IN THE SUPREME COURT OF NEW ZEALAND SC 115/2015

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

BETWEEN **LYONEL TE POU TANIWHA**

Appellant

AND **THE QUEEN**

Respondent

Hearing: 7 June 2016

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

Appearances: N P Chisnall and M F Laracy for the Appellant
M D Downs and F G Biggs for the Respondent

CRIMINAL APPEAL

MR CHISNALL:

If the Court pleases, counsel's name is Chisnall, and I appear along with Ms Laracy for the appellant.

ELIAS CJ:

Thank you Mr Chisnall, Ms Laracy.

MR DOWNS:

Yes, may it please the Court, Downs and Biggs for the Crown as respondent.

ELIAS CJ:

Thank you Mr Downs, Mr Biggs.

MR CHISNALL:

As Your Honour pleases. Just to clarify my learned colleague is going to address the second point. I'm going to address the demeanour issue. Just an issue of housekeeping that arose this morning. The Court would have received a transcript from the Crown Law Office which is the complainant's evidential video interview. It turns out that the EVI that is in the Court's bundle is, in fact, the unedited version. The version that's been filed this morning is the correct version.

ELIAS CJ:

I don't have the version that was filed this morning.

MR CHISNALL:

Can I just make it clear, that should not make any difference in terms of –

ELIAS CJ:

But we should look at the transcript as handed up today. Madam Registrar can you try and locate it, thanks.

MR CHISNALL:

I apologise for that issue but it slipped past me but fortunately my learned colleague for the Crown identified the issue.

ELIAS CJ:

Thank you.

MR CHISNALL:

The appellant's two key propositions in this case is that first demeanour findings are idiosyncratic and unpredictable, and people do know better than chance in detecting deception or honest, or dishonesty based on demeanour. The second proposition is that to keep pace with the current knowledge of the mind and personality the law must develop some means by which control is exercised over demeanour findings by juries who, the research shows, may sincerely believe they are capable of assessing veracity through demeanour. This, in our submission, is a widespread belief and a popular fallacy. As Robert Fisher said in his article, *The Demeanour Fallacy,* one should be cautious about jettisoning a popular belief that has been cherished by so many for so long but it is harder, in our submission, to argue with the science about demeanour. What we are saying is that juries should be told that they are not entitled to conclude, based on such presentation or cues, that a witness is truthful or lying. They should be told the reason why it is unsafe to rely on demeanour. It is only by doing so that we address the risk that juries will place undue emphasis on demeanour. In our submission the most obvious need for a direction is in this type of case, a he said/she said sexual case, and in our submission that is so regardless of whether or not the Crown or the defendant places emphasis on demeanour. It ought to be a direction provided whenever credibility is in issue.

ELIAS CJ:

Why does the Judge have any particular monopoly on wisdom here? In some of the other standard directions that are given it is because of experience with miscarriages of justice in the case of identification evidence or something like that. Why is the Judge's opinion worth ramming down a jury's throat in this sort of case?

MR CHISNALL:

When Your Honour says "opinion" are you saying that it's something that the Judge has a particular concern about, or is it something –

ELIAS CJ:

Why does a Judge have something to offer a jury, which is the trier of fact?

MR CHISNALL:

Well that something that the Judge has to offer is based on what the evidence shows in terms of the research. So it's obviously, much of the discussion that we have around demeanour comes from extra judicial discussions by learned senior Judges talking about experience with demeanour. But the research itself, which in my submission would need to form the background to the direction, comes from the social science itself.

ELIAS CJ:

So it's the research that underpins the submission that you make?

MR CHISNALL:

Yes, it is. Can I just perhaps pick up on that point that Your Honour just made about identification and talking about the common law developing to meet a particular concern. Identification is an ideal example of that. But obviously the Court will recall identification in law is considered, certainly up until the 19th century, to be a type of evidence that was first rate. It was, indeed, more reliable than perhaps other types, and obviously the development that's occurred, particularly in more recent times in terms of warnings that juries are provided, the background to that, of course, is that shift in the common law view of how reliable it is to take it into account where true miscarriages have arisen, and so in my –

ELIAS CJ:

But you're not pointing to examples of miscarriages, you're pointing to theoretical and, to some extent, experimental assessments by experts?

MR CHISNALL:

It's not experimental, in my submission, in that what we're talking about is a body of material that backs up the impressions that Judges themselves have formed over time in terms of the risk that attaches to that. In terms of miscarriages, it's a difficult proposition to say that it has or it hasn't caused a miscarriage where there's been reliance on demeanour, simply because we don't have any way of actually delving into the particulars of a jury decision. In my submission what we do have though is some advantage in looking at the way that demeanour is being used in Judge alone trial, where demeanour has, it's been determined, caused a miscarriage because it's been given undue emphasis, often in the most stark cases where, in fact, it goes against what the objective evidence tends to show, and so an example of that, indeed, is *Fox v Percy* [2003] HCA 22 in the High Court of Australia where we have the benefit, of course, of the Judge's reasons at first instance, and where the particular concern that the High Court identified in that case was the fact that we had a demeanour assessment which didn't really withstand scrutiny when placed alongside what the forensic evidence of the crash site showed, and so in my submission that provides support for the proposition that miscarriages can and do arise in these cases where demeanour is relied on.

ELIAS CJ:

But why is that different from any other case where there is a clash of evidence? What's so special about demeanour evidence?

MR CHISNALL:

Well, as I've hopefully made clear in our written submissions, in our argument it's a form of prejudice. What makes it different to other types of evidence is that –

ELIAS CJ:

Well it's not evidence you say?

MR CHISNALL:

No, that's actually –

ELIAS CJ:

Well that's really what you have to say.

MR CHISNALL:

That's what we have to say, but if you look at it in terms of what the research shows, it is, one, no better than the flip of a coin, which is a phrase that tends to be a common theme throughout the research in the articles, which, in my submission makes it really no more than a form of guesswork.

GLAZEBROOK J:

Can I just come down the particular evidence in this case because the particular evidence in this case as I understand it, I know that the prosecutor talked more generally about demeanour but without giving any details in terms of saying assess her demeanour and it looked like truth, but the actual demeanour we're talking about is somebody getting upset when recalling a traumatic event so that being shown the towel and getting upset? Now, I don't recall in any of the studies or the demeanour evidence that you're talking about that any of them relate to that matter. So it's quite common to give evidence that she ran crying and screaming from the room, was sobbing when she was telling me this. It's relatively often that people sob when they're recalling trauma. Now, of course, some of the directions that are given, I think, in Canada, are dealing with the situation where somebody doesn't react in the way that one would expect and some suggest that that might have been partly behind the Lindy Chamberlain issue in that she didn't react in the way that people thought she should have reacted and there have also been some miscarriages of justice in Canada, which I suspect the person would have been a bit damned if he did and damned if he didn't. He'd have been taking too much interest in the funeral of the neighbour or taking too little interest, both of which would have been shown.

But now, effectively in this case, it is natural behaviour I would have thought, although not of everybody, to be upset at recalling traumatic events. So it could well indicate someone's telling the truth. On the other hand, somebody

could, if they're not telling the truth, manufacture that, and that was put to the – not to the complainant –

MR CHISNALL:
To the defendant.

GLAZEBROOK J:
– but it was put to the perpetrator, alleged perpetrator in cross-examination. Are you saying she's made that up and, thus, she's on methamphetamine, so would make everything up, as I recall?

MR CHISNALL:
That's right, Your Honour.

GLAZEBROOK J:
But it's not something that is irrelevant. One can't say it's irrelevant because it is perfectly – unless there's something in the literature that I haven't heard that says getting upset when recalling a traumatic event can never be an indication of truth, and I don't recall anything and I just can't possibly see how that could be the case?

MR CHISNALL:
No, no, and it wouldn't go that far of course.

GLAZEBROOK J:
But we need to be grounded in what the evidence was in this case. It had been put to the jury that she'd been making it up. That must have been the allegation. She was making up the towel and making up her reaction to the towel.

MR CHISNALL:
Yes, and that is right, Your Honour.

GLAZEBROOK J:

I'm sorry, that was a slightly long way but the question really was, you're saying, that we should say it should be ignored. In this particular case with this particular type of evidence, I'm perfectly happy to say if somebody's looking up to the left and winking their right eye or whatever that sort of snake oil stuff says, that if somebody suggests that then it should be told it's totally irrelevant but it just seems to me difficult to translate to this.

MR CHISNALL:

Can I start by addressing the first proposition Your Honour made about the research and what it shows. You're right that certainly from my reading, there hasn't been any research specifically relating to emotion and whether emotion can, is more or greater in terms of the weight it might be placed. But there doesn't appear to be any contention with the fact that it does, nonetheless, fit the definition of demeanour and I would certainly invite the Court to do what the Court of Appeal did in this case and take the extra judicial description of the verbal and non-verbal cues that the Court of Appeal adopted which comes from Lord Bingham, and I've referred to that at paragraph 22 of our written submissions, which talks about the witness' conduct, manner, bearing, behaviour delivery, inflection. In short, anything that characterises the witness' mode of giving evidence but does not appear in a transcript of what the witness said. Obviously that's broader than body language.

The second point I'd make is that Marcus –

ARNOLD J:

Can I just raise one other thing before you come to it at some point? The evidence here was given by way of a video link not –

MR CHISNALL:

And evidential video interview.

ARNOLD J:

Well it was an evidential video interview but then the cross-examination was conducted, as I understood it, through TV monitors, not directly in person in other words. Now if that's right, what I wondered about is whether the research shows anything at all about the interposition of – the interposing of a television camera, whether that in any way affects the way the listener responds to demeanour? In other words, if demeanour is more powerful when seeing somebody directly in person as opposed to through a television screen?

MR CHISNALL:

No because the research tends to make the point about there being no advantage whether in fact the person's seen or not. In fact the research, and certainly my reading of it, shows that the oral evidence and the ability to detect deception is no better if the person can be seen. And in some ways, in fact, without the distraction of both audio and video, it tends to be the case that the advantage is more towards the audio alone.

GLAZEBROOK J:

I think the point might have been a slightly different one, whether somehow that's muted through the TV and I think there is some evidence, or a study, but not actually particularly well done or validated that suggest that jurors feel a slight more detachment if they see it through the television but I don't think it was particularly good research and it certainly hasn't been acted upon in any of the studies.

MR CHISNALL:

No, and it certainly doesn't go to the issue about – I suppose the underlying assumption with that type of research is that demeanour is a relevant consideration, so if it's – that may well skew the sense of advantage that a jury might feel in that kind of case.

GLAZEBROOK J:

And I think you're right. There is research to suggest that if you just hear something without seeing something that you're actually more likely to detect falsehood because you're not distracted by visual clues that might not be correct, which possibly then suggests a whole lot of things, as Mr Downs was saying about trial process is an appellant review generally but I'm not sure that's even very much more because if you – it's 60% rather than 50%. I'm not entirely sure that justifies changing the…

MR CHISNALL:

Yes, it's still on the margin of charts and the flip of a coin as we keep coming back to.

Perhaps if I can just go back to the point I was going to make about what Marcus Stone said, and it's in the Crown's materials at tab 43, the article *Instant Lie Detection*. Just to answer the question Your Honour, Justice Glazebrook, posed before about emotion, in my submission there's some utility to be gained from looking at that article because what it talks about is variable forms of demeanour that may be voluntary or involuntary. And just to pick up the point before about eyes up and to the left being a sign of lying and things like that, what it does show is that there are certain behaviours that can't be simulated because they occur when emotions initiate processes in the autonomous nervous system. The examples given in the article are blushing, pallor, perspiring and the number of facial expressions. But voluntary forms of self-expression may be genuine and simultaneous but as he makes the point at page 975, equally they may be fake attempts to convey sincerity, including becoming distressed. And so I suppose the simple point is that emotion is something that is a demeanour consideration in terms of the definition but –

GLAZEBROOK J:

But really the point is they have to be, when they are assessing something, they have to take into account the possibility that it may have been manufactured?

MR CHISNALL:

Yes.

GLAZEBROOK J:

But they can't be told they have to ignore it because if it is genuine, then it is actually a genuine indicator of truth telling isn't it?

MR CHISNALL:

Well, in my submission –

GLAZEBROOK J:

Like lying, I mean you can lie for all sorts of reasons. An innocent person might say, "I wasn't there," because they're worried they might be accused of something they didn't do, but it doesn't mean necessarily, but a guilty person could lie because they know they did something they shouldn't have done and are hoping to get out of it by saying they weren't there.

MR CHISNALL:

I suppose my point would be that it's demeanour and –

GLAZEBROOK J:

But isn't that just a jury the point there is, isn't that just a jury question? The jury is aware that a person could be faking something and they just take that into account with everything else. What help do they need?

MR CHISNALL:

Well in my submission they still need help to understand the issue of demeanour and the fallibilities that exist.

GLAZEBROOK J:

But if it doesn't arise in the case, the only thing that arose in this case was whether the emotion was faked or otherwise.

MR CHISNALL:

Yes. Can I go back to a point that I do need to emphasise when it comes to emotion? The Crown argument is suggesting that we are saying that by requiring a direction it was overt counter-intuitive development in the laws of evidence.

ELIAS CJ:

It won't be a good thing.

MR CHISNALL:

In my submission the Crown's approached this from the direction, the demeanour directions, particularly when emotion's involved, and only ever aid the defendant. It overlooks, in my submission, the point that Your Honour, Justice Glazebrook, just made which is that – and just looking at Canadian cases and also our own jury research. The Crown can be prejudiced too whenever a defendant relies on the absence of emotion as equating with lying, which is a problem that can lead to miscarriages on the other side of the equation.

GLAZEBROOK J:

But what's the direction we give here? So the jury – you must be aware that people can fake emotion. Juries know that. I mean they must know that all the time from dealing with their children. You know, "He hit me, Mummy, and I'm crying." "No, he didn't at all hit me."

MR CHISNALL:

Well that, of course, relies upon the norms from that particular – from your own relationship with a child, rather than what you know about the particular complainant or the particular witness that you're assessing and so in my submission –

GLAZEBROOK J:

But what's the direction that you would give? I can understand the direction that says not everybody reacts in the same way, so a lack of emotion may not

indicate lying. That's something for you to assess for yourselves. So you could say, well, the Crown says that her demeanour when she saw the towel shows that she was genuinely upset. You have to take into account the possibility that she might have faked that emotion.

MR CHISNALL:

There is a direction that's in the UK trial handbook. It's set out in full in the Crown's submissions at paragraph 57. The case materials we've provided in our materials as well, tab 11 of our materials, and page 317 is where the actual direction's given. It's described as – and the heading is "Alerting the jury to the danger of assumptions".

GLAZEBROOK J:

That's the one I was talking about. I can understand that. That's the one I was referring to. I thought it was Canadian but it's – but that might have a Canadian one as well. That's saying people react in different ways.

MR CHISNALL:

But it's got two sides of it and in my submission it goes directly to the heart of demeanour and just to –

GLAZEBROOK J:

Well it does but it doesn't help in your situation does it? That the jury had to take into account the fact she was faking it. This says people have different ways of reacting. I can understand that you might want to give that direction, especially if the defence are saying here you have somebody who stood in Court and had a wooden face and gave evidence matter of factly, obviously didn't care at all about this and she should have been crying.

MR CHISNALL:

Well, in my submission the direction that the UK comes up with actually does address this type of issue where it talks about conversely it does not follow that signs of distress by the witness confirms the truth and accuracy of the

evidence given. In other words demeanour in Court is not necessarily a clue of the truth of the witness' account. It all depends –

GLAZEBROOK J:
All right, so you're suggesting that the direction at paragraph 58 is the direction that should have been given?

MR CHISNALL:
57 I think it is of the Crown – yes. But it gives both sides of it and I suppose the point I wish to emphasise is a more helpful way of looking at this case, contrary to perhaps the way we depicted it, certainly contrary to the way the Crown depicted it is that it's all about a specific party's fair trial rights. Rather, in my submission it needs to be looked at in terms of the right to a fair trial from both participants.

O'REGAN J:
But was it the defence contention here that she faked shock when she was shown the towel? Is that the defence case?

MR CHISNALL:
It would have to be.

O'REGAN J:
Well was it the defence case?

MR CHISNALL:
It wasn't, yes, but it wasn't put that way.

O'REGAN J:
Well if it wasn't put that way, what was the case?

MR CHISNALL:
Well, I suppose that is, that was the inference, that it was faked.

O'REGAN J:

Was the jury asked to find that, by anyone?

MR CHISNALL:

No.

O'REGAN J:

Well why are we being asked to do it now?

MR CHISNALL:

Well, because of the fact that the Crown asked it, for there to be reliance placed on it.

O'REGAN J:

Well the defence closing was after the Crown closing.

MR CHISNALL:

Certainly, but in my submission Sir there is some issue around whether in fact demeanour is something that people are necessarily, lawyers are necessarily aware of, and can I just give as an example. We have two cases in the bundle, *Sateki v R* [2011] NZCA 239, which is a fairly recent decision from 2013, and we have *R v Tongotongo* CA313/00, 20 September 2000, which is from 2000, where the argument was made by the appellant obviously flipping what we say on its head, which is that the Judge had erred by providing a, telling the jury not to take into account demeanour, and so my simple point is that hindsight would suggest that that could have been directly confronted and the Judge could have been asked to give a direction, but in my submission it's not necessarily something that's well known to trial lawyers.

O'REGAN J:

But in this case it's all very well saying people have different clues when they're telling the truth, some people look around, some people look you in the eye, that sort of thing.

MR CHISNALL:

Sure.

O'REGAN J:

But in this case somebody just reacting in a sort of visceral way to that piece of evidence if she showed shock at that, it was either, she was either faking it or she wasn't, she was either putting it on or she wasn't. So if no one suggested that she was putting it on, why would the Judge deal with it?

