IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 60/2018
[2019] NZSC Trans 1

YUSUKE (DAVID) SENA
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing:	13 February 2019
Coram:	William Young J Glazebrook J O'Regan J Ellen France J Winkelmann J
Appearances:	D P H Jones QC and H T Drury for the Appellant M J Lillico and J E L Carruthers for the Respondent

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CRIMINAL APPEAL

MR JONES QC:

May it please the Court, Jones. I appear with Ms Drury for the appellant.

WILLIAM YOUNG J:

Thank you, Mr Jones.

MR LILLICO:

Tēnā koutou e ngā kaiwhakawā ko Lillico māua ko Carruthers e tū nei mō Karauna. May it please the Court, Lillico for the Crown along with Mr Carruthers.

WILLIAM YOUNG J:

Thank you, Mr Lillico. Mr Jones.

MR JONES QC:

Thank you, Sir. Now has the Court received the synopsis of oral argument?

WILLIAM YOUNG J:

Not me.

MR JONES QC:

It was sent through this morning electronically. I've got hard copies here. Now this is an appeal for which leave was given in broad terms. The leave decision is at tab 2 of the first volume of the case on appeal, the approved ground of appeal being whether the High Court was correct to dismiss Mr Sena's appeal against conviction brought under section 232(2)(b) of the Criminal Procedure Act 2011.

There are two principal aspects to the appeal. The first is a legal one in terms of the interpretation and application of section 232(2)(b) which is a new provision and the second is the analysis of the evidence that was given in the District Court, the District Court Judge's decision and, of course, the High Court decision which dismissed the initial appeal.

Now what I've attempted to do in the full written submissions, but also in the synopsis, is to distil the issues that the Court has to consider but provide context in the same way. The Crown and, indeed, the High Court, but the Crown in this case seem to be saying that as far as reasons are concerned *R v Connell* [1985] 2 NZLR 233 (CA) is still the basis for the law in this country and that reasons do not need to be extensive or, indeed, detailed. *Connell*

was decided in 1985 and with respect the law has moved on. Reasons are now required under s 106(2) of the Criminal Procedure Act and the scope of Judge-alone hearings has been greatly expanded so the importance of proper judicial analysis really comes to the fore.

As far as the Criminal Procedure Act is concerned, that is quite specific in that it differentiates between the grounds of appeal against a jury verdict and the grounds of appeal in relation to a Judge-alone hearing, and in the synopsis of oral argument it's put at paragraph 2 that effectively the ground of unreasonableness is retained for jury verdicts but a completely new ground has been set out for Judge alone. Now in the fulsome submissions the point is made that the observations of this Court in *R v Owen* [2007] NZSC 102; [2008] 2 NZLR 37; were obviously taken on board because the second and otiose limb of 385(1)(a) was removed, ie, that the verdict could not be supported by the evidence. It was found to be redundant, and that has not been repeated in the new 232(2)(a). So clearly the legislation contemplated the decision in *Owen* and applied the observations of this Court and against that background and in that context section 232(2)(b) was enacted.

Now –

WILLIAM YOUNG J:

But they have another model they could have borrowed, s 119 of the Summary Proceedings Act 1957, which explicitly provided that an appeal was by way of re-hearing.

MR JONES QC:

Yes. With respect, that provision didn't actually advance matters a lot in the High Court. When appeals were being taken from the District Court, one was normally greeted with the question, "Where did the District Court go wrong?" and that was normally to do with what the District Court Judge had said and what the basis for reasons were.

WILLIAM YOUNG J:

Well, the approach taken represented I guess it was based on an understanding of the history of the legislation going back to the Justices of the Peace Act 1957.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

But it was an appeal by way of re-hearing. We then have the *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141 case which explains what that means at least reasonably clearly in respect of evaluative conclusions the appeal court is as well placed to make as trial judge. But then we have the Criminal Procedure Act which adapts the s 385 model rather, and eschews the appeal by re-hearing model which was available in section 119. So what's your – you just say that doesn't matter?

MR JONES QC:

Well, the difficulty with the adoption position is that 232(2)(b) is completely new. It doesn't come from anything. It's new. 232(2)(a) adopts 385(1)(a) but –

WILLIAM YOUNG J:

Section 2, the ground of appeal in section 232(2)(b) would have been available, wouldn't it, under section 385 in the case of a Judge-alone trial?

MR JONES QC:

Well, that's where we come to the point. If the first three words of 385(1)(a) are ignored then the answer would be "yes" and that's what –

WILLIAM YOUNG J:

But wouldn't a failure to give adequate reasons be itself a miscarriage of justice or a giving of reasons which are tangibly wrong so your miscarriage of justice under section 385?

MR JONES QC:

Yes, it would and Cooke P identified that in *Connell* as I recall. I think it was demonstrably faulty reasoning His Honour referred to. But this isn't so much a case about whether reasons are adequate or not. That's an issue. But it's whether or not the assessment of the Judge was wrong or whether –

WILLIAM YOUNG J:

So what you say in a nutshell is we should look at the evidence, or the High Court Judge should have looked at the evidence, formed his own view of the truth of the matter. If that view differed from that taken by Judge Henwood, she was to that extent wrong following the language of the Chief Justice in *Austin, Nichols*. That's broadly the argument.

MR JONES QC:

Yes.

GLAZEBROOK J:

Can I just check what you mean by "if the first three words weren't there"?

MR JONES QC:

In 385(1)(a) it refers to, if I can just take you to the…

GLAZEBROOK J:

We have it in your submissions.

MR JONES QC:

Yes, I do.

GLAZEBROOK J:

On paragraph 11 and paragraph 22 are the – I presume we can look at those to see what the point is.

MR JONES QC:

Yes, it's in the appellant's casebook of authorities tab 1 page 4.

WILLIAM YOUNG J:

You just say the words of the jury should be set aside – of the jury should be deleted?

MR JONES QC:

Yes, that's essentially what the courts have said should happen, that a verdict of a judge –

GLAZEBROOK J:

Sorry, I thought – I just misunderstood what the point was. I was thinking you were saying something about 232(b) and words in 233(b).

MR JONES QC:

Not at all, no.

GLAZEBROOK J:

But that's fine. I just misunderstood.

MR JONES QC:

No, it's simply that there seems to have been, certainly from *Connell* and in various other cases, that the verdict of the jury, the words of the jury have simply been ignored.

GLAZEBROOK J:

Yes, I understand the point. Sorry.

MR JONES QC:

So generically the courts seem to have adopted the approach that a verdict is a verdict whether it's a judge or by jury, and so the unreasonableness has been applied, and coming back to Your Honour's point, if it is unreasonable then there's going to be a miscarriage. So that probably comes in –

WILLIAM YOUNG J:

And if the reasons aren't adequate there would have been a miscarriage under s 385.

MR JONES QC:

Yes, or the reasons are flawed.

WILLIAM YOUNG J:

Yes.

MR JONES QC:

So if someone says, “I believe that person because they are a Scorpio,” one can say, “Well, that’s ridiculous. That doesn’t buttress what you’re actually saying in terms of credibility or reliability.”

O’REGAN J:

But if the reasons are inadequate you’re then dealing with a case under subsection (4), aren’t you, rather than under subsection (2)? It’s just a miscarriage for another reason. It’s not a failure to assess the evidence, its just that the appeal court can’t determine whether the Judge has made an error in assessing the evidence because the reasons are inadequate to disclose that.

MR JONES QC:

Well once we get to the inadequate reasons stage then the court needs to consider the evidence and whether or not the assessment of it, whether the reasons are adequate or not, is right or wrong.

O’REGAN J:

But subsection (2) you have to identify an error because it talks about “err”, doesn’t it?

MR JONES QC:

Yes.

O’REGAN J:

And if there are inadequate reasons it may be that you can’t identify an error because you don’t know what the judge did. You wouldn’t then be in

subsection (2). You'd be in subsection (4), wouldn't you? It probably doesn't matter. You get to the same end-point.

MR JONES QC:

You could be in both. But it talks about the erring in the Judge's assessment of the evidence. So it could be, for example, to be as neutral as I can be, that the judge's reasons may be inadequate but the assessment of the evidence in terms of the ultimate finding is perfectly fine when one looks at the evidence as a whole. But it's important that the assessment aspect has to be looked at not only by the court at first instance but also by the appellate court because it's the assessment of the evidence that is important.

O'REGAN J:

But s 232(2) is referring to the trial judge's assessment of the evidence, not the appeal court's.

MR JONES QC:

Yes, it is.

O'REGAN J:

So isn't it incumbent on the appellant to actually identify for the appeal court an error in that assessment?

MR JONES QC:

It's a matter of assessment by the appellate court in my submission and it would be incumbent on the appellant to point that out, but my submission is that the appeal court should look at the assessment of the lower court, come to its own assessment in *Austin, Nichols* fashion and compare the two.

GLAZEBROOK J:

Or come to its own assessment on the evidence I think is your submission, isn't it?

MR JONES QC:

Yes.

GLAZEBROOK J:

So a true re-hearing in the *Austin, Nichols* sense, and then the argument goes on, I think, correct me if I'm wrong, to say if the view of the appeal court having assessed the evidence is different from that of the trial court then that means that the trial court is in error.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

And that would apply in any case – a half-hour speeding case or a three or six-month fraud trial.

MR JONES QC:

Well, the principle remains the same, yes. But in terms of what –

WILLIAM YOUNG J:

It's not a very efficient use of resources as you have to go through the whole exercise again.

MR JONES QC:

Well, the thing is the speeding ticket can probably be dealt with in a paragraph. I've listened to the evidence. There's a certification of the equipment that says you were going this –

WILLIAM YOUNG J:

Yes, I know, but what I'm thinking really is more of the three-month or six-month fraud trial. Does the appeal court really have to sit down and go through the entire, all the evidence, to see whether its conclusion on the critical issues aligns with that of the judge or can it not just say, "Well, the Judge has heard the evidence. Show me a tangible error. If you can, I will be

satisfied that error has been shown." If you can't and if the findings were open to the judge then you can't show an error. Those are the sort of – it's a relatively simple set of alternatives, I think, isn't it? You say basically reconsider the whole thing again on the papers. You disagree. That's it. The view taken by Justice Downs is, well, you show me the error. If you can't, if the judge – if the findings were open on the evidence then you can't show there's an error in the assessment of the evidence.

MR JONES QC:
Well, my submission that is the issue saying it was open. That is a review function. That's not an appeal function, not a true appeal function, because *Owen* –

WILLIAM YOUNG J:
It was an appeal function under section 385 in relation to jury verdicts.

MR JONES QC:
Well, that comes back to the point about the lack of any reasons being able to be given as far as the jury's concerned and the difference between the two jurisdictions because *Owen* specifically eschews the ability of the appeal court to substitute its own view and that in my submission can't be right as far as 232(2)(b) is concerned. There's a substantive difference in the provision now because if the appeal court considers that the judge got it wrong in terms of looking at its own view and saying, "We don't agree with what the judge did," applying the *Owen* review it was open to the judge the appeal would be dismissed. Applying the *Austin, Nichol* and, as far as the appellant's submission is concerned, 232(2)(b) principle of the assessment of the District Court Judge's decision, the appeal would be allowed. So there is a very real substantive difference and –

WILLIAM YOUNG J:
I agree there's a very substantial difference.

MR JONES QC:

Your Honour may be referring more, with respect, to the ability of the court to discern what the error is and not have to go about it by starting from scratch without assistance from counsel. The appellant undoubtedly has to say, look, this decision was wrong and this is why.

WILLIAM YOUNG J:

Yes, but you're saying it's sufficient to say this, that the factual findings should have been different, therefore the decision is wrong, therefore the Judge was in error. Because you see the case differently, it follows as night follows day that the judge was wrong.

MR JONES QC:

Yes, but –

WILLIAM YOUNG J:

It's quite a big submission in the context of our history of criminal appeals.

MR JONES QC:

Well, the thing is this, the right to appeal is enshrined in s 25(h) of the New Zealand Bill of Rights Act 1990. It doesn't say it's a review. It doesn't say, well, the judge could have accepted certain evidence and ignored others or other evidence and come to that conclusion. We don't agree with it, but the judge was open to that and that's something that we're going to permit to carry on and affect this person's life.

WILLIAM YOUNG J:

That middle step is normally missing. The court doesn't normally say we think the Judge was wrong but nonetheless the conclusion was open. The Court would normally say we think the conclusion was open, therefore error's not been shown. They don't normally go on to say, "Although we think it was wrong."

MR JONES QC:

No, they don't, and that in my submission is something that now has to happen.

GLAZEBROOK J:

Well, with the Bill of Rights Act you can't really rely on that, can you, given that doesn't happen with a jury trial? Because if the appeal provision in the Bill of Rights did mean that you had to have a review by the appellate court of all of the evidence all over again, then effectively that would have to apply to jury trials as well, wouldn't it?

MR JONES QC:

Well, it did and still does, well, to the point of whether it was a miscarriage and whether the proviso applied, so –

GLAZEBROOK J:

Well, no, certainly, but you're saying that the appeal court, that that means that the appeal court has to review all of the evidence that doesn't happen in an appeal against a jury trial and so either that's in breach of the Bill of Rights or the Bill of Rights doesn't require that.

MR JONES QC:

Well, the Court has to review all the evidence. I'm not going to shy away from that submission. That is incumbent on an appeal court.

GLAZEBROOK J:

Or not in a jury trial.

MR JONES QC:

Well, it would have to be to come to the assessment of whether or not the verdict was unreasonable.

WILLIAM YOUNG J:

Yes, but it has to look at only in the sense was that verdict reasonably open to the jury.

MR JONES QC:

Exactly.

WILLIAM YOUNG J:

But not do I agree with the verdict.

GLAZEBROOK J:

Well, apart from in a proviso. Possibly if we still had the proviso but…

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Yes. No, I agree with that. I agree it's different if it comes to a proviso issue –

MR JONES QC:

Yes. Well, that's really the miscarriage issue now which is incorporated so –

GLAZEBROOK J:

Yes, yes, I'm using a shorthand, which is very naughty.

MR JONES QC:

Indeed, indeed. But it still comes back to the issue of the entirety of the evidence does need to be considered. It's what you do with it at the end and what the appellant is submitting is, well, the court does have to go past the point of saying, well, that finding was open to the judge because there was some evidence to that effect. The court has to look at it and come to its own view as to the correctness or otherwise of the finding. So all it is is simply adding an additional substantive step, all it is, in terms of asking the appellate court to view the evidence in a light other than in the *Owen* principles, because *Owen* specifically excludes the ability of the appeal court to actually

substitute its own view, which in my submission is wrong and obviously offends against the principle articulated in *Austin, Nichols*. And if we come back to fundamentals, if you're a defendant and you consider you've been hard done by at first instance and you appeal, it's cold comfort if an appeal judge says, "Well, look there was some evidence and it was open to the judge to accept that evidence and so hard luck."

GLAZEBROOK J:
But that happens with a jury trial, doesn't it –

MR JONES QC:
It does.

GLAZEBROOK J:
– unless the, well, now the jury's verdict was unreasonable?

MR JONES QC:
It does but the difference is the jurisdiction because you don't know what matters are relevant to a jury or not, what they take into account or not. It's a completely different inquiry and you pay your money and you take your chance with a jury trial. With a judge, you're entitled to the benefit of analysis; for the deliberative process to be articulated so it can be followed; and that it's justified. If the judge hasn't taken into account matters that should have been taken into account, there are issues that really should have sounded in the deliberative process, then that has to be looked at very closely.

GLAZEBROOK J:
Yes, although that would be an error, wouldn't it? That would come under the Canadian formula of being an error. If there are matters that should have been, relevant matters that were not taken into account and should have been so that if the judge has, for instance, totally disregarded without explaining why a whole swathe of evidence that might actually have some bearing, then that would be an error, wouldn't it, under the test that Justice Young was articulating?

MR JONES QC:

Yes, it would be but different ways to skin the same cat. What I'm looking at is 232(2)(b) and its interpretation in contrast to 232(2)(a) which is the jury.

GLAZEBROOK J:

Well, I think I was agreeing with you that they're entitled to the benefit of analysis to show the deliberative process is followed in – actually I didn't write down the third one but I agreed with that as well.

MR JONES QC:

Yes.

GLAZEBROOK J:

But that doesn't say that its an *Austin, Nichols* re-hearing. That's the – because all of those would be errors in terms of 232(b) even on the narrow view of what that means. So yes, I agree that it's more than you get under a jury verdict, which is what the Canadian cases say in any event.

MR JONES QC:

Yes. Well, 232(2)(b), the various aspects which fed into an error in the assessment of the evidence by the lower court, that would incorporate matters that aren't taken into account, and that was argued in the High Court, of course, and that was dismissed. But there are a multitude of things that can feed into the assessment in the District Court and the judge being wrong in the District Court or, indeed, the High Court if the Judge-alone hearing is held there.

WINKELMANN J:

Mr Jones, it's a matter of statutory interpretation, isn't it, what the nature of the appeal right is and that's the approach the Crown has taken in these submissions? So perhaps you could take us to the language the statute, you say, supports your argument that this complete review of the evidence is needed.

MR JONES QC:

Well, the wording of 232(2)(b) is fundamental and that is completely different to 232(2)(a) and the question has to be asked why, if there were not meant to be a difference between the two, why is it specified under 232(2)(a) that it's jury only?

WINKELMANN J:

But what about the language, though? Does that help you? The fact it's different is not going to make the argument for you, is it?

MR JONES QC:

It's a fundamental point and if the Crown is right then 232(2)(b) is completely redundant in its present form.

GLAZEBROOK J:

No, it's not, I suggest, because everything that you just said that is required of a judge, analysis, the deliberate process follows, take all relevant matters into account and in their reasons make that clear, and that is different from a jury trial because the jury gives no reasons. We hope it follows a proper deliberative process but we don't necessarily know whether that's the case or not.

MR JONES QC:

There's a vast amount of faith put in the jury and the directions are taken from a judge as being followed by a jury, hence the need to –

GLAZEBROOK J:

Whereas under the Canadian cases at least there needs to be evidence actually in the reasons that those cautions about matters that would be given to the jury have actually been taken into account by the judge, so (b) clearly under the Canadian tier stand gives you differences from (a).

MR JONES QC:

Yes, it does in –

GLAZEBROOK J:

But the question is whether the wording of it, which I think Justice Winkelmann's asking, supports the view that it's actually a re-hearing in an *Austin, Nichols* sense rather than the added things that are required of a judge because the judge has to give reasons and has to show the matters that you actually put down have been done.

MR JONES QC:

Well, if we look at the wording of 232(2)(a), that talks about whether something was, the verdict was unreasonable, so that applies an objective test and that's what *Owen* comes in. So if you look at *Owen* we can see that there is very much a review process undertaken to see if the process was undertaken properly and importantly as far as *Owen* is concerned whether the finding was open on the evidence. It's akin to a 147 application, in my submission, that if there is evidence there then it's able to be considered by the judge and it could be adopted.

WINKELMANN J:

And that's a necessary appellate approach, isn't it, with a jury because if you took another appellate approach you'd actually displace the role of the jury from the system?

MR JONES QC:

Yes. But because the functions of judge and jury in one sense are identical but the way in which they go about their process is completely different, one's in confidence, the other has to be transparent, in my submission that is a very powerful argument in favour of the need for judges to actually set out their deliberative process so it can be followed and it is –

WILLIAM YOUNG J:

I think everyone agrees with that.

MR JONES QC:

Well, the issue is to the extent to which it's followed.

WILLIAM YOUNG J:

I think – I know there's a second issue in the case about the adequacy of the reasons but the principle that reasons have to be adequate to the occasion is I would have thought beyond doubt.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

And where reasons that are adequate to the occasion are given, the assessment of the evidence of the judge is apparent and that in itself would provide a sensible reason for providing a different test for Judge-alone trials and jury trials because the jury trials we don't know.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

We only know the conclusion, we don't know the route the jury took.

MR JONES QC:

Yes.

WINKELMANN J:

But if you look at the language of section 232(2)(b) –

MR JONES QC:

(2)?

WINKELMANN J:

So the critical provision.

MR JONES QC:

Yes.

WINKELMANN J:

You need to focus on the words, "The Judge erred in his or her assessment of the evidence to such an extent," and I assume your argument is that for us to know whether or not the judge erred in his or her assessment of the evidence we need to assess the evidence. That must be your argument.

MR JONES QC:

Yes, that's what's set out in the written submissions, because that's the only way you can actually do that is to look at what the judge's assessment was and –

WILLIAM YOUNG J:

Well, it's not the only way.

MR JONES QC:

Well, consider whether it's –

WILLIAM YOUNG J:

There are two ways of doing it. One is your way, the other is let's look at what the Judge said. If his conclusions were open, or her conclusions were open, then tangible error hasn't been – the error hasn't been shown. Now I mean in the end it's a relatively simple dichotomy, isn't it?

MR JONES QC:

Well, it is but in my submission that is not interpreting the subsection we're talking about in a correct manner.

WILLIAM YOUNG J:

Well, I know that's the submission.

MR JONES QC:

It's essentially saying, well, we're just going under subsection (a). We're still adopting the *Owen* principles.

WILLIAM YOUNG J:

Well, no, we're not because say the judge reaches a finding that is open but makes significant errors in the reasons, for instance, he gets the chronology scrambled, misstates or misrecords evidence, overlooks a critical letter or email, then –

MR JONES QC:

All present here.

WILLIAM YOUNG J:

– then that's a – then that would be an appeal on a basis that goes beyond the unreasonable verdict.

