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

SC 21/2022
[2022] NZSC Trans 12

ALAN RUSSELL HALL
Appellant

v

THE QUEEN
Respondent

Hearing:	8 June 2022
Coram:	Winkelmann CJ
	O'Regan J
	Ellen France J
	Williams J
	Kós J
Appearances:	N P Chisnall and L A Elborough for the Appellant
	M F Laracy and E J Hoskin for the Respondent

CRIMINAL APPEAL

WINKELMANN CJ:

Now, counsel, as you will see, we are joined by one of the members of this Court remotely. He's in an isolation period so can't be with us in the Court, and there are a few preliminary things we wanted to deal with.

Mr Registrar, did you want to check whether click-share was working because we had some issues with that operating remotely? It's working. Good.

Now, Mr Chisnall, do you want to…

MR CHISNALL:

If the Court pleases, I wish to begin by introducing Mr Hall.

WINKELMANN CJ:

Excellent.

MR CHISNALL:

Mr Hall is seated you can see in the white shirt. He's supported today, as your Honours will see, by members of his family and others who have been part of his contingent of supporters, some for very many years, and you'll be pleased to know I'm not going to introduce each of them by name but you can see by dint of the number here that he is a man who enjoys the close support of his family and that in no small part explains why, after nearly 36 years, this case, because of the perseverance of those supporters, has reached this Court.

WINKELMANN CJ:

Thank you. So we had some preliminary questions which we thought we'd identify for all counsel and, Mr Chisnall, your junior might like to take a note.

We don't think that we have in the materials detail of Mr Hall's incarceration. I can see that he was recalled in 2012 but we would like to know the periods of time for which he's been incarcerated.

We want to hear from both parties about whether or not Mr Hall's statement should have been excluded because we consider that's something we should address in our judgment.

We noted that the Court of Appeal dealt with the appeal to that Court simply by declining leave which was not an unconventional approach at the time. Having heard the argument they then declined leave to appeal. We are interested as to whether that creates any jurisdictional issue.

We noted that the Court of Appeal simply dismissed the – rejected the grounds of appeal relating to the murder conviction but did not address the intentional wounding conviction. Are we right in our assumption nevertheless that both were the subject of the appeal for which leave was declined?

We are also interested to hear what was the impact of the sighting experiment that was carried out by police, impact in particular in terms of the then treatment of Mr Turner's evidence. Mr McMinn offers that sighting experiment as one of the explanations for what occurred. We just want to hear what counsel say about the explanation for the events.

Finally, we are interested to hear from both parties about the issue of abuse of process, particularly in connection with Mr Turner's evidence and as to whether offering a statement as evidence which has been altered and which has, putting it at its lowest, not been checked for, in respect of the blue garment, checked for accuracy, whether that amounts to an abuse of processes of the Court.

MR CHISNALL:
Yes, obliged for that.

WINKELMANN CJ:
Sorry about the length of the line of questions.

MR CHISNALL:

I wonder…

WINKELMANN CJ:

But you just address them as they come.

MR CHISNALL:

Yes.

WINKELMANN CJ:

I'm not asking you to address them all now.

MR CHISNALL:

I will try and answer the question about Mr Hall's length of incarceration first.

WINKELMANN CJ:

Yes, so and finally before I cease with my speaking. Timing of today's… What was your expectation about how long you would take Mr Chisnall?

MR CHISNALL:.

I, to be frank your Honour, was waiting to see how the Court would like me to address it.

WINKELMANN CJ:

Yes.

MR CHISNALL:

What I had anticipated doing was presenting the submissions in the order that they appear in my written materials.

WINKELMANN CJ:

Yes and you can be confident that we have read all of that in detail, so you do not need to through in every detail.

MR CHISNALL:

No and I wasn't intending to do that your Honour. That's I would like to think not my style.

WINKELMANN CJ:

So what we are interested in is hearing the gravamen of the appeal and how – and what you say the significance of Mr Turner's statement, the non-disclosure and particularly that point about the admissibility of that statement, Mr Hall's statement.

MR CHISNALL:

Yes.

WINKELMANN CJ:

I should indicate I was asking about timing because we're hopeful of being able to deliver judgment today. So it would assist us in that regard if we were able to conclude hearing argument by the luncheon adjournment.

MR CHISNALL:

That was our intent, what we wish to do.

WINKELMANN CJ:

Yes.

MR CHISNALL:

We indicated to Mr Registrar that we were hopeful that it would be complete by lunchtime, so that was –

WINKELMANN CJ:

Excellent. Well, we'll let you get underway then.

MR CHISNALL:

If you aim at nothing you hit it I appreciate and so my intention is to – and as the Court will see a number of the issues that your Honour has raised particularly in relation to the abuse of process point is something that I've

touched upon in the written submissions and not in the, perhaps in the detail that I wish to, but given the quick time turnaround required I wonder your Honour, if I can ask an indulgence if I can remove my mask while I'm making submissions? I'm in the Court's hands about that of course and just –

WINKELMANN CJ:
Yes, go ahead.

MR CHISNALL:
– my glasses continue to fog up. Thank you. I'm obliged. I'll just start by answering these questions about Mr Hall's incarceration. I imagine Mr Hall would be able to tell us much more swiftly that I can. I can give you specific dates in a moment though.

WINKELMANN CJ:
Well it might be that we can come back to that.

MR CHISNALL:
Thank you. Just to give you a general idea, he was released on parole after about eight, nine years of serving. It was before the 10-year minimum period, of course, under the old sentencing laws. He was recalled to prison –

ELLEN FRANCE J:
So in 1994?

MR CHISNALL:
Yes. So it's – that's right. Thank you your Honour. And then he was recalled to prison in 2012 and he was released on parole in February this year. I will provide the specific dates and I was Mr Hall's counsel in the Parole Board in more recent times, so it is information that was and is in my hands. I wonder if I might come back to the jurisdictional issue last and in fact I might even, if the Court accepts that, defer to my learned friends from the Crown on that point. It's not something I'd turn my mind to and I just need a little bit of time to do it justice.

WINKELMANN CJ:

Well the Crown might give us all the answers.

MR CHISNALL:

They may do. That's what I'm hoping on that point. But the issue in relation to your Honour's question about murder and the GBH charge, the wounding charge, it's something that occurred to me too when I started to prepare this case that the wounding charge really gets no mention whatsoever in any of the documents. I'll have to review the original notice of application to the Court of Appeal but certainly my understanding is that they were really seen as part and parcel of the same issue. Whether they were explicitly separated out as charges as they should have been is something I will need to review.

WINKELMANN CJ:

So you haven't sighted the notice of appeal, Mr Chisnall?

MR CHISNALL:

No. I believe it's in the case on appeal, the original notice, but I would have to review that.

KÓS J:

But plainly they can't be separated as a matter of fact?

MR CHISNALL:

No. That's right, and they would have to be distinctly addressed as charges, but that's why I make the point Sir that it was unusual when I first started to read this that the wounding charge, even though it arose from the same circumstances, isn't really given a great deal of attention and indeed his Honour Justice Prichard's summing up you'll observe really gave it relatively brief mention as well for relatively obvious reasons. I will deal with your Honour's other questions posed as I move through the submissions, which I'll turn to now.

It's been the best part of 36 years since Alan Hall was found guilty of murdering Arthur Easton and wounding one of Mr Easton's sons. As the Court is aware, he was sentenced to life imprisonment. His appeal against conviction was dismissed by the Court of Appeal in 1987.

Turning to the facts, the Crown alleged that Mr Hall was an intruder who entered the deceased's home on the evening of the 13th of October 1985. The single issue at trial was whether the Crown had correctly identified beyond reasonable doubt Mr Hall as the offender. As the Crown aptly put it in its leave submissions, in effect this was a "whodunnit".

The deceased and his two six-foot tall sons, Kim and Brendon Easton, engaged at close quarters with the offender. At the time of trial they were six foot and one inch and six foot in height respectively. Immediately and consistently in their statements made thereafter, the Eastons described the intruder as a man very close to their height. Messrs Easton were consistent in their descriptions of a man who was sturdy and strong, and stronger than them, which is, of course, a factor that's of prominence in this case, given that the intruder was able to fend off three men who were of significant stature and in the bloom of youth for two of them, that he had medium length hair, he was wearing a dark top and it was posited that that may have been a blue sweatshirt, jeans and sports shoes. Ultimately, there wasn't any opinion given at trial about ethnicity but in the immediate aftermath of the 13th of October event the two men spoke of the intruder being Māori.