MR CHISNALL:

Well I certainly see Your Honour's point but it does come back to the idea that demeanour is an unreliable –

O'REGAN J:

Yes, but that's too generic here. You're talking about a particular reaction to a particular piece of evidence which had a particular significance in the case, and it's not a case of being, the jury potentially being confused by her response to it, it was either a genuine response or it was a fake one. That was the only two possibilities, wasn't it?

MR CHISNALL:

Yes, but it doesn't say, a genuine response doesn't say that she's shocked because it happened, and I suppose the point is, that comes out of these cases is jumping to the conclusion based on the body language that the person –

O'REGAN J:

Well is it the defence case here then that her shock was genuine but a false clue? Because I didn't understand you to be arguing that.

MR CHISNALL:

Well no because it's not as sophisticated as that Sir, and it wasn't addressed in the way that we are now, and I suppose it comes back to trial tactics not wanting to overemphasise something. But the point I would make, and it's

something that I understand Stone said in his article, when you're talking about an opportunity in a lead up to trial to demonstrate emotion, it's not beyond the bounds of plausibility to say that somebody can actually put these types of things on, and so if what we're talking about is an ability to be able to assess somebody's facial cues and other cues to actually work out whether they're telling the truth, then the research shows us that in fact we aren't any good at doing that, and that must surely hold in relation to emotion as well.

O'REGAN J:
Well we've got to ground this in the facts of this case though.

MR CHISNALL:
Sure.

O'REGAN J:
So in this case if you're not suggesting that the jury might have been confused by this reaction into thinking something, or are you suggesting that, or are you just saying, she must have faked it and the Judge should have said that was a possibility?

MR CHISNALL:
Well what we're saying is that the jury should have been warned about the risks attaching to judging a book by its over, and the type of direction, in my submission –

O'REGAN J:
But I don't think you can be as generic as that. We have to look at what happened in this case.

MR CHISNALL:
But the very direction that actually addresses the concern here is the one that's in the UK handbook. The very issue about actually jumping to the conclusion that distress shows you something about the person. Look, I appreciate the way that the –

O'REGAN J:
But again that's a generic clue about a witness being upset when giving evidence. It's certainly different from someone reacting to a particular piece of evidence when it was produced, isn't it?

MR CHISNALL:
Yes, but it also underlies the upset. Can I use an example of, and I provided a decision which is from the English Court of Appeal 2014, *R v Abdal Miah* [2014] EWCA Crim 938. It addresses a point that Your Honour Justice Glazebrook raised earlier about being able to take into account distress close in time to any offences committed.

GLAZEBROOK J:
Whereabouts are we?

MR CHISNALL:
It addresses the idea that distress is a relevant consideration and that decision, which was a kidnapping case, there was evidence about the complainant's reaction shortly after the event. Now this is an example of where distress was used by both parties. The Crown used the 111 call where there was apparent distress and anguish to say that that demonstrated that the complainant was telling the truth.

The defendant, on the other side of it, talked about the apparent calm demeanour in the evidential video interview and the fact that that demonstrated that, in fact, he was making it up.

I'll just invite the Court to read paragraphs 13 and 15. It talked about, endorsed an earlier line of reason – authority for a case called *R v Keast* [1998] Crim LR 748, which is unreported, where it said, "Evidence of demeanour given in sexual cases about the complainant's behaviour shortly after the alleged offences inadmissible." It quotes what *Keast* said, "To allow such evidence to be given," and I understand that looks like a typo but, "Merely because it is said because it could show a consistency or

inconsistency with the complainant's account, obscures the fact that unless there is some concrete basis regarding the demeanour and statement mind described by the witnesses confirming or disproving that sexual has occurred cannot assist a jury in bringing their common sense to bear on who is telling the truth." In my submission if you take that through and apply it in the Court environment, really that authority provides confirmation that, in fact, distress really isn't something which can be given the type of weight which it was in this case. And that, in my submission, would be a more genuine, I suppose because it's closer in time, which is why it provides quite a telling new point of the way that the UK approaches it perhaps.

ELIAS CJ:

Well, I'm just wondering if you can translate that? This is an admissibility of evidence point, isn't it, really? I mean whereas courtrooms are stressful places and traumatic events have to be rehearsed in them. So you might take a slightly different approach in terms of whether you admit evidence of behaviour which doesn't come across into what – into the Court setting. What's the connection that you make between these two types of cases? Just that they indicate the care that needs to be taken with reaction.

MR CHISNALL:

It certainly provides some confirmation of the approach that the UK takes and why it has the direction that it does where it talks about in Court distress but also, perhaps, the distress that comes out in other ways but I certainly acknowledge what Your Honour is saying that this is an admissibility issue but the same reasoning holds, if what you're talking about is an ability to discern from distress whether the person is telling the truth or not. If it's irrelevant or has low probative value and when we're talking about behaviour that's very close in time to the alleged offence, then moving it forward to the more artificial courtroom environment, then the question arises what relevance can it have there in terms of assisting the jury to make their decision? And so in my submission it does provide support for the point about emotion being a form of demeanour or a subpart of demeanour that a jury can take into account.

To come back to the point that Your Honour, Justice O'Regan's making about it being general, but in my submission the general is important because it attaches to the specific because it does attach to the emotion and the issue with emotion and I appreciate, and I rehearsed the idea in my head about – as a former prosecutor about an emotional complainant and how that must look to the jury in terms of spontaneity. But in my submission the problem is that if you actually adhere to what the science and what, or what jurors say about the issue, then it has to attach to the specific as well as the general.

O'REGAN J:
But that's suggesting that the jury should just hear, or just read a transcript of evidence?

MR CHISNALL:
Well that's certainly the argument that, for appeals of course that Robert Fisher and others –

O'REGAN J:
But then wouldn't we get a defence claim that they're not being able to confront their accuser?

MR CHISNALL:
Well, yes, there is the right of confrontation, but confrontation has to be something more than just demeanour. I suppose the problem we have, and it's a difficult one, and I appreciate that the way that it's being argued was, is that we're going to throw the baby out with the bathwater if we tell juries that they can't take into account the way a person looks and sounds but –

GLAZEBROOK J:
Well you can't possibly suggest that you don't take into account emotion. I can say you don't take into account the fact that somebody's looking up to the right and swivelling their eyes, or they're looking down, but emotion can indicate, especially spontaneous emotion, that something traumatic has

happened, so how could you possibly suggest that the jury is told they don't take it into account?

MR CHISNALL:
Well like I say it's certainly the approach –

GLAZEBROOK J:
I mean they must be able to just in the way they can take into account, the witness could be lying, giving evidence that's a lie, could be giving evidence that's truthful. You don't say you don't take account of any of that because there's a possibility it's a lie?

MR CHISNALL:
No, I appreciate that, but we're not talking about the evidence itself. We're talking about –

GLAZEBROOK J:
Well, but what's the difference?

MR CHISNALL:
Well, we're talking about a form of deliberation –

GLAZEBROOK J:
Well you're using demeanour but that's not a term of art.

MR CHISNALL:
No.

GLAZEBROOK J:
So there are words, there are ways of saying words. There are gestures that accompany words, all of which indicate meaning.

MR CHISNALL:
Yes, in terms of what the Court said in *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 about tone and giving it meaning, but I do come back to the

argument that was made by Robert Fisher about, that demeanour does encompass a very broad range of factors, and there isn't anything that says emotion is a more useful way of actually determining if someone is telling the truth. We tend to see it from the other side of the coin which is to say –

GLAZEBROOK J:
But we don't have any studies on that.

MR CHISNALL:
No we don't.

GLAZEBROOK J:
We don't have studies that say emotion, if somebody shows emotion they're 90% likely to be telling the truth, or 2% likely to be telling the truth, but of course you can't because some people stub their toe and you'd think the end of the world had come, and other people break a leg and carry on running through the rugby field without so much as a tear arising.

MR CHISNALL:
Yes, that's right, it's knowing the norm. In an artificial Court environment you don't know what the norm is and we don't know what it is that's actually triggered the emotion. My submission is that the research, in terms of what it shows us about the risks attaching to demeanour, must also apply to emotion. It must apply if the UK –

GLAZEBROOK J:
But I don't see how you can say that.

MR CHISNALL:
Because there's no research.

GLAZEBROOK J:

Because if, well if we haven't had any evidence in respect of emotion or any studies, I don't see that it's in the least bit scientific to infer that you just shove emotion into the list.

MR CHISNALL:

Well it's not, we're certainly not wishing to shove it onto a list. It is, in my submission a matter that's covered by the discussions about demeanour. I certainly take Your Honour's point, the issue about the fact that we don't have research, and that's, of course, the difficult –

ELIAS CJ:

The research, in itself – but the scientific research is really pretty embryonic, it seems to me, in any event. Have you, I'm just, in fact, just reading an article in the *New York Review of Books* indicating how far we are from being able to rely in law on some of the, even cutting edge, scientific assessments of the brain development and so on, and how many wrong turns there have been, and different fashions. You'd have to demonstrate something pretty compelling.

MR CHISNALL:

In terms of getting across the –

ELIAS CJ:

Well, yes.

MR CHISNALL:

– line, we're talking about it being substantiating and validated.

ELIAS CJ:

Yes, if you're talking science.

MR CHISNALL:

But the problem is, and I walked in here being certainly aware that this is a question that might be asked, it's certainly the approach the Crown has taken, about it being a somewhat extreme argument on our part. I simply rely upon what Robert Fisher said about the fact that we're talking about here isn't new and in my submission in any way outlandish because we are talking about something like 40 years worth of discussion that then is bolstered by what the psychological research shows. And so it's not something which I would describe as new or novel in terms of – I certainly accept that there are going to be findings just to certain types of science and whether in fact it ought to be placed in front of a jury, for example, but in my submission what we're talking about here is simply something which actually tends to go against what we consider is a reliable way of determining if somebody is telling the truth.

GLAZEBROOK J:

Can I just say that a lot of that research applies more generally to whether people can tell whether someone is telling the truth or not, in the absence of anything other than somebody just saying something. So it equally applies not just to demeanour but to words. So somebody could stand absolutely still and tell their story and it's still no better than chance on the research whether you will know whether someone's telling the truth or not. Now they have shown that certain things that people say/show tell the truth, and some counterintuitive. Like fidgeting, doesn't actually show people lying, in fact, being still usually does because there's quite a cognitive load involved in concentrating on what goes on, so there are some counterintuitive to, but it doesn't just apply to demeanour cues that research. The research just says more generally people are absolutely hopeless at knowing whether people tell the truth or not, and the ones who think that they are better, like customs officers and police, are actually worse than the general public, so they're doubly dangerous because they think they're better than the general public is and they're actually worse. However, what you have in most trials is you don't just have a he said/she said, you have a lot of other things that they can take into account, as was pointed out in *E v R* [2013] NZCA 678 in terms of inherent likelihood, in terms of other evidence in this case from other

witnesses, in terms of controlling behaviour et cetera, and I know we're coming on to some other issues with that later. So they're not just looking at someone but this is just one thing. The fact she cried seeing something might be a spontaneous indication but it might not, and it would only probably relate to that particular incident in any event.

MR CHISNALL:
Although the direction certainly is designed to prevent jumping to the conclusion that emotion can be equated with the truth.

GLAZEBROOK J:
Well I can understand that submission.

MR CHISNALL:
And that's why I want to emphasise the point that if the Court takes up our invitation in terms of dealing with emotion, then the direction which is balanced like the one the UK has, actually provides, in my submission, more often than not support for a complainant in a sexual case because –

GLAZEBROOK J:
But if no one suggested any of the things that are in there won't the jury just be puzzled because we now tailor directions to the particular case so if you have an emotional complainant, if you have an unemotional complainant but nobody has suggested anything about it.

MR CHISNALL:
But if the directions, well that's the problem in many ways is do we front foot it and actually assume that juries use demeanour as a way of making their decisions, and certainly if we go back to the first principle about it being something that people tend to take into account, and they overstate their confidence or their ability that it will allow them to tell the truth, then we can assume that they do use it. The type of direction that we're talking about is really to, is a form of prejudice amelioration, and so it is actually, in my submission, one where a general direction ought to be provided because

much of what we're talking about in terms of *R v E* is where the Crown relies on it in a he said/she said type case. Obviously, as I'm sure will be clear to the Court, our argument is that a direction in he said/she said cases where credibility is the predominant factor, ought to be given as a matter of course, regardless of whether a party uses it or not, and the reason is that in my submission more often than not –

GLAZEBROOK J:
But we're more generally onto demeanour so it must be something more than the paragraph 58 direction, so what else do you say should be given?

MR CHISNALL:
Well in my submission the direction that Robert Fisher proposes in his article in conjunction with that UK direction.

GLAZEBROOK J:
Sorry, whereabouts is that?

MR CHISNALL:
It's at page 600. I've provided it in our bundle. It's at tab 4.

GLAZEBROOK J:
I have to say I doubt we'll be looking at a general direction because it doesn't arise in this case but I'm just interested from the…

MR CHISNALL:
No, I mean I –

GLAZEBROOK J:
Whereabouts is it?

MR CHISNALL:
Just towards the bottom of page 600 you'll see there's, B jury warnings.

GLAZEBROOK J:

Sorry, I haven't even found this article yet. Yes, I've got it, tab 4, isn't it.

MR CHISNALL:

It's actually, the relevant element is page 601, the second paragraph down where he says, "But the one thing I must warn you against is relying on the way a witness looks and sounds when giving evidence. This can be a real trap. We all tend to think we know how honest and dishonest witnesses will look and sound. It is tempting to think that if a witness hesitates, looks down, mumbles, scratches her nose or looks nervous, she must be lying, and equally it is tempting to think that someone confident, open and quick in their answers will be telling the truth. But time and time again studies have shown that impressions of that kind are misleading. There can be any number of reasons for witnesses to present themselves in a particular way when they have to give evidence. Most of these reasons have nothing to do with their honesty and reliability."

ELIAS CJ:

Sorry, where's the direction you say you –

GLAZEBROOK J:

It's at tab 4, page 600. But I mean that obviously can't be right as a direction because of course you take into account whether somebody sort of goes [Justice Glazebrook demonstrates] I think that might be right or I think that might be right. There's a whole pile of things you take into account to take meaning. It was about this big [demonstrates]. He hit me like that [demonstrates].

MR CHISNALL:

I appreciate that there's an absolute position advanced in this article about there being no advantage whatsoever to looking and hearing the witnesses. I don't, in my experience, that that necessarily can be the case, just to use the example Your Honour just gave about size. I mean it's reading it into the record. Another example in terms of meaning that juries are going to take into

account the relative size difference between the complainant and the defendant in an assault case for example. The things they see are relevant but the point that I would emphasise is that what this direction does is it builds on what, in my submission, the point rightly made by the Court of Appeal in *R v E*. There are other reliable ways in which credibility can be assessed and it's those factors which, just like the Court of Appeal said, ought to be emphasised, but in conjunction with a warning about the danger of relying up on demeanour.

GLAZEBROOK J:

Well isn't it really relying on signs that have been shown not to indicate. So, for instance, looking up can be because somebody sees something on the wall, or they find it easier to do that rather than looking at, so isn't it that, and one can understand that, sort of, direction if, in fact, that's been the sort of thing that's been relied on by people. To say there are misconceptions in terms of whether somebody is lying or not. For instance, looking down can be a sign of respect in cultural, and some it can be a sign of nervousness, there's all sorts of reasons why people might have particular gestures, but to tell people they can't take notice of those things, when in fact some of them – hesitation might actually be an indication of lying. The witness who's very happy to answer every question until it gets awkward, and we can think of the curly question interview where there was some certainly some awkwardness in answering questions.

MR CHISNALL:

I suppose that comes back to, not so much demeanour, but plausibility, which is certainly one of the factors that the Court of Appeal quite rightly said is, I suppose the, forms the, founds common sense, and I certainly address the issue about tone and giving meaning to words. Robert Fisher, I'd certainly invite the Court to read his interpretation of that issue, because I appreciate what Your Honour is saying about it given the written word, which is on the transcripts, some meaning, but is it demeanour per se. It might be that the two together and what actually bring the transcript alive, to use some of the often used statements about it, but in most cases, in my submission the

transcript doesn't actually, certainly what the research shows, doesn't give you a second-rate ability to decide things than if you were hearing the witness. And I suppose that's my point about the need for a direction. What we're assuming is that that's something that happens on the trial which is going to engage the jury's use of demeanour. Is it going to be something that one of the parties rely upon. Is it going to be a sign, an obvious sign that a witness gives which our research would say, oh that witness was looking down all the time, that would indicate the jury might think that he's not telling the truth. I suppose that's the advantage we have, if we actually accept that it is a widely held method of deciding credibility and therefore a direction would be useful. So if I haven't been clear I wish to be about my submission that, I consider that the Court of Appeal in *R v E* certainly went most of the way in terms of addressing the issue. The residual issue is whether it's safe to say it's only a problem if undue weight has been placed on demeanour that really is the live issue. I suppose we just don't know what it is that actually founds a jury's decision-making process.

ELIAS CJ:
So, can I just understand, are you contending both a general direction and a specific one in this case?

MR CHISNALL:
Yes.

ELIAS CJ:
So your general direction, is it much more than take care because people cannot always accurately determine truth from demeanour, is it?

MR CHISNALL:
It's not that they cannot, not that they can't always, it's that they can't at all.

ELIAS CJ:
Well that's a very, that's the boldest argument, because effectively that reintroduces a requirement of corroboration in the case of, where there's no

independent evidence. I know you can say consistency and inherent plausibility, but you're asking for those sort of markers.

MR CHISNALL:

And in most cases I submit that they do exist. There are markers outside of –

ELIAS CJ:

Well yes of course they do.

MR CHISNALL:

If we're talking about sexual cases, I suppose there's two issues. If what we say is taken to its natural conclusion then it might be that a demeanour warning does actually prevent the jury from returning a guilty verdict. But if it's accepted to be a form of prejudice then, by relying on it, then that ought to be the outcome. I suppose the problem we have with this as an argument is that it might actually –

ELIAS CJ:

Well, sorry, just tell me what is your general direction and then perhaps we can deal with the specific direction in this case too.

