IN THE SUPREME COURT OF NEW ZEALAND

SC 93/2009
[2010] NZSC 52

THE QUEEN

v

GEORGE EVANS GWAZE

Hearing: 25 February 2010

Court: Elias CJ, Blanchard, McGrath and Wilson JJ

Counsel: D B Collins QC Solicitor-General and B Horsley for Crown
J H M Eaton and C Gallivan for Respondent

Judgment: 17 May 2010

JUDGMENT OF THE COURT

A The appeal is allowed and the acquittals are quashed.

B A new trial is directed under s 382(2)(b) of the Crimes Act 1961.

C A certified direction for new trial will issue to the Registrar of the High Court at Christchurch with the consequences provided for by ss 380(4) and 382(4) of the Crimes Act.

REASONS

(Given by Elias CJ)

[1] The principal and important question raised by the appeal is whether an error of law is made when a judge in a criminal trial admits evidence that ought to have been excluded in application of rules of exclusion contained in the Evidence Act 2006. Section 380(1) of the Crimes Act 1961 permits a trial court to reserve "any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto" for the opinion of the Court of Appeal. On case stated under s 380, the Court of Appeal was unanimous in concluding that evidence admitted at the trial of the respondent, Mr Gwaze, ought to have been excluded.[1] William Young P and Hammond J considered it was irrelevant (requiring its exclusion under s 7 of the Evidence Act). All Judges considered that it failed to meet the standards required for the admission of hearsay and expert opinion (under ss 17, 18, 23 and 25). The President also considered that the prejudicial effect of the evidence outweighed its probative value (requiring its exclusion under s 8). These are conclusions with which we indicate our agreement in what follows, while differing with some aspects of the reasoning in the Court of Appeal. Despite finding that the evidence was wrongly admitted and had caused a substantial miscarriage of justice, a majority of the Court of Appeal, William Young P and Baragwanath J, held that whether the statutory tests for admissibility had been satisfied turned on inferences of fact and evaluation of fact and degree. As such, they considered that failure to meet the statutory criteria did not give rise to any question of law able to be addressed on the case stated. From this view, Hammond J dissented. For the reasons to be given, this Court overturns the decision of the majority of the Court of Appeal on the point. We are of the view that the evidence was admitted in error of law.

[2] As a result, it is necessary to consider the application of s 382 of the Crimes Act which provides for the powers of the Court of Appeal on appeal on questions of law:

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1 *R v Gwaze* [2009] NZCA 430, [2010] 1 NZLR 646.

382 Powers of Court of Appeal where appeal is on question of law

(1) The Court of Appeal may, in its discretion, send back any case to the court by which it was stated to be amended or restated.

(2) Upon the hearing of any appeal under the foregoing provisions of this Part, other than section 379A, the Court of Appeal may—

(a) confirm the ruling appealed from; or

(b) if of opinion that the ruling was erroneous, and that there has been a mistrial or that the accused has been wrongly discharged or that the prosecution has been wrongly stayed in consequence, direct a new trial; or

(c) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed, or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or

(d) if of opinion, where the accused has been convicted, that the ruling was erroneous, and that the accused ought to have been acquitted, order that the conviction be set aside, which order shall be deemed to be an acquittal; or

(e) in any case, whether the appeal is on behalf of the prosecutor or of the accused, direct a new trial; or

(f) make such other order as justice requires:

provided that no conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice was thereby occasioned on the trial:

provided also that if the Court of Appeal is of opinion that any challenge was improperly disallowed a new trial shall be granted.

(3) If it appears to the Court of Appeal that such wrong or miscarriage of justice affected some count only of the indictment the court may give separate directions as to each count, and may pass sentence on any count that stands good and unaffected by such wrong or miscarriage of justice, or remit the case to the court below with a direction to pass such sentence as justice requires.

(4) The order or direction of the Court of Appeal shall be certified under the hand of the presiding Judge to the Registrar of the court before which the case was tried, and such order or direction shall be carried into effect.

[3] For reasons developed below, we are of the view that the wrongful admission of evidence has occasioned a mistrial under s 382(2)(b) and that a substantial miscarriage of justice has resulted, within the meaning of the proviso to s 382(2). We conclude that a new trial must be ordered. Such result could never be arrived at lightly following acquittal, which is why the proviso to s 382(2)(b) of the Crimes Act turns on there having been "some substantial wrong or miscarriage of justice" in addition to error causing "mistrial". But we do not consider that the determination whether there should be a new trial requires any overlay of additional balancing in the case of acquittal, in recognition of a "double jeopardy principle", such as William Young P in the Court of Appeal thought should apply. The procedure for appeal on questions of law reserved under s 380 explicitly applies to acquittals and envisages the outcome of new trial, should the Court of Appeal take the view that the conditions of s 382(2) are met. In such case there is no question of the accused being in "double jeopardy" because the first verdict is provisional only and the accused has not been "finally acquitted" within the meaning of the restatement of the rule against double jeopardy in s 26(2) of the New Zealand Bill of Rights Act 1990.

Background

[4] George Evans Gwaze was acquitted by a jury of the sexual violation and murder of his ten year old niece, Charlene Makaza. Before the verdicts were obtained and the acquittal entered, the Crown applied to reserve questions of law for the determination of the Court of Appeal under s 380 of the Crimes Act. The questions became the subject of a case stated by the trial Judge. They arose out of the Judge's admission of hearsay expert opinion statements bearing on the cause of Charlene's death, over the objection of the Crown. The information contained in the statements had become available unexpectedly and at a late stage (when the trial had been underway for nearly three weeks) through an encounter at a conference in Hong Kong between a Crown medical witness, Professor Beasley, and Professor Rode, a South African paediatric surgeon with experience of HIV and AIDS in children. Charlene had HIV, but had not developed AIDS.

[5] The Crown case at trial was that the cause of Charlene's death was suffocation which left her with brain damage. It maintained that Charlene had been suffocated during a severe sexual attack which left her with anal and vaginal tears without plausible innocent explanation. She also initially presented with watery diarrhoea when taken for medical treatment. The defence case at trial included alibi evidence, evidence of lack of opportunity, and character evidence but, in addition, a principal plank of the defence was that the Crown had not excluded sepsis as the cause of Charlene's death. Such sepsis it was suggested had overwhelmed Charlene because of her underlying HIV condition. The Crown expert witnesses could not exclude the possibility that the cause of death was overwhelming sepsis, but expressed the opinions that cause of death was suffocation. Important in that assessment were the injuries. The defence suggested that the anal and genital injuries could have been caused by nursing treatment before Charlene's death. It criticised the fact that the Crown had not sought better expert evidence about HIV.

[6] The remarks made by Professor Rode were reported by Professor Beasley in telephone conversations from Hong Kong to Detective Johannsen and recorded by him in job sheets of 14 May and 16 May 2008. There was also an email sent on 16 May from Crown counsel to defence counsel conveying the details of a telephone call on 15 May from Professor Beasley to Crown counsel. In the first communication, relating a conversation between Professor Beasley and Professor Rode on a social occasion, Professor Rode was reported to have observed in South Africa a group of children between the ages of eight and ten years:

> who had been born with HIV, had been known to suffer from congenital HIV which resulted in them deteriorating very quickly and subsequently [dying]. Their symptoms showed deterioration within the brain and they also suffered from anal tears radiating from the anus. Watery green coloured diarrhoea was also associated with this condition.

[7] Given the potential for an explanation that the anal injuries suffered by Charlene and her sudden deterioration could be attributable to HIV, the information came, as defence counsel later described it, as a "bombshell". It was unexpected. There was later evidence at the trial from the pathologist, Dr Sage, that a review of the medical literature had turned up no published reference to the symptoms described by Professor Rode as having been observed by him in HIV children.

The trial was adjourned to allow further inquiry and in particular to allow Professor Rode to be shown the post-mortem report and some photographs Professor Beasley had with him in Hong Kong.