ELLEN FRANCE J:
Just in relation to that, Mr Chisnall, can you just give me the reference to where both brothers talk about ethnicity, not immediately but just as we come to that, both brothers talk about ethnicity in those initial statements?

MR CHISNALL:
The first statement, the one I'd invite your Honour to look at, is that of the ambulance officer, Mr Holt.

ELLEN FRANCE J:
Yes, Mr Holt.

MR CHISNALL:
And it was somewhat opaque because what he said is it was a reference to "they" in the statement, and I've interpreted that as being something that them standing there and being consistent about that, and obviously the term used was different but your Honours –

ELLEN FRANCE J:
Yes, well, the Court of Appeal certainly talks about both Brendon and Kim referring to ethnicity but there's other material that suggests one rather than the other.

MR CHISNALL:
Mmm, and the 111 call, of course, only involved one although it would appear that the other brother was nearby and so that would explain the Court of Appeal's viewpoint on it that it was adopted by both.

The man the Crown said was the intruder was seen fleeing the scene by Ronald Turner. The Crown invited the jury to infer that this was Mr Hall because Mr Turner purportedly told police that a blue top owned by the appellant matched that worn by the fleeing assailant, and, as the Court has already identified, that's a real issue in this appeal and what engages the abuse of process argument that we make in the submissions.

The Crown's visual identification evidence was not reconcilable with what is known about Mr Hall, and that's why I took that opportunity to have him stand, and he's five foot and seven inches in height, Pākehā, at the time he was slim in build and asthmatic, left-handed, and on the defence case on the night of the 13th of October was wearing a red sweatshirt.

As the Court is aware, what we proposed in our notice of application were five grounds. I hope it's clear from the materials that what we are pursuing is

three and I am obliged to the Court for the indication that it wishes to engage with the issue about whether the statements should be or should have been excluded and certainly whether they would be in any retrial, and I have addressed that in some detail as the third ground of appeal and I will turn to that in more detail.

Each of those grounds, and the three that we pursue today, addresses a method adopted by the prosecution to counteract the fact that if its key eyewitnesses had correctly described the height, build, strength and ethnicity of the offender then, simply put, Mr Hall could not be the offender.

In my respectful submission, it's not an exaggeration in this case to assert that a starker example of a trial gone wrong would be hard to find. That explains the Crown's concession, for which it is to be commended, that one of Mr Hall's proposed grounds, that in relation to Mr Turner, is unanswerable and as a consequence that will, as it says, likely cast a long shadow and limit some of the arguments which responsibly can be made in relation Mr Hall's remaining allegations.

The reason I raise that of course, the Crown Law Office acknowledges that Mr Hall had suffered a miscarriage of justice. I'm sure that the Court will appreciate the power that that concession carries. It's to be commended and we do and I do so on behalf of Mr Hall for the way that the Crown Law Office has dealt with this matter. It hasn't used delay as a shield to resist this Court granting leave. It took that exceptional additional step of squaring up to the merits of Mr Hall's argument about why he suffered a miscarriage of justice and the full measure of the concession that's made by the Crown must be taken as act in the best traditions of the Solicitor-General as a minister of justice. It has expedited the appeal process and it brings with it a degree of closure for Mr Hall and his supporters. In my submission though the concession does not detract from the fact that it has taken over three decades for Mr Hall to secure the opportunity to challenge his convictions. The fact that his case is being heard before this Court reflects Mr Hall's maintenance of his proclamation of innocence and the unwavering support that he has

enjoyed from his family and others. That this Court is in the position to cast light on the deceitful strategies adopted by the prosecution to secure Mr Hall's convictions in 1986 is a testament to his and his supporters' persistence. Others, simply put, would have surrendered in the face of the setbacks that Mr Hall has suffered.

Mr Hall as the Court is aware unsuccessfully applied for exercise of the Royal Prerogative of Mercy on no less than three occasions. Twice in 1988 and a final time in 1993. Why it is that the first prerogative failed is defensible on an orthodox application of the law. The second and third however where he was declined relief are not defensible in my respectful submission. Those applications had at their heart the prosecution's failure to disclose all of Mr Turner's statements and the way in which the jury was misled as a result of the omission of that witness's complete description of the man he saw on the 13th of October. The Crown properly and candidly acknowledges that Mr Hall was failed by the prerogative process. That of course as the Court is aware and with recent authority about the fact that that's our final safety valve. It was until very recently the last resort that a person in Mr Hall's position has. What befell Mr Hall both at his trial and afterwards calls into question in my respectful submission the integrity of New Zealand's criminal justice system. The State has since 1988 known about the profoundly unfair way in which the prosecution dealt with Mr Hall, yet it did nothing until 2022.

Turning to the grounds of appeal that I want to advance. As the Court reflected in its leave decision, in light of the Crown's concession that the appeal should be allowed we accept that it's not necessary to conduct the full review that we originally sought and however I make that point on – and again I come back to our gratefulness about the opportunity to address Mr Hall's statements. In our submission it's respectfully said that engaging with the three grounds that we've proposed will do justice to the case. They provide a full measure of the miscarriage of justice that befell Mr Hall, or really to put it more accurately, what was effectively manufactured by the prosecution at his trial.

I will move to the facts if I might. I'm mindful of your Honour's indication that you've everything that's been presented and I make the point that we have provided you with a very significant volume of material indeed and we're obliged for that indication because it would be no mean feat to have to get your heads around it in the short time available. Certainly I can say honestly that it took me a very long time to do so and many before me.

WINKELMANN CJ:
Well it has been very well presented.

MR CHISNALL:
Thank you your Honour. I'm grateful for that.

WINKELMANN CJ:
We're assisted by that.

MR CHISNALL:
It's the usual story. If I had longer the submissions would have been shorter, but I consider that the material and in particular the affidavits that have been filed and that of Mr McKinnel do justice to the sheer magnitude of the investigation that was undertaken over very many years indeed to reach this point.

If I can just briefly touch on the third ground, because it does raise an issue that I want to address, given the Court's indication about admissibility being in play. As the Court knows Mr Hall has autism spectrum disorder. That's not something that's in dispute in this hearing and for that I am grateful to the Crown for the concession again that's made. It's a situation where there is fresh evidence and it's fresh in the sense that it arose in 2019 for the first time where Mr Hall was diagnosed by a specialist, despite all of the indications that perhaps presented with the benefit of hindsight might have triggered particularly in the prison environment I might say a greater scrutiny of Mr Hall's condition. But, be that as it may, of course that has a bearing on what was really the Crown's central facet of its case which is that Mr Hall

appeared to lack credibility and his behaviour was consistent with guilt it said because he provided different explanations.

We also have provided – and again I acknowledge that it's evidence that doesn't perhaps require the full scrutiny of the Court in terms of the decision, but one which we may see in future cases as an issue given what we now know about autism and looking back to the 1980s through a modern lens I suspect that we are going to see other cases in which this issue arises – and that of course is the evidence of Dr Clare Allely who's an associate professor of forensic psychology in the United Kingdom, and that of course addresses the various ways in which Mr Hall's ASD is likely to have impacted on his ability to participate in very lengthy interviews that he was subjected to by police. And in my submission and what I've said in the written submissions but I imagine the Court doesn't need to reach a determination on it, but we say that looked at through the lens of section 25 of the Evidence Act 2006 it's substantially helpful.

WINKELMANN CJ:
Can we just briefly look at her evidence.

MR CHISNALL:
Certainly. It's attached to the, in the original bundle your Honour. Perhaps if I can ask are there any –

WINKELMANN CJ:
I'm just trying to remember what page it's at. It's in the 800s isn't it?

WILLIAMS J:
What's the tab number?

KÓS J:
Tab 10.

WILLIAMS J:
Tab 10.

ELLEN FRANCE J:
In the Court's Casebook, appellant bundle part 3.

MR CHISNALL:
Thank you.

WINKELMANN CJ:
So which parts do you particularly address us to?

MR CHISNALL:
I haven't in my written submissions simply because it wasn't an issue that given the Crown's proposed approach that we have to rely upon the autism point in which to argue the admissibility issue and we've looked at it through a narrower lens your Honour.

WINKELMANN CJ:
Yes. That's why I'm asking you because it seems to me there are systemic issues at play there and that's why I asked you is because you were raising systemic –

MR CHISNALL:
I do but I've said it I suppose with a weather eye on future cases perhaps more than this case and that's why I wanted to emphasise that point. It's fortunate that we don't have to engage closely with the issue here.