MR CHISNALL:

Well, certainly the general direction is the one that I, that Robert Fisher uses in his article.

ARNOLD J:

Well if you take what the Judge said here in his opening remarks to the jury, which is at page 58 of one of the bundle, I suppose the only problem with that is that he doesn't do the flip side.

MR CHISNALL:

No, that's the problem.

ARNOLD J:

He says, “A witness may not appear confident in the witness box when giving evidence. Witness may make a number of pauses or hesitate. It doesn’t mean their evidence is untruthful. Witness may be understandably nervous.” He didn’t do the reverse and say –

MR CHISNALL:

No, and he didn’t explain what the issue is more fundamentally with it as a method of deciding whether somebody is telling the truth.

ARNOLD J:

Well, what do you mean by that? Explain why, what sort of explanation could the Judge give of all of that?

MR CHISNALL:

Well, certainly just the one that Robert Fisher gives in his article about the dangers of doing so. Just it can be a real trap.

ARNOLD J:

Well the Judge says it’s not necessarily a good way. He doesn’t – so what he’s saying is, you know, you’ve got to be cautious about the way you approach demeanour.

MR CHISNALL:

There are two lines there, and I certainly acknowledge that, the argument that juries need to be told that demeanour is an irrelevant way of deciding things, is –

ELIAS CJ:

Well it’s not what Fisher is saying here. He’s talking about caution. He’s not saying it’s not evidence which is what you said to us.

MR CHISNALL:

No, I suppose what – well I mean he talks about it being a real trap. I certainly, when you read that in line with the remainder of his article, he is saying that demeanour shouldn't be taken into account at all.

GLAZEBROOK J:

But you see the research on whether someone is telling the truth doesn't just relate to demeanour, it relates to words as well.

MR CHISNALL:

Yes.

GLAZEBROOK J:

So if you take it to its logical conclusion you could never have a trial because nobody could ever be sure that somebody was telling the truth correctly because one, they would overemphasise their ability to know whether someone is lying or not, and two, they wouldn't have a clue how to work out whether someone was telling the truth or not. Now we don't do that but you can't just pick one thing and say, don't look at demeanour, when you say you're perfectly able to look at words. Words that, if someone's lying they're much more likely to be lying through their words than they are through their demeanour.

MR CHISNALL:

Exactly and I'm not, that's the point, and I apologise if I'm speaking at cross-purposes. My submission is that as the Court of Appeal said in *R v E*, there are other, a number of other meaningful ways in which credibility can be assessed. All we're asking here is for the jury to actually be given a warning about the risk of placing emphasis on one aspect of that.

ELIAS CJ:

Well are you now just saying it's the risk, that there is a risk or are you saying that they can't, because I had understood your submission to be that how a witness gives evidence is irrelevant.

MR CHISNALL:

Certainly in terms of their demeanour, that's the –

GLAZEBROOK J:

But that can't be right, because a witness who stands absolutely still could be an indication of lying, and that's actually a proved indication of lying. The person whose voice timbre goes up could be – now I'm not saying that we would direct juries to take notice of those things because somebody might sit perfectly still because the only way they can hold themselves together is holding very tightly to the table in front of them. So of course we're not going to tell them that that's an indication of lying.

MR CHISNALL:

No, and in fact that's something we're, to take it to its natural conclusion, it's not that there are no demeanour signs that it can be usefully used, it's just that they're not the ones we expect them to be.

GLAZEBROOK J:

So why don't we pick on the ones that we would expect and give some directions about that if we're concerned that they would do that –

MR CHISNALL:

Yes, and, look, I don't –

GLAZEBROOK J:

– but I don't see how you can say, don't take any demeanour into account.

MR CHISNALL:

No, and I certainly appreciate the risks, if you provide a direction that tells the jury this, then it means that they will be afraid to actually rely on other factors, but in my submission –

GLAZEBROOK J:

Or alternatively they will rely on other factors like words that are much more likely to be lying words than their gestures.

MR CHISNALL:

Yes, and that's in my submission really what we're talking about here, is actually making sure that the jury's attention is just turned to the things that are a more reliable means of assessing credibility and I'm not suggesting that juries be educated in the way that some of the research from various law commissions determined about giving, and certainly an example in Australia of an Aboriginal direction about Aboriginal indigenous people who were giving evidence and things to look out for and things not to take into account. In my submission it doesn't, that would be fairly unworkable. I'd certainly suggest that it be kept much simpler than that. And I don't want to throw the baby out with the bathwater by saying that juries have no utility whatsoever. They are our elected, selected fact-finder for these types of cases, and we know that there are many ways in which credibility can be assessed. I'm simply inviting the Court to make it known to juries what the risk is.

ELIAS CJ:

You said that *R v E* went most of the way, but of course it doesn't go most of the way with you?

MR CHISNALL:

No.

ELIAS CJ:

At all because it doesn't mandate an invariable direction. You say a general direction should be what Fisher says but he really is simply saying, alerting juries to a risk of relying on demeanour alone. I understand you to be going further than that?

MR CHISNALL:

No, I apologise if that's the impression. I mean, by identifying the risk I suppose you identify the fact that it isn't a reliable method to make a decision.

ELIAS CJ:

Well it may not be. That's what the risk is. If it was impermissible evidence, the jury should be told so.

MR CHISNALL:

Well if we hold to the research, about it being no better than guesswork, then that would be a form of prejudice, then yes –

ELIAS CJ:

All I'm trying to do is find out what is the general direction you say should be given?

MR CHISNALL:

Can I simply leave it on the basis that in my submission the way that Robert Fisher does it in his article is an appropriate and straightforward way of doing it. I'm not suggesting any language other than that.

ELIAS CJ:

But you say it should be given in all cases.

GLAZEBROOK J:

Plus the paragraph 58 direction as I understand you.

MR CHISNALL:

Plus the paragraph 58 about emotions.

O'REGAN J:

Well that's for this case only.

ELIAS CJ:

Well then I was going to ask you about a specific in this, I was asking you about the general direction, now I want to ask you about the specific.

MR CHISNALL:

So it's that and then the specific –

ELIAS CJ:

So given that there was a reaction to the towel, what do you say the Judge should have done there?

MR CHISNALL:

In my submission the direction ought to have been the one the UK has, which is giving both sides, explaining that distress isn't necessarily a clue to the truth of the witness' account. And it all depends on the character and personality of the individual concerned. So in my submission it's the general element of the direction is that, that Robert Fisher provides, and then in conjunction with the one that the UK has about assumptions and demeanour.

ELIAS CJ:

Do you say that that direction should have been given because of the reaction or only because – because there will be reaction in lots of cases or –

MR CHISNALL:

Or lack of reaction.

ELIAS CJ:

– because of the prosecutor's statement?

MR CHISNALL:

In this case we say that it was particularly important because of the prosecutor's reliance on it. But on a more general approach the point I was wanting to emphasise is that more often than not it's the lack of emotion that

can be used in a way against a complainant, which is equally an issue, considering –

GLAZEBROOK J:
You would say in these cases it probably is as a matter of course because the juries, we don't know what the jury would rely on, and they may rely on the lack of reaction or reaction, whether or not they're asked to do so.

MR CHISNALL:
We know that they do in terms of the jury research done in 1999. Certainly that was the suggestion that – sorry?

ELIAS CJ:
It was pretty limited research.

MR CHISNALL:
It was, and I certainly wouldn't want it to be overstated in terms of – obviously it formed some importance in terms of both the Crown's argument and what the Court of Appeal considered in *R v E*, but it did, they did talk about perverse results which go against evidence and that would seem to be a suggestion that where there's been a lack of emotion perhaps, it's been counted against. It's certainly something that Elizabeth McDonald talks about in her book which has been placed in the Crown casebook and I suppose my point is simply we know that it can be something taken into account in a way against a complainant which explains part of the direction in the UK, but it has to be therefore that the other side of the coin is that emotion can't be seen to be equating with truthfulness and so –

WILLIAM YOUNG J:
But can't you say, you can have a positive which is something that can be taken into account where the absence of the positive is just neutral. So if you've got an emotional response to an item associated with the offending, why isn't that able to be regarded logically as a plus for the Crown, whereas

the absence of any apparent emotion in the way in which evidence is given, is neutral?

MR CHISNALL:

Well because it is, I suppose, having your cake and eating it too from the Crown's perspective. It's whether or not –

WILLIAM YOUNG J:

Well I understand that, but that's a sort of a rhetorical response. Just as a matter of logic, what's the answer?

MR CHISNALL:

Matter of logic though, well isn't the answer that we can't add any, put any weight on lack of emotion therefore why can we put any weight on emotion if, in fact, what we know is that distress can't be automatically equated with truthfulness.

WILLIAM YOUNG J:

I'm not sure it does apply. I mean the case has to be was not only was she prepared to come along there and tell a pack of lies, she was also prepared to feign emotion. Now that may not be a big additional step but it is an additional step, and secondly she had to be able to do it convincingly, which may be a bigger step.

GLAZEBROOK J:

And at a particular point, that one can understand why one might have got emotional having held it together up to that point.

WILLIAM YOUNG J:

If it was entirely, if the whole account of events was entirely untrue, there was no particular trigger to get emotional when shown a towel that hadn't been put in her mouth. So how would she know as it were.

MR CHISNALL:

Well I suppose when briefing often witnesses are told they're going to be shown photographs and remember that the evidence –

WILLIAM YOUNG J:

Yes, I suppose that's right. But it's still, the fact remains that they were additional factors that bore on the credibility of her account. A, that she did have an emotional response to something which one might expect would invoke an emotional response and, B, it would appear to have been a, it would have given the appearance of being an honest emotional response.

MR CHISNALL:

I suppose the flip side, if she hadn't shown emotion, then is the jury going to say well that demonstrates that she's not telling the truth. It's difficult to see them as anything other than two sides of the same coin.

ELIAS CJ:

I thought you were saying equally that both are not evidence. I thought that is your submission?

MR CHISNALL:

Yes, that is my submission and I wasn't attempting to say –

WILLIAM YOUNG J:

But I mean for instance, on a not entirely unrelated issue Judges tell juries that where the complainant hasn't made a prompt complaint it doesn't mean much, but nonetheless the fact of a complaint is regarded as being admissible where effectively the veracity of the complaint is challenged.

MR CHISNALL:

So not an all or nothing proposition but some weight. I certainly appreciate Your Honour's point and I certainly approached it on the basis that the way that they've dealt with it in the UK demonstrates a way of actually neutralising it as a significant factor and again it comes back to what Stone was saying

about the fact that these things can be concocted. Maybe that is the point. It's difficult for me, I wasn't there, I don't know how cogent she came across in her emotion, but in my submission –

ELIAS CJ:

Well you can't judge that. I mean that's really what you're submission is.

MR CHISNALL:

It wouldn't matter if I was there, exactly.

ELIAS CJ:

Flip a coin, you say.

MR CHISNALL:

Well on this small aspect of the credibility assessment. I know that the argument tends to come up against itself because of the fact that what we're often talking about is lack of emotion. But as a matter of logic surely it must be two aspects of the emotion and lack off. It's not something which, if given a direction on, is going to leave the jury in a position where they don't feel that they can judge complainant's evidence and credibility. But the issue is whether in fact it then becomes, particularly when given a nudge by the Crown, as evidence of a cogent factor, where in fact it can take on somewhat of a halo effect in terms of the jury's assessment of the rest of the evidence, and I suppose that's really what it comes back to is it was one of the first points that the Crown identified and emphasised. If what we're talking about is some weight rather than an all or nothing proposition, then we know that, certainly the way the UK approaches it, is to try and reach that balance by pointing out the two sides of the emotional coin and so in my submission the fact that it was given that emphasis, did tend to give the Crown some extra advantage.

ELIAS CJ:

Where do you want to take us to now? Have you virtually concluded your submissions?

MR CHISNALL:

I was going to address just some of the case law and that should take me through to 11.30 and then obviously my learned colleague can make the second argument unless there's any further questions for me. But just addressing the Crown's argument that our arguments are reconcilable with the common law and our system in general. It might be, as the Crown says, that demeanour is a fact-finding tool helped shape the common law. However, in my submission this can't prevent us from assimilating what we know the science to say. In other words the risk of perpetuating an error for systemic convenience. And in my submission I've given the example of identification as being one where the common law obviously responded to an issue. But certainly in my submission it's not –

O'REGAN J:

It responded to a series of cases though rather than to – and externality of scientific research in quite a different area really isn't it?

MR CHISNALL:

Yes and I certainly appreciate that one of the difficulties that we come up against is the idea of actually being able to discern what relevance a demeanour might have had on a jury's deliberation process, and that's why I make the point about pulling the strands together. Identifying the risk certainly as the Court of Appeal suggested out to happen in he said/she said cases where demeanour is relied on, is really designed to make sure that the jury spend its focus on, or puts its focus on the other factors. A direction really, and if we take our argument to its natural conclusion, limits the weight that demeanour can be given in order to prevent a miscarriage of justice occurring. But I suppose what we talk about in these types of cases is a very difficult exercise in terms of being able to work out what it is that the jury took into account and an easy way, I suppose, of working backwards, in terms of deconstructing a verdict, would be to say well there are other factors they could have taken into account, but that's why I made that point earlier about the halo effect. If it's actually given prominence by the Crown then you simply don't know what relevance, it's inviting a jury to do what it might consider to be

common sense anyway. That's really part of the problem with this, is that it may well simply be inviting them to do something that they were going to do anyway, we don't know.

So what we know is that on the Crown argument they say well, look, modest use by the Crown equates with modest use by the jury. Again we just don't know that. We –

GLAZEBROOK J:
But if the jury was absolutely convinced that reaction was genuine, then what's wrong with them relying on that? I mean there's only a risk that it was a fake reaction, isn't there? And they have to take into account that possibility, but if they're convinced it's genuine, what on earth is wrong with them taking that into account even as a major factor?

MR CHISNALL:
If they're convinced of it after being given a warning about the risks attaching to doing so, then I suppose that would be a difficult argument to stave off. But what we're talking about here is it being relied upon –

GLAZEBROOK J:
But they were alerted to the possibility that it could have been made up because of her methamphetamine use, weren't they, at least in the cross-examination of the alleged perpetrator?

MR CHISNALL:
Well they, it's hardly an answer about why it would be –

GLAZEBROOK J:
Well the defence counsel could have brought that up even further if it wanted to. Obviously are you alleging that that was a mistake on the part of the –

MR CHISNALL:

I can't go that far because obviously it's in a – responding to something that's happened there and then in the trial.

GLAZEBROOK J:

So the miscarriage arises because the jury should have been alerted by the Judge to the possibility that was faked, emotion?

MR CHISNALL:

Well that's simply that you can't jump to the conclusion that distress equates with truthfulness.

GLAZEBROOK J:

Although the jury will only take it into account if they're rational, if they are genuinely convinced that it was genuine, aren't they?

MR CHISNALL:

Sorry?

GLAZEBROOK J:

I mean juries are perfectly capable of going, those were crocodile tears, I didn't believe a word she said, and she was egging the pudding, I'm sorry I'm probably totally mixing metaphors here, by turning on the waterworks.

MR CHISNALL:

Yes, although it's the jumping to the conclusion that the waterworks means she's telling the truth and –

GLAZEBROOK J:

But first of all they have to be convinced they were genuine waterworks, and not – and juries surely like everybody will say, well she's, those were crocodile tears.

MR CHISNALL:

Yes, and in obvious cases it may well count against the complainant if they're looking at it and saying it's obviously manufactured. But the ones where they look more realistic, the risk is that they jump to the conclusion from what appear to be genuine emotion to the conclusion she's telling the truth, that's where the direction has some sway because it talks about not jumping to that conclusion, that there can be other reason for the way that a person responds, might be –

GLAZEBROOK J:

There's not very many other reasons for the way that she responds here. Either she's faking it or it's a genuine emotion. There's no other way. I mean there might be other ways, you might be nervous for other reasons, you might be lying for other reasons, but in the case of an emotion you're either faking it or they're genuine. There are not two possibilities here.

MR CHISNALL:

But it's jumping to the conclusion that the genuine emotion is because the towel was used, rather than for some other reason.

GLAZEBROOK J:

What else could it be.

ARNOLD J:

Was that ever an issue? I mean she sent a text the following day referring to the towel.

MR CHISNALL:

She did, and I don't believe he responded to it, but she did. I mean that, yes. It was, in his evidence, he certainly denied there was any towel.

ARNOLD J:

Sorry?

MR CHISNALL:

In his evidence he denied there was use of any towel.

ARNOLD J:

I see, but there was no response to the text at the time?

MR CHISNALL:

There might have been one response, I'll just confirm. I'll have a look at a moment. I think he had a one line response to it but not – whether that would be taken as an acknowledgement is a matter of, is open to interpretation, but certainly his evidence at trial was very, very much that there wasn't.

GLAZEBROOK J:

But my point was, why would she cry on seeing a towel, for any other reason than it was used, or she was lying about it being used and thought it would look really good to burst into tears when she saw the towel because that would add verisimilitude to what were a pack of lies?

MR CHISNALL:

Well I suppose it comes back to –

GLAZEBROOK J:

There's no other explanation for bursting into tears. I mean she doesn't have a towel phobia.

MR CHISNALL:

Not that I'm aware of, no.

GLAZEBROOK J:

Well she might now.

MR CHISNALL:

I'm sure she may well, yes. but the point is that the direction talks about the fact that we can't speculate about it. That it isn't something that you can take into account. I appreciate –

GLAZEBROOK J:

You must be able to take into account if you thought it was genuine, and if you thought it was not genuine then that's a real tick against her probably for the whole story not just the towel story.

MR CHISNALL:

Although I suppose it comes back to that point about distress at the time of the alleged offence being, when actually being asked to relay what's happened, not being a relevant factor. It's difficult –

GLAZEBROOK J:

But you say that's not an allowable factor but I don't think that's the law here.