[8] In subsequent communications, after viewing the post-mortem report and other material, Professor Rode expressed concern that his initial remarks could be used by the Court and said he might need "another week or so" to look into the matter and give "a well considered and correct opinion". Having reviewed the further information he was of the view that the case "may be a case of sexual assault and suffocation, but still wanted to consider further and discuss with colleagues". He wished to discuss the characteristics displayed by Charlene with other "Aids specialists and Aids pathologists in South Africa", a shift in terminology from the earlier communication which had mentioned only HIV (the condition Charlene had). Professor Beasley reported Professor Rode's views as:

> There are features that are consistent with Aids affecting the bowel and anal area which is why he thinks it is important that he is given the opportunity to consider it further. There are also features which are suggestive of sodomy and strangulation or suffocation which is why the evidence needs to be very carefully assessed.

[9] An adjournment of the length indicated by Professor Rode was considered not feasible in the circumstances of the trial then underway. The Judge declined to discharge the jury and order a new trial. He took the view that the hearsay remarks made by Professor Rode were admissible under s 18 of the Evidence Act as reliable. They were not a "full opinion", but rather "a relatively straightforward comment about the circumstances surrounding the deaths of some children in South Africa", reflecting Professor Rode's "personal knowledge". He accordingly ruled that the comments could be introduced through cross-examination "about the [14 May] job sheet on the basis that the further comment reported to the Court this morning" (the remark that the case "may be a case of sexual assault and suffocation") was also referred to. Professor Rode's comments were referred to in cross-examination by the defence of Detective Johannsen, who confirmed the substance of the communications, and Dr Sage, the pathologist, who was questioned as to their impact on his opinion that the cause of death was suffocation in the course of a sexual assault.

The case stated

[10] The case stated was not settled until 20 February 2009, a delay that is regrettable but which seems to have been caused in part by an understandable concern by both Crown and defence to obtain full expert opinion on the matters covered by the disputed evidence. Had the expert opinion supported the thesis that Charlene's symptoms were caused by HIV, it would hardly have been responsible for the Crown to press for a new trial on the basis of the reserved questions. The reports, when later received, were to the effect that the symptoms displayed by Charlene were not attributable to her HIV condition. That circumstance is not properly to be taken into account in considering the question of admissibility at trial, but it is relevant to subsequent assessment of whether a new trial should be ordered.

[11] The case stated sets out the sequence of events in the High Court. It recites the job sheet of 14 May in full but summarises the email communication of 16 May and the 16 May job sheet. And it similarly summarises the rulings made by the Judge. The 16 May communications were however before the Court of Appeal, as were the full reasons of the Judge for his rulings. Since these documents are referred to in the case stated and their content and meaning does not depend on any findings by the Judge, we consider that they are properly treated as incorporated by reference in the case stated. It would be unacceptably technical to exclude them from consideration on the basis that they had not been set out in full in the case stated. We take the view, as explained further below, that the terms of the 14 May job sheet precluded the admission of Professor Rode's comments because they did not amount to an opinion of comparability between the case of Charlene and the observed cases in South Africa and were accordingly irrelevant to the issues before the Court. The terms of the 16 May job sheet reinforce the conclusion we take from the face of the first communication (that it provided no relevant or reliable opinion evidence). We set both out in full. We also refer to some of the reasons provided by the Judge for his rulings, not repeated in the case stated, but referred to in summary in it.

[12] As recorded in the case, the 14 May job sheet read:

> He, [Beasley] advised me that over tea last night he had been discussing the case with his colleague [Rode] and that he had been advised by this

> colleague that the symptoms portrayed to him were consistent with a group of HIV patients he had dealt with in South Africa.
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> He stated that his colleague said that children between the ages of eight and ten years, who had been born with HIV, had been known to suffer from congenital HIV which resulted in them deteriorating very quickly and subsequently dying. Their symptoms showed deterioration within the brain and they also suffered from anal tears radiating from the anus. Water green coloured diarrhoea was also associated with this condition.
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> He asked if he could show his colleague photos that he had with him of the injuries and he believed that he may also have a copy of the PM report on his laptop computer. He went on to emphasise that further information in relation to how the parents died as well as other medical conditions that Charlene might have would be required for a definitive answer to be given in relation to the injuries Charlene had and in the opinion given by his colleague.

[13] On 15 May, the Judge gave an indication that he was reluctant to abort the trial. "Ideally", the evidence of Professor Rode should go before the jury "in a considered form", but that did not seem feasible. The Judge recorded his view that "it would be impossible for the accused to receive justice if the crux of the information that has emerged thus far was withheld from the jury":

> By referring to the crux of the information, I am referring to the indication that children between eight and 10 who are congenitally HIV positive (if that is the right terminology) have died reasonably rapidly in circumstances where there have been radial tears to the anus and watery green diarrhoea. Even if it transpires that the South African cases differ in other respects from the circumstances surrounding Charlene's death, that information is highly relevant and it would be for the jury to assess that information in the light of all the evidence.
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> However, because we are dealing with hearsay evidence it is important for the evidence giving rise to any cross-examination to be as accurate and reliable as might be reasonably possible in all the circumstances. In other words, that it accurately conveys what Professor Rode told Professor Beasley. For that reason I prefer the third course of sending the jury away in the meantime so that the accuracy of the information that has been conveyed can be checked directly with Professor Rode. Of course, other information may well emerge and I am not wanting to cut off the possibility of the Crown extracting information that might reveal that there are few or no parallels between the cases in South Africa and this case.

[14] Since Professor Rode was due to arrive in New Zealand the following week, the Judge asked counsel to investigate the feasibility of meeting with him to decide on a "fair and practical solution". He acknowledged that if such a solution could not

be arrived at, "I am going to be faced with aborting the trial". That was a step the Judge made clear he would take only if there was no other course.

[15] If the adjournment was to enable the accuracy and reliability of the information conveyed to be checked with Professor Rode, his answers communicated on 16 May did not provide assurance on the substance of the information of relevance: similarity between the observed cases and that of Charlene. The 16 May email communication recorded that Professor Rode, after viewing the post-mortem report and some photographs was, rather, "of the view that this case may be a case of sexual assault and suffocation, but still wanted to consider further and discuss with colleagues". The police job sheet of 16 May was even less affirming.

[16] The police job sheet of 16 May was supplied to the Judge before his reasons for Ruling No 4 were delivered (although he had previously indicated what his ruling would be) and is referred to in those reasons. In the case stated it is summarised as recording "the concerns of Professor Rode and Dr Beasley as to the level of reliance that the Court may be placing on Professor Rode's comments and that more time was required to give a well-considered and correct opinion".[2] The full job sheet is as follows:[3]

> I gave Professor Rode the written material and photographs a few days ago. I have spoken to him on several occasions since then. He is in the process of carefully considering the information, has already spoken to one of his colleagues, but is very keen to discuss it with a couple of Aids specialists and Aids pathologists in South Africa.
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> On his current assessment one of them is that the appearance of the anal region could be due to full blown Aids and he has been considering a couple of possibilities for why she may have deteriorated so quickly in a short time and led to her death. He has also been giving careful consideration to another explanation that his preliminary considerations have raised and that involves sodomy and suffocation or strangulation.
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> He has repeatedly asked me to give time to further review and consider the information and allow him to consult with some of his colleagues. He recognises the extreme importance of getting it right, given the nature of the enquiry and feels that if we wish to get the best expert opinion that it may take another week or so.

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2 At [24].