WINKELMANN CJ:
Would it be page 968 probably?

ELLEN FRANCE J:
Well for myself I found the summary. It is I think an accurate summary beginning at 998.

MR CHISNALL:

And I have summarised it in the notice of application in some detail because I anticipated that this was going to be the central feature of the case other than the Mr Turner point of course. But as we know Mr Hall's dealings with police on the 11th and 16th of December 1985 culminated in two statements that on any way you look at it were critical to the Crown case at trial which is something, of course, that the Crown acknowledges in its leave submissions and its substantive submissions.

As I say at paragraph 20 of the written submissions, it's acknowledged that this Court is not required to engage with the vexing issue of whether Mr Hall's ASD meant that he was vulnerable to the questioning techniques adopted by police to determine whether the circumstances in which the statements were made adversely affected their reliability. Second, it need not decide whether the statements were the product of oppressive conduct by virtue of that condition alone, and that's a point I wish to emphasise. We've looked at it through a narrower lens than, of course, through the law that applied under the Judges' Rules at the time.

I make this point though. Given the interrogative techniques that were adopted by police, one might say that even a man less vulnerable than Mr Hall may have been subjected to real pressure and oppression, but we know, even from what was known in the mid-1980s about Mr Hall, that he was a vulnerable man.

So we've, of course, highlighted the logistical challenges that would be posed by a fully fledged exploration of the relevance of Mr Hall's ASD and the propriety of police's conduct. The Crown though appears to tacitly acknowledge the persuasiveness of the argument that the statements would, when viewed through the modern lens of section 30 of the Evidence Act, in all likelihood be found to have been unfairly, therefore improperly, obtained. I make that point simply because as I say in a footnote, footnote 9, the Evidence Act would apply on any retrial if there was to be one but in terms of admissibility it appears tolerably clear that we have to look at it from the

perspective of the law that applied at the time, and that is a point that was made in *R v Bain* [2008] NZCA 585 by the Court of Appeal.

But what I say, and perhaps this is the point that I should have more succinctly got to, at paragraph 22 of the written submissions, even if Mr Hall's 2019 ASD diagnosis is put to one side for the purposes of this appeal, that does not diminish the fact that the police knew in 1985 that he was a vulnerable suspect. The unfair methods adopted by police to elicit Mr Hall's statements, and the likely downstream impact that had on their admissibility, in my respectful submission, explains the Crown's decision not to seek a retrial, and what I was intending to say is that the circumstances relied upon by the Crown to justify the dispositional stance that it has taken should be made known to this Court and I am, as I say, for the third time, very much obliged for the indication that it is something that will be squared up to in the judgment.

We have, I hope, provided a helpful summary of the statements themselves but also the underlying conduct by police, and I will take the Court through that if the Court would like me to in some detail but it appears that the provenance of that synopsis in the submissions isn't challenged in any material way by the Crown, and that, in my submission, ought to be of help for when it comes to reviewing it, and the point I will make now, but I do make in the written submissions, is that the way in which Mr Hall was interviewed was played out in front of the jury. It wasn't one where the statements were the pinnacle and all of the behaviour that led to those was kept from the jury. There was no sanitisation. The jury were privy to each and every manoeuvre by police to elicit the statements that were ultimately produced.

If I turn briefly to the evidence at trial and the points I wish to emphasise, first of all the offender in all likelihood was injured during this confrontation. That's a point I make at paragraph 25 of the written submissions. Kim Easton armed himself with a squash racquet, and it was a wooden one, and landed three blows to the intruder's head, breaking the racquet in the process. The intruder was able to fend off the three occupiers, open the door through which he had

entered and escape, notwithstanding the fact that he was, in all possibility of likelihood, injured. There was also evidence that they landed blows on him as well.

The intruder climbed through a hedge adjacent to an accessway and ran, and blue fibres, of course, were found by police on the hedge where the intruder egressed.

All three of the Eastons suffered wounds and, of course, as the Court is aware, Mr Easton Snr suffered three stab wounds and died very soon after the police and ambulance arrived.

I just recapitulate that on the Crown's case Mr Turner was privy to having seen the intruder run away and he described the man he saw as a fairly wide height range which is perhaps understandable by the fleeing nature of it and the fact that he was sitting down but it also matches what we know about visual identification, that a man between five foot seven inches and six feet in height of average build and wearing a blue sweatshirt. Indeed the Court might have observed that the statement maker is someone who's worked for poli - who was then police. It may be familiar to your Honours and in fact Mr Turner used that officer as an example to – as consistent with the height of the man and build of the man he saw. At trial of course the jury had Mr Turner's written statement in which he stated that the jersey that the man was wearing matched one owned by Mr Hall which had been seized by police and which was produced as exhibit 31 by the Crown. And as I said earlier, Brendon Easton's first description of the offender was provided to the 111 operator at 8.11 pm and that's at paragraph 29 of the submissions. He said that the intruder was Māori, approximately 18 years old, six feet tall and with brownish hair. The jury was also privy to Mr Hall's height and weight which I mentioned earlier and that came in through a prison officer.

What happened at trial was in my respectful submission unusual. Brendon Easton's evidence it's fair to say became vague, notwithstanding the relative level of detail that was provided in the statements, those disclosed

and those that weren't, but as I say at paragraph 31 he asserted at trial despite those descriptions given on earlier occasions that the only thing he could remember about the man was that he was wearing blue jeans and a balaclava that was pulled all the way over his face, and indeed as the Court will see from a careful observation of the evidence at trial it resulted in a somewhat bizarre re-enactment using the witness during cross-examination where he was asked to put the balaclava all – completely over his face and walk with it. When he was asked by the prosecutor to describe the man's height Mr Easton said that he was "not taller than myself and he was approximately Constable Lamb's height" and that's another point I wish to emphasise, unusual use of a police officer as effectively an exhibit in this trial where Constable Lamb at that point entered the courtroom it would seem and stood and in fact was used as the height test or the height comparison for the witness in the witness box. Constable Lamb later gave evidence that he was 175 centimetres in height, so five foot, nine.

He was of course closely examined on the difference between his trial evidence and what he had previously said to police in those statements that were disclosed. When it was put to him that he had previously said that the intruder was about six feet tall he answered: "I accept that the height of the intruder was approximately Constable Lamb's height," so that appeared to be the point that he kept coming back to. He did ultimately accept that the intruder was about the same height as he was though but Constable Lamb again entered the courtroom later when his brother Kim gave evidence and again his evidence was relatively vague but he appeared to be more candid about the fact that the intruder "was approximately" he said "Brendon's height, my height". Again the constable entered the courtroom but there weren't any follow-up questions as I say at paragraph 34 of the written submissions.

I just will take this opportunity given the question that was posed to me to talk about this – the reconstruction. I know we talked about the sighting experiment and I will get to that later but this is another in my respectful submission important piece of evidence which gives us a clear indication of

the approach that was taken by police in order to shift the inconvenience, the visual identification evidence presented to the Crown's case at trial.

As I say in the written submissions, Brendon's assessment of the offender's height was a somewhat obvious departure from what he had consistently said pre-trial about the man at least matching his height and as I said in the written submissions it's not something with which this Court must necessarily grapple but Mr McKinnel in his affidavit addresses the "reconstruction", and I use that in the submissions in inverted commas, undertaken by police with Brendon and Kim Easton on the 30th of January 1986, and the reason I put quote marks around it is simply because we don't know anything in terms of how it was undertaken, who was present, what the methodology adopted was, to reconstruct what had happened. There's simply little documentary evidence available describing it and if it ever existed, which is the question which is unanswerable, it would seem, it certainly doesn't exist now. But what is tolerably clear is that Constable Lamb was present during that reconstruction and there is a strong hint, we say, that the reconstruction was designed to dilute the pre-trial descriptions provided by Brendon and Kim Easton and, if so, it worked.

I've dealt very briefly with when it was that Mr Hall became the primary suspect with police, December 1985, and understandably that was because police were focused on identifying whose bayonet and hat those items belonged to.

Briefly, if I can just address the defence evidence, it was, as I say at 42, predominantly from family and colleagues of Mr Hall and importantly evidence about the appellant's intellectual and physical attributes were led from members of his family: his sister, grandfather, and uncle. I've summarised that briefly at paragraph 42(b) of the submissions.