MR CHISNALL:

No, I appreciate that the position has been taken in a different direction to the UK.

GLAZEBROOK J:

Well it always was the law that the hue and cry was admissible. That was the very thing that was admissible, so that's a longstanding law.

MR CHISNALL:

The reason I provided that decision is for that very reason, to show that what we're talking about in terms of the UK approach, goes against the grain in terms of the way that we've traditionally done it, and I certainly stand here acknowledging that the argument is a bold one because of that, but again it comes back to what we know about the research and what the UK says about emotion.

GLAZEBROOK J:

Well as I, very quickly reading that case, what they didn't want was to have the sort of thing where they said little [the complainant's flatmate]ny started to wet the bed three years later, the sort of thing that you got in, so very oddly a one and a half year old started to wet the bed, that shows they've been, which

we got in the Christchurch crèche case, so that's the sort of evidence they're talking about.

MR CHISNALL:
The old charge is at 25G, of that type, but it's more than that in terms of the judgment, it's actually talking about just stress at the time, so it's quite a precise temporal relationship between the alleged offence and distress.

GLAZEBROOK J:
Well I don't think it's the law here or do you say it is the law here?

MR CHISNALL:
No, obviously our law has gone in another direction in terms of not wanting to distract the jury with collateral considerations, but the UK approach is certainly different in terms of the utility of distress, or lack of distress, and so it does demonstrate where it can come into play in the, in front of the jury.

So ultimately as we say turning to, that's finished on this point about where the miscarriage is. The starting point, in our submission, is that the Crown's reliance on demeanour and the failure to correct misapprehension as an error of law in terms of process. We, as the Court will be aware having read the Court of Appeal judgment, argue in the Court of Appeal that this case fell into that paradigm example that the Court of Appeal gave in *R v E* where a direction was required. That's our argument on the narrow basis obviously before this Court. We address the more general elements of whether a direction should be given but that remains our argument in terms of why we say there was a miscarriage here.

I won't repeat what I've addressed in terms of the four points that the Court of Appeal relied on in concluding there had been a miscarriage. Those are set out in paragraph 72, those factors of our written submissions, but in our submission the issue is that the Court of Appeal really approached it on the basis that the only risk that was in play was that the jury might have placed excessive weight on demeanour, which would make the possibility of a

miscarriage fairly remote in every case, and obviously our view is that you are, by making the submission as the Crown does, saying that it's only a factor that was given modest attention by the Crown, therefore the jury would only give it modest weight in its assessment. You are forced to speculate at that point. In our submission the risk of miscarriage is real rather than fanciful if it's accepted that the jury could have relied on a prejudicial reasoning process. And that's why I come back to that point that Robert Fisher made in his article about the fact that the research shows that a perceived good or bad quality in a person will tend to colour all judgments pertaining to that person. As I said earlier, what's described as the halo effect. So once a positive or negative impression is formed of a witness, it's likely to attach to all of that witness' evidence and the reason that he gives in his article is because observers don't tend to distinguish between different parts of evidence. If that is the starting point of its deliberation process, then in our submission that really does demonstrate the risk of it being given undue weight.

Finally, as Robert Fisher says, an invitation has occurred here from a Judge for a jury to use their common sense is likely to be interpreted as an encouragement to employ an assumed facility to assess credibility through demeanour. Here we had that direction given by the trial Judge very late in the summing up. I've set it out at paragraph 69 of our written submissions where they were told this case fundamentally involves your assessment of the witnesses and what you make of the witnesses, and so in my submission that brings it back to the risk of the Crown actually placing reliance on her emotion.

GLAZEBROOK J:
Was there a reference to common sense?

MR CHISNALL:
Yes, I've set it out at paragraph 69.

GLAZEBROOK J:
Okay.

MR CHISNALL:

It's right towards the end of the summing up, and that was said in the context of telling them about the fact that really it's a case that comes down to what the jury makes of the central protagonists. So that's the risk that Robert Fisher identified about if you don't actually tell juries about the risk of using demeanour, then they may well –

GLAZEBROOK J:

So you don't have a problem with – so you say we should take out common sense from directions or you say that if it's combined with the other direction it's all right, or what?

MR CHISNALL:

Yes, the latter. Yes, I certainly wouldn't be suggesting that we tell them not to use common sense. My argument would no doubt fall into the gorge at that stage.

GLAZEBROOK J:

Well I don't know because as somebody once said, the trouble with common sense is that it often is nothing of the sort.

MR CHISNALL:

It's not common at all, yes.

GLAZEBROOK J:

Well it's not sense usually, it might be common, but it's not sense.

MR CHISNALL:

Which is the very problem with demeanour, of course, we say, is that common sense says that we can judge a book by its over, and that we can assess individuals by looking at them.

ELIAS CJ:

Well I don't know that that's right. I would have thought that common sense means that you have to be careful.

MR CHISNALL:

The background we all have, of course, is that we know the risk because we've obviously read the research and we've been told about it, but can we assume that juries don't actually use it as a factor. That's why I made the point –

ELIAS CJ:

Well the jury is, as I said at the very beginning, the jury is the trier of fact, it's all a bit demeaning, really, some of this.

MR CHISNALL:

And I don't mean it to be. The point is that we're not saying that they're second-rate decision-makers or that they can't reach a decision. If what we're doing is talking about simply identifying a concern for them, then we're still trusting in them to do their task responsibly in relation to the other ways in which they can go about it. We still talk about common sense when we talk about placing the lens of plausibility over evidence, which is one of the factors, of course, that the Court of Appeal quite rightly talked about in *R v E*, does it actually have a ring of truth to it. Their task is predicated on common sense and I don't mean it to sound demeaning because the point is if we take out demeanour we're not simply giving them no tools by which they can make their decision. We're simply investing –

ELIAS CJ:

No, but we're instructing them on how to reason, and that may be entirely right where from experience or from – or there are issues of law, that's fine, but if you're just simply talking about how to reason, I'm not sure that Judges have such monopoly on wisdom.

MR CHISNALL:

Well, I suppose the response has to be that we've vested that responsibility in Judges in the jury trial process. If we look at the Judge alone cases where demeanour has been relied on, it's Judges who haven't actually, have departed from what we would say common sense says is a useful way of doing it, but they have that ability, of course, to self-warn, and so why is it any different for a jury to be given some advice about the fallibility of demeanour. We do it all the time with –

GLAZEBROOK J:

You're still talking about demeanour generally. Here what we have is what was either a spontaneous emotion at a reminder of a traumatic event, or a falsified one. There's no other explanation for it. So it's not a, it might have been she was nervous, it might have been she was, there was only two explanations. The jury were told they had to be sure she was telling the truth. They're not going to say, I think I'll take into account this emotion that I think was fabricated in deciding she was telling the truth. They will say was she fabricating the story, was she fabricating the emotion. If I'm sure she wasn't fabricating either of those, then I will convict.

MR CHISNALL:

I wouldn't suggest that it's as stark as that. The point is saying that the emotion shows that she's telling the truth. Emotion can be for other reasons as well.

GLAZEBROOK J:

Well no but it does, if it's genuine emotion, doesn't it, because if it's not genuine emotion then it shows she's lying.

MR CHISNALL:

But, no, it could be genuine emotion for a reason outside of her telling the truth about the –

GLAZEBROOK J:
Like what?

MR CHISNALL:
Well just –

GLAZEBROOK J:
In this particular case –

MR CHISNALL:
Being confronted, I mean to use an example, confronted with the story that she's actually talked about there being a towel involved, and seeing the photo of it, and realising where she is and what she's doing. I mean I'm guessing about it, I appreciate that, but my point is that what a direction demonstrates is that you can't simply jump to the conclusion that emotion can be equated with truthful testimony, and the reason that the direction has utility is because it actually identifies other, the fact that it isn't a one follows the other.

O'REGAN J:
Is your argument that all he said/she said cases where a warning of this kind hasn't been given, constitute miscarriages?

MR CHISNALL:
No, I can't advance that submission.

ELIAS CJ:
Why not on the argument you're making?

MR CHISNALL:
As a form of prejudice the simpler approach is to say where it's been given reliance as here, and that's why I made the point a moment ago about it on the narrower basis being that it fits the paradigm example of case that the Court of Appeal talked about. It's – well the reason I don't advance it is because is it really a submission that can fly? To say that –

ELIAS CJ:

Well is it really a result that can fly.

MR CHISNALL:

Exactly, and I know that it can't be, certainly the way we look at it in terms of effect on outcome, it's a far more difficult proposition to say that it's in the back, an extant risk which is always going to colour every decision. It's easier to deal with it on the basis of this case which is it was relied on and therefore it was actually a risk.

ELIAS CJ:

Relied on by the prosecutor.

MR CHISNALL:

Indeed.

ARNOLD J:

What the prosecutor relied on was actually broader than the towel incident, wasn't it, because he refers to the towel incident in his closing, page 86, but then at 89 talks about demeanour more generally and talks about the way the complainant gave her evidence was very compelling and he then gives a caution, you can't make a judgment simply on somebody's appearance, and then goes on effectively to say you can really.

MR CHISNALL:

Yes.

ARNOLD J:

So he certainly does –

GLAZEBROOK J:

But without giving specifics like looking up or down.

ARNOLD J:

No, not saying anything, just saying it was very compelling.

MR CHISNALL:

But prosecutors and defence lawyers aren't going to necessarily get into that level of detail about the advantage it has. It's a submission that certainly we've heard many times where, I hope I've never made it but I probably have as a prosecutor, that a person's, you saw the way that they gave evidence was very compelling, and this is an example of that, where it is obviously building on the demeanour of the witness, and I suppose the risk that the prosecutor talked about we would say, of course, didn't cover the imprimatur of the Judge, and obviously the Court of Appeal in *Rua v R* [2014] NZCA 599, which is a decision, to be fair, it was some months after this trial took place, but the Court of Appeal talked about it being an unwise thing for prosecutors to rely upon, and that might explain the degree of caution that came in, but to pick up the point that Your Honour Justice Arnold just made, it's all well and good to say, look, there's a, we're not human lie detectors, but he hasn't actually identified the problem with doing so.

Unless the Court has any questions, those are my submissions.

ELIAS CJ:

No, thank you Mr Chisnall, we'll take the morning adjournment now.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes Ms Laracy.

MS LARACY:

May it please the Court. In terms of the second ground of appeal, which is the propensity evidence relating to the police safety order, I will come in my submissions to the procedural issue around section 9, which is a matter my learned friend has relied on in the Crown submissions, but by way of introduction I'd like to just go over the defendant's key propositions with respect to this ground of appeal.

The submission is that the prejudicial value outweighed its probative value, and on that basis the test for admissibility under the propensity provisions was not met. Second, the extent to which the evidence assisted in determining matters in issue, namely its probative value, was not great or it related to issues which were themselves collateral, such as the appellant's attitude to the police, or how the relationship came to the end. And the third proposition is that a direction was required because this was a case where the logic of how the evidence was relevant was not a matter of common sense. In my submission it's not obvious how this subsequent conduct could properly be used by the jury to assist them in determining a matter in issue in the case. That potential for confusion in the mind of the jury or improper reasoning is bolstered in this case because the evidence was inherently capable because of its very nature of blackening his character and therefore it could potentially be used for that purpose without more.

In terms of the prejudice, which is where I would like to start and then go on to why I say the probative value was small, the submission for the appellant is that the prejudice in this case was significant. It was misconduct of a different type and in a qualitatively different context in terms of the relationship, the timing at which it occurred in the relationship, and the fact that the police were now involved, so my submission is that it's misconduct of a substantially different type to the conduct which is alleged to be the subject, which is the subject of the case.

Second, there is prejudice in the fact that there is an inherent inference that the police considered his behaviour to be sufficiently bad, or sufficiently risky, to impose a formal order. The evidence is not simply a description of how the appellant behaved and what he did, but the fact that the State intervened and an order was made.

WILLIAM YOUNG J:

A lot of this is pretty granular. These points really should have been made to the trial Judge, shouldn't they, because this went in an agreed form.

MS LARACY:

Yes. I can go to the section 9.

WILLIAM YOUNG J:

Yes, I know, but just to talk about the detail of what went in, whether this bit or that bit should have been there, isn't it a bit late for that now?

MS LARACY:

Well the argument for the appellant, of course Sir, is that the Court of Appeal failed to correctly calculate the relative prejudice, probative balance.

WILLIAM YOUNG J:

Yes, I suppose what's slightly troubling me is that this is the sort of detailed argument that can always be made, and one could say well the balance was taken a bit too far this way or a bit too far that way, but it's a bit annoying when that argument hasn't been advanced at trial. It's been agreed that the evidence goes in and then we get this, you know, argument on detail. Now I have no difficulty about the broad principle being an issue, but it's the fine detail that troubles me.

MS LARACY:

Yes, and my submission, which is perhaps one I was going to end on, but can equally be made at the beginning, that had this evidence been challenged by way of a pre-trial application, it would have focused the mind of the Judge and of both parties as to what the particular issues were that the events from the 23rd of February were relevant to, and what way they were relevant, and what the particular propensity was, and it would have required the Crown in particular to identify why it was that the probative value, in relation to each of those issues, outweighed the prejudicial value. So the very exercise that the Court of Appeal was required to conduct in its proceeding and that now I submit to you –

WILLIAM YOUNG J:

But at a broad level it was reasonably obvious, it was that he wouldn't take no for an answer, that he was controlling and threatening when challenged, and it was very cogent evidence of that because it didn't just come from the complainant.

MS LARACY:

Well that he wouldn't take no for an answer, if, my submission is that it's probative value on whether he would take, whether he accepted the police order telling him not to contact the complainant, that the extent to which that is probative of whether he accepted her disinclination or refusal to have intercourse during the relationship, is –

WILLIAM YOUNG J:

But that's only one component of a narrative.

MS LARACY:

Yes.

WILLIAM YOUNG J:

It starts off when she doesn't want him coming round that night.

MS LARACY:

Yes.

WILLIAM YOUNG J:

So it's her saying no, him reacting badly, turning up at, what, 6.30 the following morning and creating a scene.

MS LARACY:

Yes.

WILLIAM YOUNG J:

And being belligerent and threatening.

MS LARACY:

Yes, and perhaps if the evidence had been left at that, there would be no case that the prejudice outweighed the probative value. If there had been a description of his behaviour to that effect, without more, rather than the reliance that, in fact, was put upon it by the prosecution, which extended not just to the mere fact of the police safety order being issued but to what he said to police in terms of his statements about the complainant, the threats that he made to a, essentially, unrelated third party.

GLAZEBROOK J:

Well, is it unrelated third party if it's in the context of okay, so he wouldn't take no for an answer from her but what's more, he wouldn't even take no for an answer when confronted with what most people might think was a reason to subside?

MS LARACY:

Well, if that issue had been isolated in terms of the Crown seeking for this evidence, for the evidence of threats against [the complainant's flatmate], the flatmate, to be admitted because it was probative of his general disposition to either make threats or not to take no for an answer, my submission is that it was so collateral that the prejudice would have been found to outweigh the probative value.

So the very issues that we're talking about now perhaps underlie the primary submission of the appellant which is that a direction was required to explain to the jury what these issues were and exactly how the evidence was relevant and to warn against the inherent risks of not reason from post-offence misconduct to the suggestion that that necessarily meant that he had failed to abide by what she said during sexual acts. Not to reason that there was necessarily a logical connection and, secondly, to be very wary about not generally judging him and blackening his character and assessing everything he says in a poor light simply because he has shown himself to have behaved very, very badly at a particular time in the relationship.

In my submission the jury also needed to focus on the significance of that timing in the relationship. It is a point at which the police have become involved and the appellant, on his case, was determined to see the complainant and was very upset because the relationship – because she was not responding and because he feared that the relationship had gone off the rails. Now my submission, that particularity of that timing and the context of a three or four month relationship says very little about his disposition during the relationship, his behaviour during the relationship.

WILLIAM YOUNG J:
What about his behaviour the night before, because that was the subject of a charge wasn't it, on the 21st of February?

MS LARACY:
The last incident of –

WILLIAM YOUNG J:
Doesn't that say something about that?

MS LARACY:
Well, in my submission, no. It is approximate –

WILLIAM YOUNG J:
Well, as I understand it, and I may have the narrative slightly wrong. She says that she was raped on the night of the 21st. He wants to come round on the night of the 22nd. She says no. He says rats, I'm coming around anyway at 6 o'clock, or 6.30 and then there's a fuss. Aren't these connected? Isn't there a logical thread connecting all of those instances?

MS LARACY:
In terms of a sequence or in terms of disposition?

WILLIAM YOUNG J:
Yes, in terms of a sequence.

MS LARACY:

Propensity.

WILLIAM YOUNG J:

In terms of – I mean propensity is the statute phrase but here it's just showing a pattern of events that are interconnected, a really bad attitude to someone saying no.

MS LARACY:

Well, this is why it is important to look at the degree to which it is probative and it does require the Court to take a fairly granular look. If the proposition is that it's probative that he wouldn't take no, my submission is how does that assist in the context of not accepting no, 24 hours after the last rape, no to going round to visit her. She didn't say – she hadn't said no. She had failed to answer his texts. He turned up. The proposition is that that says something about how he won't take no in the context of sexual intercourse in a relationship. My submission, rather it shows that he wouldn't – the police safety order shows that he wouldn't accept the police limitation that was being imposed on the relationship.

GLAZEBROOK J:

And that is often what happens with men who are controlling.

MS LARACY:

Yes.

GLAZEBROOK J:

The most dangerous time for women is when they end the relationship so, in fact, on the normal evidence would actually raise major alarm bells when somebody behaves like that.

MS LARACY:

Yes. It doesn't however –

GLAZEBROOK J:

So it might tend to suggest that he was controlling and wouldn't take no for an answer at various points throughout the relationship, which is what she said to explain why she didn't walk with her feet or whatever it was he said she should have done.