MR JONES QC:

Yes, it would. But the –

WILLIAM YOUNG J:

So it's overstating it to say that the approach taken by Justice Downs means that the two subsections are conflated.

MR JONES QC:

The issue is whether or not the legislation intended Judge-alone trials or appeals to be considered in a different way to jury trials.

WILLIAM YOUNG J:

Well, no, but obviously they did.

MR JONES QC:

Yes, and then –

WILLIAM YOUNG J:

I mean that's not the issue at all. The issue is how did the legislature consider that Judge-alone appeals should be dealt with. Plainly they've got to be different from jury trial appeals.

MR JONES QC:

Yes. Well, the thing is that if you have an assessment by a District Court Judge as in this instance, the Court has to determine whether the Judge erred. It's a question of how you get there.

WILLIAM YOUNG J:

Yes, absolutely.

MR JONES QC:

And so in my submission the whole, the entirety of the evidence does need to be considered as required and highlighted by counsel obviously for the court to see whether or not the assessment was correct.

WILLIAM YOUNG J:

Well, to see whether there was an error.

O'REGAN J:

It all depends on how you define errors. Isn't error something which is if the Court of Appeal or the appellate court takes a different view that's an error or is an error something which a judge couldn't reasonably have come to, a conclusion a judge couldn't reasonably have come to given what was before him or her?

MR JONES QC:

Well, in my submission the first of those two propositions is the correct one because – and that confirms with *Austin, Nichols* in terms of if the appeal court comes to a different view that's the only thing that matters and that in my submission must be right. If one applies an objective test then we're reducing the scope of the appeal to a point where you're saying, well, it was open for judge. What does that actually mean? If there's evidence of the offence occurring then it's going to be open.

GLAZEBROOK J:

Where do you get your second meaning, when you say it must be right? Where do you source that in the section?

MR JONES QC:

Well, subsection (2)(b) talks about the assessment of the evidence. Now there's no limitation in the wording in terms of the assessment of the evidence, so –

GLAZEBROOK J:

Well, it says the judge erred in assessment.

MR JONES QC:

Yes, of the evidence.

GLAZEBROOK J:

Which must mean the trial judge.

MR JONES QC:

Yes.

O'REGAN J:

It doesn't say anything about the appellate court making an assessment.

MR JONES QC:

No, but it says –

O'REGAN J:

The appellate courts are trying to identify error, isn't it?

MR JONES QC:

Yes, they're trying – well, first there has to be what is the assessment of the evidence. Was that complete or was it defective? And the next step is, well, did they err in their assessment when looking at all of the evidence?

ELLEN FRANCE J:

Well, it's to such an extent that a miscarriage has occurred and you then go to the definition of miscarriage. So it's erred in that sense, isn't it?

MR JONES QC:

Yes.

O'REGAN J:

So if there's just a mere difference of view between the appellate court and the trial court, can you say that that difference of view indicates a real risk that the outcome of the trial was affected?

MR JONES QC:

Yes. I wouldn't say it was a mere difference of view. In my submission that is the gravamen of an appeal. If an appeal court looks at it and goes, "Well, that doesn't look right," then in my submission that is the appeal process being undertaken correctly. It can't say, with respect, "That doesn't look right but it was open so we'll let it go." That in my submission is not –

O'REGAN J:

But it can say it's open. It's open therefore it's not in error.

GLAZEBROOK J:

And not a miscarriage.

MR JONES QC:

In my submission that wouldn't be the right thing to do because it depends on the definition of what is open. If, for example, you had someone who said, "I was punched in the face," that's evidence of an assault, and then they say, "Well, it was actually in a room with 10 people," and those 10 people come along and they say, "Well, we were there all the time and we didn't see an assault," if the Judge says, "Well, I accept the evidence of the complainant," was that open to them?

WILLIAM YOUNG J:

Well, that's arbitrary really, isn't it?

MR JONES QC:

Well, the thing is that you can't have an arbitrary acceptance of evidence.

WILLIAM YOUNG J:

The judge would have to say, "I don't accept the evidence of the 10 people. The reasons I don't accept them are as follows: (a) they're all friends of the defendant; (b) six of them when interviewed by the police gave inconsistent statements; (c) –

GLAZEBROOK J:

Three, they were all looking the other way.

WILLIAM YOUNG J:

– they were intoxicated, they were extremely truculent and difficult witnesses, wouldn't give a straight answer to a straight question, and I just don't regard them as credible" –

MR JONES QC:

Yes.

WILLIAM YOUNG J:

– in that case, and so one would expect those sort of reasons, you know, and leaving aside I think the arbitrary which I think was perhaps a bit old-fashioned one would expect reasons to be given for rejecting apparently cogent evidence.

MR JONES QC:

Yes, and those sorts of reasons are exactly what the appellant says should be done where there's a conflict in the evidence.

WILLIAM YOUNG J:

But that's point two, were the reasons appropriate for the occasion. That's not…

MR JONES QC:

Well, it feeds into the assessment aspect because the assessment is the Judge saying, "This is what I think of the evidence." Now that can incorporate reasons or not. But the assessment of the District Court is this is what I consider the evidence to establish, and the issue is was that wrong and one of the ways to test that is to see what reasons were given for coming to that conclusion.

WILLIAM YOUNG J:

Well, I agree with you actually for that.

MR JONES QC:

Yes. So making conclusory statements without justifying them in my submission is inadequate.

WILLIAM YOUNG J:

Okay, can we just pause there. Am I right in assuming that all the Canadian and Australian cases that are cited deal with appeals on a basis similar to that of section 385 of the Crimes Act 1961 –

MR JONES QC:

Yes.

WILLIAM YOUNG J:

– or modelled on the English Criminal Appeal Act?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Are there any other cases from those jurisdictions that deal with perhaps summary appeals from Judge alone?

MR JONES QC:

Look, I can't say there are or there aren't but they seem to be idiosyncratic to the jurisdiction. There's nothing that replicates what we have here in 232(2)(b).

WILLIAM YOUNG J:

Okay, so broadly the Australian – my impression, and I haven't analysed them in great length, but broadly my impression of the Australian and Canadian cases is that they adopt an approach which is at least broadly similar to that taken for Judge-alone trials under our section 385?

MR JONES QC:

Yes, because their legislation replicates 385.

WILLIAM YOUNG J:

Yes, okay.

MR JONES QC:

And that's the driver, the wording of the legislation.

WILLIAM YOUNG J:

So we're just really dealing with this as a matter of statutory interpretation, perhaps history and policy, but not hugely assisted by decisions from other jurisdictions save to the extent they might give some sort of parallel, indicate parallel thinking?

MR JONES QC:

Well, I would agree with that, with respect. It's all very interesting to see what's happening in other jurisdictions but they are all under equivalent provisions to 385 which is not what we're dealing with here. So –

WILLIAM YOUNG J:

Well, I was going to sort of say is there a lot more than can be said about this issue? Do you want to take this to the legislative history or is anything – we've really got to look at this section, don't we?

MR JONES QC:

Yes, this particular subsection in –

WILLIAM YOUNG J:

Yes. Now do you want to take us to – is there anything you can take us to in the legislative history that helps because we've been sort of going around in a bit of a circle putting conflicting propositions that don't much engage?

MR JONES QC:

Well, the Departmental Report for the Justice and Electoral Committee is at tab 2 of the appellant's casebook.

WILLIAM YOUNG J:

It gives conflicting signals.

MR JONES QC:

It does, as these things, so it falls on this Court to interpret the legislation.

WILLIAM YOUNG J:

As opposed to the Departmental Report.

MR JONES QC:

That's right, but some support is provided at page 21 of the case. That's paragraph 1129.

WILLIAM YOUNG J:

Yes, the trouble with that point – para 1140?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

The trouble which – the problem with that is it's just plain wrong.

MR JONES QC:

Which one?

WILLIAM YOUNG J:

The idea that criminal appeals are by way of re-hearing was plain wrong at the time this was written. Now appeal to the Supreme Court is, of course, by way of re-hearing.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

But it's a re-hearing of the appeal to the first appeal court. Now – and that appeal to the Court of Appeal was not by way of re-hearing. Now there's a wrinkle, a slightly awkward wring in that, in that there was scope for an appeal from conviction direct to the Supreme Court. But the Supreme Court if hearing such an appeal was constrained by section 385, so I still don't think it was an appeal by way of re-hearing.

MR JONES QC:

No.

WILLIAM YOUNG J:

I mean, can you suggest to the contrary?

MR JONES QC:

I can't because the reference to re-hearing under the old 119 of the Summary Proceedings Act was removed, so it wasn't replicated, is not specified here but it's a broader test in my submission because of the wording of the provision.

WILLIAM YOUNG J:

Look at 1140. The comment is made that there was a suggestion that original provision provided that conviction appeals from Judge-alone trials should proceed by way of re-hearing. It implies that an appeal from jury trials do not proceed by way of re-hearing which is not an accurate statement at all. Now that is in fact plumb wrong.

MR JONES QC:

Itself not an accurate statement of the law. So danger in terms of –

WILLIAM YOUNG J:

I wonder whether, do we, I'm never quite aware of the current play on this as to whether departmental reports are properly looked at.

MR JONES QC:

Well, we go to departmental reports, Parliamentary debates by people who perhaps don't have a great grasp of the legal issues and we come out with the wording and the Court has to discern what the legislative intent was. Where I've tried to do in the written submissions, the fulsome ones is simply break down the elements of that provision.

WILLIAM YOUNG J:

Well, just coming back, 1123 and 1129 probably don't help you. 1123 is effectively that, it suggests that the particular provisions for jury trials are simply – Judge-alone trials are simply on a mutatis mutandis basis.

MR JONES QC:

Well, that was the position, the unknown. But the point is –

WILLIAM YOUNG J:

But they're explaining the policy in terms there that there's no real distinction, save what's necessary because they are findings of fact and the same point is made in 1129.

MR JONES QC:

It was against the background of course of section 106(2) which makes reasons mandatory as opposed to helpful or good practice. So it seems with respect that the Criminal Procedure Act is showing a new, I suppose, era in terms of the function of the criminal law because on the one hand you have a far greater jurisdiction for Judge-alone trials going through to very serious offending and so the ability to scrutinise the Judge alone trial decisions needs to be enhanced in my submission.

WINKELMANN J:

1129 helps you a little doesn't it, if you look at 1129?

MR JONES QC:

Yes it does but that probably, there's the case of *Herewini v Ministry of Transport* [1992] 3 NZLR 482 (HC) I think going back to 1993 or whenever it was about how, where you have reasons, you're entitled to a fuller appeal. There's also *Roest v R* [2013] NZCA 547; [2014] 2 NZLR 296 I think talks about that.

WINKELMANN J:

Well, it's linking, it's linking this appeal ground to the *Herewini* Summary Proceedings Appeal ground.

MR JONES QC:

Yes.

WINKELMANN J:

Isn't that the –

GLAZEBROOK J:

Well, the trouble is they took out the re-hearing.

MR JONES QC:

Reference?

GLAZEBROOK J:

Yes.

MR JONES QC:

Yes.

GLAZEBROOK J:

If the re-hearing had been in there, you'd obviously be on much stronger ground.

WINKELMANN J:

But didn't they take out the re-hearing, is it your submission that they took out the re-hearing provisions simply to remove the implication that the jury trial was not by way of re-hearing because of the Supreme Court Act 2003?

MR JONES QC:

That's, yes, that's what the commentary seems to say. That's 1140 it seems.

WILLIAM YOUNG J:

So it's sort of error piled on error.

MR JONES QC:

Yeah.

WILLIAM YOUNG J:

So the problem is, in a way it does raise an issue whether we should be looking at it. From your point of view it would, I suppose, suggest that the Parliamentary history which, by reference to the externalities of the Bill as introduced and the statutes passed, made a conscious decision that there not be appeals by way of re-hearing. This gives you a sort of an explanation for that. But I'm not sure whether on the authorities we are meant to be looking at departmental reports.

MR JONES QC:

Well, probably not, given the errors and the contradictions but it's part of the background so it has to be placed before the Court for consideration.

WILLIAM YOUNG J:

Is there anything else, there's nothing else in the legislative history that is of assistance?

MR JONES QC:

Not that either side has located. But in my submission, having a more fulsome appeal right with a Judge-alone trial is something that the common law has recognised and articulated and been articulated in judgments, so this enactment of 232(2)(b) when contrasted with the jury trial unreasonableness under (a), that extends that. So in my submission, it's a natural progression, going towards Judge-alone trials because so much more criminal justice work is going to be carried out by a Judge.

WILLIAM YOUNG J:

And on your argument, so much more criminal justice work will have to be carried out by appeal courts because these things are going to have to be redone on a first appeal.

MR JONES QC:

Well, the price of justice, was it let justice be done though the heavens fall?

WILLIAM YOUNG J:

Yes, yes.

MR JONES QC:

I full appreciate –

WILLIAM YOUNG J:

It's probably best if we can do it without the heavens falling though.

MR JONES QC:

Yes, or the lights going out or something, but the thing is that that is more a practical issue for the appeal court, so that's really coming back to we've got a principle which in my submission sits perfectly well with *Austin, Nichols* and the wording of the section from Judge alone, and then from a practical sense it falls on the lawyers involved to point out the relevant evidence. So, for example, in this case I am sure everybody has read everything but there's material that is irrelevant. It doesn't actually take us anywhere. So that does not need to be reviewed in the sense of you go through every page.

WILLIAM YOUNG J:

But if someone says it is relevant we've got to go through it to decide whether it's relevant?

MR JONES QC:

Yes. Well, that would have to happen anyhow, but really it seems to be what is the principle that is applied at the end once the evidence is considered. Is it a review principle as per *Owen* or is it something different?

WILLIAM YOUNG J:

Okay, well, I think we've got that. Is there anything –

ELLEN FRANCE J:

I'm sorry, could I just check, just going back, Mr Jones, you talked about the common law recognising fuller rights for the Judge-alone trial.

MR JONES QC:

Yes.

ELLEN FRANCE J:

Do you say that goes beyond the sorts of things that Justice Glazebrook put to you?

MR JONES QC:

Just trying to remember what Her Honour said precisely but –

ELLEN FRANCE J:

Well, that's looking at things like irrelevant considerations and…

GLAZEBROOK J:

It was really what you had put down, you had actually articulated irrelevant – I can go back and have a look actually – it was irrelevant considerations, the deliberative processes misfired, a right to proper analysis, those were the three I've written down. There are probably more.

MR JONES QC:

Yes, so the fuller appeal aspect as far the common law was concerned, seemed to revolve more around if a Judge gave reasons then those reasons could be considered and if they were wrong, then that would fit into certainly one of the aspects that Justice Glazebrook's referred to.

ELLEN FRANCE J:

And just one other thing. I just wanted to check. Can you just explain how you see 232(2)(b) and (c) fitting together?

MR JONES QC:

232, well you've got (a) and (b). One is jury trial specific, (b) is Judge alone specific and (c) is a catch-all.

ELLEN FRANCE J:

Yes, but on your approach, how would (c) work when you're dealing with a Judge-alone trial? What sort of areas would that be covering?

MR JONES QC:

Potentially the apparent or actual bias for example, admissibility of evidence that wasn't, shouldn't have been there, consideration of something that shouldn't have been considered. I suppose those external things I talk about

in jury trials but in a Judge-alone situation where a miscarriage has occurred an is simply a catch-all provision. So it would have to, by definition, cover both 2(a) and (b) but it would also cover anything else.

O'REGAN J:
Presumably including in a Judge-alone case a failure to give adequate reason?

MR JONES QC:
Yes. Or in a jury trial case that a verdict was unreasonable.

O'REGAN J:
Well, that comes under (a), well, so they accumulate with don't they?

MR JONES QC:
Yes, it is a catch-all provision and it's simply to ensure, in my submission, that nothing is missed because a miscarriage is a miscarriage, however caused. I suppose in a sense it's applying the *R v Sungsuwan* [2005] NZSC 57; [2006] 1 NZLR 730; approach. Doesn't actually matter what the cause is, it's the end result which is important.

WILLIAM YOUNG J:
Okay, so do you want to perhaps move on to what we might call the merits of your appeal in terms of why you say the Judge was wrong, both in terms of reasons and assessment?

MR JONES QC:
Now the first document I'd invite the Court to look at is the full submission filed which has appended to it at schedule A a timeline. Now the background is important context because it sets out the relationship between the parties and the interaction between –

GLAZEBROOK J:
Sorry, are we still on the timeline?

MR JONES QC:

Yes and the interaction. So we can see from the timeline that there is a separation in August of 2011 and then there was custody directed and that continued on through for the entirety of 2014. Now the first point of reference in terms of any issues is June 2014 where K was slapped by the appellant because of bad misbehaviour. There was an explanation by him about this and the exchanges of the emails relating to this issue, these are contemporaneous emails of course, go from June through to October of 2014 and it is important, the reference is there, it's important to note with respect that there is no reference to any other alleged assaults as far as the children are concerned in any of that correspondence. It all relates to the sole issue in June 2014.

The emails go through to the 13th, sorry it is the 13th, that's wrong, it shouldn't be the 11th, the 13th of October and then on the 21st of October the police contact the mother directly and inform her that the prosecution is not going to occur, it is going to be, or it has been a formal warning and that had already been given and a letter had been sent and those are in the materials.

Now it's important at this point that as at 21 October when there was the direct interaction with the police by the mother, she made no mention of any other assault. Not –

WILLIAM YOUNG J:

Just pause there thank you. When I looked through the emails I couldn't find clear dates on them.

MR JONES QC:

Well, look perhaps if we can spend a few minutes just doing that because regrettably they bounce around. If I could take the Court to volume 2 of the case, page 238. I'd ask you to bear with me because there are a number of issues we need to address in terms of sequence and things of that sort, but 238 on page, yes page 238, that is the 28th of June '14. The evidence was that it was the American style and then –

WILLIAM YOUNG J:

So, I see, I see.

MR JONES QC:

Top right-hand corner, if you turn it on its side.

WILLIAM YOUNG J:

Oh, okay.

MR JONES QC:

And then the follow, the next one follows –

WILLIAM YOUNG J:

So they're at, oh, I understand it now.

MR JONES QC:

Which is the response. It's not easy to follow, I can assure you of that. Then below that on 239 is the 28th of June again and you'll see in the third line, or third paragraph of that or fourth paragraph starting off, "Last time."

WILLIAM YOUNG J:

Ah, for myself I understand how it works now. Sorry, I didn't pick up –

MR JONES QC:

There are also further differences Sir.

WILLIAM YOUNG J:

Are there? All right, okay.

MR JONES QC:

I'm sorry to say, that's just the way they were produced. This is the reference to the June slapping of the face and then there's the response on the 28th of June again, on page 239 from the appellant saying that it was a form of discipline.

WINKELMANN J:
Can I just ask, as at that, this point in time in terms of the Crown's case, what else has happened, 'cos you're making the point she makes no mention of anything other than the slapping of the face.

MR JONES QC:
Yes.

WINKELMANN J:
So on the Crown case, what else has happened?

MR JONES QC:
Well, the Crown case is saying there's indiscriminate pinching and slapping and various other things that are going on it seems. That just seems to be the overall claim but nothing is articulated, certainly of these emails or to the police.

O'REGAN J:
But none of the offences are said to have occurred during this period?

MR JONES QC:
Correct, but the important aspect is that if we go to 240 we'll see there's an email of the 29th of June from the mother –

WINKELMANN J:
And that's the 29th of June?

MR JONES QC:
29th of June, you'll see in that email, three paragraphs up from the bottom says, "So I've made this statement to the police last week." So this is in relation still to the June episode and she's gone to the police after having it reported back that K's been slapped twice in the face.

WILLIAM YOUNG J:

I can't fully read the second line of the email, "The physical violence and the," something, "Choices of your language."

MR JONES QC:

"Choices of your language."

WILLIAM YOUNG J:

"You use towards them is unacceptable and I believe –

GLAZEBROOK J:

"The years of this is quite enough. This…"

WILLIAM YOUNG J:

"Years of this…"

GLAZEBROOK J:

Something, "Is quite enough."

WILLIAM YOUNG J:

I can't read at all, "Is quite enough."

MR JONES QC:

Yes.

GLAZEBROOK J:

Latter?

MR JONES QC:

Can't read that. Matter, it seems to be matter.

GLAZEBROOK J:

Matter.

MR JONES QC:

You have younger eyes than mine.

WILLIAM YOUNG J:

This is the accusation about swearing at the children is it?

MR JONES QC:

Yes.

GLAZEBROOK J:

It is a generic physical violence allegation I suppose is possible to read it that way.

MR JONES QC:

Yes, but the only thing that is actually referred to the police –

GLAZEBROOK J:

Is the slapping?

MR JONES QC:

Is the slapping and that goes through a formal process where S, sorry should I say the name –

O'REGAN J:

Oh, I think it is probably better just to use the initials and then the transcribers will just –

MR JONES QC:

The daughter was interviewed electronically, by video and then the police, CYFs were involved and that sort of thing. So that was the formalisation of that incident in June. Now, if we go to page 241. These are then emails in October and this is Mr Sena, the first one is the 12th of October, it says that, "The kids no longer wish to come and visit 'cos they hate me. Never do anything to put them in danger or feel unsafe. They simply don't like me." He says, "I did use bad words sometimes but I always try my best to have a good

time with them, good time when they come, S hates me," et cetera. She responds, the mother responds at the bottom of the page the next day, 13th of October and that goes over the page, to page 242.

GLAZEBROOK J:

"Through their eyes you were always angry, violent, controlling and scary."

MR JONES QC:

Yes. That's the mother.