Importantly, production of the receipt for exhibit 31, the blue sweatshirt, occurred and that was, of course, the jersey that Mr Turner purportedly asserted he recognised as that worn by the man he saw fleeing. It's clear that

it was purchased in December 1985, so therefore after the murder, and, as the Court has already expressed, that's an important piece of evidence, given what we know about the fact that Mr Turner says it wasn't ever shown to him, and, indeed, it couldn't have been because when he was interviewed the first time it was before it had been purchased.

As I say at paragraph 42(c), unhappily, the trial Judge undermined the evidence about the jersey because he posited that if it had been, or the jersey that was worn on the night, would've had blood stains on it. Indeed, the Judge invited the jury to assess the possibility that Mr Hall "could well have" worn another shirt on 13 October, and then burnt it. That, of course, ties in with the fact that there was an incinerator at home.

Then paragraph (d) I talk about the fact that in this case the defence called a medical practitioner who appeared to obviously have expertise and a medical opinion about injuries but more importantly was also a squash afficionado and described the type of lacerations that are typically caused by wooden racquets, and that evidence is important because, of course, it undermined the Crown's case that Mr Hall, if he had been the man struck by Kim Easton, could have been left physically unscathed.

KÓS J:
Mr Chisnall, I'm just having some trouble following your numbering. The version you're reading from seems to have a different numbering system to the one the Court has.

MR CHISNALL:
I will pull out the submissions that I – I apologise, Sir. This is something we've struck before when I use my written submissions for oral presentation. In fact, it's paragraph 38 of the submissions that will be before the Court. I apologise for that.

I won't go through the evidence in any detail but I've provided an overview of what's been filed in support of the grounds of appeal and what I say is that the

affidavit of Ronald Turner – and the Court will observe it is an affidavit dated from 1988 and that date's noteworthy because, of course, it was brought into existence through the efforts of Mr Stainton who was the solicitor who represented Mr Hall on the later prerogative applications after Mr Williams QC was no longer representing Mr Hall – and what that establishes is, in my submission, two critical and what appear to be uncontested facts. First of all, that Mr Turner was not aware, when he signed the statement dated 24 June 1986 that was read to the jury, that police had, of course, omitted reference to the man's ethnicity, and it's important, of course, in terms of context that Mr Turner establishes that police closely challenged him on his assertion in his statements, the two earlier ones which are dated 14 October 1985 and 19 February 1986, that the man he saw fleeing was Māori, and he remained adamant of the fact that there was no possibility he was mistaken. Second and equally critically, Mr Turner deposed that he was not ever shown exhibit 31 which was Mr Hall's blue jumper which was seized by police, and again, unusually, there's no challenge to that. On its face, it would appear to be obvious that he was shown it and that he changed his opinion, and we now know different.

The affidavit of Mr McKinnel speaks for itself and, in particular, provides a close scrutiny of the two experiments that were undertaken that saw a change in the Crown's case and, of course, about the information that he gleaned from his review of police's file about the adequacy of the inquiries made to determine whether suspect A was the offender and to exclude him.

You have the affidavit, of course, of Bruce Stainton who establishes the significant efforts that were expended to try and get the true picture in terms of what police held before the trial commenced and, importantly, before the appeal within the Court of Appeal.

Then finally, we have the affidavit of Michael Wesley-Smith and demonstrates, I suppose, the synergy between the media and good journalism and dogged journalism that has enabled this case to come back to court, and I've, of course, referred to the "Grove Road" podcast, but much of the work that we

rely on now, of course, was the significant efforts that Mr Wesley-Smith made and, in particular, of course, his letter to retired Detective Senior Sergeant McMinn on the 5th of February and the extraordinary answer received. The fact that we have an answer speaks volumes in terms of casting a complete sunlight on what happened and why. We're not left in a speculative position about whether this was an inadvertent omission. We know it wasn't. He candidly admitted being amongst those responsible for altering Mr Turner's statement.

If I turn now to the first ground of appeal, and I will endeavour to address this relatively quickly as it is in the written submissions, given the clarity of the issues. Just to provide that further context, as I say at paragraph 40 of the written submissions. Mr McMinn's discussion in his 2018 letter of a sighting experiment we say accords with what was established through Mr McKinnel's review of police's file, and that perhaps addresses one of your Honour's questions to me about whether there is a nexus, I took that to be your Honour's question, between the sighting experiment and the alteration of the statement. In my respectful submission, that's a clear inference and, indeed, Mr McMinn fills that gap by saying as much.

ELLEN FRANCE J:
So what do you say the inference is, Mr Chisnall?

MR CHISNALL:
That the statement was altered as a consequence of that experiment, or at least of the view, and this is the thing I can't say is whether the experiment was indeed truly undertaken. There's no evidence to say otherwise but what we do have is a job sheet that post-dates the trial which is odd but it also perhaps provides some form of justification for the position taken by police.

KÓS J:
What exhibit is that?

MR CHISNALL:

I have included it – now there's TM34 which is exhibited to, annexed to Mr McKinnel's affidavit, and the second one, Sir, is TM35 in Mr McKinnel's affidavit. I reference those, Sir, at footnotes 36 and 35. Footnotes 36 and 35 of the written submissions refer to those exhibit numbers.

KÓS J:

So who…

WILLIAMS J:

So TM34?

MR CHISNALL:

Sorry, Sir?

WILLIAMS J:

TM34.

MR CHISNALL:

Yes, and TM35.

KÓS J:

So looking at 35, are you able to say or help us with who else might have been present apart from the five persons named?

MR CHISNALL:

No. There's very –

KÓS J:

It's not much of an experiment if you don't actually set out the detail.

MR CHISNALL:

No The methodology and – that's right.

WINKELMANN CJ:

Sorry, who? 34 has who was present, doesn't it, I think?

ELLEN FRANCE J:

I was going to say, there is another one that sets out –

MR CHISNALL:

In terms of the officers who were involved in the experiment but not certainly in terms of how it was undertaken in any detail. It just talks about the persons running across the road and it doesn't –

ELLEN FRANCE J:

There is somewhere some identification of them, isn't there?

WINKELMANN CJ:

It's in TM35 actually.

MR CHISNALL:

Yes, there's a little bit more detail in that one. That's the one which I mentioned is – it was produced, but it seems to be created in October 1986 so after the trial.

WINKELMANN CJ:

But the point is it does – the police seem to have tried to find a – well, seemed to have – would it be a fair statement the police have used this as a justification, whether it's a post-fact justification or a justification to themselves at the time to alter the statement?

MR CHISNALL:

Yes, that's a fair reflection of what appears to be shown.

WINKELMANN CJ:

And that was no proper basis; it was not for them to justify to themselves altering a statement?

MR CHISNALL:

Well, that's entirely the point. They may have held a genuine belief that he was mistaken or that he was unable to provide that opinion about ethnicity but it simply wasn't for them to decide that and to withhold it, conceal it from the jury. Mr Turner, of course, was unyielding in his opinion about it.

As I say at paragraph 43 of the written submissions, and I suppose this is really the gravamen of the point that your Honour asked me about the experiment, we say that it was the genesis of the decision to unilaterally alter Mr Turner's statement and to recapitulate, of course, he wasn't apprised of that decision. It follows he cannot have been told about the experiment itself and why police had reached the conclusion that only on that fact, and only on that crucial fact alone, he was an unreliable narrator. Everything else was consistent or could be made to work with the Crown case and it was left in for that reason.

WINKELMANN CJ:

So when you say "everything else", person running, wearing a blue sweatshirt…

MR CHISNALL:

And height.

WINKELMANN CJ:

And height?

MR CHISNALL:

And build.

WINKELMANN CJ:

And so you'd say it's an inescapable conclusion that that was – they wanted to remove, they focus on the inconvenient detail.

MR CHISNALL:

Yes.

WINKELMANN CJ:

But what are we to do about that when no one's been asked? We can't really comment that – taking that view requires us to form a view about why they did it and that's effectively bad faith. No one's been provided an opportunity to explain themselves, have they?

MR CHISNALL:

No, well, they have insofar as Mr Wesley-Smith's endeavoured to get an answer as part of his inquiry. Certainly, we haven't, we have relied upon what was in the documents but having reached the view that it would be futile to do so, but, more importantly, neither has the Crown. The question is is it a safe inference to draw, and what I simply rely upon is the chronology involved. What we know is that this sighting experiment appears to have been – and again the date is not in any way obvious or explicit – but it appears to have been in June 1986 and then, of course, Mr Turner's statement, that which was read to the jury, was dated soon afterwards, the same month, and so for that reason, in my submission, the Court can safely draw that inference that one has led to the other.