MS LARACY:

So I certainly accept that it shows that on that occasion he wasn't prepared to accept the no implicit in her silence. He wasn't prepared to accept the no implicit in the police safety order but that, in my submission, too much was made of this fact. It was used to suggest a tendency in his relationship on the issues that the jury did have to determine, namely the sexual allegations, whether it was used to suggest that it had some probative value to assisting the jury on those issues. The issue could not have been was this a man who generally doesn't accept no. That's far too broad.

ARNOLD J:

But wasn't the issue whether he was controlling in the relationship, which is what the Crown was alleging, and there was a whole lot of evidence about that.

MS LARACY:

Yes.

ARNOLD J:

The text messages and all the rest of it. And this piece of evidence is entirely consistent with that and wasn't it, this incident was the trigger for getting the police involved and don't the jury have to understand that? I mean what was it that led the police to become involved in this? And it was what happened on this evening which led to the PSO and so on.

MS LARACY:

Well there are a number – my point is that there are a number of different bases or issues which this evidence is said to be relevant to. They do overlap but it is important for us, as it should have been for the trial Judge, to identify what those are.

ARNOLD J:

So tell me.

MS LARACY:

One of them, which was the key one, it appears, relied upon by the prosecutor and effectively endorsed by the Judge as a proposition, is that the evidence was that the appellant was controlling and demanding and threatening in the relationship. And the Court of Appeal said on that that, "This evidence," of the police safety order evidence by way of shorthand, "Is probative of the true character of the relationship." So my submission is simply this. If it is relevant to that and if it is probative, then that is only by a very small degree. It assists little with the character of the relationship throughout this three or four month period and it assists no more with the character of the relationship throughout the three or four month period than any other of the discrete incidents or texts that the Crown could properly refer to, to show that at times he was violent, at times, or he threatened violence, rather. At times he was offensive, at times he was controlling but it cannot be used as a single incident at the end of the charged period and relating to a very, sort of, heightened, contextually different point in the relationship to support a submission that it tends to establish that he was generally controlling and demanding and threatening in the relationship.

ELIAS CJ:

But what about in combination? Is it really suggested that it's to be viewed in isolation? You say, I think I'm paraphrasing you, it assists no more than all the other bits of evidence but surely it assists no less than the other bits of evidence?

MS LARACY:

That's right, the difference is that those other bits of evidence –

ELIAS CJ:

Are not as prejudicial you say?

MS LARACY:

Well they're not as prejudicial for a number of reasons. One, they are inherently part of the narrative in that they form part of the chronological series of events which occurred within the duration of the charges. This one didn't and in my submission it's discrete misconduct. So the justification for permitting the other incidents, such as when he made her sit in the wardrobe, or made her walk in front –

ELIAS CJ:

You're going to have to explain to me why the chronological – it was the last episode, because everything then came to an end, but why is the fact that its after, or at the end, why does that matter? It's obviously before he's accepted that the relationship is over.

MS LARACY:

And he would say he's trying to ascertain whether it was over or not. He was meeting silence from her.

GLAZEBROOK J:

He also says that she only made up all of this after the police got involved so to that extent it is relevant as well, isn't it, because apparently, according to him, she made all of this up.

MS LARACY:

She –

GLAZEBROOK J:

Ex post facto, as soon as the police got involved.

MS LARACY:

Yes.

GLAZEBROOK J:

So isn't at that stage the nature of the police getting involved and his reaction to it somewhat relevant to why she would or would not make up those allegations at that point? He says, what, because she thought he was cheating and therefore then starting making up the allegations later.

MS LARACY:

So if it, it may well be relevant as part, a logical part of the sequence to show how the relationship came to an end, and the circumstances in which the matter came to the – the sexual allegations came to the attention of the police, but the appellant –

GLAZEBROOK J:

And in assessing his assertion that she only made up those allegations at that point.

MS LARACY:

Yes, but – so to the extent that there is a threshold relevance established, that is the necessary first element, of course, for admission of the evidence, but the prejudicial value of the entirety of the police safety order evidence, including material from the prosecutor relating to repeated, in the prosecutor's word "breaches" of the police safety orders in the days afterwards by sending texts, that entire body of misconduct evidence in the appellant's submission tells the jury so little about the facts that they needed to determine in terms of the complainant's credibility, or the nature of the relationship that it simply did not justify the price of admission.

ELIAS CJ:

So that's a section 8 balance, or no, it's still a propensity balancing, is it?

MS LARACY:

Yes, well the Court of Appeal considered the evidence was propensity. My submission to the Court is that this is the type of relationship or background or narrative evidence that this Court unanimously held in *Mahomed v R* [2011] 3 NZLR 145 (SC) to fall under the section 40 and section 43 analysis, and there are policy reasons, in my submission, that where evidence does fit within that framework, that it is important that it is subjected to the additional scrutiny and rigour of the section 40 and 43 analysis. So if Your Honour's point may well be that the admissibility equation would be much the same, wouldn't it, under section 8 and section 40 and 43.

ELIAS CJ:

I think that's right.

MS LARACY:

That may be the case but there are subtle differences in those sections and the, for instance section 40 and the 43 route requires the Court to focus on the prejudice to the defendant whereas section 8, for what it's worth, talks about the prejudice in the proceedings. So section 40 and 43, certainly in terms of most academic commentary, are taken to be provisions which provide a degree of rigour and process with a view to ensuring that evidence that comes in to show some sort of tendency or disposition, is carefully analysed, and that the balance is reached by a very thorough process which is particularly acute to the prejudicial effect on the defendant.

So the primary submission for the appellant on this ground, that if the evidence was to be there, and it was, for the purpose which the Crown sought to use it, it is evidence that did require a direction. Now the most propensity evidence will need a direction, the Court accepted that in *Mahomed*¸ and the Court also warned that –

WILLIAM YOUNG J:

Just pausing there. You said that the complainant didn't respond on the night of the 22nd of February, I think she did. I'm looking at page 31 of the case on appeal. It's got the text messages.

MS LARACY:

Yes, my learned friend –

WILLIAM YOUNG J:

No, it's 115. She does say, "U drove me around drunk last wk and didn't care. No u cnt stay its not my house and I hav 2 get up early." So she did say don't come around.

MS LARACY:

I accept that.

GLAZEBROOK J:

I was just looking as well, because there seemed to have been evidence from her that there'd been threats to [the complainant's flatmate] and if there's a later threat that would be corroborative, wouldn't it?

MS LARACY:

Well, that's right, there was a later –

GLAZEBROOK J:

Well you just said that that was irrelevant.

MS LARACY:

Well what's the, my question is what's it relevant too? What's the issue that it's corroborative of? That the complainant was right, that he was willing to threaten [the complainant's flatmate]? If that had been how the issue was put, the Crown would like to lead this evidence because it shows this is a man who has a tendency to threaten people. It wouldn't have been admitted.

GLAZEBROOK J:
Well, no –

WILLIAM YOUNG J:
To threaten people in connection with his relationship with her.

MS LARACY:
To threaten people in connection with his relationship with her? Well possibly. My response to that, if the Court is of the view that that is of such probative value in the case, that it outweighs the prejudice to the defendant from the jury knowing of misconduct directed not only at her, but at a third party, if the Court's of that view, my submission is that the jury needed a warning about how to use that evidence.

WILLIAM YOUNG J:
But there's all sorts of other stuff in there about use of drugs and alcohol and drunken driving and fighting.

GLAZEBROOK J:
Methamphetamine.

WILLIAM YOUNG J:
Methamphetamine, so it wasn't sort of a completely extraneous element, that the appellant isn't the nicest guy in the world.

MS LARACY:
That's right.

WILLIAM YOUNG J:
He's not a law abiding person in that respect.

MS LARACY:
That's right.

WILLIAM YOUNG J:

In those respects I mean.

MS LARACY:

And I wouldn't want to suggest otherwise. My submission is that to the extent that what happened on this particular occasion can be used to say something about his disposition towards police, towards threatening people, in relation to her generally, or towards her being controlling over the course of a three or four month relationship, in my submission is it's overblown when it's used for that purpose. And that's because of the particular timing and context and events at this point in the relationship.

GLAZEBROOK J:

And you are going to come onto the section 9 issue?

MS LARACY:

Yes, yes I am. So in terms of the need for a direction my submission is that this case falls squarely within the scenario described in the minority judgment in *Mahomed* at paragraphs 91(b) where a direction is required, namely the evidence does involve aspersions on the character of the appellant in respects not directly associated with the alleged offending. Second, a propensity evidence direction should given where without it there's a danger that the jury will not realise the relevance of the evidence in question, or there is some particular risk of unfair prejudice associated with the evidence.

WILLIAM YOUNG J:

Sorry, I missed the paragraph?

MS LARACY:

Paragraph 91(b) and then paragraph 92.

WILLIAM YOUNG J:

Sorry, I was looking at 90.

MS LARACY:

The reasoning in the Court of Appeal appears to have been that reliance on the subsequent passage in the minority decision in *Mahomed* that relationship evidence often won't require a direction, and I accept that, not suggesting that, for instance, the wardrobe evidence required a direction, and that's because it's a natural part of the flow of the narrative and imbedded, logically imbedded in the account of hostility and conflict in the relationship and it falls within the span of the charges and it's simply a natural part of the relationship. In addition the prejudice, because of that is, in the language of the minority in *Mahomed*, determinous with the charges and the prejudice inherent in them. In my submission there is additional prejudice in this case because of the elements of a threat to a third party, and because of the very bad character evidence in terms of him having a poor attitude to police, and that was variously framed. He was someone who wouldn't accept the intervention of police in the relationship. He was someone who wouldn't accept, who didn't respect the police, but in any event the point is that it's a, there is prejudice to the appellant in that depiction of him, and if the Court considers that it's legitimate prejudice, and that the probative value was more powerful than the prejudicial value, my submission that does not in any, to any degree suggest that a direction was not required. In my submission the fact that it was post –

WILLIAM YOUNG J:

But should that have been given, I mean it would have been, if the direction was required because the evidence showed that the appellant had made a threat to [the complainant's flatmate], would it not also have been required in relation to the fact that he had all these fights that are referred to in the text messages, had a rumble last night, or that he took methamphetamine. Wouldn't every part of the story require a direction?

MS LARACY:

Possibly. Then it comes down to not just being evidence itself but how it's used and the significance of this evidence was that it became in itself a very powerful plank in the Crown case. The Crown's opening statement to the jury started with this. The cross-examination of the appellant commenced with

this. It was a very strong feature of the prosecution's closing and the Judge chose to pick up on it in summing up but without providing on a direction. For instance the Judge said at paragraph 89, "The Crown asks you to find that he was a persistent, controlling, dominating person, ask you to take into account not just the threats against her but against [the complainant's flatmate]." Now what we've got there is a classic case of propensity evidence. The suggestion is that he has a tendency to react to this –

GLAZEBROOK J:
I thought the threats against [the complainant's flatmate] were related to [the complainant's flatmate] trying to protect the complainant and stop saying he'd sort things out wasn't it, and her embarrassment about [the complainant's flatmate] being involved? And I'm only looking briefly at bits and pieces but it does have to be put into context. So it's not that he totally – he went and threatened Mr Downs down the street that he saw one day who had nothing to do with any of this.

MS LARACY:
The suggestion was that the effect of the text and what the prosecutor was suggesting they showed in terms of [the complainant's flatmate] was that the appellant was prepared to deal to [the complainant's flatmate] if he got in the way of the relationship with the complainant.

GLAZEBROOK J:
And that's irrelevant why?

MS LARACY:
I'm not suggesting that it's irrelevant. I'm suggesting that its prejudicial value outweighs any probative value it has and, more importantly, if it was going to be used in that way, if the jury are going to be told you can take into account not just threats against her but threats against [the complainant's flatmate], which is what the Judge said, how do they take them into account? What do they use them for? Can we reason that this is a man who as extremely nasty. Not only was he vicious to the complainant but he was prepared to be violent

or threaten violence to other people as well. This is a much broader context of misconduct and misbehaviour and bad character. In my submission it required a direction.

Now the direction wouldn't necessarily have been to say you can't use it to show that he had a propensity to threaten people, other people in relation to her. The Judge may well have thought it could be used for that but the counter-proposition also needed to be put and this is the value of the direction which the minority does suggest should almost always be given. The counter-proposition is what the defence says about that evidence, namely that if the Judge had been summing up the defence contention, it would have been that this was a man who was desperate to see someone who he hoped he was still in a relationship with –

GLAZEBROOK J:
Well, his contention was he didn't make the threats, wasn't it, despite the text messages? He didn't threaten [the complainant's flatmate] or say anything about the police at page 234. So the earlier threats he denied. He said [the complainant's flatmate] was lying and so was she.

MS LARACY:
But if the Judge had been directing on this, he would have had to consider what the defence position on that use is.

GLAZEBROOK J:
Well the position was that the threats weren't made, presumably, then, they could use the evidence of the later threat, which is what they were asked to do, to assess whether the threats earlier were made.

MS LARACY:
The threats earlier in relation to [the complainant's flatmate]?

GLAZEBROOK J:

In her presence I think. I have to go through, because we haven't been taken through the major detail in respect of this but -

MS LARACY:

Again, my submission, that's highly collateral. It's extremely distracting whether he was a man who had threatened on any number of occasions or had a propensity to threaten the flatmate and that the evidence needed to be kept confined and that the jury ought to have had the benefit of the defence proposition about how this evidence could be used in terms of tendency.

O'REGAN J:

But there wasn't a defence proposition because they said the evidence wasn't true.

MS LARACY:

But on the extent to which the defence is saying that he breached the police safety order – sorry, that the Crown is saying that there's a body of evidence relating to the police safety order that says something about his tendency to behave towards the complainant or the defendant. There is a defence proposition to that. There is a defence response to that and the defence response to that was that this was – well, would be that this was a very confined, a very discrete time in the relationship which is logically, which the jury should see as quite different from the events that led up to it.

In defence counsel's submission to the jury the reason things were at this stage is because the wheels had fallen off the relationship at this point. So it doesn't tell the jury much about what was going on in the relationship when the wheels were on.

O'REGAN J:

So did the defence counsel make that point?

MS LARACY:

He did make that point, albeit not in the context of talking about it as propensity evidence, yes. I can take the Court to the defence closing on that. So count 12 is dealt with in defence counsel's closing address at page 115 of the case on appeal. Defence counsel accepted that the texts after 21 February do not reflect well on the complainant.

O'REGAN J:

But does it really make the point that you can't draw anything out of what happened after the wheels had fallen off about what was happening while the wheels were still on does it?

MS LARACY:

No. My submission is that it behoved the Judge to make that.

O'REGAN J:

Well, the Judge can't make up a defence that isn't put. I mean the defence position was these events didn't happen.

MS LARACY:

I'm sorry. I need to find the reference to the police safety order in the…

O'REGAN J:

The threat against [the complainant's flatmate] was denied wasn't it?

MS LARACY:

Yes. I don't feel confident.

O'REGAN J:

Well, the Crown position was these later events tell you something about the earlier events.

MS LARACY:

Yes.

O'REGAN J:
The defence position was the early events didn't happen, so the later events don't tell you anything. That was the two contending positions wasn't it?

MS LARACY:
Yes, and if they're roughly equal then the probative value is very small. It certainly doesn't outweigh the prejudicial value. The point is that there is a defence proposition about this evidence. In part it's that, in respect of some aspects, it didn't happen. In respect of other aspects it's that no, the quality of the relationship was quite different. But there's no balance of that in the – there's no focus on that in the summing up. There's simply the way in which the Crown used the evidence.

So just around this, the submission is that the Judge's direction needed to address the emphasis put on it by the Crown and other evidence of poor conduct on the part of the appellant did not attract that same sort of emphasis and elevation to the level of general tendency that this particular evidence did, that's why I suggest that a direction is not required in relation to every incidence of misconduct or poor behaviour on the part of the appellant of which there was evidence. I also submit that the direction given at paragraph, the Judge's direction which is summarised at paragraph 3 of the Court of Appeal's decision, would not have helped the jury at all. The paragraph 53, which is the Court of Appeal's analysis, is very brief in terms of whether a direction was required. It says that the Judge specifically referenced his prejudice direction to feelings the jury might have about people who were alleged to have committed sexual offences and people who might have been involved in domestic violence, so there's nothing specific about tying it in to this particular evidence, and these particular breaches of the police safety order. Then the Judge instructed the jury to look at the evidence clinically and carefully and not to speculate or guess. My submission, when the jury came to consider in their deliberations what use they could make of the police safety order, having been told to consider it clinically and carefully

and not speculate or guess, would have been of little or no assistance to them whatsoever.

There was a more than theoretical risk that the jury would have thought very poorly of the defendant and that that would have coloured their view of how he behaved during the relationship. I also submit that because of the way it was used, and the emphasis put on the evidence by the Crown, there was more than a theoretical risk that the jury would have put disproportionate weight on it. And in the context of what I suggest was a finely balanced case, evidence that he was –

ELIAS CJ:
The Crown only referred to this in terms of the relationship and his domineering. There's no impermissible use by the Crown of this evidence, is there?

GLAZEBROOK J:
The gainsay, the assertion that she'd been free to leave at any time and if she had actually been abused she would have left. So his reaction when she did try and leave would perhaps suggest that it would have been more difficult for her to leave than he was asserting.

MS LARACY:
And, of course, his evidence on that, which I do have the reference for, it's at page 233, is that he was trying to keep in contact with her because he wanted to show that he cared. That's why he was making contact with her. That's why he wasn't accepting the terms of the police safety order.

ELIAS CJ:
Well he might have cared in his own mind. It's not necessarily inconsistent with him being domineering and abusive.

MS LARACY:
That's exactly right Your Honour. Nor is it entirely consistent with him being –

ELIAS CJ:

Sorry I said it's not inconsistent.

MS LARACY:

No, but it's also consistent, there are two perspectives on the evidence and what I'm asking the Court is wasn't it important in the context of this case that that alternative perspective on what the evidence showed, be put.