GLAZEBROOK J:

"I asked you to stop immediately countless times." This is what they've been complaining at the time.

MR JONES QC:

That's what she's saying, yes.

GLAZEBROOK J:

Well, how does that square with no other allegations mentioned?

MR JONES QC:

There's no allegation to the police. There's –

GLAZEBROOK J:

So the point is not that there weren't allegations in the emails, just that there were no allegations to the police?

MR JONES QC:

Well, there are statements in the emails that they are meant to be complaining but there's no formalisation of anything, where there was formalisation of something that did actually happen in June. That is the point. If these other things had been happening, why weren't they referred to the police as well and importantly, why were they not advised to the police when there was the direct contact on the 21st of October? Because as we can see, in the 9th of January email which we'll come to in a minute, she made an allegation

of the children complaining of verbal and physical abuses and it simply is untrue ‘cos there’s no allegations –

WILLIAM YOUNG J:
But there are lots of allegations in the emails, that’s what, isn’t that the point, the point that Justice Glazebrook’s making. She’s making her allegations in the emails and she’s making to the police.

MR JONES QC:
This is the mother.

WILLIAM YOUNG J:
Yeah.

MR JONES QC:
Yes, this is her interacting with him and all the way through he has joint custody with her.

WILLIAM YOUNG J:
Yes.

MR JONES QC:
So they, the children are still going to Mr Sena’s home from and including Sunday to Wednesday three weeks out –

GLAZEBROOK J:
“And I did ask you to stop immediately countless times.”

MR JONES QC:
Well, that with respect is hyperbolic.

GLAZEBROOK J:
I understand that it is just that I’d understood the submission to be that nothing had been mentioned but it’s only that nothing that was mentioned to the police.

MR JONES QC:

No allegation to the police, nothing is mentioned in emails at all post 9 January, that is where nothing is mentioned at all.

GLAZEBROOK J:

Yes, I understand that.

WILLIAM YOUNG J:

Just going back a little bit, at 244, your client responds to his wife, picking up individually particular passages in the email she's sent him.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

He doesn't actually respond to the comment that, "Through their eyes you're always angry, violent, controlling and scary." He sort of engages with the email a bit further down. "Using bad words," et cetera.

MR JONES QC:

But he does say at 244 in the middle of the page, this is one of those ones where he interpolates his responses. He said, "But K, I really don't know anything I did to hurt his feeling, apart from when I disciplined him for swearing." So, he's –

GLAZEBROOK J:

And was that what the slaps were for?

MR JONES QC:

Yes, he was doing, it was something in front of his grandmother, yes.

GLAZEBROOK J:

No, no, I understand now.

ELLEN FRANCE J:

That could be applicable couldn't it to what the boy described in terms of one of the offences, one of the charges sorry.

MR JONES QC:

I'm sorry, what does Your Honour mean by "applicable?"

ELLEN FRANCE J:

Well, I was just trying to remember whether there was a similar, there were similar discussions about swearing and slapping in terms of one of the charges, so I'm just querying what he's referring to there?

MR JONES QC:

Well, in my submission it's apparent that he's, as in the appellant, is referring to the incident in June that was referred to the police, so he –

GLAZEBROOK J:

So can we, whereabouts are, oh, I see, okay.

MR JONES QC:

244, it's about half way down –

GLAZEBROOK J:

Yeah, sorry, it's just so hard to read.

MR JONES QC:

Yes. So the point about these emails is that all the way through, there is no suggestion that the appellant is accepting that he has done anything, other than the slap incident in June, and as far as the interaction by the mother is concerned, she goes to the police in June because of that incident, does not go to the police in relation to any other allegation and has direct contact with the police on the 21st of October and does not make any allegation there, or make any complaint, against the background of the children going and staying with the appellant for several nights each week for three weeks out of four, all

the way through. So in my submission, if there were in fact substance to any of what the mother said, something would have been done, either with the police or with custody and that simply didn't happen. So that's a contemporaneous fact if you will, or two facts, which militate against the authenticity of anything she says about the children saying things and that is coupled with what she does say in the 9th of January 2016 email which is patently false, about allegations. So it is a matter of looking at it in the context.

Now the timeframe of the charges, the representative charges in terms of both children, are from the 1st of August through to the end of December 2014 and the mother said in evidence that they would make complaints, literally after every visit but when one looks at the evidence, on the 21st of October she has direct contact with the police about the issue of the slap in June where the formal process has been gone through. She knows what has been done because she is being told that by the police officer. That's in the Constable McEvedy's evidence and nothing is raised with the police, nothing is done by her concerning the so-called safety or her children. If she had any concerns, in my submission, something would have been done.

WILLIAM YOUNG J:

So what did she say to that when you put that proposition to her?

MR JONES QC:

She talked about not wanting to antagonise the appellant, things of that sort, 'cos they would get bullied, or words to that effect. That in my submission doesn't sit with the cause and effect which she so clearly understands, in terms of the, well, clearly as far as the June slap is concerned, she did not consider it such that she would apply to the Family Court to change custody arrangements. That simply didn't happen. When a complaint was made in early 2015 –

WILLIAM YOUNG J:

Sorry, but there's no question but that the slap did occur.

MR JONES QC:

In June, yes. What I'm saying is that it's any other form of violence towards the children and it's coming back to what she says here about the complaints. If that were actually true, one would expect a mother who is looking after her children to remove them from the environment. You either refer it to the police, as she did in June, or to go to the Family Court. She did none of it.

WILLIAM YOUNG J:

Well, it could also be consistent with her, I suppose, seeking to preserve a relationship between the children and the father, hoping that his behaviour would moderate. I mean, it is consistent with that proposition isn't it? Which presumably was basically her explanation?

MR JONES QC:

It's inconsistent with her actions in referring the slapping incident which seems to have been an issue at the time obviously. She went to the police without consulting him.

WILLIAM YOUNG J:

Yeah, but she didn't at that time seek to change the custody arrangement?

MR JONES QC:

Correct.

O'REGAN J:

And the police actually didn't prosecute him?

MR JONES QC:

That's correct.

O'REGAN J:

So that may have affected why she wouldn't go to the police as well with it.

MR JONES QC:

Yes, but the thing is that she makes no other complaint to the police at any stage during 2014. So –

GLAZEBROOK J:

Well, people often don't complain to the police for all sorts of reasons and especially about people that they have had a relationship with.

MR JONES QC:

But she did complain without telling him as the evidence shows in the email.

GLAZEBROOK J:

Well, it might have been that she thought that was a step or a slap too far and for a reason that she didn't understand and a specific incident that she could refer to, as against a more generic complaint on the part of the children. It's just that, obviously this is matters that are put in the mix, but they're not matters that are as so clearly shows that these things didn't happen. Well, we come back to the test I suppose but…

MR JONES QC:

Well, the Judge didn't, in the District Court didn't consider any of this material at all. My point is simply this. The mother obviously is going to act, at least in part, in the interests of the children and their safety. She takes no steps in 2014 to do that, other than referring the slap incident in June 2014 to the police and she takes no steps to make any complaint on 21 October 2014 when she's contacted directly by the police and she had the perfect opportunity then to say, well, look he's still doing it, or he's doing other stuff. And that's a natural thing in my submission for someone to have done, at the very least at that point, and it didn't happen. So, all I'm saying is that the conduct that she did show when there was a definite situation which Mr Sena admitted, and which importantly he said made him realise, he said this in the DVD interview as well as his evidence, it made him realise that he could not discipline the children by way of corporal punishment and made sure that he didn't do that in future. So that was a watershed moment for him in that

respect. But the actions of the mother are clear as to what she did do in that situation and she didn't take any steps during 2014 in any way, which one would have thought she would do, had there been other issues.

So those are the emails for 2014. We then had a period of estrangement from the beginning of 2015 until the 19th of December 2015. This relates in part to the toe in the door incident which has been narrowed down to just before Christmas of 2014 and that's one of the, well, it's the specific charge of slapping K in that situation. So I just put that as background at the moment and it seems that in early 2015 there was a referral to CYFs and all contact was suspended. At that point the children didn't see their father again, literally for the whole year and in October 2015, coming back to the timeline, the appellant made application to reinstate contact and the judgment of Judge Burns in the Family Court was delivered on the 15th of December 2015 which designated contact. The first contact was the 19th of December. The second was the 26th and the third was the 9th of January when the second tranche of charges were asserted to have occurred.

There are no allegations of any sort of abuse of any kind in relation to those first two visits which were supervised and there were two designated supervisors, one was the paternal grandmother and the other was the paternal aunt. So these were people who were vetted by the Family Court, found to be suitable and the visits went from that point.

The visit on the 19th of January started off with a –

O'REGAN J:
The 9th of January?

MR JONES QC:
Sorry, the 19th of December, pardon me. The first one the 19th of December started off with the children going to the aunt's place of work where the boy showed the middle finger to the aunt and then they all went horse riding. Things seemed to improve. That is where the daughter required her father

not to take photographs and to delete them but permitted the Spanish woman who was there to take them, that's how we have them in the booklet, because they were sent by the Spanish woman to Mr Sena. That was an uneventful, if I can put it that way, supervised visit.

The 26th of December. Again, that was uneventful. That was spent at the home. The third one was the 9th of January and this is important because we can see on the timeline, page 2, that when the appellant turned up with his mother to pick up the children from the Newmarket address, the mother of the children refused to bring them down and said they did not want to visit.

Now, the emails are important in relation to this, certainly the opening email and this is, pardon me, page 230 of volume 2 and we see the date on the right-hand side, January 9. The first part of that is from the mother to the appellant and she starts off, "Kids have told me that the last visit," that's the 26th December one, "Was extremely stressful and physical and verbal abuses has occurred by you." That is simply untrue. So this is before the contact has actually even happened on the 9th of January. She then –

WILLIAM YOUNG J:
So he's outside and she's inside and they're emailing each other or texting, emailing?

MR JONES QC:
Yes, she has emailed. She's emailed him and his email below is noted, says, "Please don't lie, you have no ground. Kids were absolutely safe and never been abused. I'm picking them up. Please bring them down." So, that is the mother in an email making allegations which are untrue. What then happens is a confrontation on the –

GLAZEBROOK J:
And she agreed they were untrue?

MR JONES QC:

She, it was put to her, I can't, I'll have to get the reference. It was put to her that they were untrue and I –

GLAZEBROOK J:

No, no, I didn't think she had either but that's why I was asking.

WILLIAM YOUNG J:

What's the basis for saying they're untrue?

MR JONES QC:

That there's no allegation.

WILLIAM YOUNG J:

What you're saying is because evidence wasn't led and there was no other evidence of abuse on those occasions, this is untrue?

MR JONES QC:

Well, there was no evidence that there had been any issue with the 19 December or 26 December visits.

WILLIAM YOUNG J:

Were the children asked about that?

MR JONES QC:

In the video interview, yes, they talked about the last interview, the last visit.

WILLIAM YOUNG J:

But were they asked about the earlier two visits?

MR JONES QC:

Yes, they talked about the last visit in their interview on the 1st of March, which must have been the 9th of January one.

WILLIAM YOUNG J:

Yeah, sure, but did they actually say, but nothing happened on the first two incidents or were they just not asked about it?

MR JONES QC:

There's a reference to –

WINKELMANN J:

They make quite generalised allegations don't they about pinching?

MR JONES QC:

Yes.

WINKELMANN J:

And beyond themselves, that there are others in the family who are pinched?

MR JONES QC:

That's S I think, sorry, the daughter. The thing is that when there were questions put to witnesses about the 26th of December. First the prosecution objected saying there's no allegation in relation to that date and secondly, the Court prevented questions because there was no allegation about that date.

WILLIAM YOUNG J:

But it just might be a strong submission to say that this first sentence or so is a plain lie.

MR JONES QC:

Well, my submission, it's a strong submission but it is a valid one because there is no allegation in terms of any earlier visit.

WILLIAM YOUNG J:

But if the Judge wouldn't allow evidence about those visits then –

MR JONES QC:

Well, she prevented cross-examination of them in relation to them because there was no allegation.

WILLIAM YOUNG J:

So, okay, did she know that you were going to suggest that her mother was lying in this email?

MR JONES QC:

The, I can't remember the sequence.

WILLIAM YOUNG J:

So who gave evidence first, did the mother give evidence before the children or vice versa, I can't recall?

MR JONES QC:

Mother gave evidence after the children.

WINKELMANN J:

Is your point that the children don't narrate anything occurring on those two visits in their EVIs, evidential videos, interviews?

MR JONES QC:

Yes. Having said that, there was a level of ambivalence I think with K. He talked about what happened the second time or the second to last time or something, but that seemed to confuse things with the bruise on his arm and things of that sort so he was a bit unclear.

WINKELMANN J:

And the children do say it's always happening, don't they?

MR JONES QC:

They do but, well, they try to, but in terms of being able to defend the charge, there were supervisors there and evidence was available from those people and because of the way the case was, how should we say, constricted by the

Court, the evidence wasn't led about the earlier visits. It was just a non-issue. And it comes back to the point that the mother is making this allegation but the interesting thing is that after the 9th of January when these pinchings are meant to have occurred, she says nothing in subsequent emails and is more interested about conversations concerning her and substitute visits. She doesn't mention anything about any allegations by the children. So it seems to be a moving feast but certainly there is nothing to support the 9 January allegations by her, or through her.

If I can just go through the emails at this point, 230 is the one which just looked at which is the 9th of January. If we then go to page 258 of volume 2, this is the next email which is the 22nd of January, which relates to a change of days because the paternal grandmother had to go back to Japan because her husband needed medical treatment.

We then have, if we go back to page 257, so we start at 258 and then go forward in the bundle. We have an email of the 23rd of January at 9:44, pardon me, the bottom of the page, this is Mr Sena saying, "I'm waiting at the bottom of the apartment, please bring the kids down." There's an earlier email it seems from her saying, "Sunday is no good." And then we have a longer email on the 23rd of January 2016 from the mother to Mr Sena and there is no mention in that email of any sort of complaint or abuse. And you see at the top of page 257, second paragraph, second line, "However, my priority is the children's safety and their emotional wellbeing." Talking about being happy at his place.

We then go to page 259 which is the next in sequence, that's the 29th of January. That's a legal letter concerning a change in access. We then go to 231, page 231, this is into February, February the 6th. That's from the mother and then at the bottom of that page is the response by Mr Sena and you'll see over the page at 232, middle of the page he said, "I'm applying for the warrant." Now that's the warrant of, or requiring access that had been –

GLAZEBROOK J:

Can we just go back to this February email. There are allegations of violence in there then. What's, what do you say about that and the domestic violence as well.

MR JONES QC:

Well, the domestic violence can't possibly have –

GLAZEBROOK J:

No, I understand that. It's just I wondered what you said about them, that was all.

MR JONES QC:

Well, these are just generic claims by the mother. Importantly, she doesn't say anything about the photograph of the bruise ostensibly taken on the 15th of January, doesn't say anything about seeing marks or anything of that kind. She just resorts to these generic allegations.

GLAZEBROOK J:

I thought you'd said there were no allegations of violence in these emails, unlikely earlier ones.

MR JONES QC:

Well, there was no allegation of violence after the 9 January supervised visit and so this is now February. So it's almost a month later and the mother is resorting to what she said in the past about generic allegations and the question has to be asked, if the children had made complaints about the 9 January supervised visit, why wasn't that in any email and if the bruise was identified on the 15 January, why wasn't that in any email and why wasn't it referred to?

GLAZEBROOK J:

So they were emails that didn't refer to that or, they were emails trying to stop contact.

MR JONES QC:

There's no reference to the photograph of the bruise. There's no reference to anything bad having happened on the 9th of January unless you take the 6th of February generic allegation which is a month later. That's something to support that. But this is against the background of Mr Sena having to threaten a warrant of enforcement to get the children on the 9th of January and then he has to, on page 232, threaten it again and he gets one and the cause and effect is, the mother then goes to CYFs and makes a complaint and of course custody is suspended.

Now I note the time but that is, that probably completes the email traffic. There's another one on page 233.

COURT ADJOURNS: 11.31 PM

COURT RESUMES: 11.46 PM

MR JONES QC:

Thank you Sir. Coming back to the page reference for the 9 January email, volume 3, page 155. So the top of the page, page 155 and the email's referred to the portion that we'd been talking about was read out to her. She stated she couldn't remember what had been reported and then it was put to her about whether they'd reported anything or she just put it in the email to make it look bad and she said, "No, I only write the truth." Just while we are on the emails, if we go to page 160, you'll see at the top of the page, at line 5, the email of the 23rd of January.

GLAZEBROOK J:

Sorry, I missed the page reference.

MR JONES QC:

160 Ma'am.

GLAZEBROOK J:
In the?

MR JONES QC:
Same volume, just a few pages on, yes. 160, referring to the 23rd of January email. Just over half way down, "So this is two weeks after the 9th?" "Yes." "Where is there any reference to the children complaining?" "Don't see it anywhere." "Is that because there wasn't a complaint?" And then she said, "I don't think because I want to talk about the abusing thing, it's about the schedule." And it was put to her that if the children had complained to being physical abused on the 9th, the main thing would have been their safety, "Yes." "Where is there any reference in this to them having been abused on the 9th?" "Nowhere." "That's because I suggest they hadn't complained?" "No, that's not true. Just left it out." "Yes." "By that stage you say he'd already taken a photograph of K?" "I can't remember. Just by looking at the date, I have." And then it is put to her she's just trying to make it difficult to actually see his children and saw an opportunity because of the change of dates.

So she doesn't accept that she told a lie in the 9 January email preceding the visit but in my submission, in the circumstances of the case when there is no allegation in relation to that and that was made clear by the Judge and indeed the prosecutor, in my submission her saying that in that generic way and then, well, specific in terms of it being on a previous supervised visit but secondly, there being zero reference in contemporaneous emails to any complaint about 9 January abuse, in my submission is very important. And that of course was not referred to in the District Court, wasn't taken into account, and that comes back to the issues. I don't want to go through the demeanour fallacy issues or the price of that, but this is contemporaneous material and it's one of the important factors that's referred to in *E (CA799/2012*) *v R* [2013] NZCA 678 and as referred to in *Taniwha v R* [2016] NZSC 121; [2017] 1 NZLR 116. So, this is material which supports the defence position and detracts from the prosecution case quite significantly in my submission not considered.

Now one of the other aspects which wasn't looked at at all was the implausibility of a parent fighting to renew custody or contact with his children, managing to achieve that in a supervised situation and then using the 3rd occasion it seems to gratuitously pinch both of them under the noses of supervisors without anyone seeing anything and this of course is where the children assert that they were being intimidated by the appellant and had to go and barricade themselves in their room and of course there's no evidence that that in fact occurred from any of the adult witnesses.

Coupled with that, we have of course the defence evidence which is given short shrift in the District Court and is dismissed again in the Court on appeal in the High Court where we have the two supervisors come and give evidence and we have the Spanish woman, Ms Rojas who also comes along. She came back from Spain to do that to confirm that everything was well and good with the children on the 9th of January. No complaints, no issues and indeed no realistic opportunity for any offending to have occurred and when one takes that into account and the implausibility of the pinching having occurred, in my submission that was something that the Court had to look at, had to address and simply did not.

Now in the High Court it was dismissed by Justice Downs as something along the lines of experience shows that defence is based on lack of opportunity lack realism. With respect, the context of that visit needs to be looked at. The people who were present and gave evidence in the defence, that needs to be considered and that allegation, given the lack of any sort of reference in the contemporaneous emails lacks realism in terms of the allegations.

Now in the summary of oral argument I've listed at paragraph 7 a variety of points, some of which have already been covered, which in the appellant's submission were not considered adequately or at all in either District Court or the High Court, and the first is an obvious one, the animus of the mother and it seems both the children, general contradictions, inconsistences and the appellant says untruths in the evidence. So credibility and reliability with the key issues, as there usually are, and we're dealing with young people and

their unreliability in a general sense, I suppose, has to be considered. We've already dealt with the emails of 2014 through to October. The absence of the complaint by the mother. What the appellants say is the false allegations by the mother of abuse in the 9th of January email. The mother's intransigence in the face of Court orders, which tends to fly in the face of the District Court Judge's finding about how she was trying to do the best for her children in a lawful way. The implausibility we've covered. The absence of contemporaneous references and emails, that is significant and been covered. The mother's resort to police without apparent inhibition. The evidence was that on the 9th of January the return of the children was a few minutes late. She was already marching off to the Newmarket Police Station. So there's no suggestion that she is reticent about bringing any matters to authorities attention, and then of course we have the key witness for the prosecution, which is the daughter, and the clear, in my submission, untruths which she has told, which are simply not addressed in the District Court judgment and should have been, and which are side-lined as they are dealt with, which ones are dealt with in the High Court decision.

WILLIAM YOUNG J:

What was her explanation for saying delete the photographs?

MR JONES QC:

She said that photographs had been used in the Family Court proceedings, or custody proceedings, to depict her, and presumably the brother, enjoying themselves, and that was something that she said was unrealistic and so she did not want the father to take photographs or to have them therefore she asked that he delete them and he did. Now the antipathy that the daughter showed is manifest. She talked, for example, of the grandmother going through her bag to find her phone. She found that was offensive. She talked about the father stalking her by going to school and asking teachers who her friends were and who she was playing with. That was something she didn't like. She claimed that counsel for the child was not objective, so she is the, as in the daughter, is claiming that counsel isn't doing their job and is siding with the father. She also said in her EVI that she was pinched so hard on the

9th of January she thought it would bleed and could leave a scar, and of course there's no evidence of any of that. I do need to make an amendment to the written submissions, if a note could just be made, that point is made at paragraph 83, it's in the wrong place. Paragraph 83 should, in fact, come after paragraph 90 because it relates to –

GLAZEBROOK J:
Sorry, in your submissions which paragraph are you…

MR JONES QC:
Paragraph 83, I refer to the pinching hard and the thought it would bleed and leave a scar reference. That's in the full submissions. That should actually be in relation to 9 January, it's slotted in at an earlier point. So it's after paragraph 90.