It may not be in the context of this case something that the Court has to necessarily reach a concluded view on and the reason for that, of course, is because it's incontestable that Mr Turner's visual description of the man he saw on the 13th of October was intentionally altered by the prosecution, and that's what makes this case rare. We're not dealing with opacity around whether this was a mere omission; we know that it was done intentionally and that, of course, the context was the single purpose of the exercise that was undertaken by police, Detective Sergeant White with Mr Turner to try and have him change his opinion about ethnicity in his second statement, the penultimate one before that which was read to the jury was created. It was a very short statement, it's in the bundle that's been provided and it appears to have been for that purpose to persuade Mr Turner that he may have been

mistaken about the ethnicity of the man he saw as a male Māori. He came back unequivocally and said that he was sure of his view. And what we say is that the circumstances that led to the statement of the 19th of June 1986, the creation of which deceitfully overrode Mr Turner's refusal to resile from what he previously said, was the prosecutor or prosecution substituting its opinion for that of the eye witness. Its deceit was masked by what can only have been the intentional decision to withhold Mr Turner's statements of 14 October 1985 and 19 February 1986 which, as the Crown very properly accepts, the prosecution of course was obliged to disclose.

In my respectful submission the inescapable inference of this case and that which can safely be reached by this Court is that the prosecution adopted a deliberate strategy to deceive Mr Hall and his trial counsel. That in my respectful submission constitutes grave misconduct. And there can be no doubt, lingering doubt about the materiality of Mr Turner's statement. It was read at trial ultimately but that was of course on a misapprehension about what had been left out and it doesn't detract from the fact that we know that it was of such significance that his Honour Justice Prichard told the jury that Mr Turner's statement is an important piece of evidence and of course the Judge chose to read it to the jury for that reason because as he said it has quite a bearing here. And as the Crown very properly acknowledges in its written submissions it was key evidence and it was as it said unjustifiably altered in a material way, to use its words at paragraph 24. Again that is a very proper concession.

KÓS J:
Presumably it's also conceivable that had the original statement been provided Mr Turner's evidence would not have been taken as read.

MR CHISNALL:
It most certainly wouldn't have been. I safely predict that Mr Williams QC, a very experienced and vigilant counsel, would not have agreed to it. And the Crown uses the description of concealment in terms of what happened that the jury was – that that information that Mr Turner could provide was

concealed from it and in my submission that is an apt description of the outcome, but perhaps a somewhat anodyne way of describing the deceit behind the act.

The ultimate issue is whether alteration of Mr Turner's statement caused a miscarriage of justice and I've distinguished between an ordinary miscarriage and I use that term just simply to reference the continuum that we know exists in terms of real risk at one end and an impingement on the right to a fair trial at the other. In my respectful submission this is very much a case that must fall at the unfair trial end of the spectrum, and that's not something with which the Crown has grappled of course in any detail in its submissions. I've endeavoured to do so and I've been aided of course by this Court's recent decision in *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 which bears some similarities which I'll turn to in a moment. But I have addressed in my submissions what I took to be a faint suggestion by the Crown that the alteration did not – of Mr Turner's statement did not necessarily pose a real risk to the outcome of the statement. That's been clarified –

WINKELMANN CJ:
Yes. They've clarified that.

MR CHISNALL:
They have clarified it. But as I say, our counterargument and the one that I persist with today, is that Mr Hall's trial was rendered unfair as a result of misconduct by the prosecution and based on unorthodox application of the authorities. There's no requirement to make any further inquiry if the Court accepts that into whether what occurred affected the result at trial. And that's why I say that there's perhaps some assistance to be gained from what this Court recently said in *Haunui v R*. There of course as the Court knows very well the prosecution's decision to present its case on the basis that was quite questionable on the evidence known to the Crown meant that the jury was presented with an incomplete picture and that in my submission is a very apt description of what happened in this trial and also what this Court went on to say –

WINKELMANN CJ:

Well it's a different order this case though isn't it?

MR CHISNALL:

Oh, it is and that's a point that –

WINKELMANN CJ:

To be fair to the prosecution in *Haunui* this is a different –

MR CHISNALL:

Yes, absolutely but in terms of looking at it though the fair trial lens, that was the ultimate conclusion reached by this Court that that was an unfair trial as a consequence and it wasn't a decision where there was any underlying deceit or gamemanship[*sic*] on the part of the Crown –

WINKELMANN CJ:

In *Haunui*?

MR CHISNALL:

That's the difference. In *Haunui*, yes and that is a point that really does distinguish the two cases. But in terms of the analysis required, in my respectful submission that does provide a helpful way of guiding the distinction between an ordinary miscarriage on one hand and an unfair trial on the other, recognising that sometimes it can be difficult to discern where it falls and we tend to say we know it when we see it but in my submission that does perhaps provide us with a greater clarity around what it is that the Court needs to look for. But of course what that, what fell out of that case is that the appellant was prevented from placing before the jury evidence supportive of his defence and that's the quintessential issue here.

WINKELMANN CJ:

So here you say that we can form the view that the police used deceitful strategies?

MR CHISNALL:

Yes. It's in my submission a conclusion which is readily available and one which I'd invite the Court to reach given what we know.

KÓS J:

You've used the word "prosecution."

MR CHISNALL:

Yes I have.

KÓS J:

You're really referring to the police here?

WINKELMANN CJ:

Yes, so that was my next question.

MR CHISNALL:

Yes.

WINKLEMANN CJ:

So what do you – so you limit that? There's no, there is –

MR CHISNALL:

There's no evidence that the Crown was complicit and the police, the former police officers who dealt with this case as you'll see from the material in Mr McKinnel's affidavit circled the wagons. They have put the blame squarely on the Crown prosecutor. There's no evidence to suggest that he did that and I –

KÓS J:

Except that evidence of course.

MR CHISNALL:

Well except that evidence, well given – well that's a very fair point Sir and it's something which will I'm sure in the fullness of time be inquired into by police.

But the point I make is I use that term “prosecution” simply in a neutral sense. Ultimately as is always the case the Crown bears the responsibility as the prosecutor to ensure that the obligations regarding disclosure are made but, as was said recently by the Court of Appeal in *R v Lyttle* [2022] NZCA 52 and it really does reflect the divide in New Zealand, the police are the ones who remain ultimately responsible in the sense that only they tend to have access to the information and what they convey to the Crown shapes what is ultimately conveyed to defence counsel and that perhaps demonstrates a fundamental weakness in our system and one which might require greater scrutiny, which is why I’ve referred to *Lyttle* because in my submission of course one of the points that was made in that case perhaps has been somewhat better answered than it was at the time about whether anecdotally we’re dealing with failures to disclose or whether there’s a greater issue, a systemic issue.

But like I say, and I say this as a former Crown prosecutor, one would hope that the Crown would readily and quickly raise such an issue with the judge if this had arisen and we can use a good dose of common sense to suggest that this is, it’s very unlikely that the Crown would have not brought something of such importance to the attention of others and indeed there is something to be gleaned from the correspondence which the Court would have seen involving the prosecutor where he talks about the information being conveyed to him by police and his reliance upon that –

KÓS J:
Part of the trouble here is that this is not simply Mr Turner’s statement –

MR CHISNALL:
No.

KÓS J:
– but we’re also dealing with the earlier statements of the Eastons and Mr Holt’s statement.

MR CHISNALL:

And that's why it's in my submission open to conclude that what this was was a calculated plan to ensure that the defence was masked from information that could have proved relevant to disproving the charges.

And that turns the argument to the very brief way in which I've dealt with the abuse of process issue and I've said in the written submissions that perhaps the issue can be viewed from that direction and I've said also that it's not something that this Court necessarily needs to decide but it occurred to me that there is a real synergy between the unfair trial issue and the abuse of process issue in terms of what's the test described in *Fox v Attorney-General* [2002] 3 NZLR 62 (CA), and, of course, in this case we say that it is available to conclude that this was bad faith and that the prosecution decision to alter Mr Turner's statement constitutes an abuse of process as a result and one that, of course, cannot be countenanced by this Court and there's no suggestion it would be. While, of course, and this is the point I attempt to make in the written submissions, abuse of processes tends to be at through the lens of a stay application and the analysis, of course, whether to order a stay is forward looking, as I say, rather than, as we're doing here on appeal, retrospective. It's looking at whether in fact there is an ability to have a fair trial.

