELIAS CJ:

So, and the Crown hasn't appealed. It's just that it's very awkward when these determinations of the High Court affect a change in status or establish a status and we're asked to doubt that conclusion in this case. I'm just really wondering whether, if we're looking at this just on a stand-alone basis as should this man be allowed to vacate his plea, why is the circumstance that the proceedings have been stayed in respect of the others not sufficient to be, yes, to be a reason?

MR DOWNS:

Well, let me attempt, if I can, to articulate a response to that. It may be a response, whether it's sufficient or not remains to be seen, to say that it's always open to a defendant to enter a plea of guilty as a matter of choice and if he or she does so certain benefits may follow. Now that indeed was the situation for this appellant, because he received a discount for his guilty plea, which of course reflected –

ELIAS CJ:

Which will go, if his plea is vacated.

MR DOWNS:

Yes, but I suppose the point is that he exercised an informed –

ELIAS CJ:

But he might be left in jeopardy of a fresh trial and the Crown would have to consider whether to proceed or not, and you couldn't really proceed if you hadn't appealed Justice Collins' determination, could you?

MR DOWNS:

Well, I think what I can say is, Your Honour, that if the appellant's convictions were to be quashed that would of course be the end of the case insofar as he were concerned.

ELIAS CJ:

You mean the Crown – I'm just trying to look at this as a stand-alone issue, because I wonder whether we have mucked matters up a little bit by putting the questions in the order they were. If the question for this Court had been whether he should be permitted to vacate his plea and if we were to be of the view that because the proceedings had been stayed against his co-offenders it was right to vacate the plea, the Crown would then have to decide in the normal course whether to proceed.

MR DOWNS:

Mmm.

ELIAS CJ:

And my point is, could you really responsibly proceed if you hadn't appealed against the determination of Justice Collins?

MR DOWNS:

Well, I can't…

ELIAS CJ:

I'm just looking for symmetry here.

MR DOWNS:

Yes, and I understand that –

ELIAS CJ:

Yes.

MR DOWNS:

– and I understand, with respect, the force of Your Honour's analysis. It's just that there are other ways of analysing the case, as is so often the way, and one of them is by reference to choice and to the appellant being an autonomous and informed individual who knew that the stay application had been brought and who made an election, having regard to a variety of circumstances he has told us through the notice of appeal, that he was prepared to plead guilty. The other way, on the face of the *Togher* decision, is to suggest that it's not automatic that an abuse results in a conviction being quashed for someone who has entered a plea of guilty if there appears to be a higher threshold in such a case, presumably reflecting the choice

aspect that we've just referred to. Now it may be that in a situation where the abuse is an abuse with a capital A by which, for example, it's a rendition case or it's the product of torture – I mean, sadly, these examples are not hypothetical in the world in which we live – then of course, of course a conviction in those circumstances could not be allowed to stand. But in the respondent's respectful submission it would not automatically follow that simply because things have been stayed that someone who elected to plead guilty would have the benefit of that subsequently.

ELIAS CJ:

No, I understand all of that. It's just the dimension that others have been treated differently that bothers me. So if it was a stand-alone case and he came along and said, "Look, I really think that there was an abuse here and I'd like you to vacate my plea," well, the Court might accede to that because it might think it was worth a run. As to whether his conviction –

MR DOWNS:

Yes.

ELIAS CJ:

– should be quashed, it might be a matter of discretion. But here, in substance, the discretion has already been exercised and the Crown hasn't appealed.

MR DOWNS:

Well, I suppose, you know, I don't wish to be circular, but I suppose we come back to where we started and that is to what extent is it relevant that the appellant was cognisant of the matters that gave rise to a successful stay application. The English cases tell us that if he or she wasn't then of course that's a very powerful blow –

ELIAS CJ:

Yes.

MR DOWNS:

– in favour of the discretion being exercised, but they're silent on the precise proposition that confronts, with respect, this Court.

ELIAS CJ:

So you're answer really has to be, to the question, why should he be treated differently, why is that an acceptable outcome for the system of justice, your answer has to be, because he made a choice.