GLAZEBROOK J:
What's the point about these matters? Because in terms of antipathy to your father, I mean it could be because the allegations are true, or it could be because you don't like him, you make up allegations, but what's the point of this?

MR JONES QC:
Well we haven't got an objective witness, clearly because –

GLAZEBROOK J:
Well you might have because she might dislike her father for a very good reason, and there's been that long history of the mother saying the children don't want to go and they're upset all the time they go, and there's violence all the time they go, and they had had a year off.

MR JONES QC:
Well the thing is that there is antipathy by the daughter towards her father and in my submission the things that he was said to be doing are perfectly normal for a parent going to a school and asking who his daughter is actually friends

with and playing with, and she refers to it as stalking, that perhaps gives a flavour of what it's like –

GLAZEBROOK J:
My children wouldn't have been too impressed had I done that.

MR JONES QC:
I don't think they'd call it stalking, they'd probably just say we don't want you here, or mind your own business potentially, I don't know, but she's casting him in a very bad light, and –

GLAZEBROOK J:
Well I'm not sure because my kids always accuse us of stalking them. I think it might have a different meaning for younger people than it does to older people and legally.

MR JONES QC:
Well the other thing is there are various allegations that she made, for example, she said that the appellant used to pinch everyone in the family, that simply wasn't so. That he –

GLAZEBROOK J:
Well you say that but is that right or not? Did she say that was a lie?

MR JONES QC:
She said she saw it. She's not admitting that she lied.

GLAZEBROOK J:
Well has she admitted it was a lie, then why do you say that wasn't the case?

MR JONES QC:
Because the evidence is that he didn't.

GLAZEBROOK J:
Well whose evidence?

MR JONES QC:

She's the only person saying it. No one is, the defence witnesses are saying, look, this just didn't happen. It's like the –

GLAZEBROOK J:

They might be supporting their relative.

O'REGAN J:

I mean there's a conflict of evidence. You can't say therefore your witnesses are true and the Crown's witnesses are lying.

MR JONES QC:

But that brings to focus the issue the Judge didn't address the defence evidence or the conflicts, that's the point. For example –

O'REGAN J:

Well hang on. Is your point that the Judge didn't address the conflict or are you saying that there was evidence that she was telling an untruth here. Because –

MR JONES QC:

Both.

O'REGAN J:

– this is in the context – well there isn't. I mean there's just a conflict of evidence. It's up to the Judge to assess it.

MR JONES QC:

But the thing is the Judge didn't assess it –

O'REGAN J:

Yes, but your submission to us was that we should say she's lying. How can we do that?

MR JONES QC:

Because we have – well, one can look at the type of allegation she's making. She said that the paternal grandmother called the boy a penis and the mother said, "Well that's just ridiculous, I'd never do that," and she was re-examined on that about, "Was this in Japanese or what language was it in," and she said, "Oh no, I understood completely," et cetera, et cetera. She said that the appellant had tried to kill his mother with a knife and she saw that. She said that the brother was being tortured, looked like he was being tortured. There were all these wild allegations that she makes which in and of themselves at face value seem extreme and, in my submission, show that this person is simply unreliable and she is the foundation of the findings. The Judge relies on her and here she is making all these various allegations against the appellant, against his mother, it seems for reasons unexplained, that she no longer has any love for the aunt who is the person that she and the brother used to sleep with when they stayed at the appellant's home. There's just this complete and utter antipathy towards the appellant and his family and that was not addressed at all by the Court. So that comes back to the evaluative aspect. Does this person have an axe to grind, as in the daughter, does she just want to be with her mother because she likes figure skating and wants to be with her as opposed to going and seeing her father, and is this a way of her being able to do that? And, let's face it, it worked. He hasn't seen the children since the 9th of January 2016 except in a Court environment. So the mother has got what she wanted. The children have got what they wanted. So that's the cause and effect aspect, but there are –

GLAZEBROOK J:

What was put to them in respect of this?

O'REGAN J:

The reason they could be antipathetic to him is because it might be true. It can go either way. That theory can go either way, can't it? It would explain the truth of the allegations or it might explain that there was a plot to make false allegations against him. But it's not clear either way. I mean I don't think it supports your case that much because it's equally true in the other direction.

MR JONES QC:

Well, there's clearly a basis for the antipathy. Whether that's legitimate or not is probably the issue. But what I'm looking at more is what the witness is saying about other things, all against the appellant and his family.

WINKELMANN J:

So, Mr Jones, your point is the Judge didn't address those issues in her reasons. They are the main planks of your case and she didn't really squarely confront them.

MR JONES QC:

That's correct, Ma'am.

WINKELMANN J:

And so if you're correct with that then – and she should have, then we would look at them and we could, you would – normally if she'd looked at it we'd apply deference but she hasn't looked at it so you'd say we have to assess it again on your analysis of what we have to do?

MR JONES QC:

Yes, once you got to the point of the erring to a point where a miscarriage had occurred, as in a different result might have happened, and because the daughter was the principal witness in my submission that has to be the case.

WINKELMANN J:

There's another allegation in the material which I don't know what went onto it, what happened to it, but it's in the volume about an allegation the daughter made about inappropriate touching, quite a serious allegation.

MR JONES QC:

No. There was some – she gave a reference to the father allegedly touching her on the leg.

WINKELMANN J:

That was kissing. It's an allegation in relation to kissing.

MR JONES QC:

Yes, that was completely denied and it wasn't taken any further. That's something that doesn't…

WINKELMANN J:

But it came out, was that in evidence, because I wonder why it's in our volume of materials. That was why I'm asking you.

MR JONES QC:

I think it was put in – well, it certainly wasn't part of the case in terms of the evidence against the appellant in the District Court.

WINKELMANN J:

And it wasn't part of the defence case, this is evidence that she's just making up allegations?

MR JONES QC:

No, that was completely a non-issue. It wasn't addressed.

WINKELMANN J:

So we don't know how it came in?

ELLEN FRANCE J:

But the evidential video interviews weren't redacted?

MR JONES QC:

No.

WINKELMANN J:

But I think it's actually in correspondence in the file.

MR JONES QC:

I can't recall at the moment. I'll look at it over lunch. I recall the issue. I think there was a reference to CYFS, might have been a reference to CYFS, and there was an inquiry and there was no action taken. But that forms no part of any allegation and shouldn't form part of the evidence in this case, but it's –

WINKELMANN J:

Well, that's why I was asking about it, why it's in the materials.

MR JONES QC:

Well, there's probably a number of things in the materials that shouldn't be there. Nothing about the sentence, for example, should really be there because that's not being appealed, but I think it was just simply put in because it was in the District Court and in the case and that was it.

ELLEN FRANCE J:

She does talk about it in her evidential video interview, kissing, page 149.

GLAZEBROOK J:

Sorry, 179 of the…

ELLEN FRANCE J:

149, page number.

WINKELMANN J:

The allegation I am thinking about is much more serious than that.

ELLEN FRANCE J:

Yes, yes.

MR JONES QC:

Yes, there is reference to kissing in terms of kissing on the cheek or kissing on the forehead in the EVIs. I think the issue that Your Honour is referring to was an issue of inappropriate kissing that was raised at some point, but there was, nothing came of it. There was an inquiry and there was no action taken.

Regrettably something that is irrelevant and shouldn't be taken into account, such as that, may well have been something in Judge Henwood's mind.

GLAZEBROOK J:
Why is it irrelevant?

MR JONES QC:
There's nothing to do with the matters at issue.

ELLEN FRANCE J:
I thought the reference to that was in the, Judge Burns' judgment, and it's not clear to me, is that part of the, what was before Judge Henwood?

MR JONES QC:
Yes, thank you, 247, yes. It's an excerpt from the social worker's report, going back to 2011. So it's in the decision of Judge Burns but it's simply there as a reference point it seems and the response is recorded at the bottom of 247.

GLAZEBROOK J:
But you're not suggesting that the kissing and holding her down when she said she didn't want to be kissed is irrelevant as background, because it would have to be relevant wouldn't it?

MR JONES QC:
But it's unproven.

GLAZEBROOK J:
Well that's the whole point about allegations.

MR JONES QC:
So how can be it – I'm sorry –

GLAZEBROOK J:

Well if the Judge accepted that he held her down against her will when she didn't want to be kissed and kissed her, and did the same to the brother, that is relevant background, didn't it.

MR JONES QC:

But the Judge didn't make any such determination.

GLAZEBROOK J:

Well not but I thought you were saying that she might have taken it into account and therefore there was a miscarriage, and it was irrelevant.

MR JONES QC:

No, I wasn't saying there was a miscarriage as a result.

GLAZEBROOK J:

Okay, well, that's fine.

MR JONES QC:

I'm simply saying that Her Honour may have got a flavour and that might have potentially influenced her, I don't know.

GLAZEBROOK J:

But that, it would be legitimate influence if it was admissible evidence.

MR JONES QC:

If it were admissible then, well, I don't see how –

GLAZEBROOK J:

Well why isn't it admissible is what I'm asking you?

WINKELMANN J:

Are we talking about the EVI reference?

GLAZEBROOK J:

The EVI, yes. Obviously the other one isn't.

MR JONES QC:

Sorry, I thought you were talking about the one in Judge Burns' decision.

GLAZEBROOK J:

No, the EVI.

MR JONES QC:

Well that, the EVI, well the Judge, neither Judge in the District Court or the High Court makes any reference to that aspect.

GLAZEBROOK J:

So we just ignore it.

MR JONES QC:

Just ignore it.

GLAZEBROOK J:

I just wondered. I was just making sure there wasn't a submission about it.

MR JONES QC:

No, not at all, I was simply responding to Justice Winkelmann's –

WINKELMANN J:

Query about how that other material was there.

MR JONES QC:

Yes.

WINKELMANN J:

So we don't think Judge Burns' decision was before the District Court Judge in any case because why would it be.

MR JONES QC:

It was.

WINKELMANN J:

It was, okay.

MR JONES QC:

It was submitted as an exhibit because of the custody arrangements and the reference to the warrant of enforcement.

WILLIAM YOUNG J:

Well it was part of the narrative.

WINKELMANN J:

Yes, part of the narrative.

MR JONES QC:

Yes it was.

ELLEN FRANCE J:

So in the sense something that the defence relied on?

MR JONES QC:

Yes, as far as the narrative was concerned, saying this is what had to happen, this is the stricture around the visit. It's formal, it's supervised, approved people and if you don't comply then there's a warrant and the mother was cross-examined on the reference to the warrant and she understood that, and part of the defence narrative was, well, you made these allegations because you knew that would suspend custody because it had happened in early 2015 and you knew that was a way around the decision of Judge Burns to have supervised access.

Now as I've just, in relation to that, page 253, bottom of that page, this is still Judge Burns' decision, paragraph 31, His Honour is obviously concerned

about whether access will, in fact, be facilitated and talks about an application for a warrant and his availability. Looking at paragraph 32 of the decision there is a prohibition on any physical discipline or being touched in any way whilst either parent has the care. So that decision was a result of the appellant applying to the Court and the Judge found the two supervisors, the paternal grandmother and the paternal aunt to be suitable and that's what happened. So that's the context of the visits on 19 and 26 September and importantly on 9 January. Of some interest is that the daughter's birthday is the 15th of June. The paternal aunt went to her school, gave her a birthday present and also the brother a present, he didn't want it but eventually took it. On the 9th of January the daughter gave the present back to the aunt. It was put to her that she gave it back because she believed that that would be the last visit and she said no. It was a watch.

So in my submission it's plain that there are forces at play between the two factions, if you like. The mother on the one hand has openly accepted that she wants sole custody. The paternal grandmother and the paternal aunt had expressed their desire to have contact with the two children. The evidence was that the appellant had explained to them the importance of making sure that the children were looked after and were happy and that the visits went well so as not to jeopardise supervised access and that in the defence submission is precisely was happened and that the 9 January allegations are simply untrue.

GLAZEBROOK J:
Well, there is a finding of at least some extent in relation to it that he put on a good front when other people around but when he had moments with the children he would change his personality. Paragraph 70.

MR JONES QC:
Yes.

GLAZEBROOK J:

Well, that was what the Court considered had happened rather than that he actually did take into account the difficulties with custody. So he made sure there were no witnesses but still continued with his behaviour is what the Judge found.

MR JONES QC:

But this was put to the High Court. It seems that what he's wanting is to go through the effort of getting contact back with his children, having supervised visits, having immediate members of his family supervisors and then lurking, waiting for unguarded moments so he can gratuitously pinch them. It makes no sense.

GLAZEBROOK J:

Well, it makes no sense to people who aren't violent but it might make sense to somebody who is intrinsically violent. So domestic violence generally makes no sense to us. One can't understand it. But that doesn't mean it doesn't happen.

MR JONES QC:

Yes, but domestic violence is a generic situation. Here we're talking about the specific context of –

WINKELMANN J:

It all turns on lack of self-control though, doesn't it, and if he's got no self-control he might have no self-control to an extent that even when it's in his own interest to control himself he can't.

MR JONES QC:

Well, there's no evidence to that effect, but I accept entirely that anything can be rationalised if that is where one wants to go. But in my submission looking at the evidence it militates against that. There's no basis for it, and if something had happened why on earth is it not referred to in the

contemporaneous emails? Why isn't there a complaint referred to? Why doesn't the mother take steps? She doesn't. We've been through that.

WILLIAM YOUNG J:
Well, you've dealt with the evidence. Do you want to deal particularly with the reasons the Judge gave?

MR JONES QC:
The District Court or the High Court?

WILLIAM YOUNG J:
Yes, the District Court Judge gave.

MR JONES QC:
I can and because of the paucity of reasons I'll be relatively brief.

WILLIAM YOUNG J:
The reasons are sort of spliced into the conclusions in that she hasn't said, "I prefer the evidence of the prosecution witnesses for the following five reasons." So there's nothing like that in the judgment.

MR JONES QC:
Your Honour with the greatest of respect is being generous in terms of the splicing aspect. What we have in my submission are a series of conclusions which do not have reasons behind them. The findings at, so the first volume, page 61…

WILLIAM YOUNG J:
Can I? I'll underline what I think are the reasons and you can tell me whether I've missed any or whether I'm too generous. Para 60. She seems to say, well, the daughter corroborates the evidence of the brother, so the corroboration is one reason perhaps.

MR JONES QC:
Yes.

WILLIAM YOUNG J:

The next para, this is I guess a demeanour or a character assessment. It records what she's made of the mother, that she was an honest woman doing her best to protect her children.

MR JONES QC:

Yes, that's a conclusion. It's not a reason as to – there's no reason as to why she found her to be so.

WILLIAM YOUNG J:

I agree with that in part. It's the sort of demeanour assessment that I think is open, it may be open to a Judge where you look at the parties, you've got a reasonable chance to form a view of what sort of people they are, and her view of the mother is that she was an honest person not putting the kids up to tell lies. Now that's partly a conclusion, it's sort of a reason as well. I don't think this is a good way to write a judgment.

MR JONES QC:

No.

WILLIAM YOUNG J:

I'm just trying to discern what the reasons are.

GLAZEBROOK J:

Mind you it can be difficult in those circumstances to do anything other than – because it's not an issue of saying well is this document true, was there a contract. There are these five documents, there's this evidence that supplements it. It is much more of an impressionistic aspect I would have thought in these sort of cases.

WILLIAM YOUNG J:

And one thing the Judge does refer to is the interchange of emails where he's saying, what should I do, and she says, this is what you should do.

MR JONES QC:

That's in 2014.

WILLIAM YOUNG J:

Yes.

MR JONES QC:

Yes, that's where he's asking for help, in terms of parenting, from the mother.

WILLIAM YOUNG J:

Paragraph 60 there's, I suppose, a bit of propensity.

GLAZEBROOK J:

Paragraph 62 do you mean?

WILLIAM YOUNG J:

Paragraph 62 I'm sorry, yes. Interspliced with narrative. And then there's arguably a bit more propensity in 63.

MR JONES QC:

Yes, the finding that he has a hot temper, with respect, wasn't made out on the evidence in my submission.

WILLIAM YOUNG J:

Did he acknowledge it, he didn't acknowledge it in evidence, was it put to him in evidence?

MR JONES QC:

He said as part of the 2014 situation he did an anger management course, he said that in evidence, and that's the standard thing that one does, as I understand it, when there's some allegation like that.

WILLIAM YOUNG J:

What about his mother, did she say, presumably she said he had anger issues.

MR JONES QC:

No.

WILLIAM YOUNG J:

She didn't say that?

MR JONES QC:

She talked about emotional ups and downs but not anger.

WILLIAM YOUNG J:

All right, so you say that's just a straight mistake in a record of the evidence?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Did the grandmother admit that she was not, she was in nearby rooms on occasion?

MR JONES QC:

The grandmother, she said she was in, sometimes she might be in the next room making lunch. The grandmother's evidence is at 237 of volume 3. Yes, 237. She says at page 250, it was the last question and answer, "At any of those supervised visits, was David ever alone with the children?" "No."

WILLIAM YOUNG J

Sorry, where are you?

MR JONES QC:

Page 250, right at the bottom of the page. Page 242, for example, about two-thirds of the way down talks about, "Playing a game using a computer, I always supervise sitting behind them." And 243, being told about the supervisory obligations, which is telling, "I have to supervise and sit with the children all the time, otherwise we can't have our grandchildren to visit us." That's her speaking as a grandparent obviously. And no complaints.

WILLIAM YOUNG J:

Was the sister at work on the days alleged?

GLAZEBROOK J:

On the 9th I think she was, wasn't she?

MR JONES QC:

On the 9th she came home for a couple of hours around lunchtime, but she was, the grandmother was present and the Spanish woman, Ms Rojas, was present on the 9th, all the way through.

WILLIAM YOUNG J:

So what did Ms Rojas say about that, did she say she was ever out of the room?

GLAZEBROOK J:

Page 245 is where the grandmother says she leaves to cook lunch.

MR JONES QC:

Yes.

GLAZEBROOK J:

So it's not quite true that she's with them all the time. I mean she won't have totally understood I think I suspect.

WILLIAM YOUNG J:

Okay. I was in that room next door.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Okay, what about Ms Rojas, what did she say?

WINKELMANN J:

Page 217.

GLAZEBROOK J:

She wasn't there the whole time on that day, was she?

WINKELMANN J:

No, she was there for one day I think.

MR JONES QC:

Ms Rojas –

WINKELMANN J:

9th of January I think.

MR JONES QC:

In 215 is probably where it starts for her. And towards the bottom of the page, "Could you observe the interaction between Rimi and the children?" "Yeah, it was very good." And talking about from lunchtime until the children went home, "Whose company were you in, who were you with." Page 216, "With David, grandparents and me."

WILLIAM YOUNG J:

So she gives, in effect, an alibi for the day.

MR JONES QC:

Yes.

GLAZEBROOK J:

Or does in the sense she would have heard everything which is what the grandmother said too.

MR JONES QC:

Well she says at the top of page 216 yet after lunch the children were with David, grandparents and me. Rimi is gone by that stage. "And what were the

kids doing in the afternoon?" "They stay with me and grandpa and then, yeah, we were all together."

WILLIAM YOUNG J:
So the Judge made a finding that the visitor was not with the children every minute, what was that based on, do you know?

MR JONES QC:
I presume that, I can only presume that the Judge is trying to say at some point she might have had to go out of the room for the call of nature or whatever, I don't know.

WILLIAM YOUNG J:
Presumably the children said that there were times when they were alone with their father and grandmother, sister and Ms Rojas weren't there.

MR JONES QC:
Yes.

WILLIAM YOUNG J:
So presumably this is a finding of fact rather than what you might call a reason?

MR JONES QC:
Well the thing is that the evidence of the defence witnesses on this issue was just dismissed in a sentence.

WILLIAM YOUNG J:
What you say is she hasn't addressed the evidence squarely?

MR JONES QC:
Correct.

WILLIAM YOUNG J:
Okay, I understand.

MR JONES QC:

And should have done so because it's not a question of, okay, if you have a video going all day you're going to have conclusive proof. If you have someone who says, I was in the room with the person all day, then you have conclusive proof that that person is believed and they're reliable, but you get to a, in my submission, a fairly absurd stage where you're looking for alibi evidence to completely exonerate the person when that may or may not be possible in a domestic situation. But what you do have is whatever the attendance was is no issue of complaint, no allegation or no suggestion of anything untoward happening, and this is against the background of course of both children talking about barricading themselves in their room. Now these things just aren't addressed and what you do is you have children who are saying whatever they want to say –

WILLIAM YOUNG J:

Did they both say they barricaded themselves in their room?

MR JONES QC:

Yes, yes.

WINKELMANN J:

On the 9th?

MR JONES QC:

On the 9th.

WILLIAM YOUNG J:

So you're saying the Judge has effectively made a sort of a finding in the middle?

MR JONES QC:

Well the Judge is being very selective and the major concern is that there was evidence that addressed things that the children had said which contradicted what the children had said and it wasn't discussed and it was simply – well,

whether it was taken into account or not, who would know, clearly it wasn't as far as the overt words of the judgment are concerned. The other thing –

GLAZEBROOK J:

Well, I mean she was obviously aware of that evidence because it is in that long narrative of evidence, a lot of what you're saying. It's not necessarily addressed except for the generic finding which might come down, of course, to whether generic findings are enough under the obligation to give reasons.