WINKELMANN CJ:

So your point is it doesn't really matter whether we – it won't sound (inaudible 11:06:00) doesn't really matter whether we say it's an abuse of process.

MR CHISNALL:

Well, no, if you look at it through the orthodox lens of this being an unfair trial then no, it doesn't, but in my submission the abuse of process analysis may be helpful in terms of analysing whether there's been an unfair trial. It's certainly a gloss maybe in this case which is why I haven't in the time available given it perhaps the due diligence of a greater, a more significant written argument. But like I say, it is something that I've raised because it

appears to be an apt way of reviewing what happened here and whether that does provide some assistance.

The other point I make about abuse of process, of course, is that there is, of course, a clear authority that it's not a remedy that's used to punish police or the Crown, the prosecution, for malfeasance or misconduct. It's about the integrity of the Court and the process rather than being used as a disciplinary measure.

ELLEN FRANCE J:
I was going to ask you in that respect because that aspect is discussed in *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705, in this Court's decision, and you know there the Court talks about the various categories and I'm not quite sure which category you'd say this falls into if you were to analyse it as an abuse of process.

MR CHISNALL:
I'm not sure that it comfortably can be put in either. That's the problem and –

ELLEN FRANCE J:
No, well, having looked at *Wilson* that's the reason for my question.

MR CHISNALL:
That is a problem.

KÓS J:
I'm also troubled, Mr Chisnall, with your proposition that it might be a useful lens to look at unfair trial. It seems to be improbable that that's so, that it may in fact simply be a distracting lens.

MR CHISNALL:
That's why I use the term "gloss", whether it's a gloss or an unnecessary gloss is perhaps an issue for this Court and I said I don't wish to make the role of Judges or lawyers who are dealing with abuse any more difficult and certainly

don’t want to make it any more difficult assessing whether there’s been a fair trial.

KÓS J:
That’s the point.

MR CHISNALL:
And that’s a fair point, Sir, but it occurred to me that it is something that perhaps, more in this case than any other, that I can readily identify.

WINKELMANN CJ:
Well, we don’t need to proceed in a formal sense in making a finding of abuse of process.

MR CHISNALL:
No, no.

WINKELMANN CJ:
I suppose I’m interested. There are probably systemic reasons to remark that it was a misuse of the processes of the Court.

MR CHISNALL:
Yes, and I suppose the way to look at it, or the way I would look at it, is it’s not a stepping stone necessarily, an important stepping stone on the weight or conclusion that there’s been an unfair trial. It might be another lens through which to look at it, and that’s why I’ve prefaced the argument with the acknowledgement that we don’t hang our hat on it, so to speak, because it’s one that is somewhat novel.

ELLEN FRANCE J:
No, well, the usual approach in that context would be to say there should have been a stay, wouldn’t it?

MR CHISNALL:

Yes, and I suppose if we go to that step it's saying if this had been known at the time would that have been the result? And one might say, looking at *Lyttle*, maybe not. It's a reluctant step in a murder trial and understandably so. But, of course, all of that tends to demonstrate the difference between the *Lyttle* case and this. It was the diligence of counsel and the persistence that saw that information disclosed before the trial and even though it saw a costs order made later, at least that was remedy that followed the trial. Here, of course, the central point of difference is that we're dealing with information that wasn't disclosed until it was no longer of any real use to Mr Hall.

But as I say in the submissions in terms of the two features of an abuse of process, we say it prejudiced the fairness in Mr Hall's trial and as a flow-on consequence it inevitably undermined public confidence in the integrity of the system.

The final point I just wanted to make before I turn to the second ground is that the Crown does say in its written submissions that the trial Judge squarely addressed the relevance of the possibility that the intruder was Māori. We challenge that. There is one aspect in my submission of the Judge's summing up that does compel emphasis and I acknowledge that one of our original grounds related to whether the Judge's summing up was fair and balanced. I know the Crown in its written submissions pointed to the, perhaps the differences in approach in the 1980s. I'm not sure as an excuse that takes us very far. I would – I maintain the submission that any way you look at it whether in 2022 or 1985 – 1986 that this summing up doesn't withstand scrutiny in terms of that test for balance. But what we know is that his Honour Justice Prichard emphasised the inherent unreliability of identification evidence and of course this was at a point when section 344D was, the warning had just come into effect, about visual identification following *R v Turnbull* [1977] QB 224 (CA), and so that was a warning that in any other trial and said in a different way probably wouldn't have attracted any criticism but in my submission it was the way that his Honour dealt with it in this case that does require some consideration by this Court. It downplayed the

relevance of the stark differences in height, weight, strength, handedness and ethnicity also perhaps between the man described by the Eastons as compared to Mr Hall. Of course what the Judge told the jury was that the eye witnesses were “of no real assistance in establishing the identity of the offender.” In my submission if that didn’t undercut the defence case it’s difficult to conceive of an example, of a more clear example where that has happened. In a case that entirely hinged on whether the Crown had proved beyond reasonable doubt that Mr Hall was the offender the real possibility that he was deprived of an acquittal as a consequence of the Judge’s approach in my submission is plain to see.

To end on this point we say that this was a trial that was unfair and Mr Hall’s appeal should be allowed as the Crown commendably says. The Crown indeed in its submissions uses the term “unsafe” to describe the convictions and in my submission that appears to be tacit acknowledgement that this was no ordinary miscarriage of justice, even if it hasn’t engaged with whether this was an unfair trial. In my submission that would invite the conclusion it was.

Turning to the second ground and we describe it in the heading as the width of the disclosure failings and the impact that had on the fairness in Mr Hall’s trial. This ground of course is part and parcel of the first ground. They’re intrinsically linked and we acknowledge that. There are six categories of information that we say really isn't in dispute in terms of the fact that it wasn’t disclosed to Mr Hall’s trial and appeal counsel. In fact the Crown fairly says that there were multiple disclosure breaches alleged. It doesn’t appear to resist the analysis in any real detail though about the fact that what we’ve described in these six categories was information that was withheld from the defence. Mr Turner’s statements, the two that preceded that that was read. We know that cannot be disputed. The reconstruction that was undertaken by police with Brendon and Kim Easton in their home in January 1986 which appears to provide a cogent explanation for the way in which at trial each modified downwards his estimate of height and how perhaps the introduction of the left-handedness point came to be, which of course raises the other point that the pathology evidence shows about the safety of such expert

evidence, but indeed there appears to have been also more clear information that wasn't made available about handedness, which really did cut against the Crown case that Mr Hall was the offender because he's left handed. And then of course as we said, the sighting experiment which I've already covered but it seems tolerably clear that that was in June 1986 that that particular process was undertaken, which is why I emphasise the nexus between that and the change of the statement.

We have the various statements taken from Brendon and Kim Easton and that's carefully set out in Mr McKinnel's affidavit, and indeed the Judge told the jury and quite orthodoxly that what a witness says close in time is perhaps the most useful way in which to gauge reliability, but here police withheld those which would have been the most useful way in which to undertake that assessment and that, of course, takes us to Hugo Holt's statement which is that of the ambulance officer who attended who was the first man on the scene and that perhaps answers, your Honour, Justice France's, question to me about whether it was one or both of them who adopted that description.

And then, of course, we have the information taken by police when suspect A was police's primary suspect as well as information about the items of clothing that were seized from him, the very limited forensic testing that was undertaken, and that's both limited by virtue of the fact that he was disengaged as a suspect but also the techniques that were available in the '80s as well, and preceded DNA, of course.

WINKELMANN CJ:
So what exactly do you say was omitted in respect of suspect A? I was interested. Was it the material, the things that caused the police to treat him as a suspect?

MR CHISNALL:
Yes, and the statements that were taken, the alibi statements. What Mr McKinnel talks about in his affidavit is that when he at first received the police file a great many documents were redacted or partially redacted and so

that would reflect what perhaps was provided to Mr Stainton in the ’80s, and what was available to Mr Williams when he argued the appeal in the Court of Appeal in 1987, and so what the analysis shows is that the way in which suspect A was excluded by reference to those who were with him on the night wasn’t a robust process.

ELLEN FRANCE J:

So is the concern in relation to that then twofold? Material about why the person became a suspect in the first place and then as to the – I’m not sure what’s the right word – the accuracy or otherwise of the exclusion of that person, is that right?

MR CHISNALL:

That’s right. They must be the two aspects to it.