ELIAS CJ:

Sorry, what was that? You said –

MS LARACY:

That the reason – if the police safety evidence, the police safety order evidence is there, the Crown proposition is that it shows a couple of things. One, is that he's controlling and threatening. Two, that he's unconcerned about police involvement in the relationship and unconcerned about police intervention in the relationship. I struggle with the relevance of that but those were the core Crown propositions about what this evidence showed. The defence submission in response to that, or the position that should have been put by the Judge, is that what the breach of the police safety order was also consistent with, was his case that he cared about her.

GLAZEBROOK J:

I doubt the Judge is going to say anything of that sort in any direction.

MS LARACY:

Well that was his –

GLAZEBROOK J:

The Judge might say, this is his, this is the defence contention, but I doubt the Judge is going to give any sort of imprimatur to say he cared about her by behaving in the way that he did after the police safety order.

MS LARACY:

No, the Judge might say it shows that he was persistent but the jury –

GLAZEBROOK J:

Well the Judge might just leave it to the jury I would have thought. I mean this is actually appalling behaviour. The Judge is not going to be giving excuses for appalling behaviour in front of a jury surely.

MS LARACY:

The more appalling the behaviour is unless the Court's satisfied that it's directly probative and to a reasonably high degree if something's an issue, the more it requires a direction as to being careful around that evidence.

GLAZEBROOK J:

Well his contention is, if these things had happened, she would have left, she was free to leave at any time, I was Mr Nice Guy all the way through the relationship. This behaviour afterwards showed that he was anything but Mr Nice Guy. He was prepared to breach safety orders and make threats to a whole pile of people. This is not Mr Nice Guy allowing someone to leave the relationship at any time, is it?

MS LARACY:

And –

GLAZEBROOK J:

And wishing them the best of luck and saying, I hope we can still be friends at some point in the future.

MS LARACY:

So Court of Appeal reasoned along those lines, Your Honour, that it was relevant to the issue of whether she was free to leave at any time, but the probative value of that issue is very slight because doesn't it also show simply that he was persistent in wanting to see her. Is it necessarily consistent with stopping her –

GLAZEBROOK J:

Most people don't breach orders that are given to them by the police, do they? Just by being persistent?

MS LARACY:

No but there was a motivation there that was consistent with characteristics that could be presented in a good light, and that was the defence case on this, when he was cross-examined about this issue he, about the breaches of the order, he said that it showed that he cared about her, that's why he kept on texting her.

ELIAS CJ:

I can't see that his motivation matters in terms of the evidence. I'm just struggling to understand that linkage. That if you're complaining that the Judge didn't even things up by saying it's consistent with him caring, I'm not sure that that is a sufficient answer in any event.

MS LARACY:

Well the evidence is admissible presumably because it shows a tendency to behave in a particular way or a particular state of mind, and my submission is that it was equally open for the jury to infer that it showed a different state of mind. Not a brazen disregard for police intervention, but an overwhelming desire to remain in contact with someone who he wanted to, who he cared about. It's not only consistent with the tendency and the state of mind that the Crown would put on it, and as soon as there is an alternative available, that goes both to how prejudice, how probative is it really of the proposition which the Crown's advancing, but in any event even if it is probative, and more so than it's prejudicial, it requires balance, the jury should approach it in a balanced way, taking account of whatever can be said about the tendency or the state of mind on the part of the defendant, and that didn't occur here, and most importantly it requires the direction to be careful about illegitimate reasoning process from an active misconduct on a particular occasion, to assuming that that necessarily says anything about what happened on other occasions, rather to tell the jury it's just part of the entire factual matrix, and

that they need to think about the evidence from both perspectives. The jury should have been cautioned against reasoning processes which carry that risk of unfair prejudice.

Now if I can just come on to to section 9, but before I do that it's important also that I just make a point that in terms of the Court's own assessment of the nature of the relationship, it's almost as though there are two relationships in this case depending on which set of text messages the fact-finder looks like. There are the text messages, both of them are before you, but the Crown selected a large number of text messages which they say characterised the relationship fairly but which do paint a very different picture in their entirety from when the defence text messages are looked at, which paint a much more, a picture of a much more balanced relationship where, to the extent there's power and control and negotiation and people getting angry with each other, it's much more mutual.

My learned friend has suggested that the –

GLAZEBROOK J:
What point do we take from that?

MS LARACY:
Well, that the, in terms of assessing – the jury had the benefit of all the text messages when they came to consider the nature of the relationship. All I'm really asking is that when the Court, if Your Honours haven't already –

GLAZEBROOK J:
What relevance does that have?

MS LARACY:
Because the material put in by the Crown is highly selective, in my submission, and again this is a submission that was made by defence counsel to the jury, it's highly selective in terms of what it shows about the tenor of this relationship. Was not a relationship that was always controlling on his part.

The text messages are very clear about that. Not a relationship on, even on the complainant's case where there was always non-consensual sex, it was a much more nuanced, balanced, variable, fluid relationship.

WILLIAM YOUNG J:
Sorry, this is apropos of nothing you're just saying at the moment, but there was evidence as part of the complainant's narrative of threats that he made towards [the complainant's flatmate] in the course of her relationship with him.

MS LARACY:
In the text messages?

WILLIAM YOUNG J:
No, just in her evidential interview.

GLAZEBROOK J:
That was the point I was making before, so the actual threat was corroborative of her evidence of those threats, which was again related to what she said was the controlling nature of the relationship. But I'm not quite sure where the more balanced comes into it in terms of anything we have to decide. I mean she, there was clearly consensual sex and then non-consensual sex, often it was following.

MS LARACY:
Yes, and there were times when he was controlling and there were times when he was not controlling, and if, for instance, the Judge had taken it upon himself to direct about –

GLAZEBROOK J:
So it's to do with the, this point is related to directions?

MS LARACY:
Well, yes Ma'am, it bears on it that there's a perspective, that this evidence is being used by, the PSO evidence has been used by the Crown to suggest a

tendency in the relationship to be controlling. Of course that needs to be balanced by the interpretation on evidence that's given to you, particularly in the exhibit that's been put forward by the defence, which shows that this was a much more equal relationship, and to that extent the PSO evidence on the defence case says nothing more than on that particular date, when he was in a state of high emotional upset, he behaved very badly. It says nothing about the previous three or four months of the relationship. It doesn't tell you anything about whether she was more likely or not to have consented on any particular occasion to intercourse. So that would be the sort of balance that would come from considering the counter-proposition to that put forward by the Crown. That simply didn't happen in this case.

The Crown has suggested that –

GLAZEBROOK J:
That it's not enough that he put the defence case and said what the defence case was?

MS LARACY:
Well I do, I commend –

GLAZEBROOK J:
That that was put.

MS LARACY:
I commend the three steps which the minority judgment identified in *Mahomed* which is that where an order is appropriate –

WILLIAM YOUNG J:
A direction is appropriate?

MS LARACY:
Sorry, where a direction is appropriate, the Judge should one, identify the evidence in question and explain why it has been led, and the legitimate

respects in which it might be taken into account by the jury. Two, put the competing contentions of the parties. Three, caution the jury against reasoning processes which carry the risk of unfair prejudice associated with the propensity evidence.

GLAZEBROOK J:

The submission is that the general direction's doing that, and the general direction on prejudice isn't sufficient in this case, it should have been specifically identified and discussed, is that the proposition?

MS LARACY:

Yes, and the reason for, while I accept that in many relationship cases it won't be necessary to give a propensity direction, in this case it is because of the additional prejudice involved by the aspersions on his character that come from the references to [the complainant's flatmate], and threats against a third party, and because of what this evidence says about his, on the Crown case, about his attitude towards the police, which the jury may well have, or police orders, which the jury may well have thought painted him in a very poor light. And those factors are not germane to, or imbedded in, or a necessary part of the narrative on the charges. That's the difference. In many cases the misconduct is part of the natural chronology of the charges and it just comes out as part of that flow. I appreciate this is at the very end of that flow and the Court may say it's all part of a sequence. However, there are aspects of this evidence which are unusual, that paint him in a distinctly poor light in relation to conduct that doesn't just relate to the complainant, and those are the very factors that this Court in *Mahomed* suggested were the types of things that would prompt a direction.

WILLIAM YOUNG J:

Like a lot of things in life you can look at it in two ways. One, you can look at it in terms of it involves contempt for police orders, it involves a challenge, a threat to [the complainant's flatmate]. Another way of looking at it is that in a context where police and [the complainant's flatmate] were perceived to be standing between him and getting the complainant to do what he wanted to,

he was prepared to threaten them, which means that it is about the complainant. I mean those are the two competing versions of the problem I think aren't they?

MS LARACY:
Yes, yes. It's certainly not a case where the logic and the relevance of this evidence is simply so much a matter common sense that it didn't need distinct articulation and advice to the jury on what role it played in the trial.

My learned friend's submissions suggest that no direction is required and indeed suggests that this is not propensity evidence. The only point I propose to make about that, because we've essentially covered everything I can say on those points, is that the law commission in its 2013 review of the Evidence Act, propensity rules, considered arguments raised by the Crown which are very similar to some of the ideas in my learned friend's submissions, and did not think that they should influence law reform and, of course, my submission is that *Mahomed* is the guiding authority and even on *Mahomed* this is a case which required, despite being a relationship or narrative evidence, it was a case that required a direction.

The section 9 issue arises because this evidence went in by consent. My learned friend has referred the Court to a number of New Zealand, older New Zealand, and English authorities, however, my submission is that this case, sorry this Court in *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730, and in a recent decision of *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 and *Edwards* has made it very clear that the Court will always reserve the right to intervene and prevent a miscarriage of justice howsoever caused, and that there is no special gloss or test for on appeal revisiting an enquiry into an issue simply because defence counsel made a concession.

The most recent Court of Appeal cases on this are very pointed and deal expressly with that issue, and I've got copies of the cases for the Court, or I could just give you the citations, but they're *Wilson v R* [2015] NZCA 531 and *Marsich v R* [2012] NZCA 470 where the Court of Appeal was firmly of the

view that section 9 agreements are subject to judicial discretion, and that the Judge, that's the use of the word "may" in section 9, and that the Judge is not thereby relieved of the responsibility to ensure that the trial is fair. So the question for the Court is, was the evidence admissible, and if it was inadmissible, either because it wasn't relevant, or because the probative prejudice balance was the wrong way round, then the fact that counsel consented is nothing that the appellant should be held to, if thereby the admission of the evidence created a real risk that it affected the verdict. In *Wilson* paragraph 17 and 18 the most relevant that they include the statement, "The trial Judge must guard against the possibility of an unsafe verdict being returned on the basis of such evidence which could give rise to an appeal being brought on the grounds that admissibility had been wrongly conceded."

And just in the final few minutes before the lunch break, it's difficult to, it's not entirely clear how section 9 applies in this case because the assumption seems to have been that the evidence was admitted under section 9(1) of the Evidence Act which allows the Judge, where the parties agree, to admit evidence that's otherwise inadmissible. So if this was under section 9(1) as a matter of law the police safety order material must be inadmissible.

Section 9(2) on the other hand deals with the manner in which evidence is admitted. The proposition might be made here that this is what was agreed, that the evidence be admitted in written form but in that case it still leaves open the question of whether that evidence was, in the first place, admissible or inadmissible.

So if it's under section 9(1), if the Crown accepts it's under section 9(1) then the starting point has to be that the evidence is inadmissible and, of course, no agreement is needed if it's admissible evidence.

ELIAS CJ:

Ms Laracy, are you drawing this to a conclusion or will you need a bit more time?

MS LARACY:

No, I can finish there, unless the Court's got any questions about section 9.

WILLIAM YOUNG J:

I think I would assume that it was thought that the evidence was admissible and the agreement was as to the form in which it was to be given. I mean I suppose that's my impression of how what happened should be interpreted. The assumption must have been that in the absence of an agreement, the Crown would be in a position to call the evidence from a flatmate and from the police officers concerned and to circumvent that it was agreed that the written evidence would suffice.

MS LARACY:

That may be the case. With respect, the case on appeal is that trial counsel's concession that the evidence was admissible per sé was wrongly made, and the –

WILLIAM YOUNG J:

Of course, I mean if you took section 9(1) in a very literal way, you would say well, because of the concession it was admissible.

MS LARACY:

Yes, that –

WILLIAM YOUNG J:

But I don't think anyone is saying that.

MS LARACY:

No, and certainly the commentary in *Adams on Criminal Law* doesn't suggest that. It relates to evidence which is inherently inadmissible. But the concern for the Court is always, whether on appeal, there is some different stance being taken from what was at trial a deliberate tactical stance. That

presupposes, in this case, that there might have been some benefit to the defendant from any part of the police safety order material coming in. There was no tactical advantage to the defendant from that evidence at all. So there's no suggestion that this was a case where advantage that was seen at the time is, in retrospect, being regretted. Rather, it's a case where an error has been made in the sense that no reasonable counsel who had turned his or her mind to the admissibility of this evidence would have considered that it was admissible or that admissibility should simply be conceded.

ELIAS CJ:
But there was no objection to the evidence.

MS LARACY:
No, and that's where I take the Court back to these recent cases, which I can provide the Court with, of *Wilson* and *Marsich* , which confirm that the line of authorities relied on by my learned friend but the fact of the failure to object doesn't relieve the trial Judge of the duty to ensure that the evidence is admissible and that there is a fair trial.

WILLIAM YOUNG J:
But just to come back to the point I raised with you when you commenced your submissions. Might it not be material to some of the detail of what you're saying, some of the detail of your complaint whether perhaps the police safety order should have been redacted in some respects or this little bit of evidence should have been cut out or that bit of evidence might have been added by way of balance? I mean those are the sort of points that trouble me more than the sort of complete argument, what it was consent to, therefore, it can't be challenged but I don't accept that, but I do wonder whether we can be really expected to carry out the same sort of exercise the Judge would at trial, or before trial, with quite the same particularity.

MS LARACY:
No, I appreciate that the Court's probably not realistically in a position to do that, so what I submit the Court is required to do, however, is to look at the

evidence in the round and the way it was used and form its own view as to overall its prejudice versus probative values and consider whether, in the context of this trial and the various issues, is there any risk that the jury could have either misused it or been confused about how they ought to apply the evidence. And that's a reasonably confined question and if the Court's view on that is that a direction was required, then my submission is that there is a real risk of a miscarriage in this case. And it's essentially the halo argument that my learned friend for the appellant made that it's evidence which, of its nature, could colour the way the jury considered the appellant and the charges and the entirety of his evidence.

Unless the Court has any further questions, those are my submissions?

ELIAS CJ:
No, thank you Ms Laracy. We'll take the lunch adjournment now.

COURT ADJOURNS: 1.07 PM
COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes thank you, Mr Downs

MR DOWNS:
May it please the Court. The Crown's case, or at least written case, in relation to the first issue may probably be paraphrased in this way. It's one thing to recognise that demeanour is a sacred cow. It's another thing to, then, slaughter it because the appellant's case, as it appears in writing - The appellant's written case as we apprehend it, is that demeanour, which is defined broadly it appears, is a form of irrational prejudice which juries must be expressly warned to disregard. And the appellant's case, in this respect is, we suggest, radical.

It's inconsistent with what may fairly be described as a mountain of common law. I mean, just to give one example really off the top of the cuff, in the case

of *A-G for the Sovereign Base Areas of Akrotiti and Dhekelia* [2005] UKPC 31, [2006] 2 LRC 368 the Privy Council decision emanating from Cyprus in which the complainant was screened and there was insufficient room for prosecuting and defence counsel to see the witness at the same time. Lords Rodger and Brown described it as trite that demeanour is always something that may be taken into account in the assessment of fact of a witness.

Turning closer to home, *Owen v R* [2007] NZSC 102, [2008] NZLR 37, that case, as will be recalled, was concerned with reasonableness challenges to a jury's verdict and appellate deference in relation thereto. The Supreme Court observed that there was a natural and undoubted advantage in relation to the Court at the first instance by virtue of seeing and hearing the witness. And we note also in that case that out of Court demeanour was a factor that was relied upon by the Supreme Court in dismissing the appeal. The Court may recall from having read the facts of the case that the complainant there ran naked, or partially naked, down the street in a visibly distressed state, and that was seen as supporting her testimony.

We see no different view from a full Court of the Court of Appeal in *Munro v R*. It's true in that case scientific research in relation to demeanour meant that no longer could demeanour be considered to be utterly immune to appellate review but, nonetheless, the case concluded with the proposition that there was considerable advantage reserved for those at first instance seeing and hearing witnesses.

The high point of the appellant's case in relation to the common law is perhaps *Fox v Percy*. The Court will recall that involved an unfortunate accident involving a horse.

ELIAS CJ:
I can't say that I do recall it.

MR DOWNS:

Well, a rider was thrown from a horse when a car came around what was almost a blind bend and hit the horse. And the case was, at least, in part concerned with the deference that a Judge is entitled to as fact-finder at the first instance. And the Court noted, that is the High Court of Australia noted that research in relation to demeanour no longer meant that that particular facet enjoyed the status it once held but nonetheless settled upon the proposition that first instance Courts were still entitled to considerable deference in relation to their findings. Now all of this may raise the question well, so what, to which the Crown's respectful response is that it does serve to highlight the radical nature of the appellant's case, mainly that demeanour is a form of prejudice which juries must be expressly disregarded to ignore.

The list goes on. A recent decision of the Supreme Court of Canada called *R v NS* [2012] 3 SCR 726, perhaps better remembered by the facts of the case in which the complainant, who was alleging sexual abuse at the hands of her former partner who was a devout Muslim. She declined to remove the headdress that revealed only her eyes when she testified. And the issue of how that right, or religious right, could be squared with the right of a defendant to confront his or her accuser reached the final Court of Canada and its significance for present purposes is that the Canadian Supreme Court was unanimous essentially as to the proposition that the demeanour of a witness is a material consideration relevant to a fair trial and that covering a face, certainly in that way, could be a potential impediment to a fair trial.

Now that's a very hurried summary of the current common law but it may be thought necessary having regard to the case as presented, at least in written form, by the appellant.