MR DOWNS:

Because he – well, I'd like to think we can be a little more refined, that he made a choice that was an informed choice, in circumstances where he was wholly apprised of all of the relevant circumstances. Now –

WILLIAM YOUNG J:

There are cases that say that, I think, that a later ruling as to admissibility of evidence or inadmissibility of evidence doesn't warrant setting aside a plea of guilty?

MR DOWNS:

Yes, that's for example *Le Page*, Sir, which is in the bundle. But *Le Page* is a case in which the person pleaded guilty, he subsequently sought leave to appeal to the Court of Appeal on the basis that perhaps he had a defence to the charge; the charge was one of either drugs or arms offending or both. The relevant evidence had been discovered in consequence of the search, and he contended that if the issue had been explored in advance of the plea of guilty the evidence would have been excluded. Now the Court of Appeal conducted an inquiry in relation to whether the evidence had been improperly obtained and found it hadn't. But it also said that even if it had, the guilty plea would essentially be binding and he wouldn't be able to go behind it.

WILLIAM YOUNG J:

There are English cases to the same effect, aren't there?

MR DOWNS:

Yes, well, essentially they draw a distinction between what is said to be only defence being removed from the person's grasp, in which case it appears that a guilty plea doesn't bind the person, or may be quashed, or the conviction may be quashed, and the situation in which it's said that the defence is made much more difficult by a ruling. In other words, it leaves open the prospect of the person going to trial, irrespective of what their case is actually like, and *Le Page* essentially adopts the same distinction.

WILLIAM YOUNG J:

Is there – there's a reference in one of the cases, I think, which I can't find now, where the Judge commented rather bleakly that, "The appellant doesn't even make a pretence of being innocent." What's that case?

MR DOWNS:

Ah…

WILLIAM YOUNG J:

Does that ring a bell?

MR DOWNS:

Well, it might –

ELIAS CJ:

Yes, I've read it too. I think it's in your submissions actually.

MR DOWNS:

It might be *Togher*, because that was, the Court will recall there were two separate indictments in relation to very serious drugs offending, but they had been, they had come about or they had been divided as a consequence of what was said was to be case management reasons.

WILLIAM YOUNG J:

Right. Alright, yes.

MR DOWNS:

Ah, my learned friend's been very generous. So it's actually in the Crown's submissions at paragraph 68, and the citation I'll – no, the citation's actually –

WILLIAM YOUNG J:

The Australian case.

ELIAS CJ:

Oh, the Australian, yes.

MR DOWNS:

Yes, yes, *R v Toro-Martinez* [2000] NSWCCA 216, (2000) 114 A Crim R 533, the Australian case. It would be fair to say that the Court of Appeal was sceptical of the existence of the jurisdiction, or at least imposed a very high threshold. It referred to the case having to be, "Extreme, not just extraordinary."

ELIAS CJ:

What on earth is the difference over...

MR DOWNS:

Well, I, it may be, it may a reference to the distinction between an abuse of process with a small a and one with a capital A, in other words one that involved a human rights abuse or something so pernicious that it couldn't be allowed to stand.

To round out the submission with a modest matter of fact, there is a suggestion that the evidence of Detective Inspector Wormald was a material change in evidence and that that may be part of the mix to permit the discretion to be exercised in the appellant's favour. Detective Inspector Wormald gave evidence because there was a request made of the crown that he testify. His name was mentioned by one or both officers in the earlier hearings and the purpose of his evidence was to explore whether, when he applied for interception warrants, he was aware of the misconduct in issue in the Courts below, and it was in that context that the so-called additional evidence was said to come to light.

WILLIAM YOUNG J:

Sorry, but was there any additional evidence to the effect that if not able to carry out the scenarios involving the search warrant and the arrest they would have pulled the operation?

MR DOWNS:

To the respondents I, we see no material distinction between the evidence of Detective Inspector Wormald and that of the earlier officers.