WINKELMANN CJ:

The definitiveness of the exclusion?

MR CHISNALL:

Yes, and because that was a point that featured in the trial which the Court of Appeal engaged with, the unusualness of the opinion provided by the officer about the fact that police were confident that they’d excluded robustly over 300 suspects as they said. In this case we’re concerned with one but it tends to deepen the concern around that particular statement made to the jury, what we now know.

WINKELMANN CJ:

And the material that the police had assisted them in initially identifying suspect A as a suspect, part of it was information that he had been doing robberies in the area?

MR CHISNALL:

Yes, there'd been a robbery in Queen Street, Papakura, some time earlier and the two – he was spoken to and he denied it but his two co-offenders both admitted it.

WINKELMANN CJ:

And he also fit the description better, didn't he?

MR CHISNALL:

Yes, he does, and that's a point we make in the submissions although heightwise he's somewhat below what the Eastons described as the Court will see. But it provided a further way in which to undermine the integrity of the Crown's identification evidence which is important.

There is a point that's made by the Crown that there was reference at trial to some of that, the information that wasn't disclosed, for example, references, oblique references to further statements made by the Eastons and indeed the reconstruction. That's at Crown's submissions, paragraph 31.2. The point I simply make in response is, well, it's effectively trial by ambush if it can be disclosed through a witness at the time of trial rather than in advance of trial and it doesn't excuse the failure, in my respectful submission, that there might have been reference made to other documents in existence. It tends to explain why it was that there was such persistence on the part of Mr Stainton and Mr Williams before him to try and secure information.

WINKELMANN CJ:

Well, I rather thought the Crown's point was different though. I think the fact that – they were saying the fact there was reference at trial to some of the evidence that we put in the category non-disclosed and a hue and cry didn't go up suggested it may in fact have been disclosed but simply not recorded as such.

MR CHISNALL:

And that may be a point that the Crown and I – if I've misconstrued the Crown's point then so be it. It tends to demonstrate the problem, doesn't it, with trying to reconstruct what was disclosed and we've seen it with more recent files than this, the task it presents, but, as Mr McKinnel says, in my submission, he's taken a safe approach. He's been definitive where he can be and really for the purposes of this appeal we can be definitive about certainly the Turner statements and the statements of the Eastons.

ELLEN FRANCE J:

Well, we can be definitive about the matters, the items that the Crown accepts.

MR CHISNALL:

Yes, but it doesn't appear to really provide a great deal of – there doesn't appear to be a great deal of divergence. In fact, the categories of information that it summarised in its leave submissions are helpful and importantly it acknowledges that suspect A and the information provided, not just to the defence but to the Court of Appeal as well, was abbreviated. Nothing before the trial and very little information afterwards.

Turning to the principles about disclosure, and I won't belabour these, they can be briefly stated and have referred to the recent decision of the Court of Appeal in *Lyttle* which pulls together the relevant principles but the points I want to emphasise, of course, is that the purpose of full disclosure is to promote the right to a fair trial, with closely connected rationales that include the equality of arms, the right to make full answer and defence, avoidance of trial –

WINKELMANN CJ:

Can you just slow down there? This isn't in your written submissions, is it?

MR CHISNALL:

It is.

WINKELMANN CJ:

Is it? Where is it in your written submissions?

MR CHISNALL:

But the point is that it's axiomatic that prosecuting agencies must approach disclosure obligations as an administrator of justice. They're not to do it in an adversarial way, and that's a point that was made by the Court of Appeal in *Lyttle* at paragraph 23 and I respectfully adopt it. It tends to affirm in the recent decision in *Lyttle*, like I say, that perhaps this is a perennial issue around non-disclosure. It's not for this Court to have to decide that. I simply flag it because it would appear that following so closely after *Lyttle* that this is an issue that isn't unique to the 1980s.

WINKELMANN CJ:

In terms of the principles that applied as to what was to be disclosed at the time, you would expect any statement that would contradict in terms of – the name has gone out of my mind. How could it go out of my mind?

MR CHISNALL:

There's no difference in approach, I think that's the way to put it and that's the way the Crown very fairly acknowledges it.

WINKELMANN CJ:

Wickliffe.

MR CHISNALL:

So we're not talking about a divergence that should have happened in the 1980s and just as it should now.

WINKELMANN CJ:

I myself thought it was a more narrow approach but not so narrow as to exclude these things.

MR CHISNALL:

No, that's right. I think perhaps we've seen greater or more careful articulation of what needs to be disclosed in the Criminal Disclosure Act 2008 but in the context of this –

ELLEN FRANCE J:

I would have said the things that weren't disclosed in this case were all things as is accepted but even under the Rules as they were at that point should have been disclosed.

MR CHISNALL:

Yes, and that's a helpful acknowledgement by the Crown because it removes any room for contention around whether there was a faint possibility that it could be justified and it's helpful to perhaps compare what the Court of Appeal said about what it knew at the time and what impact that had on the trial with what we now know, and, of course, it pre-dated the Court of Appeal's judgment, only just, *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, also reported as *Pearce v Thompson* (1988) 3 CRNZ 268 (CA), but we come back to the point it just doesn't matter in the context of this case, the principles about disclosure are known, and as I say and the Crown acknowledges that it was obliged to disclose any material conflict between the prosecution case and Mr Turner's initial inconsistent statement that the man he saw Māori/dark skinned. That was the way the Crown put it, and in fact that addresses the first category of information that was withheld and undercuts the Court of Appeal's conclusion where it said this is not a case in which the Crown has not disclosed to the defence that a witness has said something different in conflict with evidence given at the trial, and cited *R v Wickliffe* [1986] 1 NZLR 4 for that proposition. Well, we know that's wrong.

And so in my submission pulling the strands together just, and I'll make that point just to come back to your Honour Justice France's question for me before about what isn't in dispute by the Crown in terms of categories of information. I'd invite the Court just to look at paragraph 57 of my written

submissions where I just simply quote what the Crown has said, which was that: “The material relating to suspect A, some statements given by the Easton brothers; and attending ambulance officer, Mr Holt’s, statement.” For the purposes of this appeal those aren't in dispute but we say it was deeper than that.

In my submission if we look at what the Court of Appeal said and it’s set out at paragraph 58 of my written submissions. In its conclusion it said about the Crown’s or the prosecution’s meeting of its duty, it said in this case it hasn’t: “fallen short in its duty of fairness to the defence nor do we consider that a miscarriage of justice has occurred through the information concerning suspect A not being available to Mr Williams at the trial when there is still no evidence to shake his alibi or to connect him with the offence.” What in my submission Mr McKinnel’s affidavit persuasively establishes is that contrary to what was said by the Court of Appeal in 1987 the prosecution had in its possession information that does indeed shake suspect A’s alibi and which despite the unsatisfactory way in which police investigated can be said to connect him with the murder. And I just simply invite the Court to look at Mr McKinnel’s analysis which I’ve summarised briefly at paragraph 60 of the written submissions in terms of where the inadequacies around disclosure with suspect A lie and why it is that we say indeed this was a major failing on the part of the police and it does as I say tie us back in with what was said at trial by a senior police officer, Detective Sergeant White, about having excluded over 300 persons and what is said is we – that normally meant interviewing at least two or three alibi witnesses per person, checking these two or three persons’ stories as well as then completing each individual matter. I am satisfied that those persons were not involved in this matter. We cannot underestimate the power of that statement, that opinion by a police officer and a senior one about the steps that have been taken by police. And we simply now know that what we have in front of us alters the conclusion reached by the Court of Appeal and that there is a compelling argument that the Court itself was misled in 1987 because of the selectiveness of the information made available to it by the Crown. The prosecution’s decision to withhold information about suspect A was an error that in my submission

permeated both the trial and the earlier appeal and it's available to this Court in my respectful submission to hold that the prosecution approached its disclosure obligations in a way intended to secure Mr Hall's convictions by depriving the defence of relevant information that responded to the Crown's case and that assessment of what is relevant remains constant, something that disproves, and that's what was in my submission withheld in this case.

To pull it to a conclusion then, in my submission this aptly meets the test that's described in *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 by the Privy Council and has been adopted of course by this Court in *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 and more recent decisions as a paradigmatic example of a blatant and intentional departure from best practice which meets the high threshold described which of course is a failure so gross or so persistent or so prejudicial or so irremediable that it undermines the right to a fair trial. In my submission that's entirely apt as a description of what happened here. Mr Hall's right to a fair trial guaranteed by the New Zealand Bill of Rights Act now but which really enshrines the common law duties wasn't met. It was a fundamental failing.