3 This was typed as it was spoken by Professor Beasley to Detective Johannsen.

> Professor Rode stated that there has already been one life destroyed, he realises the seriousness of the matter and does not want to make a mistake.
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> He did not think his preliminary comments would be used by the Court other than to be given sufficient time that he can develop a well considered and correct opinion. I do not think that he would expect that any of his comments so far could or should be used one way or the other within the Court. I think he would be quite alarmed if he thought that his initial comments were to be used by the Court in any prejudicial sense until he has had time to consult appropriately and come up with a definitive opinion.
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> All that he has done so far is shown that there is legitimate reason for him to ensure that it is investigated further.
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> He realises there is a lot at stake here and does not want to get it wrong.
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> The characteristics of what he has seen in the documentation and photographs raise the possibility of more than one explanation and he sees it as his responsibility to try and clarify the actual sequence of events that occurred that led to the death.
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> There are features that are consistent with Aids affecting the bowel and anal area which is why he thinks it is important that he is given the opportunity to consider it further. There are also features which are suggestive of sodomy and strangulation or suffocation which is why the evidence needs to be very carefully assessed.
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> Professor Rode arrives in Christchurch at approximately 5pm on Wednesday night. He would rather meet up and discuss it with lawyers on both sides on an informal basis prior to finally making his opinion. He can be contacted through me. I am able to rearrange his schedule on Thursday afternoon or Friday if necessary.

[17] In his eventual ruling of 16 May, the Judge had all this material before him. Although sympathetic to Professor Rode's wish to "fully consider the whole matter before expressing any opinion" (a scruple he seems to have attributed largely to Professor Rode's professional standards), the Judge felt he had to "weigh other considerations". He considered that delaying the trial to accommodate the proposed meeting would be "pointless" since Professor Rode had already made it clear he would need a time frame of two weeks to finalise his views and a delay of that order would require discharge of the jury. That course he was not prepared to take on the basis that it would cause expense, delay and "serious injustice". The hearsay statements already made, however, the Judge considered could be admitted under s 18(1)(a), because reasonably reliable:

> [12] When considering the first requirement in para (a) that the circumstances relating to the statement provide a reasonable assurance that the statement is reliable, it is important to keep in mind the contents and

context of the statement. As reported in the job sheet, Professor Rode's statements involve a relatively straightforward comment about the circumstances surrounding the deaths of some children in South Africa. These statements must have reflected his personal knowledge otherwise he would not have made them to Professor Beasley. The statements were then relayed by Professor Beasley to the police.

[13] In all the circumstances there is no reason to suppose that the method by which the information has been relayed would have affected its reliability. Professor Beasley has already given evidence. He is an eminent paediatric surgeon and I was very favourably impressed by him as a witness. The information that he was relaying was within a medical sphere and there is no reason to think that he would have failed to accurately relay what had been said by Professor Rode. Nor is there any reasonable basis for concluding that Detective Johannsen might have failed to accurately record what was conveyed to him by Professor Beasley. Again, I note that the information is relatively straightforward and brief. I am therefore satisfied that there is a reasonable assurance that the statement is reliable in terms of s18(1)(a).

[14] For reasons already given yesterday, and again today, I am perfectly satisfied that the maker of the statement, Professor Rode, is unavailable as a witness in terms of s18(1)(b)(i).[4] Currently he is in Hong Kong. As I have already said there is no reason to believe that he would be able to provide an opinion within the next week; his timeframe is at least two weeks which would mean that this trial would have to be aborted if he was to give evidence in person.

[15] While Professor Rode is clearly alarmed by the developments in this case, the aim is not to obtain a full opinion from him. That is not feasible. Rather, it is to tell the jury about the comments that were made by him to Professor Beasley.

[16] I am also satisfied that the alternative under s18(1)(b)(ii) is satisfied. Undue expense or delay would be caused if Professor Rode was required to be a witness. As I have already said, this would involve aborting the trial and in my view aborting the trial at this stage would not only give rise to expense and delay, it would give rise to a serious injustice.

[18] The case stated concludes by recording the questions of law reserved for the opinion of the Court of Appeal pursuant to s 380 of the Crimes Act:

- Was I correct to admit into evidence the hearsay statements of Professor Rode?
- Was I correct not to abort the trial as requested by the Crown on 16 May?

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[4] "Unavailable as a witness" includes the situation where a person is outside New Zealand and it is not reasonably practicable for him to be a witness (Evidence Act 2006, s 16(2)(b)).

- Was I correct in ruling that Dr Meates-Dennis [an expert for the Crown with experience in the treatment of HIV children] should not be recalled to have the hearsay evidence attributed to Professor Rode put to her?

Because of the terms of the leave granted in this Court, only the first question remains live on the present appeal.

The decision in the Court of Appeal

[19] In the Court of Appeal, the Crown maintained that the admission of the evidence was erroneous in law and that there had been a mistrial. In consequence, it sought a direction for a new trial on the basis, provided for by s 382, that the improper admission of the evidence had occasioned "some substantial wrong or miscarriage of justice ... on the trial".

[20] Unanimously, the Court of Appeal held that the evidence had been improperly admitted.[5] William Young P and Hammond J held that the hearsay opinion should have been excluded as not relevant under s 7 of the Evidence Act. The President also considered that the probative value of the evidence was outweighed by its prejudicial effect, requiring exclusion under s 8. The trial Judge had not analysed the question of admission in terms of ss 7 and 8, as was his responsibility whether or not the argument addressed to him invoked the sections. All members of the Court of Appeal were in agreement that the Judge was in error in considering that the test for admission of hearsay evidence (reliability of the statement under s 18 of the Act) had been met. They also considered that the condition for admission of expert opinion evidence under s 25 of the Act (substantial helpfulness) had not been fulfilled, a matter the Judge had not separately considered, although William Young P accepted that the Judge's reasons for ruling the hearsay reliable meant that he would have concluded it was substantially helpful also.

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[5] At [81]–[95] per William Young P, at [184] per Baragwanath J (with more hesitation on the point, because he considered at [176]–[177] that Professor Rode's standing was such that "any considered statement by him would provide 'substantial help'" in educating the jury "concerning the symptoms of advanced HIV" as opposed to being an "opinion on causation") and at [198]–[203] per Hammond J.

[21] In their conclusions members of the Court were influenced in particular by Professor Rode's own assessment (as communicated on 16 May) that his remarks should not be used by the Court.[6] As Hammond J expressed it, "there is ... something fundamentally wrong about incomplete or minimalist hearsay evidence going before the jury against the professional view of the maker of it".[7] Baragwanath J was less concerned about the opinion being partial because "*so far as it went*, the statement was of substantial help and reliable".[8] But he similarly took the view that "the admission of what Professor Rode himself asserted was not a 'well considered and correct opinion' did not *in fact* meet the standards required by the Evidence Act and in that sense was wrong in law".[9]

[22] Despite the conclusion that the evidence had been improperly admitted because it did not meet the standards required by the Evidence Act, William Young P and Baragwanath J held that the error was one of fact, not law. On this view, the Court of Appeal had no jurisdiction under s 380 to entertain the questions stated or order a new trial under s 382. Although the President took the view that the trial Judge had erred in the inferences he had been prepared to draw as to the reliability of the statements admitted, he accepted that there was evidence capable of supporting those inferences and that there was, accordingly an error of fact, not law:[10]

> The crux of the difference between my approach and that of the Judge lies in the following points:
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> (a) He regarded Professor Rode's initial comments as straightforward propositions of fact which were of plain relevance to cause of death.
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> (b) I take the view that subsequent developments, particularly the 16 May job sheet, mean that the initial comments were not relevant and reliable and for largely associated reasons carried the risk of unfair prejudice to the Crown and were not substantially helpful.

Although the Judge had not analysed the question of admissibility against ss 7, 8 and 25, William Young P considered it was not "plausible to assume that he would

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6 At [27] per William Young P, at [184] per Baragwanath J and at [200]–[201] per Hammond J.
7 At [213].
8 At [181].
9 At [131].
10 At [105].

have resolved the admissibility question differently had he engaged in the step by step analysis which I have".[11]

[23] Significant in the President's approach was his view that, if the matter had been viewed as at 14 May, it was difficult to take issue with the Judge's approach. He "plainly considered that the initial comments were material to cause of death and relevant":[12]

> It did not matter that Professor Rode did not purport to give a full opinion as to what caused Charlene's death. Rather it was a snippet of information which, when combined with all other relevant information, had a logical bearing on cause of death.