MR JONES QC:

Yes, I must say that the –

GLAZEBROOK J:

And you would say not, it must be addressed in more detail and that there has been a change in the law from there, as I understand your submission. That reasons mean, leaving aside the appellate function, that reasons mean at trial Judge level, full reasons where the evidence is not addressed by detailing it for either side and then doing a generic, well therefore I find, at the end.

MR JONES QC:

Well –

GLAZEBROOK J:

If, in fact, that even is enough to give reasons, although here there's more than the, "And therefore I find."

MR JONES QC:

Yes, recitation of evidence is not analysis.

GLAZEBROOK J:

No, no, and I totally understand that submission, it's just tends to, it would certainly not be a submission you could make that a lot of this was not before the Judge's mind though, because you do then have to look at the recitation of evidence.

WILLIAM YOUNG J:

It's a point, I think we've got past the point where the argument, I mean you've dealt with your argument that this was a finding that wasn't available to her. The focus now really is were her reasons adequate for the occasion.

MR JONES QC:

In a sense, yes, but in my submission were her findings available, was her assessment coming back to the section –

WILLIAM YOUNG J:

I mean in a sense I suppose there are three issues. One, what's the section mean; two, was there an evidential basis or was she wrong in findings, so those are the first two arguments. The third one is, in any event the reasons were inadequate, and I mean that's the aspect of the case that troubles me a bit more than the other two issues.

MR JONES QC:

Well in my submission the, it's not a question of, I don't want to stray into the area of was there an evidential basis for a finding because –

WILLIAM YOUNG J:

No, I'm trying to put that to one side, I'm just looking at the reasons.

MR JONES QC:

Well reciting evidence isn't a reason. The Crown submission –

WILLIAM YOUNG J:

No, I entirely agree with that.

MR JONES QC:

– for example, and indeed in the High Court where it said, oh the evidence was before the Judge. Well my response to that is why didn't you articulate it and deal with it.

WILLIAM YOUNG J:

Well I mean it would have been better to take each incident by turn and analyse the evidence in relation to those incidents and analyse the probabilities on each side as well as what the witness has said, incident –

MR JONES QC:

I would agree with Your Honour except to substitute for the word "better" the word "necessary". Because the fact is that if evidence is led it's always going to be in front of the Court. It's a statement that has no value to say, oh the evidence was before the Court. Well, yes, of course it was, and if it's evidence before the Court, and it's evidence that should have been addressed because it sounds on issues relating to credibility or reliability, by necessity it should be addressed by the Court. So the Judge should make a finding or it should form part of a deliberative process, and that feeds into the reasons aspect.

O'REGAN J:

Potentially it's a different outcome if the appeal was allowed only on the basis that the reasons were inadequate. Presumably there should be another trial whereas if the appeal is allowed on the basis that there's a material error maybe not.

MR JONES QC:

Yes, if the Court found that the assessment of the evidence was such that the standard of proof couldn't be met, then that would mean it would end.

O'REGAN J:

What are you contending for, another trial or an acquittal.

MR JONES QC:

I don't think anyone wants another trial.

WILLIAM YOUNG J:

Well you're contending for an acquittal on the basis that he should have been acquitted at the time.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

If the reasons are inadequate there would be a question whether in view of the age of the children or the time that's elapsed there should be a second trial.

MR JONES QC:

Yes.

GLAZEBROOK J:

But usually we would order a retrial anyway and it would be for the Crown to make that assessment.

MR JONES QC:

Indeed, and it may be that, yes, it'd probably depend on, if that happy situation eventuated, what the Court said about the evidence and the issues that have been raised.

WILLIAM YOUNG J:

Okay, I don't want to sort of shut you down but is there much else you want to say? Is there – well, sorry, one thing, is there any helpful authority in the post-Criminal Procedure Act era on whether conclusory reasons are sufficient to discharge the obligation under the statute to give reasons, whether generalised demeanour-based credibility assessments which in a sense is what we've got here with a few add-ons, the corroboration or propensity.

MR JONES QC:

There's the – well, the thing is that it's confused somewhat because the *Owen* principles are applied so the test –

WILLIAM YOUNG J:

But reasons can – it's always – we're just looking at reasons.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

What constitutes an adequate set of reasons? Have we got – is there anything that's of assistance on that?

MR JONES QC:

No. Your Honour in fact in a case called *R v Eide* [2005] 2 NZLR 504 (CA) in 2005 referred to *Connell* which was 20 years old at that point, it's now 34 years old, about the need potentially to revisit. But even in *Connell* Justice Cooke indicated that it was a statement of principle in the early stages, if you like, of Judge-alone hearings. Now what we've got is a great advance over the last 30 plus years and new legislation and greater accountability in my submission as far as reasons are concerned.

WILLIAM YOUNG J:

We haven't got *Eide* here, have we?

ELLEN FRANCE J:

I've got it here.

WILLIAM YOUNG J:

You've got it?

MR JONES QC:

I've got a copy of *Eide* if you want it, Sir.

WINKELMANN J:

There's quite a good discussion of it in the Canadian cases, particularly in *Douglass v R* [2012] HCA 34, (2012) 290 ALR 699 and not post-CPA of course but the obligation to gives reasons in paragraphs 13 and 14, I think.

WILLIAM YOUNG J:

Sorry, what page is that?

WINKELMANN J:

That's in the respondent's bundle of authorities, tab 21.

WILLIAM YOUNG J:

At page, sorry?

WINKELMANN J:

At page 703 – page 380, top of the page 380. Paragraph 13 and 14.

MR JONES QC:

I just remembered there was an authority which I will look to find which was a little closer to home as well. I do have a case which I can circulate, case *R v Creamer* CA178/06, 16 October 2006 which was unreported but I recalled it the other day. I actually appeared on it, so that refers to *Eide*, *Connell* and *Eide*.

WINKELMANN J:

But the points in *Douglass* that's made is it's just not enough to say you accept one person's evidence because that doesn't preclude possibly – you're not necessarily addressing it to the criminal standard in those circumstances.

MR JONES QC:

Equally the statement, well, if you accept someone's evidence and someone else is giving contradictory evidence by inference you're rejecting theirs, well, that's all very interesting but you've got to consider it. If you've got a conflict,

if you've got contradictory evidence, you've got to have two sides of the coin. "I accept this evidence because," and, "I reject this evidence because."

WINKELMANN J:

I think the points being made in *Douglass* is it doesn't really comply with the direction that's given to the jury about approached evidence when there's a conflict that you might accept one, reject one other but be left with a reasonable a doubt and that's not addressed by simply accepting one person's evidence, the possibility that you're left with a reasonable doubt.

MR JONES QC:

No. Yes.

GLAZEBROOK J:

It depends what was said in that though because she did remind herself in this of beyond reasonable doubt, and it may have been in that. The Australians are a bit strange anyway because they don't tend to review factual evidence.

WINKELMANN J:

It's Australian, not Canadian, yes, quite, yep.

GLAZEBROOK J:

So they have to find a legal error. When I say "strange" different from us I should probably have put.

MR JONES QC:

Stick with strange. Can I just say this as a last matter? It's all very well to state something such as a standard or give oneself a direction but the essence is in the application and it's the application which is critical and that comes back to adequacy of reasons, dealing with evidence that needs to be dealt with and is really the essence of the judicial function analysis, because if you don't have analysis then there's no basis for or legitimate basis for your conclusions.

WILLIAM YOUNG J:

Okay, thank you.

MR JONES QC:

Just one last point, sorry, Sir. Your Honour referred to potential propensity. That was never run as propensity. It was run as part of the narrative.

WILLIAM YOUNG J:

But narrative…

MR JONES QC:

Talk about relationship propensity or…

WILLIAM YOUNG J:

Yes, relationship propensity. The attitude one person has towards another while not coincidence propensity is still propensity under the Evidence Act 2006.

MR JONES QC:

Yes, although the counter to that would be, of course, that steps were taken to remediate and things of that sort, so which is probably why it wasn't – it was looked as part of the background as opposed to anything else.

WILLIAM YOUNG J:

Yes, no, I understand that.

ELLEN FRANCE J:

Justice Downs seems to have treated it sort of as propensity –

MR JONES QC:

Yes.

ELLEN FRANCE J:

– paragraph 46, because he refers to slapping a child to the face as unusual behaviour and then goes on to talk about…

GLAZEBROOK J:

I think Judge Henwood also treated it somewhat as propensity.

MR JONES QC:

Yes, it's a bit difficult to address it when it's part of the background and it's not actually put forward as propensity so that there would be potential safeguards or considerations that need to be taken into account. But as far as the issue is concerned, the defendant or the appellant said, "That put the fear of god into me and so I made very sure that I didn't do anything that might transgress." So whilst it could be propensity, equally it could be, as far as he's concerned certainly, and this is borne out by the supervised access issue, a very real reminder that he can't do it.

WILLIAM YOUNG J:

Okay, thank you. Right, Mr Lillico.

MR LILLICO:

May it please the Court, I might just start with a very minor matter. I've intituled my documents and introduced myself. I try to do so carefully in Māori but I introduce myself as appearing for the Crown and in fact this was a police case. So the matter of a retrial would be a matter for the police force rather than the Crown.

WILLIAM YOUNG J:

So should it be intituled – police?

MR LILLICO:

It should be *Sena v The New Zealand Police*, so yes.

GLAZEBROOK J:

Should it?

WILLIAM YOUNG J:

Yes, it's been mixed practice on this. I think the Supreme Court did say 10 years or so ago that these cases should be intituled – this was under the Summary Proceedings Act in the name of the police. I sort of wonder a bit about that, how that works now in relation to category 3 and category 4 cases because this is a category 3 case presumably, or is the category 2?

MR LILLICO:

It's category 3, Sir, yes.

WILLIAM YOUNG J:

So he did have a right of election?

MR LILLICO:

He did. I know they're Summary Proceedings matters but I note that *Brooker v Police* [2007] NZSC 30; [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1 were both intituled police.

WILLIAM YOUNG J:

Yes. *R v Awatere* and – *R v Awatere* [1982] 1 NZLR 644 (CA) anyway was Summary Proceedings intituled using The Queen so, I mean, the practice hasn't been entirely consistent. But I think –

MR LILLICO:

No, and under the CPA the Solicitor-General is required to appear in the Supreme Court and in the Court of Appeal, so that might be an argument for the Crown being intituled in that way.

WILLIAM YOUNG J:

But the prosecution decision would in fact be made by the police if there was a retrial ordered.

MR LILLICO:

It would, Sir, yes.

WILLIAM YOUNG J:
Okay.

MR LILLICO:
Now the police or the Crown acknowledge that the presence of reasons is acknowledged by the statute and that distinction is in place in the Criminal Procedure Act and because of that distinction effectively an appellant gets, in the words of the Court of Appeal in *R v Slavich* [2009] NZCA 188 gets a fuller appeal. So the Crown acknowledged that. It's a fuller appeal firstly because you gain the possibility as an appellant – you gain a pathway to a retrial simply by the way that the reasons are expressed which is obviously not something that can happen in a jury trial. So that's the first way that it's a fuller appeal. The second way – or that's the primary way that it's a fuller appeal because if there's any illogical reasoning for one thing, if there's a misdirection about the law for another, the Judge misdirects herself about it, then that may well be the miscarriage that leads to retrial.

O'REGAN J:
But that would be equivalent to the Judge not directing the jury properly, wouldn't it? So it's not that different really.

MR LILLICO:
It's not that different except when we come to facts because the Judge could –

GLAZEBROOK J:
It might be different in that the jury mightn't have understood it. We just assume they do and apply it.

MR LILLICO:
Yes.

GLAZEBROOK J:

But if they didn't, if they gave reasons we might find that they didn't understand it and didn't apply it.

MR LILLICO:

And sometimes we see that, don't we, in questions from the jury if they're recorded?

WINKELMANN J:

But you're saying it's functionally different –

MR LILLICO:

It's functionally –

WINKELMANN J:

– because we have something to examine and that's all you're saying?

MR LILLICO:

Yes, Your Honour. So, for instance, if Judge Henwood had found as a fact that the daughter couldn't be believed about the 9 January incident and then had also found as she did that the son was unclear and had a struggle with language and remembering, then a later finding that the children's evidence is corroborated and therefore we can find the 9 January pinching incident proven on that basis would be illogical and on its face and obviously we don't get that with a, in a jury trial.

WILLIAM YOUNG J:

Well, just to take an example which probably isn't completely – even if correct it's not decisive, but the – in para 63 the Judge said, "His mother indicated he'd had some anger issues." Now I understood Mr Jones to say that simply wasn't correct. She didn't say that.

MR LILLICO:

That might be an example except on –

WILLIAM YOUNG J:

It may not be and if she said he had emotional issues then it may not be a big issue but if it could be an issue and it could be an error –

MR LILLICO:

Yes, it could be. It's the kind of thing that could potentially be an error. In this case the submission is that, for the Crown, is that you should perhaps add this, Sir, to your list of findings because in a sense the Judge has said that Mother said had anger issues. Really I think that should be read as a conclusion on the basis that he'd previously slapped his son.

WILLIAM YOUNG J:

No, but if what Mr Jones says is right, she's misrecorded the evidence.

ELLEN FRANCE J:

Well, just so we don't, on that, she's asked, "What would you say if I said that David has anger issues?" and then it's incorrectly tran – "I know she has some issues, it's like emotional ups and downs, but he never ever showed, he never hardly ever show emotional about anything to us for using any force towards my grandchildren."

WILLIAM YOUNG J:

Okay, so it's an awkward issue, confused because of the translation, interpreting.

MR LILLICO:

Yes, and also there's the other – the submission would be that it's –

GLAZEBROOK J:

Well, the she/he will be because they don't have gender. So that's a…

MR LILLICO:

A problem for the translator, yes.

GLAZEBROOK J:

Well, not really. It's just that – so what page is that?

ELLEN FRANCE J:

Page 249 of the evidence, and then you do need to also look at what the appellant himself says about it as well.

GLAZEBROOK J:

So it could be anger issues, he has some issue?

ELLEN FRANCE J:

That's right.

GLAZEBROOK J:

Yes, some anger issues which is what the Judge said.

MR LILLICO:

And can't the Judge in drawing that conclusion draw on the fact that he has admittedly slapped his son before. He –

WILLIAM YOUNG J:

Well, I was going to say even if Mr Jones' interpretation of this is right, it's probably not critical because of the other evidence.

MR LILLICO:

Yes, Sir.

WILLIAM YOUNG J:

But I suppose more, well before lunch, more trouble to me really is a failure to deal in substance with the alibi evidence, if I can put it that way.

MR LILLICO:

I was going to say some brief things about the test before coming onto the case at hand, but I was only going to be brief because –

WINKELMANN J:

Well, you said there was something. When you were dealing with *Slavich* and how it was acknowledged in *Slavich* that a defendant gets a fuller appeal with Judge alone, you said the main reason is because of this functional reason, but there was some other reason?

MR LILLICO:

The only other one, and it's difficult to find a clear statement of this in the law, but when we'd say, Your Honour, that although it would be tempting to substitute reasons for Judge Henwood and to make her judgment somehow stronger, we can't do that, in the Crown's submission. We have to take the reasons as we find them because we have the benefit of them having been written down and we really take this from cases like *Wenzel v R* [2010] NZCA 501 where we could have said of course the Judge knows the elements of fraud and of course the Judge has turned his or her mind to what dishonesty is, but the Court of Appeal didn't do that. They let the reasons stand or fall for themselves and that's the other great benefit, I would submit, for an appellant in these sorts of cases. We can't – we have to be careful as the court I think has been to date in the discussion with my friend to talk about what the Judge actually did decide and did express in the judgment and that's the other benefit probably for appellants.

In terms of the standard of review, the point I wanted to make about the legislative history is that the legislative material as far as it goes and I think perhaps the view that came out of the discussion with my friend was that there was a muddy picture and that may be because in the legislative material, particularly the explanatory note, there's a discussion on the one hand of the approach with the appeal section in the Criminal Procedure Act is to take a modified Crimes Act 385 view of the world.

WILLIAM YOUNG J:

So where's the explanatory note?

MR LILLICO:

It's in the Crown's bundle, Your Honour. Tab 32, and it's on page 804 of the overall pagination of the bundle. So –

WILLIAM YOUNG J:

It says that an appeal against conviction in a Judge-alone trial, the rehearing procedure is retained as in section 119 of the Summary Proceedings Act. But we now know that it was taken out, albeit for perhaps a reason that wasn't that flash.

MR LILLICO:

Yes. So –

GLAZEBROOK J:

Although the –

WINKELMANN J:

Well, that's the language. The language is taken out, not necessarily the concept.

GLAZEBROOK J:

Yes, although then they explain what a concept of a rehearing is in the concept of – which is effectively –

MR LILLICO:

Herewini.

GLAZEBROOK J:

Well, it's effectively a review, not *Austin, Nichols*.

MR LILLICO:

And so –

GLAZEBROOK J:

Again, perhaps misunderstanding what the law is but…

MR LILLICO:

And so the legislative material pulls us, well, might pull the Court both ways because at the same time we're saying we want a modified Crimes Act model. We say that we're preserving the Summary Proceedings Act approach. Ultimately, we would submit that Parliament did pin its colours to the mast and make a decision as they had to because neither – you can't have both approaches at the same time, and they nailed their colours to the mast by using the language of 385, ie, miscarriage of justice.

WINKELMANN J:

Can I just ask, this explanatory note comes before the departmental report or after?

MR LILLICO:

Before, Your Honour, and Justice Young asked a question about the status of the departmental report. We can probably avoid controversy about that because in the select committee report the select committee accepted parts of the departmental report which means that essentially that a parliamentary body has spoken about the report. I haven't – I thought I'd given that to you in tab 32 but in fact I've just repeated the explanatory note but –

WILLIAM YOUNG J:

Well, it's 1 o'clock. It might be quite helpful to have that after lunch.

MR LILLICO:

Yes, thank you.

WILLIAM YOUNG J:

We'll take the adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.15 PM

MR LILLICO:
So I think just before the break I was going to get to the extent to which the select committee report adopted what the officials had said or suggested in a departmental report and it's not a strong point for the Crown in that at the end of the day it's the legislative wording that was chosen that matters but to be complete about how the Bill was developed it probably pays to refer to it. So the relevant parts at – passage is at page 9. So again –

WILLIAM YOUNG J:
So it's just plumb wrong?

MR LILLICO:
Yes, and –

WINKELMANN J:
So where is it, sorry?

MR LILLICO:
It's at the bottom of page 9, Your Honour.

WILLIAM YOUNG J:
Top of page 10.

MR LILLICO:
Top of page 10. So again the proposition that was in the explanatory note is repeated and accepted and we have this tension again between choosing a modified –

WILLIAM YOUNG J:
I suppose we could do it the old-fashioned way and just interpret the statute rather than the departmental report and the select committee report?

MR LILLICO:

And that's what I'm going to suggest to you because the wording, although there's some confusion about whether in fact they were adopting a modified Crimes Act 1961 model, the wording that they used, "miscarriage of justice," tends to suggest that that's what they landed on, and of course if they were going to adopt my learned friend's approach of the appeal court coming to its own conclusion of the facts, there's very much different wording that could have been used. For one thing, as Justice Young suggested, section 119 of the Summary Proceedings Act or there are much more explicit examples overseas, including the Court of Appeal's Act in Canada which is referred to in the respondent's bundle at page 628.

WINKELMANN J:

Well, what about this argument? If you just look at the words of the legislation, it appears to say that it's a ground of appeal if the Judge erred in their assessment of the evidence and how can the Court of Appeal form a view as to that, whether they assess – if they don't assess the evidence.

MR LILLICO:

Yes, well, we can't paint out the appellate court's assessment of the case entirely, can we, because it's quite a natural part of any kind of decision-making to arrive at your own view about what happened? But it's not the starting point and it's not the ending point so…

GLAZEBROOK J:

Well, is the question what they're assessing the evidence for? Are they assessing the evidence for, in order to form their own view of the evidence or are they assessing the evidence to see whether there's an error –

MR LILLICO:

Yes, Your Honour, yes.

GLAZEBROOK J:

– on the part of the court below, or the trial court?

MR LILLICO:

Yes, Your Honour. So what I was going to say is that it's quite natural for appellate court judges on the appellate court I would submit to come, for those judges to come to their own view, but it would only then be to inform their analysis of, for instance, illogical reasoning or unreasonable verdict as we would say is the case in terms of *Connell* and it wouldn't be the end point. We couldn't substitute and write down that conclusion. The appellate court couldn't reach their own conclusion and write that down as its reasons for judgment.

WILLIAM YOUNG J:

Can I just – sorry, you mentioned something before and I couldn't find it. What's the – you say there's a Canadian Criminal Appeal Act?

MR LILLICO:

No, not a – Court of Appeal Act, Sir. It's referred to page 628 in *HL v Attorney-General of Canada* 2005 SCC 25, [2005] 1 SCR 401. So if you have a look at…

WILLIAM YOUNG J:

That's a civil right of appeal, isn't it?

MR LILLICO:

Yes, it's an example, I'm just relying on it as an example of the kind of wording.

WILLIAM YOUNG J:

Yes, but our civil, I mean we would have identical or substantially identical provisions in what was the Judicature Act 1908 and is now the Senior Courts Act 2016 and the Court of Appeal Rules which is amid – the appeal to the Court of Appeal in a civil case is an appeal by way of rehearing.