Now we respectfully detect a softening of the appellant's position, whereas it had been suggested that demeanour and references thereto were irrational prejudice and a matter for mandatory curial direction. As we apprehend it, the position is now less confrontational, if I may say so, and rather that juries ought to be warned that demeanour, or demeanour investigations can be

mistaken, at least in isolation, and that care ought to be taken. With respect those are unremarkable propositions and we don't cavil with any aspect thereto.

ELIAS CJ:
Well do you say they should always be given, those directions, those general directions?

MR DOWNS:
No, we do disagree as to that aspect, so the issue is whether a direction of this type, whatever it may precisely entail, ought to be mandatory or otherwise, we would avert to the following propositions. The first is in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, a decision of this Court in relation to an absence of previous convictions and how that was to be treated. The Court may recall that it expressed a view at paragraphs 40 and 41 of the judgment that mandatory jury directions were really reserved of issues of irreducible importance, those things to which were fundamental to a fair trial. That has significance because of course the legislature hasn't seen fit, or I should say it hasn't seen it necessary to include demeanour, or anything of that regard, in the mandatory direction suite and indeed the mandatory direction suite is very narrow so section 123, the Court may recall, requires a Judge at first instance to tell a jury not to draw an adverse inference about the alternative way in which a witness is giving evidence. So, for example, behind a screen.

Section 124 is directed to the issue of lies in a criminal case and the situation is that a Judge is only required to give that direction if one of two situations arise. The first is if the defendant, by his or her counsel, wants it. That was seen as alleviating many of the arguments about lies, or in terms of the difficulties in relation to directions about lies, and the second is where the Judge concludes that undue reliance maybe placed upon the lie, and in that situation it then becomes mandatory for a direction to be given.

The third and, of course, most obvious is in relation to identification cases and more particularly identification warnings. Essentially the R v Turnbull [1977]

QB 224, [1976] 3 All ER 549 (CA) position in section 126. And to complete the list of at least potentially mandatory directions, section 122 of *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 which the Court will recall was concerned with potentially unreliable evidence, but of course the direction becomes mandatory only when the Judge reaches the view that for whatever reason the evidence in issue may be unreliable. All of which is a very laboured way of making the point that the list, or suite, of mandatory jury directions is very narrow indeed –

ELIAS CJ:
You don't suggest that it's limited by those identified in the Evidence Act, do you?

MR DOWNS:
No I don't, respectfully, submit the Act necessarily delimits mandatory directions, but I would make this observation. The Act maybe thought as indicating or identifying the most obvious situations and it's notable, we respectfully suggest, that identification as a warning has been brought about by high experience. There have, of course, been high profile cases of profound miscarriages by virtue of weaknesses or failings in relation to evidence of that nature. Now the appellant, with respect, has nothing in that order in his case. Nothing whatsoever. And it's relevant too, and I apologise for –

ELIAS CJ:
Sorry, nothing of what order, I'm not sure that I follow. What sort of order do you think you'd have to be in?

MR DOWNS:
Yes, it was an elliptical response on my part. What I had meant to say was that he can't point to any hard evidence of miscarriage in other cases, or notable or celebrated failings, arising in relation to demeanour.

GLAZEBROOK J:

I did refer to that one case in Canada, and I think it was a lack of reaction at the time a young girl was murdered, so there has been – and I think that's probably where some of those directions in Canada arise from. So I think it was a lack of reaction, not going out and searching for this young girl who was missing, which was taken as being an indication that he didn't care and in fact had murdered her. I think I did say to Mr Chisnall that equally I think if he'd been at the forefront of the search that probably would have been used to say that shows he took an unnatural interest in the search and…

MR DOWNS:

In fairness to Your Honour, you also mentioned Chamberlain as a possible example.

GLAZEBROOK J:

Yes.

ELIAS CJ:

But is this – yes, right.

MR DOWNS:

In which, ironically, it was the absence of demeanour that is said to be the concern. But may I round out the point in this way by saying that –

ELIAS CJ:

I don't know that that can be said to be absence of demeanour. It might be absence of reaction but it's one of the problems with a word like "demeanour". It covers how you give your evidence really.

GLAZEBROOK J:

Well, both of those were absence of what people might have thought should have been the normal reaction –

MR DOWNS:

Yes.

GLAZEBROOK J:

– which because there's such a range of reactions that one can have to those experiences there is not a normal reaction, but it's not – you say it's not demeanour as such.

MR DOWNS:

No.

GLAZEBROOK J:

It is an assumption that people should behave in certain ways and when they don't that then counted against them.

MR DOWNS:

Perhaps we might describe them as cases in which there's an apparent lack of concern on the part of the defendant or an apparent lack of reaction that causes one to raise an eyebrow. But to complete the point hopefully more tidily I should observe that whereas identification as a species of direction is obviously founded on clear evidence of miscarriage, I respectfully suggest that we can't place demeanour in the same category, and I note too that the New Zealand Law Commission did consider the issue of demeanour back in 1997. Your Honours may recall from either the report of that era or from our written submissions that there was thought given to whether there should be a demeanour direction, particularly in relation to the fact that we are now a more multicultural society, and the Commission concluded that the better course was not to have such a direction for completeness. That's at page 361 of the appellant's materials.

So we were at the point as to whether such a direction should be mandatory or otherwise. We submit it should be otherwise for the reasons we've already identified but including the fact that demeanour, of course, isn't always an issue. I mean, not all criminal cases involve a contest in the way that this one

did. There can be circumstantial cases, for example, which don't turn on anyone's body language, demeanour, call it what you will, but they turn on whether an inference should be drawn from a constellation of a variety of apparently innocent pieces of evidence and to say that a jury should hear a demeanour direction in a case like that may be thought to be somewhat awkward, all of which suggests that the decision of the Court of Appeal in *E v R* which has been very much at the centre of the appellant's written case represents good law and that a direction need only be given in a case in which a Judge is of the opinion that there is a real risk of a miscarriage otherwise arising, that is in the absence of such a direction. Now I acknowledge, of course, that always gives rise to the uncertainty on the part of a Judge as to whether he or she needs to deliver a direction and associated litigation if one is not given. It may be thought the lesser of two evils as opposed to having a mandatory direction in the absence of an apparent problem in relation to the operation of our system.

It is implicit in what we've said and explicit in our written case that there's no miscarriage of justice in this case. The fact remains that there was a single and brief reference to the complainant's reaction when she was shown the towel in the course of cross-examination. That's at pages 239 and shading into page 240 of the notes of evidence. But the appellant essentially denied any wrongdoing in relation to that. It was a modest feature of the Crown's closing. The prosecutor's submission was that demeanour in a general sense on the part of the complainant was compelling, and that was his term, but the submission contained its own exhortation for caution because the prosecutor essentially said to the jury that was but one of many matters, and on the Crown's thesis this is not a case in which a Judge confronted with those circumstances would need to give a direction, a point, it may be thought, underscored by the absence of any such request at the time of trial.

Unless there are other questions in relation to the first ground, that is the respondent's case.

ELIAS CJ:

Thank you, Mr Downs.

MR DOWNS:

In relation to the second ground of appeal, perhaps I should begin by clarifying the section 9 issue that we raised. Now lest there be any misapprehension, it's not the Crown contention that we're seeking to import some form of North American waiver doctrine. It's no part of our case that if there's an absence of objection or the admission of evidence by consent or agreement or any other species thereto at trial that means that the point can't be examined before a higher Court. It is, however, our case that when there has been such agreement in the Court below there should be cause before the issue is examined. So it's not a matter of precluding analysis but calling attention to the circumstances in which higher Courts will be prepared to entertain that challenge. Now –

ELIAS CJ:

Where do we find the record of the concession that was made, if there is one?

MR DOWNS:

We won't find a record of a concession as such, Your Honour. What we will find is the evidence of the relevant officer was read to the jury in its entirety, and I believe I'm correct to say that he wasn't required to attend in consequence of that. So it's the evidence at page 175 of the notes of evidence. It's page 175 and Your Honour will see that the prosecutor refers to the brief of evidence of Jason Keeys being read by consent. That occupies two pages of transcript because it's typed and it appears that the officer wasn't present in person.

ELIAS CJ:

Yes, thank you.

MR DOWNS:

Now whilst I'm on this issue, we note it's long been the case that the absence of objection to evidence at trial or admission by some form of consent has long been thought to have appellate consequences, it's just that the Courts have differed from time to time as to what those consequences were. So *Stirland v DPP* [1944] AC 315 (HL), a proviso case as it happens, refers to the logical consequence as being an assumption that there's an absence of prejudice associated with the admission of the evidence, or an absence of prejudice suffered by the defendant in those circumstances, or at least that's one possible conclusion that a Court may draw. The New Zealand Court of –

ELIAS CJ:

What, from the fact of reading or from the admission because it's –

MR DOWNS:

Your Honour, either or both. We're not seeking to draw a distinction in this regard.

ELIAS CJ:

Yes.

MR DOWNS:

And since then the New Zealand Court of Appeal has repeatedly referred to not being favourably inclined to re-visit issues of admissibility when there has been consent at first instance. Now, as it happens, it's always done so. So that observation has been made at the same time that it satisfied itself that the evidence was properly admissible. But all of this is a rather laboured way of introducing the question as to what are the principles that attach to the admission of evidence by consent and should there be some form of restraint shown by appellate Courts in their preparedness to re-examine issues of admissibility?

ELIAS CJ:

Isn't it, though, I mean can you take it much further than saying the evidence wasn't objected to because this form – I see, yes. I see. I'm sorry, I'm just looking at the text.

WILLIAM YOUNG J:

Well it depends on whether you treat this as a consent to evidence about the offence of the 23rd of February or whether you treat it as the consent to the manner in which that evidence is to be given. I'd been inclined to look at it in the latter terms. I would also, perhaps, be inclined to be not over vigorous in trying to assess in a fine tuned way whether every single aspect of this evidence would have been necessarily admitted if the case had been tested. It's more the thrust of it that I think is in issue.

MR DOWNS:

Well, we acknowledge, which is one of the reasons why we raise it, with respect, the variety of appellate responses. As Your Honour observes, one approach is to say, well, we'll always be prepared to re-visit it but the issue of extent or granularity, as Your Honour put it, may be an issue.

WILLIAM YOUNG J:

Well this obviously wasn't a tactical decision except in the very limited sense that the defendant presumably would have preferred the less dramatic written text to be given in evidence rather than the blow by blow account by the constables, but that's about the limit of it, isn't it?

MR DOWNS:

Well presumably Your Honour's correct, although we don't actually know. I mean that's one of the difficulties that can arise when we have a late objection. I don't mean late objection in a pejorative sense.

WILLIAM YOUNG J:

But there was nothing in it for the defendant to have this evidence in. There was nothing about it that really helped him.

MR DOWNS:

Well I have to say that it's not obvious but it helps. His own counsel in closing refers to the sequences not reflecting well on him. That's toward the end of –

GLAZEBROOK J:

On the other hand, if you accept it's admissible, then this is probably the least damaging way that it could be put before the jury.

MR DOWNS:

Indeed.

GLAZEBROOK J:

In terms of it being just read out in the –

ELIAS CJ:

Going backwards but I must say, looking at section 9, I find it hard to read (a) as being otherwise than a way of getting evidence that's actually appreciated as being inadmissible. I don't think that any evidence that you allow to be called in written form –

GLAZEBROOK J:

That's the second part I think.

ELIAS CJ:

I know, but also wrapped up in it is an acknowledgement that the evidence is admissible. I think there must still be – sure, there may be some evidence which is inadmissible which it suits everybody to have before the Court in some way or another, some opinion evidence for example, in particular, but if it's not appreciated that there is an issue as to admissibility, I'd find it very hard to read into section (1)(a) a consent to the admission of inadmissible evidence unless that's actually been flagged and identified.

MR DOWNS:

Well, I don't necessarily disagree, with respect, it's just that because the case has been taken in this way we don't actually know, which is one of our points.

ELIAS CJ:

Well, it looks very much as though there was consent to have it go in in written form because it was better going in in that form but that the question of admissibility was never confronted, so then there's the question whether you can, not having objected to admissibility, raise it on appeal.

GLAZEBROOK J:

Where do you get that from, because we don't know – do we know on what basis it was because –

ELIAS CJ:

Well, it's recorded that it's admitted by consent and I think all you can take from that is that their admitting it in that form.

MR DOWNS:

Well, I suppose what it brings me to, which I ought to deliver sooner rather than later, is the allied submission that one of the categories in which a Court may be prepared, sorry, an appellate Court may be prepared to entertain a fresh admissibility challenge is where there's a direct, unequivocal complaint about trial counsel error in the Court below.

ELIAS CJ:

Yes.

MR DOWNS:

Now my learned friend has been very careful not to say anything to that effect but –

ELIAS CJ:

Well, it is counsel blunder if inadmissible evidence which is prejudicial has been admitted and counsel haven't objected to it.

MR DOWNS:

Yes, and the point that I'm trying to advance is that if there's examination, which of course is entirely a matter for the Court, as to the surrounding circumstances in which admissibility will be entertained, certainly by a final Court, it is, well, what are those circumstances? Does an appellant, for example, and it's only an example, need to exert some species of trial counsel error or is it sufficient to say, again as another example, "Well, any reasonable person looking at this evidence would recognise immediately it's inadmissible and fundamentally prejudicial to the defendant's interests." Now those are two possible approaches. They're not the only ones but the difficulty that the respondent respectfully identifies in the jurisprudence to date, which really can go back to *Stirland*, there's no clear statement of principle as to the circumstances in which challenges like this may be made.

WILLIAM YOUNG J:

Isn't the sort of uninterrupted course of the authorities completely against you that in every case the evidence is looked at?

MR DOWNS:

Well, in a sense Your Honour's entirely correct as is so often the case but the point is that that tells –

WILLIAM YOUNG J:

The Courts are saying one thing and doing another.

MR DOWNS:

Well, the difficulty is, of course, of course if evidence has given rise to a miscarriage of justice the Court is duty bound to give effect to that. I mean, the statute tells us as much quite apart from any notion of innate justice on the part of a senior common law Court, but once we go beyond the very abstract

how does that principle operate in practice, and it's the respondent's respectful submission that there is considerable room for a final Court in this jurisdiction to express a considered view about the circumstances in which challenges such as this will be permitted.

WILLIAM YOUNG J:
So what do you say we should do here, to be specific?

MR DOWNS:
As to this particular case?

WILLIAM YOUNG J:
Yes. Entertain the challenge or don't pontificate about it?

MR DOWNS:
Well, the short answer is yes and I don't mean to be glib because we're here, but it's the principle, with respect, that the respondent is concerned to identify.

WILLIAM YOUNG J:
What principle should we identify? Have you got a proposition?

MR DOWNS:
Well, we've hinted at two in the written case and namely that, obviously, if evidence is admitted in consequence of trial counsel error and that's pleaded in the Court of Appeal, the Court below, well and good. If evidence is advanced by the Crown late, for example, as sometimes happens, a development occurs, no one really has the chance to turn his or her mind as to whether the evidence should be received, but a judgement call is made on the eve or at trial that the evidence should be received, in those circumstances it may be uncharitable to say that there needs to be trial counsel error.

WILLIAM YOUNG J:
So shall we apply sort of a *Sungsuwan* approach?

ELIAS CJ:

I have to say I would not apply, myself, at the moment, counsel error to this. If you have evidence which is inadmissible and is material and may have caused a miscarriage of justice, surely an appellate Court has to consider the substance of that, and how it came about is really much less important, because the law says it's inadmissible.

MR DOWNS:

Well we entirely agree in the sense that, yes, if there's a miscarriage arising by the introduction of inadmissible material that's prejudice to the defendant and properly, well of course that –

ELIAS CJ:

But why do we have to look at counsel error all the time, when all of those –

GLAZEBROOK J:

You may do if there's been an agreement that made it admissible –

ELIAS CJ:

Well I think it is quite a significant point this point about section 9, because section 9 on one view cements in place inadvertent error, and it cannot be, I think, used in those circumstances. It's quite clear from the context that nobody considered the question of whether the substance of the evidence was inadmissible, the consent went to the form in which it was brought in.

MR DOWNS:

Your Honour is referring to this case?

ELIAS CJ:

Yes.

GLAZEBROOK J:

Sorry, I was referring more generally, where there has been an explicit consideration in a decision that you want for a particular reason.

ELIAS CJ:

Oh, yes, I'm sorry, yes, okay, in those circumstances.

MR DOWNS:

And the point that I was making, that I haven't articulate well, is this, that because of the way this challenge has emerged late, and the way in which it's emerged, we don't know what the position was.

WILLIAM YOUNG J:

Well can I just postulate a slightly similar but not identical situation where there's recent complaint evidence which the prosecutor wants in because it looks a bit like recent complaint, and the defence are quite happy to have it in because it's not exactly in accord with the narrative of events on which the prosecution is based, so there's a bit in it for both sides.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

Now in that situation perhaps one might say, well it's too late now. You consciously accepted the risk that it will be treated as recent complaint evidence because you intended to show that the complainant was a liar because she'd given an inconsistent account of events at the time.

MR DOWNS:

And that's –

WILLIAM YOUNG J:

So that's a different situation to here –

ELIAS CJ:

That's a tactical choice.

WILLIAM YOUNG J:

Yes, so there's nothing in this because there's nothing in it, as far as I can see, for the defendant.

MR DOWNS:

Well –

WILLIAM YOUNG J:

The only thing you can say in it for the defendant is on this form thing, that it's better to get it in, in writing than to have the police officers give their evidence with the nuances that might come out of that.

MR DOWNS:

Well that's still a tactical consideration that I respectfully –

ELIAS CJ:

Yes, but it doesn't take you as far as accepting the, that inadmissible evidence has been accepted by counsel.

MR DOWNS:

Yes.

GLAZEBROOK J:

Isn't your stronger point that it was admissible anyway.

MR DOWNS:

Yes.