The change to the assessment of relevance came only with the information made available on 16 May in the job sheet:[13]

> This showed that Professor Rode did not regard his comments to be sufficiently well considered to be put before the jury. As well, there is the shift in terminology – from HIV to AIDS. I recognise that this job sheet was created after the Judge had given his ruling on the morning of 16 May but it was, nonetheless, before him by the time he gave his reasons and it would, of course, have been open to him to have changed his mind.
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> In light of the second job sheet, it is far from clear that Professor Rode's initial comments were made in relation to HIV as opposed to AIDS. Given the apparently conflicting information conveyed in the job sheets, it was also unclear whether the group of patients referred to in the initial comments were truly comparable to Charlene. In those circumstances the initial comments were only relevant under s 7(3) if it could be assumed either that the patients had indeed suffered from HIV and not AIDS or, alternatively that there was no material difference. To my way of thinking, the uncertainties around these assumptions are so great that the initial comments no longer had the required "tendency" under s 7(3) and, for this reason, were not relevant.

Nevertheless, the President was of the opinion that the error made was one of fact, not law. That was a view he considered to be supported by Australian and Canadian authority. He concluded:[14]

> The issue for the Judge was very much a matter of degree. There were some considerations that pointed to the reliability of Professor Rode's initial comments and other factors that went the other way. A balancing exercise

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11 At [105].
12 At [82].
13 At [83]–[84].
14 At [106]–[107].

> was required. It could not fairly be said that the application of the law (in this case the relevant provisions of the Evidence Act) to the facts admitted led to only one answer. Nor can it be said that the approach of Chisholm J demonstrated a misinterpretation of the relevant law. He and I primarily differ on the inferences to be drawn from the 16 May job sheet. These considerations point strongly to the ruling having turned on issues of fact and not law.
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> I conclude therefore that the Judge's ruling was fundamentally factual and thus is not susceptible to review under ss 380 and 382.

[24] Baragwanath J, similarly, considered that the "sole arguable error is of fact",[15] although he took the view that the critical fact (that the 16 May job sheet threw doubt on the earlier views expressed by Professor Rode) was not one recorded in the case stated as having been found by the trial Judge. Had it not been that the approach adopted by other members of the Court meant that there was little purpose in further inquiry, Baragwanath J would have sent the matter back under s 382(1) for the Judge's finding on this fact to be stated. The "primary ground" of Baragwanath J's decision was therefore that "it is premature for us to determine the case".[16] On the basis that the statutory tests were not met because of the 16 May information, Baragwanath J accepted that there had been a substantial miscarriage because of the "obvious importance" of the statement in providing "an attractive lawful explanation for injuries which otherwise could have no innocent explanation".[17] But he concluded that the error was not one that could be corrected on Crown appeal because it was an error not of law, but fact, namely in "placing more weight on the initial Professor Rode material than was justified".[18] There was no jurisdiction to entertain an appeal on that ground.

[25] Hammond J differed from the other members of the Court in characterising the error made by the Judge in admitting the statements as one of law. He considered it fatal to the admissibility of the evidence that Professor Rode had "plainly conveyed that the contents of his statement were *not* reliable for the forensic purpose to which it would be deployed: the cause of Charlene's death".[19] It was

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15 At [130].
16 At [130].
17 At [187].
18 At [188].
19 At [200].

irrelevant within the meaning of s 7. The Judge's "highly unusual approach to admissibility"[20] had led him into error:[21]

> It is simply not enough to say that, as far as it goes, it is accurate that there have been cases of a particular kind in South Africa, at least without some articulation as to why evidence that children in South Africa had died in a certain way could be of any relevance to this trial.

If relevant, because directed to cause of death, the statement was inappropriate opinion evidence. It was "of only the most provisional and unreliable kind".[22]

[26] In taking the view that the error was one of law, Hammond J first pointed to the language of the proviso to s 382(2) ("although it appears that some evidence was improperly admitted or rejected") which envisages that questions of admissibility reserved under s 380 amount to questions of law: "[t]o suggest that the Judge's admissibility ruling is not susceptible to review runs counter to the plain wording of the section".[23] Secondly the Judge had failed to apply the definition of "circumstances" in s 16(1),[24] so that he had misunderstood the scope of the inquiry required by s 18(1)(a). He had limited reliability to the accuracy of the reports: "[b]ut it was the circumstances and content of Professor Rode's statement that made it unreliable and inadmissible. That is a classic error of law".[25] Thirdly, the Judge "performed only a partial admissibility inquiry" because he did not consider the serious issue of relevance under s 7.[26] Finally the Judge himself was of the opinion that the questions stated were ones of law.

[27] Although it was unnecessary for the majority to reach the questions of mistrial and the proviso to s 382 on the view taken that the error was one of fact, William Young P and Baragwanath J did express opinions on these consequential points which it is convenient to consider later in explaining why we would set aside the acquittal and order a new trial.

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20 At [206].
21 At [202].
22 At [206].
23 At [216].
24 Reproduced at [44] below.
25 At [217].
26 At [218].

The purpose for which the evidence was admitted

[28] Before dealing with the question of error, it is necessary to deal with an argument put forward in this Court on behalf of Mr Gwaze, although not apparently developed in the Court of Appeal, that the evidence was admissible as relevant not to cause of death, but to impugn the expertise of the Crown witnesses, only one of whom, Dr Meates-Dennis, had direct experience of working with children with HIV. The suggestion was made that the statement of fact (as to the symptoms observed in the South African cases) was properly admitted to challenge the expertise of the Crown witnesses, none of whom knew of such symptoms being associated with children with HIV. On this basis, the evidence would not be admitted as opinion that Charlene's symptoms were similar (inviting the inference that her sudden deterioration and death could have been caused by HIV) but to create doubt about the expert opinions given by the Crown witnesses as to cause of death from non-natural causes.

[29] Putting opinions contained in published articles or treatises to expert witnesses is permissible in jurisdictions in the United States under an exception to the hearsay rule. Approaches vary, but generally require either acknowledgement by the expert being cross-examined of the general authority of the work or a finding by the judge (based on evidence or on judicial notice) that the work is of general authority.[27] It may then be read into the record of the proceedings, becoming evidence of the opinion or information contained in the work and also providing a basis in some cases for the suggestion that the witness is not up to date with expert knowledge in the field of claimed expertise.

[30] The Supreme Court of Canada has expressed more caution, taking the view that if the expert witness does not know the work or, if knowing it, denies its authority, "that is the end of the matter. Counsel cannot read from the work, since that would be to introduce it as evidence".[28] If the witness knows the work and acknowledges its authority, then to that extent it is confirmed by the witness's

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[27] An example is the hearsay exception for "learned treatises" contained in the Federal Rules of Evidence 28a USC §803(18).

[28] *R v Marquard* [1993] 4 SCR 223 at 251.

evidence. The Supreme Court declined to relax the established Canadian approach and to drop the requirement of witness adoption.

[31] In New Zealand, admissibility of the statement depended on the condition of reliability prescribed by s 18 of the Evidence Act for hearsay. No expert witness adopted the statement. Indeed, it was not put to the only Crown witness with extensive experience in treating patients with HIV, Dr Meates-Dennis. She had concluded her evidence before the ruling as to admissibility was made and the Judge declined a Crown application for her recall on the basis that she had already been asked whether the cause of death and Charlene's symptoms could have been attributed to Charlene's underlying HIV condition.

[32] More fundamentally, as the Solicitor-General pointed out, there is no suggestion that Professor Rode's observations had been recorded in the medical literature. As the trial Judge said, the evidence was information reflecting Professor Rode's "personal knowledge" and as such could not discredit the Crown witnesses or provide opinion evidence as to possible causes of death (as it was used) without its reliability being accepted. That assurance was not obtained through the Crown expert witness, Dr Sage, who could only say, as he did, that he had no knowledge of such symptoms being associated with HIV and that there was no mention of them in the literature. In those circumstances, the statement could not be used to suggest that the witnesses were not up to date with the subject of expertise and there was no basis for suggesting a "learned treatise" test of reliability had been met.