WILLIAM YOUNG J:

And Detective Inspector – I mean, as I understood it from the evidence that was given in front of Justice France, the purpose, it was acknowledged that the purpose

of the undercover operation, enhanced the deception that was practiced, was to facilitate the gathering of evidence.

MR DOWNS:

Yes, it was, and those sequences appear at pages 73 and 81, as already examined by the Court in the course of argument.

GLAZEBROOK J:

This mightn't be – you mightn't be the right person to ask about this, but where in this evidence is the best indication of a change of evidence –

MR DOWNS:

Well, I think –

GLAZEBROOK J:

– in terms of what Justice Collins was relying on?"

MR DOWNS:

I think the appellant would answer, "Page 218."

GLAZEBROOK J:

218.

MR DOWNS:

That was when His Honour Justice Collins addressed questions to the detective inspector, and the detective inspector talked about how shoring up the credibility or apparent credibility of the undercover officers dovetailed with the need to, or dovetailed with the purpose of gathering further evidence and also protecting the officers. We respectfully venture that it was essentially before Justice Simon France in any event.

GLAZEBROOK J:

Oh, I see, to continue to gather information, right.

MR DOWNS:

Yes, to continue. It perhaps made more express a linkage that hitherto had been implicit.

GLAZEBROOK J:

Although the “continue” is the Court’s words not the detective’s words.

MR DOWNS:

Forgive me Your Honour while I just find the passage.

GLAZEBROOK J:

The top of 218.

WILLIAM YOUNG J:

Well, at page 81.

GLAZEBROOK J:

It says, “Extend out beyond where we were at.”

WILLIAM YOUNG J:

Yes. I mean, if you compare it to page 81 it’s basically the same, isn’t it?

MR DOWNS:

Well, there’s very little in it.

WILLIAM YOUNG J:

Yes. I mean, it says, “And to enhance the prospect that he would be accepted by the targets of the operation, agreed?” “Yes, of course, they are all linked together.” “And thus have access to evidence gathering to support charges against those targets?” “Evidence gathering or intelligence gathering, absolutely, that was the purpose for being there.”

MR DOWNS:

We do venture that there’s no material change in testimony.

WILLIAM YOUNG J:

Well, I must confess I can’t see any for the moment.

GLAZEBROOK J:

Well, unless you read that “continue” as being, “We wouldn't have continued without,” but it’s not the detective’s words.

MR DOWNS:

The only other –

WILLIAM YOUNG J:

There may have been other ways of alleviating suspicion or attempting to alleviate suspicion that didn't involve a fake search warrant or a fake arrest.

MR DOWNS:

Yes, well, one hopes that there are better and more lawful ways.

WILLIAM YOUNG J:

Yes. So it's just that the counterfactual that he would have been called is one counterfactual, the other counterfactual is they'd have done it a different way.,

MR DOWNS:

In terms of the factual sequence, in the month of May Mr Tulouna had confronted the male undercover officer essentially about his identity, and then shortly before the 27th the police learned of "word" as it was put, going around the South Island town that there was an undercover, two undercover officers in town. Does that justify what they did? Plainly not. But it does explain why they felt they needed to take action.

If the Court pleases, perhaps there's only one matter left. I have to confess this isn't foreshadowed in our written submission but it may be material. This case arises under the Crimes Act 1961 and, more particularly, part 13 section 385. Under the Criminal Procedure Act 2011 the concept of a miscarriage of justice is defined in the statute, and the reason for respectfully drawing it to the Court's attention is that that definition, that definition doesn't necessarily admit of the type of discretion that may be admitted by the inherent elasticity of the phrase "miscarriage of justice" in the section 385 context. Now it's not an issue that arises on the instant facts, but it may be an issue that arises in future cases.

WILLIAM YOUNG J:

What's the section of the Criminal Justice Act?

MR DOWNS:

Yes, so the relevant provision, if the Court pleases, is section 232.

WILLIAM YOUNG J:
So that's the definition of “miscarriage”, is it?