MR LILLICO:

Yes. The only point I'm trying to make from it is that if we were going to adopt the kind of analysis that, or if Parliament had adopted the kind of analysis that my friend has or the kind of power that my friend says appellate courts have then they might have used either section 119 as a model or they could have used this kind of language as a model.

WINKELMANN J:

Well, they did think they were going by way of rehearing though, didn't they? They thought that that they had to take out rehearing from one provision so as to suggest the other one wasn't an appeal by way of rehearing.

MR LILLICO:

Yes.

WINKELMANN J:

Doesn't that run against your argument?

MR LILLICO:

Only if your position is that rehearing is only of one sort of variety, Your Honour, if rehearing always means that you come to your own view of the evidence, which we say it doesn't, rehearing is driven by context.

WINKELMANN J:

And you've got authority that supports you in that, haven't you, quite a bit of authority that says a –

MR LILLICO:

Fox v Percy [2003] HCA 22, (2003) 214 CLR 118 is the – there's the main submission or the main case we refer to which attempts to break down and then ultimately fails to define the types of rehearing. It posits that there are four types of rehearing and then says, well, ultimately these aren't the only types either because it's completely driven by context.

ELLEN FRANCE J:

Just going back to what you were saying before about the appellate court, if the appellate court forms the view that the judge has erred in his or her assessment to such an extent that it's created a real risk that the outcome of the trial is affected, are you saying that the appellate court can ignore that view? When you talk about not substituting its own view, if that's the view that the appellate court forms, what…

WILLIAM YOUNG J:

Aren't you saying that the Court of Appeal, that the appellate court looks at the evidence to see if there's a discernible error in the judge's approach? If there isn't then that's the end of the story. If there is then the judge, the appellate court is going to have to consider whether there's a miscarriage of justice which may require its own assessment of the evidence as in terms of the old proviso cases like *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145, and *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300.

MR LILLICO:

Yes –

WILLIAM YOUNG J:

That it in a nutshell?

MR LILLICO:

It might be. I find it easy to think about examples perhaps because, for instance, if picking up the notes of evidence and the record in this case you read them and you came to the conclusion that Mr Sena must be guilty, sorry, must be innocent because of the uncertain way that his son gave evidence.

WILLIAM YOUNG J:

Could be a funny conclusion to come.

MR LILLICO:

It would be but –

WILLIAM YOUNG J:

You might think it hasn't been proved because of the uncertain way his son gave evidence. You'd hardly think the uncertain way his son gave evidence means he's innocent.

MR LILLICO:

Hasn't been proven, the better way to put it.

WINKELMANN J:

Mr Lillico, can I take you back to Justice France's question though because that's what I'm interested in because it seems to me that you were reading down the natural meaning of the words, and that's what Justice France I think was asking you.

MR LILLICO:

Well, the words of the section ask you, don't they, to look at the judge's assessment? So has the judge erred, the judge being the trial judge, have they erred in their assessment of the facts? So it doesn't –

WINKELMANN J:

To such an extent.

MR LILLICO:

So it doesn't in its terms refer you explicitly to the appellate court's own view. What I'm suggesting is that the appellate court's own view might inform that analysis and might allow the appellate court to spot errors in the reasoning.

WINKELMANN J:

But how could that appellate – what else does the appellate court have other than its own assessment of the evidence when it's deciding whether or not there's an error? You're saying it can only look at the reasons and the evidential pathway that the Judge took and set out in their reasons, but is there anything in that section that suggests that narrowing?

MR LILLICO:

Only that we've used the word – only that we've used the term "miscarriage of justice" which usually imports notions of allowing room for reasonable minds to differ in terms of *Owen*.

WILLIAM YOUNG J:

It's a very slippery expression. I mean it doesn't – I think in the end it is a simple policy issue. It is perfectly possible to read the section in the way in which Justice Winkelmann has postulated, that is if the appellate court thinks that a particular finding should have been made on the evidence and the judge made another finding, well, then it follows as night follows day that the judge was wrong. So that's one way of reading it. It's consistent with the language. The other way of reading it, also consistent with the language, if you look at the judge's assessment is there any tangible error in that assessment?

GLAZEBROOK J:

Which can include whether they didn't take account of evidence they should have taken account of –

WILLIAM YOUNG J:

Yes, yes.

GLAZEBROOK J:

– which in itself means that the appellate court, even on that analysis, has to look at the evidence. I mean obviously one would expect counsel to say, one wouldn't expect the appellate court to have to do it itself if counsel didn't suggest that but…

WILLIAM YOUNG J:

And in any event bad reasons, insufficient reasons, are a separate basis for appeal under the miscarriage grant.

MR LILLICO:

Yes. Do we also read into Justice Winkelmann's conception of the reading appreciation for the advantages that the trial judge has?

WINKELMANN J:

Well, there's deference, of course. In the *Austin, Nichols* model there's deference and all of the cases say you have varying levels of deference. But taking you back to this issue of policy, because it does seem to me that you can read this section as quite opaque about exactly what it means, there is a policy question about whether in the criminal jurisdiction we should be taking this fuller view of things or a lesser view when in the civil jurisdiction we take a full view, so why in the criminal jurisdiction should we be more hands off when it's a judge than we are in the civil jurisdiction, because that's what you're saying, when it's in the criminal jurisdiction we should be more hands off the reasoning process when it's exactly the same function that the Judge is doing which is receiving evidence, assessing, witnesses, so why in the civil jurisdiction would we be more interventionist, reaching our own view, still required to see that the judge is in error but we can substitute our own view of the evidence but not in the criminal jurisdiction?

MR LILLICO:

I'm not sure about the policy reasoning behind it but we've consistently used the – or not consistently because, of course, we had a different regime with section 119, but haven't we made a choice in relation to this, or hasn't Parliament made a choice in relation to this particular statute that they were going to use the '61 Act and section 385 as a springboard?

WINKELMANN J:

Well, that's the question because if they were going to use it why did they use a different subsection than appears in that? They haven't just used it. They've put something else in there.

MR LILLICO:

Well, they were trying, in our submission, they were trying to cope with the acknowledged distinction between the two fora that you have reasons for decision, but they didn't mean to go further than that and allow appellate courts to simply, to arrive at their decision on the appeal by substituting their own view that –

ELLEN FRANCE J:

If that was the case, so why are both not referring to the verdict being unreasonable?

MR LILLICO:

Well, presumably because the erring of assessment encompasses an unreasonable verdict.

WILLIAM YOUNG J:

But a verdict that's reasonable on the evidence might still be reached by reasons that don't stand up to analysis. I mean if this case had been tried by a jury and the jury had found the defendant guilty, well, that would have been probably the end of the story. Because a Judge has given reasons, we can look to see whether the reasons bear scrutiny.

MR LILLICO:

Yes, and that's the distinction that –

WILLIAM YOUNG J:

And they might not bear scrutiny if the verdict's unreasonable, if we're of that view, but they might not bear scrutiny for other reasons.

WINKELMANN J:

But that doesn't require a different statutory provision, does it? That's again a functionality that just drives off a different approach. It would still be captured within unreasonable, so why have the different subsection as Justice France asked?

MR LILLICO:

To make it clear that we have a fuller appeal, that you can have – you can uphold an appeal purely on the basis of the way that the reasons are presented in a Judge-alone trial.

WILLIAM YOUNG J:

You couldn't have that the jury's reasons for reaching the verdict were – erred in its reasons for reaching the verdict because it doesn't give reasons.

MR LILLICO:

No.

WILLIAM YOUNG J:

So there has to be a difference between a jury verdict and a Judge-alone verdict.

MR LILLICO:

There does.

WINKELMANN J:

If I take you back to my policy question because it does seem to me a rather fundamental issue that lies – if we agree that there's little in the Parliamentary materials to assist us and it is really a policy decision, there does seem to be a question as to why we should devote more judicial resource to civil appeals and checking out validity of the reasoning by a Judge alone than we devote to criminal appeals.

MR LILLICO:

Maybe volume, Your Honour. The District Court, for instance, isn't burdened by the same number of civil trials as it is criminal trials in respect to High Court. Maybe the division is slightly higher but maybe it's simply a volume issue and my friend has adverted to the fact that we can now have a Judge-alone trial of course for a speeding or a traffic matter or a sexual violation. So a great deal of the District Court's business in particular is

Judge-alone trial work, and perhaps that's the reason for it but I'd have to confess not to knowing the answer really. We have to come back to the statute's wording which uses this old phrase which is in fact defined in the section as "miscarriage of justice" and at least in the trial jurisdiction, and we know that '61 was the model and we know from *Owen*, the decision of this Court in *Owen*, that reasonableness is foremost in that when examining verdicts in that jurisdiction.

ELLEN FRANCE J:

Isn't one way of reading (b) that it's simply saying it's not any error that's made, that it's only errors that are such, to such an extent that a miscarriage has occurred?

MR LILLICO:

Yes, it requires materiality which is consistent with the trial jurisdiction, the jury trial jurisdiction as well. The court has to find as well as it being in error, of course, that there's a real risk that the outcome will be affected, whereas the danger in simply arriving at your own view of the case is that you don't allow any appreciation for whether reasonable minds could differ for one thing.

WINKELMANN J:

And the reality that evidence looks quite different black and white on a page than it does as it comes out the courtroom.

MR LILLICO:

Yes, I mean even under section 119, and this didn't receive much attention from my friend, but even under section 119 there was deference where a court was allowed, was explicitly, appellate court was explicitly allowed to come to its own conclusions about the evidence. We had, and the word used before by Your Honour was "deference", maybe in the end there's very little between – and I don't know of any cases that really attempt to define what "deference" actually meant apart from statements about cases involving credibility. So perhaps in the end we're not too far apart if we allow room for deference on the one hand in the 119 Summary Proceedings Act view of the

world or the view of the world that I'm attempting to promote here which is resting on *Connell* and the ability for a fuller appeal where reasons can be examined.

WILLIAM YOUNG J:

Austin, Nichols was a case of an evaluative assessment which broadly the appellate courts were as well placed as the Commissioner to reach and the only advantage the Commissioner had was the Commission did a lot more of them which was the reason why the Court of Appeal thought that some attention, that deference, to use a word that's sort of not much in favour now, but that some deference should be shown to the Assistant Commissioner's decision. I don't read *Austin, Nichols* as saying that you simply reconsider credibility findings. Indeed, I think that's put to one side.

MR LILLICO:

No, credibility cases are explicitly referred to as one sort of situation where you can't straightforwardly substitute your own view.

WINKELMANN J:

There is another functional difference between crime and civil, isn't there, which is most credibility findings in civil are firmly based upon documents? There's normally documents to assist a Judge with their credibility pathways.

MR LILLICO:

Yes.

WINKELMANN J:

Whereas in crime there often isn't.

MR LILLICO:

Yes, and I think Justice Glazebrook adverted earlier to the difficulties perhaps in expressing reasons when you're just dealing with viva voce evidence, the difficulties in expressing findings one way or the other about credibility.

WILLIAM YOUNG J:

If you imagine a case of someone threatening to assault another, they meet in a street, one says, “Well, the other person threatened to punch me,” and the other guy says, “No, I didn’t,” the Judge who hears that case will be hearing it devoid of context. It might be quite hard to give a reasoned credibility finding. Most cases, even crime, have a – they almost always have a bit of context. I mean this case has a bit of context.

MR LILLICO:

Yes, and we’ll move on to the facts of the case in a minute and I – and the context was incorporated by the Judge we say in the reasons for the credibility findings, and I don’t want to be taken as saying that the difficulties of expressing, that Judges find in expressing themselves when looking at credibility mean that you don’t have to do it because *Connell*, which we say is still the leading authority, does require you to give a plain statement of the essential findings and if you’re in a credibility case then essential findings must be about credibility and so there has to be something about why the decision was made to prefer one witness over another. It wouldn’t be reasons that were appropriate.

WILLIAM YOUNG J:

All right, I mean I myself, although I’m very strong on the view that reasons should be given and they should be adequate, think it would be fair to accept that it can sometimes be difficult to explain a credibility finding without essentially just repeating it in different ways which to some extent is what the Judge has done here.

MR LILLICO:

Yes. To an extent and I suppose we’ll go into it but at the risk of going into dangerous water again just a point about the legislative history about reasons. My friend said it was a new, well, he didn’t use the word but implied that it was a revolution in terms of – and a new –

WILLIAM YOUNG J:

By 2011 there was plainly an obligation to give reasons.

MR LILLICO:

Yes, and what I was going to say is that a departmental report, because the Bill to that point hadn't, had required appellate courts to give reasons, they hadn't required trial courts to give reasons, the Law Society pointed this out to the Select Committee and pointed out that although this was the practice for trial judges to give reasons in a Judge-alone context and you – and the Bill required appellate courts to do so, it was absent from the Bill as it stood and officials accepted that was a proper point and the Select Committee then amended the statute. So I would say, even though it was new, it was simply codifying practice.

WILLIAM YOUNG J:

All right. Just in terms of the facts and the reasons, as I understood Mr Jones' submission the children said that on the 9th of January there was quite a florid incident which resulted in them barricading themselves in their room. Now do you accept that or not?

MR LILLICO:

Yes, I accept that.

WILLIAM YOUNG J:

All right. If that's the case then –

GLAZEBROOK J:

Can you point us to the evidence on that because it's actually a bit difficult from the transcripts to actually work out what day is what, because I was looking at a barricading in the room but it wasn't really barricading. It was – they were – but I didn't think that that was the operative time. I mean they just said they were in their rooms and had been sent to them, I think, or something.

MR LILLICO:

I might leave that to my learned friend. It's in the transcript that they talked about the barricading and I accept that and both children did so. There is some fuzziness about what day it is and I'm not sure I can take you to the exact –

GLAZEBROOK J:

Well, that's what I wasn't sure about because it wasn't clear to me because there was a hide and seek incident.

MR LILLICO:

The hide and seek incident being much earlier in time, Your Honour, yes.

GLAZEBROOK J:

Yes, exactly.

MR LILLICO:

Yes.

GLAZEBROOK J:

But there was a, well, not barricading but – I don't know whether they used that term.

MR LILLICO:

I might have to defer to my friend on that because I don't have the references readily available. The –

WILLIAM YOUNG J:

Well, effectively, I mean – well, we'll have to sort of make what I'm about to say provisional then. Effectively the Judge dealt with the evidence of the supervisors on the basis that their evidence was not inconsistent with the evidence of the children.

MR LILLICO:

That's fair because she did place – she says explicitly, doesn't she, that she places weight on it but ultimately finds the daughter in particular reliable?

WILLIAM YOUNG J:

Now if it were the case that there was a very florid incident on the 9th of January, it's not particularly likely that that would escape the notice of the supervisors.

MR LILLICO:

No, but the Judge of course was turning her attention to the actual incident which was alleged in terms of the pinching where…

GLAZEBROOK J:

So is the submission there that that was – well, we really need to see the evidence on it because if that was divorced from the rest of it…

MR LILLICO:

So the son says –

GLAZEBROOK J:

I'm actually going to ask a really silly question because I've just realised that we don't have any addresses in here from the – does that occur in a Judge-alone trial? I would have thought so.

MR LILLICO:

We have to ask for leave is my understanding of the practice. You have to ask for leave to make submissions about the law, the Judge being understood to know about the law, but it's usually – it's fairly common.

GLAZEBROOK J:

So they don't make any submissions about facts either?

MR LILLICO:

It's fairly commonplace to Judges, in my experience, for Judges to ask for submissions but technically my understanding is you have to ask for leave. I don't know if they were made in this case.

GLAZEBROOK J:

So effectively there are no submissions made by counsel?

WILLIAM YOUNG J:

Well, not necessarily. Under the Summary Proceedings Act –

GLAZEBROOK J:

Well, it's very odd on a really serious trial frankly.

WILLIAM YOUNG J:

No. But under the Summary Proceedings Act the statute provided for the Magistrate or Judge to hear from the informant and the witnesses called, and the defendant and the witnesses called, and most District Court Judges in my experience took the view that that meant that you were entitled to open the case but there was no entitlement to make closing submissions although they sometimes heard them, particularly if it was a case of any complexity.

MR LILLICO:

Yes, yes, so, and it would surprise me –

WILLIAM YOUNG J:

But has that been carried through? Is this dealt with in the procedure in the Criminal Procedure Act?

MR LILLICO:

It might be in 106, Sir, because that deals with how cases are to be heard, section 106 of the Criminal Procedure Act.

WINKELMANN J:

The Rules. I think it might be in the Rules.

GLAZEBROOK J:

So effectively you're allowed to address a jury on the facts but you're not allowed to address a Judge. It's exceedingly odd.

MR LILLICO:

Well, my memory is better about the summary proceedings approach.

GLAZEBROOK J:

Well, summary proceedings are relatively minor offences though. That's the point.

WILLIAM YOUNG J:

Well, it could be burglary. They could be robbery. This is under the Summary Proceedings Act 1957.

ELLEN FRANCE J:

If you look at 105, conduct of a Judge-alone trial which says, Mr Lillico said, "Unless the Court direct otherwise, neither the prosecutor nor the defendant may make an opening statement other than," a short outline by the prosecutor, in the case of the defendant a short outline of the issue or issues, and then it sets out about the evidence, and then subsection (4), "Unless the Court directs otherwise, neither party may make submissions on the facts or address the Court on the evidence given by either party."

GLAZEBROOK J:

It's very odd.

MR LILLICO:

So just in –

GLAZEBROOK J:

I mean that to a degree might actually militate against the view that you have to in detail go through what the defence was because you actually have no idea what the defence was apart from the questioning.

MR LILLICO:

Yes, and that's perhaps why in a Judge-alone hearing the cross-examination sometimes you will see is very sign-posted and made very clear what are the points being made so that in the event that no submissions are permitted about the case or the facts as the defence see them it might at least be apparent from the line of questioning.

WINKELMANN J:

My understanding that normally District Court Judges do seek submissions and do allow it because of that very point, because it's unfair to the defence. It's not apparent what the defence is. But we don't know if it occurred in this case?

MR LILLICO:

I don't know but –

GLAZEBROOK J:

Well, it doesn't look like it if we don't have them which is what I was –

O'REGAN J:

Mr Jones will know.

MR LILLICO:

Mr Jones will know. There you go, it didn't.

MR JONES QC:

To be fair, there was a very – there was a limited ability to put a timeframe essentially or timeline and there are no submissions on the facts though as such.

ELLEN FRANCE J:

Just in terms of this barricading incident, is that the one where the daughter says, "I put a chair there to lock him away from myself," or is it a different incident? I'm looking at 136.

GLAZEBROOK J:

I thought that was the August incident.

WILLIAM YOUNG J:

Well, what page is this?

GLAZEBROOK J:

The hide and seek incident. But I'm not sure.

ELLEN FRANCE J:

136 of volume 2. It starts off at the top of that page talking about, "The last time you saw your dad."

GLAZEBROOK J:

Maybe it is.

WILLIAM YOUNG J:

It is the last time, and it was on that, she says it's on that occasion, "She called my brother a penis," and that he started swearing. Presumably it was the grandmother there. "And I put a chair there to lock him out and later he came in from the window." I mean it's very difficult with children, it's very difficult when there's a series of incidents which in the mind of a child may sort of be conflated or where their memories of one will flow into another, but if that's the simple narrative it's hard to see that the grandmother and the Spanish visitor and the sister if she was there would have not noticed it.

MR LILLICO:

Although the allegation at its simplest was that there was punching and you'll recall the Judge's reasoning that that sort of thing absent –

WILLIAM YOUNG J:

But it's sort of funny how that would – I mean it would be off if that happened without a context where the father had for some reason or another had a

chance to get angry. It's not very likely that just for the hell of it he would sneak out while the supervisors weren't there and pinch the children.

MR LILLICO:

Although the context would be that, as we've heard, that he's on his best behaviour because he'd won the supervised access from the Family Court and had had his mother and his sisters watching over him, so to speak, and needed to guarantee that the contact continued, and the Judge's reasoning was that perhaps the mask slipped when he was alone with them. The evidence of the grandmother was that sometimes she disappeared into the kitchen. The evidence of the sister was that she only came for lunch.

WILLIAM YOUNG J:

Well, I mean it's conceivable. I agree that it's sort of conceivable that there may have been, you know, momentary periods of time when he wasn't under observation with the children, but the likelihood of an incident of violence, even low-level violence, happening without a context doesn't seem very high, but there's been a chance for some tension to arise, exchange of words.

MR LILLICO:

Well, the son talks about – bearing in mind that there was little weight placed on the son's evidence.

GLAZEBROOK J:

I'm not terribly sure about that timing.

MR LILLICO:

There was little weight placed on the son's evidence, of course, as we've already discussed because he wasn't very clear but in his evidence he doesn't place a lot of context around things. He simply says, and this is in relation to the pinching on the 9th of January, that, "My sister was watching TV too."

WILLIAM YOUNG J:

What's the page, sorry?

MR LILLICO:

I think it's 99 of the notes.

WINKELMANN J:

Is this the 9th of January?

MR LILLICO:

Yes, Your Honour.

WINKELMANN J:

Because this is the period of time when she's watching television when the Spanish lady says she was with them all the time they were watching television. Ms Rojas.

MR LILLICO:

Yes. "You talked about the situation where you were watching TV, and your father came in and sat next to you and you said that he pinched you in the arm. Who was in the room when that happened?" "Um, no one." So…

GLAZEBROOK J:

Sorry, again what page?

MR LILLICO:

It's 99 of the notes of evidence, Your Honour.

GLAZEBROOK J:

And is that the small letters or the big letters?

MR LILLICO:

The big ones.