[33] In reality, the hearsay statement of Professor Rode was treated as an opinion that Charlene's symptoms, as portrayed to Professor Rode by Professor Beasley, "were consistent with a group of HIV patients he had dealt with in South Africa",[29] permitting the inference that the Crown had not excluded the possibility that the cause of death may have been as a result of HIV. That was also the basis on which the consideration of admissibility took place, as is made clear by the Judge's description in the case stated of the discussion of 15 May that the adjournment was "to enable the accuracy of the information that had been conveyed to the Court to be

[29] Job sheet of 14 May 2008.

checked directly with Professor Rode" and by the fact that the Judge "left open the possibility for the Crown to extract further information that may reveal if there were few or no parallels between the cases in South Africa and this case".[30] It was in response to the further inquiries that Professor Rode advised that, having reviewed additional information, he "was of the view that this case may be a case of sexual assault and suffocation".[31] That was an opinion directed at cause of death, in qualification of the first indication that whether there were parallels with the observed cases in South Africa should be investigated. It led the Judge to require the qualification – that the cause of death might be sexual assault and suffocation – to be given in evidence as well as the suggested opinion that there could be parallels with the observed cases.

[34] It is clear that both statements were treated as opinions bearing on cause of death in the ruling as to admissibility. And that is how the evidence when admitted was used at the trial, in cross-examination of Dr Sage, the pathologist, as to cause of death, in the address of counsel for the defence, and in the summing up of the Judge. Professor Rode's statement was put to Dr Sage as providing a basis for rejecting his opinion that Charlene did not die of natural causes. Defence counsel in addressing the jury described Professor Rode's statement as a "bombshell" because the symptoms shown by Charlene seemed to match the group of cases in South Africa. In his summary of the defence case in his summing up, the Judge referred to the point made in defence counsel's address that "the evidence from Mr Rode about there being a group of children in South Africa who had died quickly with remarkably similar symptoms is of extreme importance in this case".

[35] The Judge, too, in summing up treated the evidence from Professor Rode as bearing on cause of death. He warned the jury that the statement was hearsay and had to be treated carefully. He also made it clear that "Professor Rode hasn't expressed any final view". That was "not surprising":

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30 At [19].

31 Email communication of 16 May 2008.

> [32] ... What he has said really falls into two parts. The first is that there are a group of children in South Africa who have died quickly under circumstances which, at least on the surface, have close parallels – I should say displayed symptoms – which under the circumstances indicate close parallels with those involved in Charlene's death.
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> [33] The second part is that having seen some photos (we don't know which photos) and Dr Sage's post-mortem report, Professor Rode commented that the symptoms – that Charlene's death might have been caused by sexual assault, by asphyxiation involved in a sexual assault.
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> [34] The Crown suggest to you that Professor Rode in making the second observation had changed his mind. I don't understand it that way. All Professor Rode was saying is that this might be a case of asphyxiation during a sexual assault. Might not be as well. So it is not a matter of this being a concluded opinion in any way. In the end, ladies and gentlemen, it is going to be for you to make what you will of these comments from Professor Rode. But I would say that you would be extraordinarily bold if you gave them no weight at all.

[36] In context, there is no basis for the submission that the statement made by Professor Rode was admitted to discredit the expertise of the Crown witnesses. It was admitted to cast doubt on the substance of their opinions that Charlene died through non-natural causes, namely through asphyxiation during a sexual attack. And it was treated as opinion that the injuries and Charlene's deterioration and death were explained by HIV.

The evidence should have been excluded as irrelevant under s 7

[37] The statement attributed to Professor Rode fails the condition for admissibility provided by s 7. As the heading to the section indicates, it expresses the "fundamental principle that relevant evidence [is] admissible":

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
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> (a) inadmissible under this Act or any other Act; or
>
> (b) excluded under this Act or any other Act.
>
> (2) Evidence that is not relevant is not admissible in a proceeding.
>
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[38] The Judge took the view that the evidence was descriptive of the cases observed by Professor Rode and that, as to such description, it was reliable under s 18, although hearsay, and therefore admissible. He does not seem to have separately considered the question of relevance. A description of the symptoms suffered by a group of HIV children was not in itself relevant to the case. The observed group had to be linked to Charlene's case. It was not necessary to establish relevance to show that Charlene's symptoms *did* come within the observed syndrome. But the description of the cases observed could only be relevant to the issue of Charlene's cause of death, as it was used, if linked by the opinion that her symptoms *could* fall within the syndrome observed.

[39] No such opinion link was provided by Professor Rode. The statements recorded in the job sheet did not provide the necessary link between Charlene's case and that of the observed HIV children. The reference to the HIV children was made in informal circumstances and on the basis of an unknown oral communication of the symptoms displayed by Charlene, about which Professor Rode needed more information. They were not capable of amounting to an opinion that the symptoms between Charlene's case and the observed cases were similar. They suggested, rather, a line of inquiry requiring investigation. That is how the report seems to have been treated by the Judge on 15 May, when he adjourned the trial to allow the additional material to be viewed by Professor Rode, against explicit recognition that the Crown might obtain information that "there are few or no parallels between the cases in South Africa and this case". The opportunity provided did not lead to an opinion that Charlene's case could be within the observed syndrome, as the 16 May communications make clear. The job sheet recorded Professor Rode's view that "[a]ll that he has done so far is shown that there is legitimate reason for him to ensure that it is investigated further".

[40] Without an opinion that the cases were comparable, we do not consider that the remarks made by Professor Rode could be treated as having "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding", as required by s 7. They were accordingly not relevant. In this view we differ from William Young P in the Court of Appeal, who treated the statements recorded in the job sheet of 14 May as initially relevant and admissible, but overtaken by the

communications of 16 May. On their face we do not consider they could reasonably be taken as an opinion of comparability, a conclusion fatal to their admissibility in application of s 7.

[41] Although we consider that the statements attributed to Professor Rode on 14 May were not reasonably to be taken as an opinion that Charlene's symptoms could have been within the syndrome described in the observed cases and were irrelevant without such linkage, the problem of relevance was compounded by the shift in terminology between the communications of 14 May and 16 May. This was the feature which particularly weighed with William Young P in the view that the statements were not relevant. The shift suggested that the observed group suffered from "full blown Aids" rather than HIV. As the President noted, unless there was no material difference between the conditions (a matter not clear on the communications), Charlene's symptoms could not be explained as referable to the condition of the observed group because there was no suggestion she suffered from AIDS. We agree with him that the absence of evidence explaining the shift and its implications meant that the uncertainties were so great that the initial comments should have been excluded as irrelevant under s 7 and unreliable under s 18 on that basis too.

[42] The Judge was in a difficult position. The suggested line of inquiry came at the last possible moment, with the trial well underway. It was clearly important and needed to be explored for reasons of trial fairness, as the Judge himself recognised. But until Professor Rode was able to give an opinion that Charlene's symptoms could be within the syndrome he had observed, his description of the cases observed was not relevant. And if not relevant, the Judge was obliged to exclude it under s 7(2). It was understandable that the Judge should have been reluctant to discharge the jury, but we are of the view that it was the only proper course available if an adjournment was not feasible because of the effect on the jury trial.

The evidence should have been excluded under the rules of exclusion contained in ss 17, 23 and 8 of the Evidence Act

[43] Additionally, we consider that the Judge was obliged to exclude the statements under the rules of exclusion provided for hearsay evidence by s 17, for opinion evidence by s 23, and by the rule of general exclusion under s 8 where probative value is outweighed by the risk of unfair prejudice. Because we are in general agreement with the unanimous assessment of the Court of Appeal in concluding that the standards for admissibility under the Act were not met, we state our reasons briefly. They overlap in relation to the three provisions of the Act, which require assessment of reliability, substantial helpfulness and probative value respectively.