MR DOWNS:
Subsection (4), yes. In subsection (2) “miscarriage of justice” means, “Any error, irregularity or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial or a trial that was a nullity,” and of course the appellant in relation to the guilty plea case commenced with a very proper, with respect, concession that under the tests that exist at the moment this couldn't be brought with any of the existing categories. It may be a matter for another day, but we simply avert to the issue –

ELIAS CJ:
I’m just wondering whether – that cuts both ways thought, doesn’t it, because it also applies to the appeal to the Court of Appeal and would suggest that the Court of Appeal – oh, I was going to say were doing it the other way round.

MR DOWNS:
No, the appeal to the Court of Appeal was under the Crimes Act, Your Honour.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
But this is a Crimes Act appeal.

MR DOWNS:
Yes, it is.

ELIAS CJ:
Yes.

MR DOWNS:
I’m just, at an –

WILLIAM YOUNG J:
They’re say, “Don’t write too widely because the Criminal Procedure Act is different.”

MR DOWNS:

I'm not, wouldn't be that impertinent. It's rather that –

WILLIAM YOUNG J:

No.

MR DOWNS:

– this is an issue that isn't necessarily governed by the text of the instant provision.

ELIAS CJ:

Yes.

MR DOWNS:

If the Court pleases.

ELIAS CJ:

Yes, thank you. Thank you, Mr Downs. So Mr Cook, do you want to be heard in reply?

MR COOK:

Just very briefly. Just in terms of, it's only five points, the first is just in terms of the counterfactual and that they could have allayed suspicion differently. There was significant opportunity at the first hearing before His Honour Justice Simon France, the second evidential hearing, and then the evidential hearing before His Honour Justice Collins to say how it would have been done differently.

The next point is there might have been some suggestion earlier on that Mr Momo-Wilson got a benefit because of forgoing the challenge in relation to his guilty plea. In terms of the, it's not in our case on appeal unfortunately, but in the Court of Appeal case I'd ask Your Honours to look at, it's paragraph 13 of the sentencing notes before His Honour Justice Mackenzie and –

ELIAS CJ:

Where are they?

MR COOK:

I think someone had their Court of Appeal casebook up –

WILLIAM YOUNG J:
Not me.

GLAZEBROOK J:
Not me.

MR COOK:
– so I can tell you exactly, I can tell you –

ARNOLD J:
Not me, I don't think.

WILLIAM YOUNG J:
Is it cited in the Court of Appeal judgment?

MR COOK:
I can make it available. I've got an electronic copy of the…

ELIAS CJ:
So what does it say?

MR COOK:
It says that – so this is the sentencing. It says, "I'm allowing a discount of around 20%. I consider that in doing so I've taken into account your counsel's submissions on that issue and on the effect of your plea and of the conditions of your bail." So she's talking about the fact that he'd been on electronic bail for a period of time.

ELIAS CJ:
Yes.

MR COOK:
And then it refers to the sentencing indication which doesn't indicate, in my submission, that it was because he was forgoing his chance of the abuse of process.

WILLIAM YOUNG J:
What was his sentence indication?

MR COOK:

Touch and go around two years.

WILLIAM YOUNG J:

Right, and then he failed a drug test or something, didn't he?

MR COOK:

Yes he did and it was, the carrot was there for home detention and then he was sentenced to imprisonment, he served two months, and then was granted bail pending the bail and then he was out for a long period of time, and because of the *Antonievic* appeal and then the appeal to this Court from *Lee* and *Jones*, there was a huge delay, and then I started acting for him at that point and we had a sentence appeal in front of the Court of Appeal and they said because of the length of time you've been out, been on electronic bail, you haven't breached, you haven't been on curfew, you passed a drug test which we provided an affidavit, you're going to get home detention now.

ELIAS CJ:

A re-sentence?

MR COOK:

Yes. And that just brings me to the timing issue. His guilty plea was between the two Justice Simon France hearings. So he had the first one and then plea of guilty and then there's the second Justice Simon France hearing in which the police came back and said, oh, by the way that material you put forward that actually wasn't correct. The next point –

ARNOLD J:

And his sentencing was also, the plea of guilty and the sentencing was before that second hearing?