ELLEN FRANCE J:

I was just going to say the boy's account of the locking in the room is, seems in the evidential video interview to be very similar to the daughter's at

page 181. “We just went into our room and locked the door. It didn’t have any locks but we put a chair on it.”

GLAZEBROOK J:
Which is after the pinching.

MR LILLICO:
Yes, so the venue for the pinching seems to be TV or a lounge-type area whereas the barricading seems to be perhaps a separate incident. The other reference useful perhaps in terms of the daughter is at 143 of the Court of Appeal’s casebook where, and this is the evidence of the daughter – sorry, it’s taking a while to find it. In my note the evidence was that they were watching TV. Here we go, it’s actually page 186. “In the house watching TV.” “What happens next?” “Stopped watching.” “How many times did he pinch you?” So…

WINKELMANN J:
What page is that? 186 of volume what?

MR LILLICO:
Sorry.

WINKELMANN J:
Did you say 186, Mr Lillico?

GLAZEBROOK J:
Volume 2.

WINKELMANN J:
Volume 2, right.

MR LILLICO:
Yes, 186 of the transcript, volume 2. So, in as far as the actual mechanics of the assault are concerned, it’s pinching in a kind of lounge room, TV watching kind of context and that perhaps sits more comfortably with the Judge’s

findings that the grandmother and Ms Rojas in particular, because they were there for most of the time, might have been in another room. You'll recall Ms Rojas' evidence that in particular she wasn't with K the whole time because they were watching a belly dancing video with the daughter and she accepted on that occasion at least that the son wasn't there. So we know that she wasn't with all the children all the time and we know that about the grandmother because she was in the other room preparing a meal and we know it in particularly in relation to the aunt because was only there for lunch. She had to go to work and perhaps and that makes explicable in my submission the finding that, although the Judge gave weight to these people who had some independence, although some investment also because the children were their relatives too, although she gave weight to it and this is at 70 of the judgment, 64 of the case, she ultimately found the daughter to be reliable.

WILLIAM YOUNG J:
I mean, it may be the Judge was just being polite.

MR LILLICO:
And that's referred to isn't it in the case law?

WILLIAM YOUNG J:
Judges often make findings based on mistake when they really think the witness was not telling the truth but let's just assume that these are three witnesses who came along there to tell the truth. Their whole purpose of being there was to supervise the father and if what they say – I mean, it would be odd of them not to have noticed events of the kind that the children talk about.

MR LILLICO:
Yes, and don't we often say in relation to witnesses giving evidence that is on, at points incredible and at points corroborated and supported that –

WILLIAM YOUNG J:

But that's the trouble, the Judge just said, oh, well, it doesn't really matter because these children talk of sort of isolated incidents which could have happened in a flash and they may have been out of the room but that's not really what the children were talking of.

MR LILLICO:

No and in terms of broadly what they were saying was happening, we do have the barricading perhaps on that day.

WILLIAM YOUNG J:

Well, how could that not have been noticed by the three other people or whoever was there, given the purpose for which they were there? If they're honest.

MR LILLICO:

Doesn't that feed into the requirement to give reasons that are adequate to the occasion and the Judge –

WILLIAM YOUNG J:

Yes, that's right and I wondered whether simply saying, well, by implication they're witnesses of truth, but their evidence isn't inconsistent with what the complainants say, was actually fudging the issue?

MR LILLICO:

Well, I'm hoisted on my own petard there because I've said and I think it's right that we can't supply supplementary reasons for a Judge sitting alone who has supplied a judgment but what we can say is that the only requirement on a Judge, if we look at *Connell* which we say is the law here, they're required to give a simple statement of the essential findings. They don't have to, or in the words of the Canadian Supreme Court, you don't have to give, you just have to describe the path to the judgment. You don't have to describe all the landmarks.

WILLIAM YOUNG J:

But the path to the judgment here would have to be reconciling the evidence of the children with the support witnesses or alternatively rejecting flatly the evidence of the support witnesses.

MR LILLICO:

Which she did didn't she by saying –

WILLIAM YOUNG J:

But I don't think she did reject the evidence of the supervisors.

MR LILLICO:

Oh, no, I didn't mean rejecting but she allowed, she saw a path to saying that it wasn't inconsistent with their evidenced.

WILLIAM YOUNG J:

But if that's not a credible path, doesn't that mean the reasons fail?

MR LILLICO:

Sorry Sir?

WILLIAM YOUNG J:

That's not a credible path. If the path she identifies is in fact incredible, not plausible, doesn't that suggest a failure in the reasons?

MR LILLICO:

Well, both children said that they had – broadly speaking, both children had said that that there was pinching. They corroborate one another.

WILLIAM YOUNG J:

Yes, I know that. I mean I accept there was an evidential basis to convict. I have no difficulty with that.

MR LILLICO:

Yes.

WILLIAM YOUNG J:

What I don't like is the fact that the reason for not finding in favour of the supervising, not allowing a defence based on the evidence of the supervising witnesses, doesn't seem to me to make much sense.

GLAZEBROOK J:

Unless she's just saying, well, the pinching could have taken place and I don't need to decide what happened afterwards.

WILLIAM YOUNG J:

If she'd said that I could perhaps have – it would have been less trouble. If she'd said, "Well, they're not really talking." It just seems to me their evidence is inconsistent with the sort of kerfuffle that the children suggest occurred.

MR LILLICO:

I think the only answer I can give is that –

WILLIAM YOUNG J:

It could have been better expressed.

MR LILLICO:

It could have been better expressed and the Canadians would say that's a landmark. The path was given. You don't need to talk about the landmark.

WILLIAM YOUNG J:

Well, I've put the point to you I hope clearly enough.

MR LILLICO:

Just two very specific points about the evidence. One is in relation to my friend's submission that the email saying that – the email between the two parents with mother saying that there had been abuse before the 9 January visit, so you'll recall the discussion about that. There is – it's not very clear, the Crown couldn't put it, the police couldn't put it too highly, but there is suggestion in the evidence, the strongest reference is probably in the son's

evidence, in the notes at page 115 and 113, where the interviewer tries to orientate the son in the three visits and he says pretty clearly, he doesn't give a lot of contextual information about how the pinching was done, but he says pretty clearly at 115 and 113 that there was pinching on the second occasion which he's able to do in reference to third occasion being the last time he saw his father. So that's a reasonable indication from him at least that there were other allegations about those last three contact visits. So the submission really is that positing that email as a lie might be or is too strong.

There's a reference also in the daughter's transcript at 151, page 151 of the transcript, where she talks about other things, and I think by "other things", if you refer back to page 150, she seems to be talking about the incident on the trampoline that we discussed earlier, the kissing on the head and so forth. She seems to be saying that that happened a week before the last occasion, the 9 January occasion. So again there is some suggestion in the evidence that at least the second visit might have been problematic although the 9 – it was the last visit, the third visit, that was the subject of the specific charges.

I think we may have covered this already but just to be sure, the Judge's reference to temper, I think we've covered that.

WILLIAM YOUNG J:
Well, it's a bit ambiguous but if the Judge made an error it would hardly be material one.

MR LILLICO:
No, and I think we have covered that and that was the evidence from the mother about emotional ups and downs and the gender that she used and perhaps the difficulty with language. But those are the specific points I wanted to make unless I could assist any further.

ELLEN FRANCE J:
Just going back to the standard of review, a concern I have on your approach is that what you end up with is irrationality, if that's the right word, and then

some sort of mistake at either end of your spectrum and the Court can intervene in those cases but that there's somehow some area in between that where on your approach there wouldn't be a miscarriage. Am I wrong in that?

MR LILLICO:

Do you mean, Your Honour, where the Court stands back, looks at it, comes to a view that the Judge got an aspect wrong but nevertheless couldn't peg it to some sort of irrationality?

ELLEN FRANCE J:

Yes, or there's no sort of obvious mistake, if you like.

WINKELMANN J:

Error on the face of the record, really, is what it's kind of like, isn't it?

WILLIAM YOUNG J:

I suppose the issue really is how do you discern error?

MR LILLICO:

Yes, well, I think I'd – that is what I'm saying because the reasons are only providing grounds for a retrial if that kind of irrationality is able to be discerned on the face.

WINKELMANN J:

Why do you say that the standard of miscarriage of justice helps you with that argument because I don't see the connection, necessary connection?

MR LILLICO:

Well, because the standard miscarriage of justice imports materiality and we usually say, don't we, in relation to –

WILLIAM YOUNG J:

But it also imports in some context an evaluation by the court itself. I mean I really don't think that helps you at all, I mean a device in *Matenga* case, miscarriage of justice was seen as implying a requirement for the Court to

satisfy itself that the verdict, the guilty, that the appellant was guilty. That is, of course, presuming it would come kick in only if an error had been shown in advance of that question.

MR LILLICO:

I'm not sure I can take it too much further. The point is I've already made it. I can't make it any better in relation to the reasonable minds differing.

WINKELMANN J:

Can I also ask you about there's a reference, where is it, to *Herewini* in one of the standards, one of the documents in the history? Is it in the –

GLAZEBROOK J:

That was the select committee report, I think.

WINKELMANN J:

In the select committee? Because –

GLAZEBROOK J:

No, that was the explanatory note.

MR LILLICO:

It was the explanatory note, I think. Yes, they even went to the trouble of repeating a large chunk from it, Your Honour.

WINKELMANN J:

Because in *Herewini* the Court said, "The appeal Court may come to its own view on questions of fact and law," didn't it?

MR LILLICO:

It did, yes, and so my point about *Herewini* is that even in *Herewini* deference was paid especially in relation to credibility and we just – if we're standing back, reaching our own view and simply making our own view the reason for the appellant judgment or the centrepiece to the appellant judgment, there

doesn't seem to be much room for paying that kind of deference to trial judges' assessment of credibility.

WINKELMANN J:

Well, even *Austin, Nichols*, although I know the word's not fashionable, but that's what really it's about. It's saying that the – it acknowledges that you have to show an error. That's the whole concept of the appellate, of the appeal process, and it does allow that sometimes the trier of fact is in a better position than the appeal court and it's a – and I mean the Australian authority has quite extensive discussion about the fact that you have different levels of deference depending upon the process. It's a functional inquiry.

MR LILLICO:

Yes. I suppose a more difficult area is if it's not a credibility issue as such, the trial judge from proven facts draws an inference and then that's an inference that the reasonable minds could differ on that. That might be more difficult and what we would say is that if we're going to have deference for credibility we should also have deference and a reasonable appreciation of Judges as, all Judges, as professional fact finders and as – and for the allowance for reasonable minds differing.

GLAZEBROOK J:

Yes, except that the question then comes which Justice Winkelmann asked you earlier that why would that be different in a civil case, because it would be different in a civil case if you had 10 documents and that was all and no credibility issues, merely an issue of interpretation of the documents and inferences drawn from them, then there would be no question but *Austin, Nichols* would say if the appeal court comes to a different view then ipso facto the trial judge was wrong.

MR LILLICO:

Yes, and I don't think I –

GLAZEBROOK J:
So why should that be different in a civil case?

MR LILLICO:
Yes, and I don't think I've done any better than the answer that was already supplied for me by Justice Winkelmann which perhaps it's a volume issue. I don't know the answer to that on a policy basis.

WILLIAM YOUNG J:
But in truth, I mean in any case if it's just a matter of documents, a court would probably, an appeal court would feel equally able to make a decision on it.

MR LILLICO:
In the same position.

WILLIAM YOUNG J:
I mean the problem is that virtually all criminal cases involve credibility issues and –

O'REGAN J:
And usually only viva voce evidence as well.

WILLIAM YOUNG J:
And usually viva voce evidence with some context but nothing like the context we get in most civil cases.

WINKELMANN J:
So you said you didn't think there might be much between it. Perhaps the answer is that if the answer is – perhaps the answer is that it's deference that effectively we can't replicate the experience the trial judge hearing the evidence comes out as it does and seeing the witnesses.

MR LILLICO:
Yes, well, we'd support the use of the word "deference". The only difficulty with it from the Crown's point of view is that the only example that is usually

given of deference is the credibility call, although I suppose another example, just harking back to *Stichting Lodestar* itself, is specialist tribunals, but perhaps the third example of deference should be where inferences are drawn and reasonable minds can differ.

GLAZEBROOK J:

But the trouble is that is the case in civil cases as well, reasonable minds can differ on an evaluative basis, but if the appeal court is in exactly the same position as the trial court then why should it not be the appeal court view that prevails? So why is there a reasonable minds can differ?

MR LILLICO:

Well, perhaps because in the Criminal Procedure Act and the Crimes Act we're using error and it's very difficult to call or to label a situation where reasonable minds differ an error. It's simply an ordinary incident of intellectual life that reasonable people might disagree with one another. Calling it an error seems strained and unlike the civil statutes, I suppose, we've got a criminal statute which focuses in on error, a material error, leading to a different outcome and perhaps that's the source of the difference.

ELLEN FRANCE J:

I think the difficulty is that what you're talking about in 232(b) is an error that has created a real risk that the outcome of the trial was affected. So if that's the sort of error you're talking about, I'm not sure how you can then say all reasonable minds would differ on that.

WILLIAM YOUNG J:

If reasonable minds would differ, it's not an error. I mean that's the view. If on the evidence, if we look at this and say, well, a reasonable person may have thought that Mr Sena, you know, was telling the truth and we can put our hands on the transcript and say, okay, he's plainly a straightforward guy, it would be hard for us to say but the Judge wasn't entitled to prefer the evidence of his wife, and although we might take a different view we're not persuaded that she was in error.

GLAZEBROOK J:

No, but I think we're talking about this because I think we've accepted there has to be some deference in respect of that but I think we're talking about the – say it was just completely documents and you could take one inference from it or another inference.

WILLIAM YOUNG J:

Well, then it would be plain if it was – the plain – you'd been – the appeal court's verdict wouldn't really, would be as in as good a position to reach a view as the trial court.

GLAZEBROOK J:

So if it came to a different view, even if it thought reasonable minds could differ, there's an error because it would be counter-argument to Mr Lillico's argument.

WILLIAM YOUNG J:

Well, I think that would be the case.

O'REGAN J:

But in this case in the High Court Justice Downs throughout talks about things being open to the Judge or an available conclusion or something.

MR LILLICO:

So therefore Justice Downs didn't spot the kind of lack of logic or coherency or irrationality that Justice France is talking about and he can find himself or allowed a margin of appreciation for the Judge's view of the evidence which we say is appropriate. It's a – it might be a rehearing. It probably is a rehearing but it's not a retrial. You don't get a new trial in the High Court, a new trial in the Court of Appeal, a new trial in this Court.

O'REGAN J:

Is the same – yes, I suppose it doesn't matter where the appeal is, does it? It's just a first appeal so it doesn't matter whether it's from the High Court to the Court of Appeal or from the District Court to the High Court.

MR LILLICO:

The only distinction would seem to be in relation to this Court in terms of the use of the word "rehearing". But they're all reviews. They all might well be rehearings. They're not –

WILLIAM YOUNG J:

But our decision, our function here is to rehear the appeal before Justice Downs.

MR LILLICO:

Is to rehear, yes.

O'REGAN J:

Exactly. We're hearing the decision from which we are dealing with an appeal, not the original trial decision.

MR LILLICO:

You're rehearing, yes. But it's never ever a re-seeing, and I suppose that's the distinction. We never re-see the witness and get the chance to assess those kinds of – the information that's given by seeing a witness cross-examined.

WINKELMANN J:

Did Justice Downs go beyond an error on the face of the reasoning in the judgment though, because he didn't really look at the argument that there were – that the reasoning didn't stand up when you looked at the rest of the evidence, did he? Or did he? That's the question, did he?

WILLIAM YOUNG J:
He did in a conclusory way.

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
He said we all know that in familial cases evidence of lack of opportunity isn't very convincing. That's basically what he said, I think, isn't it?

MR LILLICO:
No, although interestingly the Judge herself, that wasn't her reasoning for dealing with the opportunity aspect, was it?

WINKELMANN J:
I think it was.

MR LILLICO:
We've already discussed that, but – so in that sense Justice Downs' remarks could be described as conclusory, but the Judge did try to navigate exactly what the defence witnesses were doing and what they weren't doing and –

WINKELMANN J:
Well, what about the – how did he deal with the argument, defence argument, that the mother had – that the children's evidence was explained by the level of animus that the mother had created toward the father?

MR LILLICO:
I think his reply to that, if I'm right in remembering, is that it's equally, I think it was an argument that popped up in discussion with my friend, that that behaviour might be explained by, for instance, the daughter's dismay at not being protected by her father.

WINKELMANN J:

Well, actually, how he dealt with it he said was that the Judge did address it but when I looked at where the Judge has addressed it it didn't seem to me, and reasonable minds might differ on this point, that she had addressed it.

MR LILLICO:

I don't think Judge Henwood dealt with the idea –

WINKELMANN J:

Because she says she found the mother genuine in trying to protect her children. It seems that there's – but there's another issue and she might been trying to protect her children but she might have done something – what did she do to protect her children?

MR LILLICO:

Yes, I think the most that is said about that…

GLAZEBROOK J:

Well, of course, it does come down to the real difficulty of there not being cogent submissions on one side or another because effectively that's saying, well, she should have guessed that the real thing was to say it had all been fabricated by the mother. But I'm not sure the questioning actually went quite that way.

MR LILLICO:

Although that was, that particular point, the – it's not coaching but the poisoning theory – was understood by the District Court Judge.

GLAZEBROOK J:

Well, I understand that but she had to sort of infer it from whatever and…

WILLIAM YOUNG J:

She could have asked for submissions.

GLAZEBROOK J:

Well, to be honest I think they should ask for submissions in the circumstances.

WINKELMANN J:

And I think they normally do.

GLAZEBROOK J:

I mean obviously you don't in circumstances where it's did the car crash into the back of the other car or whether was the person speeding, but…

WINKELMANN J:

I think they normally, in a complex case, any case of any complexity, submissions are normally allowed.

WILLIAM YOUNG J:

Can I just take you, just to go back a point, take you to volume 1, page 36? This is Justice Downs dealing with the supervising witnesses. It starts at page 35. The Judge noted that Mr Sena's sister was only present for two hours and did not see Mr Sena slap the boy in June. And then 67, open to place little weight on the evidence. Bias was an issue. According to S, the grandmother was an untruthful witness. The grandmother saw the June slapping, in turn implying that Mr Sena was untroubled to act in this manner in front of her. Then Ms Rojas isn't an independent witness, is effectively what he says. And then, "Experience suggests a defence based on absence of opportunity often lacks realism." Now that's not really the analysis of the Judge. I mean she hasn't said that the grandmother's a liar, she hasn't said that Ms Rojas is coming all the way from Spain just to help out her sister's friend. So he's really said the Judge rejected the evidence of the supervising witnesses, as I read that. And which would have been a stronger conclusion if that's what the Judge had said she'd done. Now I suspect that Justice Downs may be right, but if she was going to reject her evidence she really had to say so.

MR LILLICO:

Yes, and I think the – well, you mentioned earlier, Sir, that the difficulty of calling a spade a spade in a credibility assessment, especially in a case like this where –

WILLIAM YOUNG J:

There is an old case that refers to that. I mean I can remember there was a case but I can't bring it to mind.

GLAZEBROOK J:

I think that case might have said you should do it politely but I think later it was said or I think it was said, well, if you're going to reject it you need to – yes.

WILLIAM YOUNG J:

No, it's an older case. It's from the 70s or 80s, I think.

MR LILLICO:

Because you can see particularly in a case like this where, of course, there's been criminal proceedings and Family Court proceedings but they're all, it's an extended family and people have to try and pick themselves up and maintain relationships afterwards, and you can see why it – or the – perhaps even if Judge Henwood was thinking that Ms Rojas was somehow some sort of ring-in or that the grandma was lying, that she needed to find another way to express things and she –

WINKELMANN J:

Well, didn't it have to be put to Ms Rojas that she was a ring-in? I don't think it was, was it? It was not put to her she was –

MR LILLICO:

I think it was highlighted that she was a friend of the paternal aunt's.

WINKELMANN J:

In the cross-examination?

MR LILLICO:

Yes.

WINKELMANN J:

But don't you need to put it to the witness that therefore you might be making things seem, sound better than they are if you're going to then invite the Judge or if the Judge is then going to disbelieve that evidence?

MR LILLICO:

Well, particularly if you're not going to make submissions, Your Honour.

WINKELMANN J:

If you're not going to make submissions, yes.

MR LILLICO:

So Judge Henwood's, the trial Judge's analysis of the facts are probably a lot more conservative because she attempts to rationalise the fact that a pinch could have happened while the supervisors weren't present.

WINKELMANN J:

Would you accept that what Justice Downs has done is he's taken the approach the Court said in *Wenzel*, "You may not approach," which is fixing up the reasoning a little bit for the Judge and coming to a different basis for the conclusion?

MR LILLICO:

Yes, but Judge Henwood's judgment stands by itself and didn't need defending in that manner.

WILLIAM YOUNG J:

All right, is there anything else you want to say?

MR LILLICO:

No, that's really the submission, thank you.

WILLIAM YOUNG J:

Okay, thank you. Thank you, Mr Lillico.

MR LILLICO:

Thank you.

WILLIAM YOUNG J:

Mr Jones. Can I just ask you sort of an unrelated, a question unrelated to the submissions? Presumably Mr Sena speaks Japanese?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

So –

MR JONES QC:

Actually, actually I've never spoken Japanese to him. I've never heard him speak Japanese and I presume he must but frankly I haven't asked that question.

WINKELMANN J:

Someone says that he speaks both Japanese and Korean, yes.

MR JONES QC:

I think one of the daughter's says Korean and Japanese.