[44] The general rule under s 17 of the Evidence Act is that hearsay statements are not admissible unless within one of the exceptions provided for in the Act. The only arguably applicable exception was that contained in s 18(1) which applies only if "the circumstances relating to the statement provide reasonable assurance that the statement is reliable". Section 18(1) provides:

> **18 General admissibility of hearsay**
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> (1) A hearsay statement is admissible in any proceeding if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
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> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

"Circumstances" is defined in s 16(1) as:

> **circumstances**, in relation to a statement by a person who is not a witness, include–
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> (a) the nature of the statement; and
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> (b) the contents of the statement; and

(c) the circumstances that relate to the making of the statement; and

(d) any circumstances that relate to the veracity of the person; and

(e) any circumstances that relate to the accuracy of the observation of the person.

[45] The Judge seems to have taken the view that reliability under s 18(1)(a) was established if there was sufficient assurance that Professor Rode's words had been accurately captured and communicated by Professor Beasley to Detective Johannsen and then accurately recorded by Detective Johannsen.[32] Because the Judge had formed a favourable view of Professor Beasley's reliability and because the occasion was an exchange of views of medical practitioners, immediately and responsibly relayed to the police, he took the view that the circumstances provided an assurance of reliability. But the definition of "circumstances" for the purpose of hearsay evidence makes it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making. The Judge's approach, in considering only the reliability of the capture and recording of the information, was not sufficient discharge of the responsibility under ss 17 and 18 to exclude evidence except where the circumstances provide reasonable assurance of reliability. For the reasons discussed at [37]–[42] in relation to relevance, the circumstances of this informal and limited communication could not give reasonable assurance that any opinion of consistency of symptom was reliable in terms of s 18(1)(a).

[46] Section 23 of the Evidence Act provides that "[a] statement of an opinion is not admissible in a proceeding, except as provided by section 24 or 25". Section 24 is of no application, because it is concerned with opinions which are necessary if the witness is to communicate "what the witness saw, heard, or otherwise perceived". Here, what the witness observed in other cases was irrelevant to the proceedings unless the opinion was given that the cases were comparable to that of Charlene. It was that opinion itself that had to qualify for admissibility. And it could only do so under s 25(1), which provides:

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[32] Ruling (No 4) of Chisholm J at [13], reproduced in *R v Gwaze* at [28] per William Young P.

> An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

[47] The deficiencies already discussed in relation to relevance and reliability (that on its face the statements amounted to no more than an indication of possible inquiry, without opinion linking the cases) lead us to the view that the only conclusion possible is that the statements of Professor Rode were not opinion from which it could reasonably be thought that the jury could obtain substantial help in understanding whether Charlene's death could have been attributable to natural causes. That was the fact of consequence to the determination of the trial for which they were admitted and for which they were used. The question of substantial helpfulness, though not distinctly addressed by the Judge, turned on the same considerations that led him to conclude that the hearsay was reliable. Our view that the statements were not relevant and were not reliable (because on their face not opinions of comparability between the cases) results in the conclusion that they were not helpful either and should have been excluded under s 23 because the condition of admissibility of substantial helpfulness in s 25(1) was not met.[33] The opinion was unreliable hearsay and unhelpful.

[48] The Judge was also obliged to exclude the evidence under the general rule of exclusion contained in s 8. There was no probative value in the evidence in circumstances where there was no considered opinion expressed by Professor Rode that the symptoms observed in Charlene could be explained by HIV. Indeed, the communications of 16 May indicated that he took the view that it would be wrong to use his initial comments in "any prejudicial sense". And the change in terminology to "full blown Aids" made it unclear whether the patients referred to in the initial comments were suffering from HIV or AIDS and whether their histories were therefore comparable at all to that of Charlene. We agree that the risk of confusion was prejudicial to the Crown and was compounded, as the President thought, because the information was put before the jury in a way which provided a partial

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[33] There is overlap here which, as the Court of Appeal rightly recognised, makes it artificial to say, as was submitted, that the Judge's failure to address "substantial helpfulness" was itself an additional error of law.

picture only of what had been conveyed in the communications of 16 May. The prejudice was significant, as is indicated by the treatment of the evidence in the Judge's summing up.[34] It was not overcome by the Judge's direction to the jury that the opinion did not purport to be a concluded opinion. As already indicated, we find it impossible to take the view that Professor Rode was purporting to put forward even a tentative or provisional opinion that Charlene's injuries were consistent with the symptoms displayed by the group of HIV children. In our view the information available to the Judge at the time he gave his ruling on the admissibility of the evidence required him to exclude the statements under s 8.

The error in admitting the statements as evidence was an error of law

[49] All the rules of exclusion provided by the Act are binding on judges. Although their application may raise "nice questions of judgment",[35] they do not confer discretion as to the admission of evidence. They prescribe standards to be observed. Such rules do not therefore assume distinct allocation of responsibility between trial judge and Court of Appeal which restricts appellate oversight. If hearsay evidence is not reliable, the judge must exclude it. If expert opinion evidence does not meet the standard of "substantial helpfulness" set by s 25(1), it is not admissible. If the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, it must be excluded by the judge. Whether these standards are met entails judgment, not the exercise of a judicial discretion. If the standards are not met and the evidence is wrongly admitted, the error is one of law which can be corrected on appeal.

[50] The characterisation of error as one of law does not change even if the judge must determine a preliminary question of fact in reaching the ultimate judgment as to admissibility. Although questions of admissibility and weight (the value to be placed on evidence) are commonly treated as distinct for the purposes of allocating responsibility between judge and jury, evaluation of evidence is also often necessary

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[34] Referred to above at [35] (at [34] of the Judge's summing up) where the Judge told the jury that "you would be extraordinarily bold if you gave [the statements] no weight at all".

[35] As was said of questions of relevance in *Smith v The Queen* [2001] HCA 50, (2001) 206 CLR 650 at [6] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

in deciding questions of admissibility turning on relevance, reliability, substantial helpfulness and probative value. The question of admissibility being addressed does not thereby become a question of fact. It remains one of law. Thus *Cross on Evidence* says that questions concerning the admissibility of evidence are matters of law for the judge even though they sometimes depend on a preliminary finding of fact by him.[36] Distinctions between law and fact drawn for the purposes of appeals on points of law following substantive hearings may turn on policies of efficient allocation of responsibility between trial and appellate courts. Care therefore needs to be taken in reading authorities to distinguish those concerned with such distinctions after substantive determination of the proceedings[37] from those dealing with the supervision by an appellate court of the gate-keeping functions performed by the trial judge in admissibility rulings. The latter are directed at helping to secure "the just determination of proceedings"[38] in the establishment of facts at trial.

[51] The purpose of the Evidence Act is not served by preventing correction of erroneous application of the rules of exclusion of evidence on the basis that it includes some preliminary finding of fact or that it entails evaluation. Admissibility rulings based on non-discretionary standards have been treated as giving rise to questions of law in New Zealand[39] and in the United Kingdom,[40] Canada[41] and Australia.[42] Compliance with legislative minimum standards, a question of law, may be contrasted with cases concerned with the exercise of discretion entrusted to the trial judge which, unless the discretion has been exercised on wrong principle, do

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36 JD Heydon (ed) *Cross on Evidence* (Australian looseleaf ed, LexisNexis Butterworths) at [1585].

37 As in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

38 Evidence Act 2006, s 6.

39 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [15]; *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at footnote 9 and *R v Johns* [1987] 1 NZLR 136 (CA).

40 See *Halsbury's Laws of England* (5th ed, 2009) vol 11 Civil Procedure at [797] and the cases there cited; *Halsbury's Laws of England* (4th ed, reissue, 2006) vol 11(3) Criminal Law, Evidence and Procedure at [1363].

41 *R v Schwartz* [1988] 2 SCR 443 at 459 per Dickson CJ (with whom the other members of the Court agreed on this point); *R v B(G)* [1990] 2 SCR 57 at 71 per Wilson J. And see the broader statement in *R v Araujo* 2000 SCC 65, [2000] 2 SCR 992 at [17]–[18] (not on a point of admissibility) that the application of a legal standard is a question of law.