MR COOK:

Yes. The next point, I might have misunderstood it so I –

WILLIAM YOUNG J:

Wasn't the second hearing on the 24th of August?

MR COOK:

Yes.

WILLIAM YOUNG J:

So that's after the plea of guilty but before the sentence, is that right?

MR COOK:

No, Sir, that's after the plea of guilty and after sentence.

WILLIAM YOUNG J:

I thought the sentence was September?

MR COOK:

Sorry, yes 13th of September, so after the plea of guilty and before sentence.

BLANCHARD J:

The sentence was 13th of September.

WILLIAM YOUNG J:

So that's after the second hearing?

MR COOK:

Yes. The next point that I was going to raise was the discussion between my learned friend and Her Honour the Chief Justice, and I may have got this wrong, but it seemed to be talking about an appearance of injustice in relation to the other larger, bigger players in terms of the offending, being entitled, or getting the stay and it not being appealed further, and the inconsistency between this position. It was very quick but it just, something in the back of my mind, and it's a case of *Ferris v Police* [1985] 1 NZLR 314. It's not quite the same but it did ring a bell and this was where, as was the want when we had summary indictable. Mr Ferris was charged with cannabis and possession of cocaine, cocaine only being dealt with in the High Court. He was acquitted in the High Court on the same evidence which was from an accomplice and then in the District Court he was convicted and on appeal to Justice Hardie Boys His Honour said there was just a bit of, there's just a bit of unfairness in you having been convicted in the District Court on the very same evidence that was rejected by a High Court jury so he quashed the conviction and it goes into a bit more detail.

That's a very rough summary given that I was reading it while the discussion was going on.

The final point which I'm slightly more confident about is in the bundle of authorities at tab 17, which is *Babos*, and it's the dissenting judgment of Her Honour Justice Abella, and it's at page 562. So it's tab 17, page 562, para 84. Again this was the point Your Honour the Chief Justice was making about the balancing exercise. I had made what was classed as a concession, which I tried to qualify by saying that it just intuitively you're immediately deciding whether something is sufficiently egregious and at the bottom end of that paragraph 84 it says, "it is one thing to require that trial Judges look at the 'competing interests at play' before concluding that the State conduct could not be condoned." That's the intuitive balancing process that I was submitting about. It's put clearly on a much more euphonically pleasing way than I did. Because once, in my submission, a trial Judge has found that the conduct can't be condoned because it's such an exceptional assault on the public's sense of justice, then it is conceptually inconsistent to balance it out. Unless there's anything further, those are my submissions.

WILLIAM YOUNG J:
Was there any evidence in front of Justice Collins that in the absence of the search warrant and arrest scenarios, the undercover officers would have been withdrawn?

MR COOK:
That's the point Your Honour raised before. I can't give an answer off the cuff. I just don't know sufficiently, confidently. I can look at that and I can file something.

ELIAS CJ:
Well it's on the material we've got, is it?

MR COOK:
Yes. Justice Collins found that in his decision but I think Your Honour is asking me to go to the evidence and point out where he's got that finding from.

WILLIAM YOUNG J:
Yes I'm just, what I'm –

GLAZEBROOK J:

Mr Downs says 218 but is there…

MR COOK:

Well 218 is the aspect that's ringing in my mind because it was an exchange between His Honour and the detective inspector which led to it, and it was the way that it continually came out and it was clear that he was talking about, it wouldn't have continued, but I just want to be sure that there's not somewhere else where that's been pulled from, but that was, in the short time I had to look at it, that was what I saw it being.

ELIAS CJ:

Thank you counsel for your very helpful submissions and excellent oral argument. We will reserve our decision in this matter. We have got your indication, Mr Cook, that there is some urgency about that.

MR COOK:

Just on that, I think he's got a month to go, so the urgency is not as much as it was.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 2.58 PM