GLAZEBROOK J:

That there may be bits and pieces of it as Justice Young said that if you looked at it minutely may have been better not in there, may even have been inadmissible, but taken in the round it was admissible.

MR DOWNS:

That is precisely the respondent's case, it's just that –

ELIAS CJ:

You might have a bit though that's so prejudicial that you have to focus on that and you can't look at it in the round.

MR DOWNS:

Well, I'm being pulled in different directions. It's just that, yes, it is entirely the respondent's case that the evidence is admissible.

ELIAS CJ:

Yes.

GLAZEBROOK J:

In its entirety I would think.

MR DOWNS:

Yes indeed, but we're also making the antecedent point, not so much directed at this case plainly, but in future cases of which there will be many, no doubt, in which an appellant will want to ventilate a belated complaint about the admissibility of evidence, and I maintain the advancement of the respectful submission that this is a matter of principle.

ELIAS CJ:

And you're advancing that on the basis that it can be established that consent was given to the admission of inadmissible evidence, not simply the form of the evidence.

MR DOWNS:

Well we may need to agree to disagree as to those two variables because the Crown respectfully suggests that the form of the evidence is a relevant consideration.

ELIAS CJ:

Is a relevant consideration?

MR DOWNS:

Yes. Is a relevant consideration.

ELIAS CJ:

I'm not sure that I follow that.

MR DOWNS:

Well say for example if the evidence is admissible, which we maintain is the position in this case, it's often the case that a defendant's counsel will say it's better that it be adduced, as here, by way of being read, or by way of admitted fact, and so that would be a relevant consideration in the mix.

ELIAS CJ:

If you say we shouldn't have let it in or it shouldn't have been let in, in that form but if the objection is as to the substance, admissibility, because it wasn't relevant or because it was more prejudicial than probative or something like that.

MR DOWNS:

Well, as a matter of theory yes, but we venture that the distinction between form and substance may well erode in practice.

ELIAS CJ:

Well, it should not because that's really where unfairness creeps in. It seems to me that (b) is very much a matter of formal proof but (a) is about admitting evidence which is inadmissible and unless you can show that there is consent to that, I would've thought that section 9 doesn't feature subsequently. You can't then say sorry, it was consented to.

MR DOWNS:

Well, let me respond in this way, and imagine we didn't have section 9 before us. It would still be open to a final Court in terms of the orderly development of the law to say that challenges of this nature should not be novel in that Court.

GLAZEBROOK J:

It's just difficult to do so, isn't it, because obviously if really bad inadmissible evidence comes in that could have caused a miscarriage of justice that is likely to be counsel error but to say you have to assert it as counsel error rather than just say the Judge should have thrown out the evidence whatever the agreement was.

MR DOWNS:

Well, I suppose the position being advanced is that there is a satisfactory halfway house between a North American waiver position, which we don't advance and the position in which there's no impediment whatsoever to an appellant being at liberty to raise a point not raised in the trial Court when admissible.

GLAZEBROOK J:

But you can raise it. It won't be taken any notice of unless it caused a miscarriage but if it could cause a miscarriage then – but I don't know that you can say much more than that and you don't know until you've raised it whether it could have caused a miscarriage.

O'REGAN J:

It would be pretty hard for a Court to say there was a miscarriage but we're not going to let you raise the point that shows it was.

MR DOWNS:

Well, of course a Court can't by virtue of its statute and its conscience.

WILLIAM YOUNG J:

And the other thing, our legislative scheme of appeals requires us to focus on what happened at trial rather than what happened in the Court of Appeal because certainly the position in section 385 and, I think it still is under Criminal Procedure Act 2011, the question for this is whether there was a

miscarriage at trial, not are we really happy with the way the Court of Appeal dealt with it.

MR DOWNS:
Yes.

WILLIAM YOUNG J:
Now that may be part of the reasoning but it might make it hard to say that once leave's been granted we should say well, this point wasn't argued in the Court of Appeal, therefore we won't pick it up now. That would be a good reason for not giving leave but once leave's been given we may just have to accept it.

MR DOWNS:
I can do no more than recapitulate the point that there is room for consideration of the issues as one being germane to the orderly development of the law, which brings us to admissibility itself.

Now it's the respondent's case that this evidence was unquestionably admissible. I mean this is one of those cases in which relevance and probative value can be asserted in any number of ways but it shouldn't turn on any form of clever pleading. The truth of the matter is that the evidence revealed the appellant as domineering and controlling, which was precisely how the complainant had described the appellant and his behaviour.

She had made it clear in her evidence that he had said to her more than once that he didn't have the slightest concern about the police intervention. So, for example, at the notes of evidence at page 31 there was a text message exchange, that was page 31, in which the complainant is essentially saying I don't want you to come over tonight, obviously mindful of what may happen if he does, and the appellant is resisting that analysis and makes the point that he doesn't give a "fuck" about the pigs because they're of no concern to him, which is obviously a reference to the police.

Similarly, in relation to count 4, that was the rape that took place in the complainant's home. The context is that she's residing with a flatmate referred to in the evidence as "[the complainant's flatmate]" and prior to the active rape, and I should add that this is the notes of evidence at page 72 and it's also on the face of the original interview transcript at pages 14 and 50.

GLAZEBROOK J:
14 and 15?

MR DOWNS:
Sorry, 5-0, 14 and 5-0.

GLAZEBROOK J:
That's what I heard, but I wasn't sure.

MR DOWNS:
The complainant is saying that she doesn't want to have sexual intercourse with the appellant, he seeks to persuade her by saying does he need to smack her around to encourage her to a contrary point of view, and goes on to say that he doesn't care about [the complainant's flatmate] or the police and that he will assault them or deal with them as he needs to. There's another example, admittedly more modest, in relation to counts 1 through 3. That was the opening sequence in terms of the indictment. You'll recall there was a fight in which the appellant injured one of his friends and the complainant started cleaning up the room in blood more particularly which incensed, it appears, the appellant. She said that she did so and told him she was doing so because she was worried that he'd be in trouble with the police. Now it's true he didn't say anything expressly contrary to that; he just assaulted her instead. But the context suggests it's indicative of an attitude that he's undeterred by authority or indeed by her wishes in relation to the point.

So to recapitulate, the evidence is of considerable relevance and probative value as to the way in which he dominated and controlled the complainant. It's relevant and of considerable probative value too as to his attitude to her

responses and to the police. It's significant too that it did form part of the logical narrative in terms of when the relationship came to an end. The final rape, count 12, occurred one evening. There was the exchange the following day in which the appellant said that he wanted to come round. The complainant made it clear he wasn't welcome. In those circumstances she arranged for [the complainant's flatmate] to be home and it was the next morning that the appellant was arrested and removed from the premises for being there without her consent and being angry and belligerent. So it's not a situation as the appellant has suggested it is in which this is an incident that's removed from the relevant sequence and to be considered in isolation from the other evidence. It's very much part, the respondent respectfully submits, of the admissible narrative for the jury. It's also a case, to borrow the minority's expression in *Mahomed*, in which any prejudice, or a legitimate prejudice I should say, is co-terminus with relevance and probative value.

Now I venture that the Court needs little reminder of the facts of *Mahomed* but it may be helpful to set the scene that that was a case in which the little baby was left in a carpark, left in a car, more particularly, on a hot day and that particular episode fell within or between an assault that was obviously not fatal and a subsequent and fatal assault, and, of course, in that case the majority concluded that the evidence was inadmissible, but on the minority's analysis at paragraph 74 of the *Mahomed* judgment it noted that the allegation was really little different from that levelled against the appellants in that case by virtue of the nature of the charges and in that sense its relevance and probative value was entirely coterminous with the other evidence, and we respectfully submit that analysis holds true for this particular occasion.

It occurs to me as I conclude the submissions in relation to admissibility that I've failed to answer a question from Justice Arnold asked of my learned friend in relation to whether there was a reply to the text message of the complainant about the towel. Your Honour may recall that the complainant referred in the message to that being, as she put it, "Fucked up shit," and that she didn't want a repeat of that. The response of the appellant was that, "I won't do that again, hon."

Which leads us, I believe, to whether there needed to be a direction given by the trial Judge in relation to this issue, which we note again wasn't the subject of a request at trial. Here we respectfully advance the minority judgment in *Mahomed* again as providing a helpful and comprehensive statement of the applicable law. Now this particular case has certain features which told powerfully against the need for a direction and this is as follows. The first is this wasn't extrinsic evidence by which I mean if we imagine, for example, a case of alleged sexual abuse of young children, it may be in a case of that nature that the prosecution adduces evidence based upon a conviction from an earlier case, that the defendant has a particular propensity, undressed, essentially of a paedophilic nature and in that situation of course there is an extrinsic allegation that's been made, and obvious associated prejudice. In this particular case there was no such extrinsic point and the allegation that was being made was essentially coterminous with the nature of the case.

The second point that tells powerfully against a direction is that the evidence came from the complainant herself. It wasn't given from any other person. And of course there's an extensive analysis in *Mahomed* about how the common law approached that type of situation.

O'REGAN J:
Well the evidence included the evidence of a police officer describing what happened.

MR DOWNS:
Yes, but it was, I should say it was directed at her, as opposed to directed at a third party, is perhaps my point.

O'REGAN J:
Oh I see. But it wasn't her evidence?

MR DOWNS:

Yes, yes Your Honour's right, quite right, the evidence came from an independent witness but it was behaviour directed at her as opposed to another party is what I had meant to say.

The final point is, in respectful disagreement with my learned friend, whereas she accepted that this, or a direction would not be necessary where the evidence comprised a natural part of the narrative, which was her phrase, with respect a helpful phrase, we suggest that this fell precisely within that category. It was very much part of the narrative. And we can test that point by raising a counterfactual. If this evidence required a direction we rhetorically enquire, why not the wardrobe incident? I mean the wardrobe incident didn't found account, for example. It portrayed the appellant as extremely domineering, controlling, to the point of being obsessive and peculiarly so, and so a case could be made that that evidence ought to have attracted a direction before this. And the question then becomes one of degree and trial management and it maybe thought that the true principle that resides again back in *Wi*, that is this Court's decision that mandatory trial directions are reserved for issues of irreducible importance to a fair trial.

O'REGAN J:

I don't think we have been told, we're not being asked to say a direction is mandatory here, we're just being asked to say, one should have been given all the facts of this case.

MR DOWNS:

Yes, well this is unusual because it appears there's substantial agreement between the parties as to applicable principle, so for example there's no contest that, whether propensity evidence or some other evidence, sections 8 and 43 mark some of the standards, it's rather a case of respectful disagreement as to the application of those principles to the facts. Beyond that there's little the respondent can usefully advance unless there are, of course, further questions from Your Honours?

ELIAS CJ:

Thank you Mr Downs.

MR CHISNALL:

Yes, if the Court pleases. Perhaps if I can just commence my response by addressing the point about section 9 and what level of scrutiny is placed on trial counsel decisions. In my submission there's been an unnecessary and unduly complex proposition put to the Court about the approach required in these types of cases. It really simply comes back to what this Court said in *Sungsuwan*, "The Court will always reserve the right to intervene and prevent a miscarriage of justice however so caused," and perhaps it's a matter of looking at which lens an issue's best considered through. What we're talking about here is, in my submission, an unnecessarily complex process being suggested by the Crown in terms of looking at it through the lens of trial counsel decision making when in fact what we're talking about ultimately, particularly in a case involving propensity evidence where, of course, there's a code of high test for the admission of evidence, is a question of law in terms of what this Court said in *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 and so, in my submission, to undertake the type of pirouette that the Crown's suggesting ought to be undertaken to look at it in terms of what advantage it might have served to allow the evidence is just adding an unnecessary gloss to the process that this Court ought to follow.

Just to pick up the point that Your Honour, Justice Williams, made before about section 35 evidence, prior complaint, and how there might be looking at the record some apparent advantage to be gained from allowing evidence in, I suppose that's the type of tactical decision where it might be relevant to know what the decision making process was, but I'd suggest that in those types of cases if there's an apparent advantage to the defence in allowing the evidence in it probably answers the question whether there's been a miscarriage of justice in most cases, and so I simply come back to the point that what we're talking about here might have been an agreed way of putting the evidence in front of the jury for tactical – to try and reduce the sting to the

defence case but the question of admissibility is still very much one which falls to the appellant Court, and –

ARNOLD J:
It is always better though to know exactly what the thinking of counsel was.

MR CHISNALL:
If there was such thinking and I suppose the –

ARNOLD J:
Well, there must have been such thinking. I mean, it can't have – it didn't happen inadvertently. I mean, this evidence was presented in this way as a result of an agreement. Counsel must have had some thinking. It's not obvious what advantage there was but we don't know, you know, what that thinking was and it would be good to have the reassurance of knowing what it was.

MR CHISNALL:
I suppose it's whether or not it adds a further overlay to what should be a relatively straightforward exercise in terms of working out whether in fact the admission of the evidence caused a miscarriage. I appreciate Your Honour's point that there might be cases where knowing the reasoning process might assist with that exercise, but our argument here is simply that there is no tactical advantage that can be seen on the record from doing this and –

GLAZEBROOK J:
That's assuming it's inadmissible.

MR CHISNALL:
Yes.

GLAZEBROOK J:
If it's admissible then there's a major tactical advantage in having it presented in this form.

MR CHISNALL:

Absolutely and that's the second stage of the inquiry, of course, if we fail on the first. So I simply raise this point because in my submission if the Crown's argument is taken to its natural conclusion the part of me that catasrophises these things suggests that we might end up looking at it through a lens where is an expectation placed on appellate counsel to always put before the Court what trial counsel's tactical decision was, and it's a question of whether that actually brings you any closer to addressing the principal consideration about whether there's been a miscarriage. In my submission it simply adds an unnecessary gloss to the process.

Second point I wanted to make was about the need for a direction and I'd endorse what my learned friend just said. It's one of those cases where in terms of the applicable authorities and principles we're obviously on the same page, we're certainly, in terms of the *Mahomed* application and *Wi*. I would simply say on the question of whether a direction was required that the degree of scrutiny that my learned friend just placed around the relevance in itself, in my submission, suggests the need for a direction. It's simply not straightforward in terms of what its relevance is, and the fact that it required that degree of description by the Crown, in my submission, demonstrates the fact that it wouldn't have been obvious to the jury.

Finally, just on the demeanour point, perhaps if I can just briefly address two of the decisions that the Crown referred to, starting with the Supreme Court of Canada's case of *R v NS*, which is the niqab case, and wearing obviously facial covering. Can I just ask the Court to when it reviews the decision to note that there was an argument put forward on behalf of the complainant and both by the interveners in that case about demeanour, relying upon the, much of the research that obviously forms the basis of this case. The Crown argument in that case was that, "Communication involves not only words but facial cues and a facial gesture may reveal deception. This credibility assessment is equally dependent not only on what a witness says but on how she says it." That's paragraph 18.

The majority in that case felt that it lacked sufficient evidence to address the issue, whether seeing a witness' face is important to effective cross-examination and credibility assessment and hence to trial fairness. In that case it said that it had only a four page unpublished review article suggesting that untrained individuals cannot accurately detect lies based on facial cues and the fact that it wasn't tendered through an expert for the appeal. So what the majority in that case fell back on was to say, and this is at paragraph 21 of the decision, "this much, however, can be said. The common law, supported by provisions of the Criminal Code, and judicial pronouncements, proceeds on the basis that the ability to see a witness' face is an important feature of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly."

However, it did go on to say on the very next paragraph, "Face-to-face confrontation is the norm, although not an independent constitutional right." And, "Long-standing assumptions of the common law can be displaced, if shown to be erroneous or based on groundless prejudice – thus the reforms," and it used as an example, "The reforms to eliminate the many myths that once skewed the law of sexual assault." So I simply make that point because it was addressed but it was left on the basis that it didn't feel in a position to adequately address the issue in that case.

GLAZEBROOK J:
Well there's also no expert evidence here, and especially not directed specifically at the complaint which is the, on the one hand a spontaneous indication of emotion, on the other hand a manufactured manifestation of emotion.

MR CHISNALL:
And I read it on that because I felt that it's necessary to address an issue that may be weighing on the Court's mind about what evidence is required, and I don't shy away from the fact that we don't have that evidence and it is a matter of taking into account, in our submission, the materials that obviously

form the basis of the findings made in *Munro*, and *R v E*, and also of course by the High Court in Australia in *Fox v Percy*, but I do acknowledge that the issue about emotion isn't one that's been addressed by research that has been tendered to this Court, but it does come back to what the Court – sorry the jury direction in the UK provides in terms of assumptions.

I simply raise that as an issue because it clearly is something which isn't as simple as the Crown suggests that Court's have squarely said demeanour is something that's infallible and it can be taken into account, but rather an understandably conservative approach about shedding something, which has obviously had some considerable relevance over a very long period of time, and I would invite the Court to, believe I leave the Supreme Court of Canada case, to read the dissenting judgment of Justice Abella which in my submission more centrally confronts the issue of demeanour and its relevance in terms of the fair trial right, and where His Honour did look at the issue of the Canadian direction on demeanour.

I just simply end on the point that His Honour made in that case, "A general expectation is not the same as a general rule, and there is no need to enshrine an historic practice into a 'common law' requirement." That's at paragraph 92 of the judgment. In my respectful submission to a degree that's what we have in this case with the argument that's being made by the Crown and my end point is simply that taking it down to the narrowest issue of whether there's been a miscarriage, the Court of Appeal in *R v E* quite rightly said that the risk is the most acute in he said/she said cases, and where the Crown has, or one of the parties has placed reliance on demeanour. In my submission respectful submission, this is that paradigm case that the Court of Appeal referred to, and if a direction wasn't, or isn't required in this case, then in my submission it's difficult to conceive of a case where it will be required.

Unless the Court has any questions, those are my submissions.

ELIAS CJ:

Thank you Mr Chisnall, thank you counsel, Mr Downs, for your submissions. We'll reserve our decision in this matter.

COURT ADJOURNS: 3.20 PM