42 JD Heydon (ed) *Cross on Evidence* (Australian looseleaf ed, LexisNexis Butterworths) at [1585] and [11005].

not give rise to error of law. The fulfilment of a statutory condition for admissibility (without which evidence must be excluded) is not the same thing as exclusion in the exercise of discretion.[43] Even if determination of whether the statutory condition is fulfilled turns on a preliminary assessment of fact by the judge, it remains a question of law[44] because "the absence of legal justification for admitting evidence at trial involves a question of law".[45]

[52] This conclusion, which we come to both on existing authority and because rules of exclusion are enacted to ensure integrity of trial, is also consistent with the way admissibility is treated in the proviso to s 382(2) as a question of law. As Hammond J pointed out, the suggestion that the Judge's admissibility ruling is not susceptible to review "runs counter to the plain wording of the section".[46] The conclusion has the further advantage of being clear.[47]

[53] If in a case stated under s 380 the preliminary facts are disputed, the Judge's findings on them are included in the case stated (which can be sent back for amendment if necessary should the findings not be recorded). As it happens, no such question of disputed preliminary fact actually arose here. There was no issue taken with the Judge's statement of the material facts. We are unable to accept that Baragwanath J was correct to suggest that the impact of the job sheet of 16 May on the statements recorded in the job sheet of 14 May left an open question of fact to be determined. Both records were taken at face value. There was no preliminary question of fact required to be found and left unresolved, which might have required amendment to the case on referral back to the trial Judge under s 382(1). The only

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43 As was the case in the decision of the High Court of Australia in *Williams v The Queen* (1986) 161 CLR 278, relied on by the President at [61] and [67], and in *R v Gillis* [1966] 2 CCC 219 (BCCA), relied on at [67].

44 See, for example *R v Johns* [1987] 1 NZLR 136 (CA), where admissibility turned on whether "reasonable notice" of intention to adduce an intercepted private communication had been made by the party intending to adduce it, as required by s 24 of the Misuse of Drugs Amendment Act 1978. Without fulfilment of that condition, s 24 provided that evidence of the intercepted communication "shall not be received in evidence by any Court".

45 *R v Schwartz* [1988] 2 SCR 443 at 459 per Dickson CJ.

46 At [216].

47 A benefit recognised by the Supreme Court of Canada in *R v Biniaris* 2000 SCC 15, [2000] 1 SCR 381 at [22] in respect of all threshold jurisdictional issues.

issue was whether, taking the statements at face value, they fulfilled the statutory conditions for admissibility. Were they relevant? Were they hearsay which was reliable? Were they opinion which was substantially helpful? Did their probative face value outweigh the risk that they might have an unfairly prejudicial effect on the proceedings? These were all judgments required by the statute as the condition of admissibility. If the Judge, as we think, erred in fulfilling the statutory conditions, he erred in law.

As a result of the erroneous ruling, there has been a mistrial which occasioned substantial miscarriage of justice

[54] Section 380(1) permits the statement of any question of law:

> arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge other than a question arising on any of the proceedings preliminary to the trial and already determined by the Court of Appeal under section 379A.

The section provides the opportunity for appellate supervision of all aspects of law in the judicial conduct of trials, including of preliminary, subsequent and incidental rulings. As Dixon CJ in *Vallance v The Queen*[48] suggested, the policy behind such provisions is "concern in the operation of the criminal law"[49] rather than correction of verdict. The power to set aside verdicts under s 382 is ancillary to the determination of the point of law reserved for the opinion of the Court of Appeal under s 380.

[55] The powers of the Court of Appeal on appeals on questions of law are contained in s 382, which is reproduced at [2]. If of the view that "the ruling was erroneous, and that there has been a mistrial or that the accused has been wrongly discharged or that the prosecution has been wrongly stayed in consequence", the Court of Appeal may direct a new trial under s 382(2)(b) on the basis that "some substantial wrong or miscarriage of justice was thereby occasioned on the trial".

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48 *Vallance v The Queen* (1961) 108 CLR 56.
49 At 62.

[56] Section 382(2) of the Crimes Act and its predecessor[50] have been in substantially the same form since first enactment in s 415(1) of the Criminal Code Act 1893. The wording is taken directly from clause 542 of the draft code prepared by the Criminal Code Bill Commission (UK).[51]

[57] The meaning of "mistrial" has received little attention in the case law. In *R v Fogden* Fair J took the view that it was not a term of art and meant simply "a trial vitiated by some error" or "a trial not according to law".[52] Generally, courts seem to have been content to go straight to consideration of the proviso when of the view that there has been some trial error. However if every error of law at trial amounted to "mistrial", there would be no need for reference to the concept in s 382(2)(b). Section 382 is constructed along similar lines to s 385. Consistently with the approach taken by this Court to the interpretation of s 385 in *R v Matenga*,[53] we are of the view that an error that gives rise to a "mistrial" must be one *capable* of affecting the verdict. If an error is of that character, the proviso makes it a condition of the exercise of the power to grant a new trial after acquittal that the Court of Appeal is of the opinion that the error has in fact occasioned "some substantial wrong or miscarriage of justice ... on the trial". Since the opinion that an error occasioned a substantial miscarriage of justice in fact necessarily entails acceptance that the error was capable of producing that effect, a two-step process may be unnecessary and the practice of going straight from finding of error to consideration of whether the proviso is fulfilled is sufficient. What the structure of s 382(2)(b) does indicate, however, is that the proviso is not concerned with entirely speculative effect. It is only errors which are reasonably capable of affecting the verdict that can give rise to mistrial which occasions a substantial miscarriage of justice.

[58] The same proviso in s 382 is expressed to apply to errors where the accused has been convicted, although the threshold for the exercise of the power in such cases under s 382(2)(d) is the opinion of the Court of Appeal that the accused "ought

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50 Crimes Act 1908, s 445(1).

51 Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879).

52 *R v Fogden* [1945] NZLR 380 (CA) at 385.

53 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

to have been acquitted" and it results in acquittal, rather than an order for new trial. The application of the further test of "substantial wrong or miscarriage of justice" in the proviso to cases under s 382(2)(d) (where the Court has already determined that the accused "ought to have been acquitted") is jarring in the same manner described in relation to the application of the proviso to some of the grounds under s 385 in *R v Matenga*.[54] But in relation to acquittals following an erroneous ruling amounting to mistrial, the additional tests in s 382 of "mistrial" and "substantial wrong or miscarriage of justice" ensure that acquittals are set aside only where such step is required for reasons of integrity of trial.

[59] Although the provisos under ss 382 and 385 both use the language of "substantial miscarriage of justice", the proviso under s 382 is not the obverse of the proviso under s 385. Each is coloured by the context of the section in which it is located. Under s 385 the Court must allow an appeal against conviction if there has been a wrong decision on any question of law but may dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred". The Court cannot conclude that no substantial miscarriage of justice has actually occurred unless it is affirmatively satisfied of guilt.[55] Unless of that view, the Court must allow the appeal. Indeed, even if affirmatively satisfied of guilt, the Court is not obliged to dismiss the appeal, but has a discretion to do so. The position under the proviso to s 382 is to different effect and arises in the different context of obtaining an authoritative opinion on a question of law reserved. In some cases the statement of that opinion alone will be the only appropriate outcome for error found on case stated appeal after acquittal, because the test of "mistrial" is not met or the proviso does not apply.

[60] In considering what may amount to a "substantial wrong or miscarriage of justice", William Young P considered the different approaches to similar provisions in Canada and Australia. He referred to the Canadian view that the Crown must show that the error had "a material bearing on the acquittal"[56] and the Australian test that a correct approach "would not have been likely to make any difference in the

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54 *R v Matenga* at [9]–[11].
55 *R v Matenga* at [31].
56 *R v Graveline* 2006 SCC 16, [2006] 1 SCR 609 at [14] per Fish J.

result".[57] New Zealand practice was, he thought, "consistent with a sparing use of the power to set aside acquittals in these circumstances".[58] It should be used only where the admissibility ruling "was of high significance in the context of trial":[59]

> To put this another way, satisfying a simple "might have made a difference" test is not enough.