WILLIAM YOUNG J:

Well, his mother speaks Japanese.

MR JONES QC:

Yes. He's Korean Japanese. He's…

WILLIAM YOUNG J:

Well, it's just a bit odd that he and his wife communicate in reasonable but far from perfect English rather than Japanese. You don't know why?

MR JONES QC:

I don't know why.

GLAZEBROOK J:

Maybe they can't write it.

WILLIAM YOUNG J:

Right, maybe, yes.

MR JONES QC:

Your Honour asked about any post-Criminal Procedure Act decisions concerning reasons. There's a High Court decision of Justice Wylie *Te Heu Heu v Police* [2014] NZHC 329 which we can certainly get and provide to the Court.

WILLIAM YOUNG J:

Well, you don't need to do that. We can locate it. And does he add anything to the mix that we've really got from – I mean *Creamer's* a reasonably good case and I mean I don't think the obligation to give reasons has changed much between 2006 and now despite the interposition of the Criminal Procedure Act.

MR JONES QC:

No, no, it probably hasn't although it's obviously been formalised. Just to the point that's just been discussed, paragraph 67 of Justice Downs' decision about the grandmother not being a truthful witness. As I read it, His Honour is reciting that according to S she was an untruthful witness, as opposed to any finding that she was. That's at page SC030 –

GLAZEBROOK J:

But I think he's saying that the Judge was entitled to accept that evidence.

MR JONES QC:

In my submission –

GLAZEBROOK J:

But the question is whether she did accept it, that's another matter.

MR JONES QC:

Well, the thing is this, there are the various issues already raised in terms of the grandmother's reliability and credibility vis-à-vis the daughter. So that squarely puts this into issue because if the daughter is saying she's telling porkies, then the issue of the grandmother's credibility is well and truly before the Court and it's simply not ruled on.

ELLEN FRANCE J:

The cross-examination though of Ms Rojas doesn't really suggest does it that she's lying? It's more putting to her that she's out of the room at various points in time.

MR JONES QC:

Yes, the prosecutor –

ELLEN FRANCE J:

Because it's relatively short.

MR JONES QC:

Yes, the prosecutor appreciated it. It seems that it was more directed towards opportunity and the ability to monitor, as opposed to anything else.

WINKELMANN J:

And if this quite complex scenario that S described of barricading herself in the room and her father saying these various things. If the Judge you say needed to address that, whether she accepted Ms Rojas' evidence that really

nothing untoward happened, she was with her most of the day looking at belly dancing on the TV. So when she went through that assessment the Judge then would have to conclude whether or not she was satisfied that occurred and she also had to think what it meant to her assessment of S's credibility more generally didn't she?

MR JONES QC:
Yes.

WINKELMANN J:
Because she gave a very detailed account of something which is very significant.

MR JONES QC:
Yes, and that brings into focus the issue of opportunity to even have gone and done the, it's my word barricading, putting the chair against the door to prevent entry but it is the precursor to that as well which, excuse me, it's already been referred to, page 136, pardon me, this is volume 2, this is the transcript of the video interview, 136 so it's volume 2. Now, this is the interview on the 1st of March 2016. So it is a little under two months after the 9 January visit and if we go to 136 we look at line 7 and she is being specific, "So last time I visited my dad," and this when she talks about, "Like in public he's always nice, acts like he's really caring, actually really terrible," et cetera. That's something the Judge picked up on and said in the, or referred to in the, judgment but didn't then look at the following where she then talks about, "Doing my own things in my room. My brother, he was playing." Talks about him coming in and that is when she says the grandma came in and calling the brother a penis and then the locking of the door, the barricading in with the chair. And the son refers to it at page 181 and again, this is video interview on the 1st of March 2016 and at page 181, line 24 and he talks about in the first line, "The last visit." Talks about, "Pinching him on the arm, turned red, started to turn into a bruise, started to pinch my sister as well. We just went into our room, locked the door but didn't have a lock," so he put the chair on it.

So, it is all part of the allegation of pinching, this putting themselves in the room which in my submission doesn't bear scrutiny.

Now, if I can briefly come back to the wording of section 232(2)(b). The words or the particular words that we're dealing with are the words, "Assessment of the evidence," and in my submission that obviously includes conclusions in terms of what evidence is accepted because the only reason that any court is going to be looking at the evidence is if there's been a finding of guilt. But it's broader in my submission as well because the term is assessment of the evidence as opposed to reaching conclusions. So it's the assessment of the evidence in terms of potentially all of the evidence, including material that has not been properly dealt with. So it's a broader concept in my submission.

WILLIAM YOUNG J:

Just tell me how do you say we should look at a sort of de novo consideration of the evidence, what should we do? Should we, probably what I'd do is I'd actually do something like you've done with a timeline, I'd break the evidence down, I would identify the evidence referable to each incident. I'd then also more generally look at the whole, the contextual evidence. But how am I really going to form a view as to whether the wife is a sort of difficult manipulative woman who is putting children up to tell lies about their father so she doesn't have to deal with him anymore or whether the father is a man who's short in the fuse, strong sense of entitlement which is consistent with one or two of his emails, and inclined occasionally to use a low level of violence against the children when he is cross. I mean, how could we sensibly engage in that task?

MR JONES QC:

Is the import of the question how can that been done on the record, as opposed to seeing the witness?

WILLIAM YOUNG J:

Yeah, how can it be done sensibly on the record?

MR JONES QC:

Well, the record is used in all appeals and so any appellate court has to undertake that function.

WILLIAM YOUNG J:

I agree we have to assess the evidence, we have to understand what the Judge did by reference to what the evidence is.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

But how could we, let's say the Judge had given a great judgment that had met all my sort of criticisms and she'd broken it down incident by incident and she gave seven or eight reasons for preferring the evidence of the children and the mother and each of those reasons was credible in the sense that there was nothing tangibly wrong with it. How could we really reconsider her verdict, how would your sort of reconsideration work?

MR JONES QC:

Well, in the example Your Honour's given, there wouldn't be much chance of having an appeal if it's all been done properly.

WILLIAM YOUNG J:

No, no, but if all you could say is, she's reached the wrong decision, I accept all her steps are plausible and they're devoid of any obvious error. The fact of the matter is, Mr Sena's innocent and she should have recognised it. Now, how would we engage with that sort of argument?

MR JONES QC:

That's a situation without context, in terms of what the evidence would be. Clearly to put an appeal on the basis of the Judge has got it wrong, you need to hang your hat on something, as opposed to simply saying, well, she should

have come to a different decision, because that's my view and that's my client's view. That can't possibly –

WILLIAM YOUNG J:

Well, I agree that you might, even on my approach say that in fact the finding of guilt isn't plausible when you look at the firmly established reference points that lie all around the area of controversy. It just doesn't make sense to think that events happened in the way in which the complainant said. So that's fine. But here, you draw one set of inferences from the emails. I'm perhaps inclined to see it slightly differently or at least in a more fuzzy way. You say why would he do this with his supervisors there and I think well, perhaps they're telling lies. So how would we really reconsider the case if we're not sort of firmly anchored in the Judge's reasons but we're just really starting afresh?

MR JONES QC:

The evidence has to be considered as a whole so starting afresh is probably what has to be done. The difficulty is, as far as this case is concerned, that there weren't findings of credibility against –

WILLIAM YOUNG J:

But we're just going to have to – but on your approach, but when it comes to the appeal court, you just put the Judge's reasons to one side. All you look at is whether the verdict was correct.

MR JONES QC:

Yes, but reasons obviously inform whether or not the decision was correct. That must be part of the evaluative process. It's part of the deliberative process.

WILLIAM YOUNG J:

I thought it wouldn't be on sort of the strict approach, sort, if the strict approach adopted in *Austin, Nichols* is applicable to credibility finding, which I

actually don't think it is, I don't see why you'd pay any attention to what the Judge thought at all.

GLAZEBROOK J:

Well, *Austin, Nichols* allows you to but doesn't require you to, although that is specialist tribunal so maybe it actually doesn't quite allow a difference.

WILLIAM YOUNG J:

In the old days, even despite my vast age, before my time, essentially that's what the Supreme Court did do on appeals under the Justices of the Peace Act. They just started afresh. What the Magistrate has said was of no moment.

GLAZEBROOK J:

Well, actually, a bit like the Employment Court model.

WILLIAM YOUNG J:

Or the Employment Court or the Environment Court on appeal from a local authority. So it's not an unknown process.

MR JONES QC:

No.

WILLIAM YOUNG J:

It's just unknown to me since 1957 in relation to criminal appeals.

MR JONES QC:

I suppose the difficulty with that is that the Court of ultimate appeal would be inundated with everything because nothing else below would matter. All you'd need is a record.

WILLIAM YOUNG J:

It's sort of an inverted pyramid. So…

O'REGAN J:

It becomes a practice run for the appeal.

MR JONES QC:

That's right. If you have two appeals, the ability to have appeals, then you'd simply go, "Well, who cares what happens at the first instance in the first appeal. We'll go for the second."

WILLIAM YOUNG J:

That sort of concession may imply your heart's not really in this argument.

MR JONES QC:

Certainly. I'm simply looking at it in the way that Your Honour's putting it forward.

WILLIAM YOUNG J:

You're trying to put yourself in my shoes.

MR JONES QC:

Well, the thing is this the first instance court is seized of the responsibility of hearing the evidence and coming to a decision. The first appeal court is seized of the responsibility of seeing whether or not the first Court got it right, if I can use those terms.

WILLIAM YOUNG J:

Well, another way of putting it, whether it could be said the first Court got it wrong, which is perhaps a slightly different formulation.

MR JONES QC:

Yes.

O'REGAN J:

I think it's the latter because it does talk about error, doesn't it?

MR JONES QC:

It does talk about error. So on the face of it you have a court of competent jurisdiction that's made a decision and then the appeal court looks at it and it's for the appellant to make the running in terms of pointing to problems in the evidence and/or the reasoning so that –

WINKELMANN J:

It has to be the reasoning. It has to be linked to what the Judge did because it has to be the Judge's error, so you can't just build a completely new case.

MR JONES QC:

Well, it has to be, it doesn't have to necessarily be the reasoning in my submission. It can be the conclusions reached because that's part of the assessment. That's why the wording assessment of the evidence is important and that could be in terms of whether or not evidence is diluted in terms of its importance or significance or elevated the wrong way.

WINKELMANN J:

It still goes to reasoning but you're saying it's not limited to how it's articulated in a judgment. It could be a failure to look at things.

MR JONES QC:

Yes, an omission –

WILLIAM YOUNG J:

But doesn't your argument go the point where if the appeal court thinks the Judge, that the proper verdict was not guilty, the fact that the Judge found the defendant guilty is an error?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

And that –

MR JONES QC:

If the appellate court's assessment of the evidence –

WILLIAM YOUNG J

Is that the proper verdict was not guilty.

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Then whatever the Judge says, however plausible and – are the Judge's reasons –

MR JONES QC:

Yes.

WILLIAM YOUNG J:

– an error has been established.

MR JONES QC:

And in that case, yes.

WILLIAM YOUNG J:

But that's going to be almost every case, isn't it? Isn't that argument going to be available in almost every defended case?

MR JONES QC:

Well, the argument will be available but the reality would be that probably in nine cases out of 10 it's not going to succeed.

WILLIAM YOUNG J:

But isn't the Judge – might we not get to the point where counsel for the appellant says, "Well, your task is to decide whether this decision is correct or not. You'd better rehear the evidence because you can't really do that on the papers."

MR JONES QC:

Well, I don't imagine that that would be allowed.

WILLIAM YOUNG J:

Well, I don't imagine it would either but I'm not sure what the basis for saying no is. If you're right and the appellant is entitled to a complete essentially de novo consideration of innocence or guilt…

WINKELMANN J:

Isn't your answer the provisions of the Act which prevent you having a new, having – it doesn't allow a rehearing of the evidence. It's simply on the record – apart from the –

MR JONES QC:

It has to be on the record. The other thing is this.

WILLIAM YOUNG J:

But there is a power to call further evidence, isn't there?

MR JONES QC:

Sorry, Sir?

WILLIAM YOUNG J:

There must be a power to –

WINKELMANN J:

Admit fresh evidence, I think.

WILLIAM YOUNG J:

– admit – well, can't you – certainly under Summary Proceedings Act you could rehear the charge, could rehear –

MR JONES QC:

Yes, you could rehear but no one ever did. Well…

WILLIAM YOUNG J:
What's the Criminal Procedure Act say?

WINKELMANN J:
Was it the Rules?

WILLIAM YOUNG J:
Is it the old Crimes Act provisions or is it more akin to the Summary Proceedings Act provisions?

MR JONES QC:
It's on the record and there's an ability to have fresh evidence but then the *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 criteria come in.

WILLIAM YOUNG J:
Okay, so it's effectively the old Crimes Act approach to new evidence, not the Summary Proceedings Act.

MR JONES QC:
Yes.

WILLIAM YOUNG J:
Okay.

MR JONES QC:
But the interesting –

WILLIAM YOUNG J:
Well, that might point a way for the argument then, mightn't it?

MR JONES QC:
Well, in my submission no because it seems when we boil it down the only difference between the court, on appeal, and the court, at first instance, is that the court at first instance has had the ability to see and hear the evidence being given. That seems to be the critical issue and that's where we get to

the issue of deference and what deference should or could be given to witnesses at first instance. Now in certain cases there may be instances where deference needs to be given and should be given if there is a close call, but in my submission if you have the phrase which I personally have issues with about reasonable minds may differ, when you're talking about the criminal standard of proof, if you have a reasonable mind thinking, "That guy is not guilty."

WILLIAM YOUNG J:
I might just – but I mean in a way I don't think appeal Judges normally say that. I suppose my view might be, I don't know whether this person is guilty or not. I'm not going to form a view they're not guilty. What I'm going to look at is whether the process was appropriate and whether the evidence supported the finding that was made.

MR JONES QC:
Well that's the *Owen* situation, in my submission.

WILLIAM YOUNG J:
Yes, I know that's the *Owen* approach.

MR JONES QC:
In my submission the Court needs to go further.

WILLIAM YOUNG J:
Well, I would go further and I'd say do the reasons stack up?

MR JONES QC:
Yes, my friend has just referred me to section 334 of the Criminal Procedure Act which refers to the Summary Proceedings Act as part of the footnote. So that's the power to receive further evidence. But in terms of the difference between civil appeals and criminal appeals, for example, when the liberty of a person is at stake as opposed to some civil remedy, in my submission there's a greater imperative for the Court to consider matters carefully and to throw

resource at civil appeals as opposed to criminal appeals seems somewhat wrong.

Now there was an aspect of the discussion about whether or not the –

GLAZEBROOK J:
So is there power to rehear the whole or any part of the evidence?

MR JONES QC:
Yes. That goes back to the Summary Proceedings Act. About how it was put to the mother and whether the Judge knew what the defence was going to assert, if I can refer the Court to the case volume 3, this is the evidence, at page 152, it's page 152 just after the – where it says, "Cross-examination continues," it's put to the mother, "You didn't want the children to go back and see their father or his family, did you?" This is cross-examining the mother. "Yes, that's correct." "You wanted to cut them out completely from their lives." "Yes." Then it goes up to the top of page 153.

WINKELMANN J:
Well, also you communicated it to the children.

MR JONES QC:
Yes.

ELLEN FRANCE J:
It's at 153, so I don't – the poisoning line.

MR JONES QC:
Yes, the poisoning line is 153 about line 20-something. So it was squarely put that the mother was looking to have the children for herself and take them away from the appellant.

GLAZEBROOK J:

And at the bottom of 153 she denies poisoning them against it. She said she doesn't want to give them any wrong idea.

MR JONES QC:

Yes. That's what she says, yes.

GLAZEBROOK J:

Which is what the Judge accepted being her motive.

MR JONES QC:

Yes. The Judge – it refers to that at – this is in volume 1 – SC062 at paragraph 61. So she makes – and the Judge makes a generic finding about the mother but doesn't address issues concerning the emails as such. She refers to earlier emails, indicating a background of difficulties, but that relates it seems to the 2014 emails and no suggestion of anything to do with the 9 January email or those subsequent which don't refer to any reference to complaints or anything of that sort.

WINKELMANN J:

And do you say she should also no doubt express you with your defence line that in fact the children got the ideas from her in her poisoning of them?

MR JONES QC:

It should have been – well, it doesn't need to be put necessarily in such a way but –

WINKELMANN J:

Well, she relies on the fact the children give effectively the same account and your defence was of course they gave the same account because they were being influenced by their mother.

MR JONES QC:

Influenced, yes. I wouldn't say the – that poisoning was my word, but certainly influenced by the mother. Interestingly –

GLAZEBROOK J:

Although I don't think you put to them they – or that she had given them the story, did you?

MR JONES QC:

I –

GLAZEBROOK J:

Not at least at 152 and 153.

MR JONES QC:

Well, that's the bit about poisoning them against the…

GLAZEBROOK J:

No, I understand that but you didn't say, "And you told them to say this and you made it up and coached them," which I don't think was your allegation in any event.

MR JONES QC:

No, well, it didn't need to be because the reliability and the credibility of the children was key and the mother was certainly an integral part. The children could have made things up on their own. We simply don't know. The allegation is from the defence perspective that what they said was simply untrue.

ELLEN FRANCE J:

You do put to – now which one are we in? The boy, for example, "Has your mother told you to say bad things about your dad?" Page 104 of the notes of evidence.

MR JONES QC:
Yes.

ELLEN FRANCE J:
“You took a while to answer that – any reason?”

MR JONES QC:
Yes, that’s when I should have said, “You didn’t answer that for about 15, 20 seconds, did you?” so it was in the record, but it’s implicit in that.

There’s evidence from the daughter which – I’ll just refer the Court to that.

ELLEN FRANCE J:
I think you’ve asked the same sort of question of her at page 71.

MR JONES QC:
Yes, towards the bottom of the page, doing what the mum tells you to do, “Has your mum told you to say these things about your dad?” Now she denies that, of course. So it was put in that way but equally it may be something that has originated from the children but the issue is the reliability and the credibility.

Just while we’re on page 71, we can see at about line 10 where it’s put to the daughter about saying in the second interview that, “You would complain to your grandmother and she’d do nothing?” “Yes.” “Is that true?” “Yes.” “You said she didn’t care?” “Is that true?” “Yes.”

Then over the page at 72, it’s put to her that there was no pinching and no slapping of the son, her brother, and then reference to the evidence that the daughter had given about being pinched so hard she thought it might bleed. No one saw the redness. And then when asked, “If that happened why didn’t say you to somebody,” et cetera, and she said, “I did, to my grandmother,” and then it’s put to her squarely that she had complained to the grandmother and she said, “Yes.” “So if she comes along to Court and gives evidence,

says you didn't complain, is she telling lies?" "Yes." So, and the grandmother did in fact come along and say just that. That's at page 247 at line 8 through to about 15. It's the grandmother's evidence.

Now there's also one further excerpt which I just want to refer the Court to. Yes, page 68 of the notes, same volume, volume 3. It's towards the bottom of page 68. This is a reference to the mother telling the daughter it was going to be the last time she visited. She says, "I don't think so." "Is it possible she did?" "Don't remember." Asked about giving the watch back. "Yes." "Why?" "I just didn't want it any more. I just didn't want to have anything that they gave to me." "That they gave to you?" "Yes, my family." "So the whole family is no good?" "Yes." "You don't want anything to do with them?" "No, I don't." And then she's asked about the aunt who she had a very close relationship with. That's simply an example of the deep-seated animosity it seems that the daughter has for, not only the appellant, but also his family.

And the only other point I wish to make is that in terms of the submission by the Crown that the District Court decision needs to stand on its own and can't be augmented by reasons in the High Court, with respect Justice Downs did just that or attempted to do that by trying to rationalise the decision which, in my submission, is incorrect.

ELLEN FRANCE J:
Would you accept that in that context the appellate court can say, well, it doesn't matter, the error in reasoning? So let's say, for example, you had a defence that simply wasn't tenable and that wasn't dealt with. Do you agree that the appellate court can say, well, that's immaterial?

MR JONES QC:
Yes. But if there are issues that should be addressed and aren't, they can't be made up essentially on appeal.

GLAZEBROOK J:
Well, actually on your submission they'd be able to, wouldn't they?

MR JONES QC:

Well –

GLAZEBROOK J:

I mean if the appellate court can look at the evidence on its own then it can make up what it likes, make up in terms of if it comes to a view on the evidence as a whole that actually the decision was right but for wrong reasons then on your analysis the decision would have to be upheld, wouldn't it? You can't have it both ways.

MR JONES QC:

Well, if the Judge at first instance has erred, that would, that could be satisfied but then the issue would be has the erring in the assessment been such as to occasion a miscarriage as defined and that is where there may be an issue as to an alternative reason or basis for the decision.

WILLIAM YOUNG J:

But your point here is the Judge has effectively made a different set of findings, that Justice Downs has made a different set of findings which in fact weren't made by the trial Judge?

MR JONES QC:

Yes, filling in the gaps.

WINKELMANN J:

On credibility issues, which he couldn't do?

MR JONES QC:

Yes.

WILLIAM YOUNG J:

Okay, we'll take time to consider. Are you finished?

MR JONES QC:

Yes, I am.

WILLIAM YOUNG J:

I don't want to cut you off.

MR JONES QC:

Sorry, I've just had this handed up. Sorry, I had it handed to me a moment ago, a few minutes ago. No, that is all, thank you.

WILLIAM YOUNG J:

Thank you, Mr Jones. Thank you, Mr Lillico. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 3.53 PM