[61] We agree that a "substantial wrong or miscarriage of justice" is not shown if nothing more can be said than that the evidence "might have made a difference" to the actual verdict reached. The error must have occasioned a substantial wrong or miscarriage of justice "on the trial". That is an actual substantial wrong or miscarriage of justice. Nor, on the other hand, is it necessary for the appellate court to be of the opinion that the verdict of acquittal is wrong.[60] It is not appropriate to speculate about what the particular jury would have done if the error had not been made. Rather, the proviso requires the appellate court to be satisfied that the error was one highly material to verdict, so that the integrity of verdict is undermined by it.

[62] The members of the Court of Appeal were unanimous in the conclusion that the wrongful admission of evidence occasioned a mistrial and fulfilled the proviso to s 382(2) because it caused a substantial miscarriage of justice. William Young P thought the matter more finely judged than Hammond and Baragwanath JJ, a view that was influential in his indication that, if persuaded that the error had been one of law, he would not have granted a new trial (a point we deal with below).

[63] We agree that the error in admission of the evidence amounted to a mistrial and occasioned a substantial miscarriage of justice on the trial, within the meaning of s 382(2)(b) and the proviso. Although there were other planks to the defence case, cause of death was a key issue in the trial. The irrelevant, unreliable, and unhelpful hearsay opinion was used to great effect, as is clear from the defence address and the Judge's summing up. Counsel for Mr Gwaze rightly described the evidence during

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57 *Vallance v The Queen* at 66 per Kitto J.
58 At [78].
59 Ibid.
60 Although that is the condition for exercise of the power to set aside a conviction under s 382(2)(d).

the trial as "pivotal". Its inclusion was not only capable of affecting the verdict, amounting to mistrial, but also constituted a substantial miscarriage of justice.

A new trial should be ordered

[64] The terms of s 382 are permissive. They do not compel the court to grant a new trial. There will be circumstances in which the court would be justified in declining to order a new trial notwithstanding its view that an error has caused a mistrial and an actual substantial miscarriage of justice on the trial. Examples may more readily be seen in circumstances extraneous to assessment of the conditions contained in s 382, such as delay or disproportionality of the outcome of new trial where the charge is not particularly serious. It is more difficult to contemplate that a court which has found substantial miscarriage of justice would readily be justified in declining a new trial on the basis of its assessment of the prospects of prosecution success at trial, because such assessment would pre-empt jury verdict after proper trial.

[65] William Young P was of the view that the case was one where a new trial should not be ordered. He thought it "at best a close call"[61] whether the likely effect of the ruling was sufficiently substantial to justify the conclusion that there had been a miscarriage of justice. In addition to other elements of the defence case and defects in the Crown case, he thought that the jury's "prompt verdicts of not guilty" did not suggest "fine scales" were necessary:[62]

> While I am happy to accept that the disputed evidence may have made a difference to the result, I do not see the probability that it did so as being sufficiently great to warrant ordering a new trial.
>
> In short, had I been persuaded that the admissibility ruling turned on an erroneous legal determination, the "second shot consideration"[63] and my reservations as to the substantiality of the disputed evidence in relation to the verdicts would have persuaded me that directing a new trial would derogate unacceptably from the spirit of the rule against double jeopardy.

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61 At [124].

62 At [125]–[126].

63 A reference to his concern at [123] that there was "a sense in which the Crown appeal [was] ... an attempt to obtain a new trial at which it [could] present a stronger case than at the first trial".

[66] Three principal considerations weighed with the President in this view. Since our different view leads us to the contrary conclusion that a new trial should be ordered, we address them in turn.

[67] First, the President was concerned that s 382 should not erode "the spirit of the rule against double jeopardy". As a result of his preferred approach, he proposed the test that "the Crown should only succeed in an appeal under ss 380 and 382 if":[64]

> [t]o set-aside the acquittal and direct a new trial would not be an unacceptable derogation from the spirit of the rule against double jeopardy.

The President considered it would not amount to such unacceptable derogation in "most cases where an erroneous legal ruling has in substance terminated the case in favour of the defendant"[65] or in cases where the Judge has misdirected the jury as to elements of the offence.[66] In such cases, the acquittal would not "truly represent a finding by the jury on the merits of the case",[67] so that a retrial would not derogate unacceptably from the spirit of double jeopardy. As already indicated,[68] we do not think the principle of double jeopardy, as expressed in s 26(2) of the New Zealand Bill of Rights Act 1990, was engaged. The procedure for reservation of questions of law under s 380 makes it clear that, where such reservation occurs, any verdict (whether to convict or acquit) is provisional until the Court of Appeal determines whether it is to be set aside and a new trial ordered. The legislation already provides a significant hurdle before that course can be taken. It is not enough that there be error, nor that there has been a mistrial as a result. The conviction or acquittal cannot be set aside and a new trial directed "unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice was thereby occasioned on the trial". We do not agree that the permissive wording of s 382(2) allows the Court to construct an additional general test for application in cases of Crown appeal following acquittal. That additional burden is inconsistent with the statute, which itself imposes a high threshold.

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64 At [71].
65 At [72].
66 Illustrated by the cases of *R v Renata* [1992] 2 NZLR 346 (CA) and *R v Jones* [1986] 1 NZLR 1 (CA) and in Australia, *Vallance v The Queen*.
67 At [76].
68 At [3].

[68] The second consideration that weighed with the President was the view that there is a distinction between errors in directing the jury as to elements of the offence or errors where the "ruling has in substance terminated the case in favour of the defendant"[69] on the one hand, and errors in ruling evidence inadmissible on the other. Although he considers that it is only in the first two cases that the acquittal would not "truly represent a finding by the jury on the merits of the case", it is the case that errors in admitting inadmissible evidence or excluding admissible evidence which in themselves occasion "some substantial wrong or miscarriage of justice" on the trial may also mean that the jury verdict does not "truly represent a finding by the jury on the merits of the case".[70] The conclusion reached by the jury may be materially influenced by inadmissible evidence or by the exclusion of evidence that should have been admitted.

[69] Finally, it is clear that the President's view that the questions of error and resultant mistrial were finely balanced was based on his view that the 14 May job sheet only became inadmissible on receipt of the further statements of 16 May. Since we take the view that the 14 May statement did not amount to the necessary opinion of comparability and was irrelevant as received, we consider that the error was more fundamental. We do not regard it as "at best a close call" whether the likely effect of the ruling was sufficiently substantial to justify the conclusion that there was a miscarriage of justice. We agree with Hammond J that "the evidence before the jury was quite misleading" because the hearsay statements misleadingly suggested expert "equivocation as to the cause of death".[71]

[70] There was no proper basis upon which the Court of Appeal could have declined to order a new trial. The circumstances that lead us to that conclusion are the seriousness of the alleged offending and the opinion now available from Professor Rode that makes it clear that he does not support the defence contention at trial as to cause of death and the reasons for the symptoms displayed by Charlene. The delay in resolving this matter has arisen for proper reason (obtaining expert assistance and taking the point on appeal to the Court of Appeal and then to this

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69 At [72].
70 At [76].
71 At [232].

Court). Delay in such circumstances is not a matter which can outweigh the interests of justice in obtaining a verdict only after proper trial. Notwithstanding the significant points raised for the defence (referred to at [5]), this is not a case where it could realistically be suggested that the Crown case is not substantial. In addition to the medical evidence relating to Charlene's condition, it included DNA evidence which, if accepted, linked the accused to a sexual assault on Charlene and other evidence suggestive of sexual assault. We conclude therefore that the acquittals must be set aside and a new trial directed.

Result

[71] The appeal is allowed. The acquittals are quashed and a new trial directed under s 382(2)(b) of the Crimes Act 1961, with the consequences provided for by ss 380(4) and 382(4).

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