I see the time.

WINKELMANN CJ:
Yes. So have we dealt with your – are we coming back to the statement or –

MR CHISNALL:
Yes, I'm going to deal with that last.

WINKELMANN CJ:
Okay. So as I look at it now we've dealt with most of the points apart from the statement and the two jurisdictional points which I think – and you're going to give us more detail about Mr Hall's incarceration –

MR CHISNALL:
Yes.

WINKELMANN CJ:

– if you have it. But I suggest maybe perhaps you discuss with the Crown the jurisdictional issues –

MR CHISNALL:

Yes. We can do that over the break.

WINKELMANN CJ:

– over the morning adjournment so we see if we can, okay, thank you. Take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 12.02 PM

MR CHISNALL:

I'll start by answering the easiest question you posed for me, the one I should have answered at the beginning if the computers had been working, which is dates when Mr Hall was released. So he was convicted formally on the 26th of September 1986. He was –

WINKELMANN CJ:

You have to go a little bit slow.

MR CHISNALL:

Yes. Sorry.

WINKELMANN CJ:

1986.

MR CHISNALL:

Yes. Released on parole on 14 November 1994.

WILLIAMS J:

Was he in – on remand prior to conviction?

MR CHISNALL:

Yes he was and I haven't got the remand date so I'll find that out if the Court's interested in –

WILLIAMS J:

Well that will be relevant, won't it?

KÓS J:

He was arrested on the 2nd of April '86 wasn't he?

MR CHISNALL:

Yes. So, yes that gives a date. He was recalled on an interim basis on 9 May 2012.

KÓS J:

Can you give me the release date again sorry?

MR CHISNALL:

9 May 2012.

KÓS J:

No, the release date.

MR CHISNALL:

Sorry, the release date was 14 November 1994. The recall was made final on 20 June 2012 and Mr Hall was paroled again on 10 February this year.

If I can turn to the third ground about the statements, I'm mindful of time and I'm obliged to the Court for giving us further time to wrestle with the jurisdictional point which we have been found collectively wanting on in terms of coming up with a definitive answer. Perhaps if I can circle back to that at the end. I have had discussions with my learned friend for the Crown about it.

I won't go through in any detail the way in which police conducted the interviews with Mr Hall.

WINKELMANN CJ:
Can you just highlight for us the features that you say should lead us to conclude the Judges' Rules were breached, the interview was oppressive, and respond to the Crown's point that it makes in relation to it.

MR CHISNALL:
Which point in particular?

WINKELMANN CJ:
I think that they say it's unclear as to at which point it becomes unfair and oppressive.

MR CHISNALL:
Well, perhaps the best answer to that question is the way in which the first statement was – or at least the way that the police conducted themselves on the 11th of December, and starting at paragraph 87 of the written submissions is really the pith of the argument or the synopsis, where two officers arrived unannounced at Mr Hall's place of work. He wasn't provided with a caution at that point.

KÓS J:
Just help me there. Before that, what had directed them to Mr Hall?

MR CHISNALL:
Dealings with the family, and so his brother, Greg, had been spoken to by police and had told police that he recognised the hat, and so that was through door to door inquiries, and indeed he was the one who then referred to the bayonet, the fact that his brother had –

KÓS J:

Okay, so it's very hard to understand on what possible basis the interview could have taken place on the 11th of December '85 without caution, given the officers knew exactly what they were about to attempt to uncover from him, which was ownership of those two items.

MR CHISNALL:

Yes, and that had been the focus of the inquiry up to that point, and an important point to note and it's something that's made clear in Mr McKinnel's affidavit is that Greg Hall was treated as a suspect as well. When he was spoken to he was directly challenged on the basis that he was the killer because of his knowledge of these items. So that reinforces the point that your Honour makes.

But, as I say, they arrived unannounced and there was no pause before he was subjected to questioning. As I say, at paragraph 88, he was transported to the Papakura Police Station by Detective Sergeant White who immediately commenced questioning the appellant in the car about the bayonet and the hat which made it abundantly clear what the focus of police was.

ELLEN FRANCE J:

At that point in terms of the 1912 Rules would he have been in custody whilst in the vehicle?

MR CHISNALL:

Yes, certainly in terms of detainment, the test is the same in my understanding of the Judges' Rules and what we now have under the more modern –

ELLEN FRANCE J:

Yes, I was trying to be clear about the position under the 1912 Rules.

MR CHISNALL:

In terms of reasonable belief and knowledge about him being a suspect then in my submission there hasn't been a material change in terms of –

WINKELMANN CJ:'

So he would have thought he was in custody, he wasn't free to go, because no one's telling him anything, they're just questioning him and he's in a police car?

MR CHISNALL:

There tends to be this unrealistic suggestion made that somebody can just walk away from this situation but that, of course, isn't really, in my submission, an answer in a case by a man who's kept in custody on two occasions for such long periods of time, starting in a motor vehicle on both occasions when he's transported back, and certainly in terms of detainment, as the Court's well aware, *Everitt v Attorney-General* [2002] 1 NZLR 82 (CA) is the current case about arbitrary detention which turns on the nature, purpose and extent and duration of any constraint and whether a defendant or a suspect has a reasonably held belief, induced by police conduct, that he or she is not free to leave, and my very brief review of that, and again I apologise that it's not a feature of the written submissions, but again in my submission it appears that that reflects the common law position under the Judges' Rules just as it does post-Bill of Rights.

ELLEN FRANCE J:

Well, in terms of the – you identify it, you say there've been breaches of the Judges' Rules, are you saying breach of rule 1 in relation to no caution?

MR CHISNALL:

Yes, yes.

ELLEN FRANCE J:

And breach of rule 3 in terms of cross-examination?

MR CHISNALL:

Cross-examination, and the point I make about –

ELLEN FRANCE J:

And anything else?

MR CHISNALL:

Well, those are the two that really must be the direct bearing. No is the short answer, your Honour, I don't consider that the others are really pertinent. The point that's made by the Crown in its submissions is that perhaps what constituted cross-examination was a lesser standard or a different standard under the Judges' Rules compared to now. In my respectful submission that's not right. What this Court said in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 which built on what was said in *R v Ali* CA253/99, 8 December 1999 is an accurate reflection of the law as it stood under the Judges' Rules just as it does now in my submission.

WINKELMANN CJ:

And what do you say, how do you say that Mr Hall's autism or at the time their belief that he wasn't – that he was impaired. I don't think they ever accepted they believed that did they?

MR CHISNALL:

No.

WINKELMANN CJ:

Yes. It was put to him.

MR CHISNALL:

That's the point. The Crown in its written submissions say that the witnesses called by the defence weren't challenged at trial on that which of course created a conflict that wasn't tested in the evidence because the officers themselves were tested on it and didn't really accept it. Although the answers given were certainly alluded to, the fact that they were unaware of issues, the

fact that there was a reference made explicitly to the way in which Mr Hall signed the statement, for example, which I've included in the submissions, speaks volumes about the fact that police, why say it if it wasn't something with which they were concerned? So the way it was put at trial was that Mr Hall was intellectually backward and other terms which got – were the parlance of the day but certainly where you look at what the family said compared to what the officers said compared to the way that the police conducted themselves towards Mr Hall then in my submission it's very much an available inference that police were aware of his vulnerability, and –

WINKELMANN CJ:
What do you say about what you can make of the statement when you read it?

MR CHISNALL:
In terms of the statements themselves, they're actually relative anodyne in the sense that, of course, Mr Hall doesn't, he never resiled from the stated view that he wasn't, the stated position which is that he wasn't the offender. So it wasn't an admission or they weren't admissions in that sense. But that's why I say it's not so much the statements themselves but rather what was relayed to the jury about the process and it was replete with opinions about his honesty, it was replete with, or several examples anyway, of his emotional response to things which, on the police case, clearly would invoke an emotional response, a normal –

WINKELMANN CJ:
So you're saying the questioning included commentary which should not have been before the jury?

MR CHISNALL:
Exactly, and I've included a more recent case that your Honour sat on in *L (CA533/09) v R* [2010] NZCA 131 which looks at it in terms of that point about providing an opinion about honesty. I mean it's an axiomatic rule but it's hard to see a more obvious example of repetition of the opinion given by

many officers that Mr Hall was lying and that he was trying to mask what happened to these items and as it was put to him several times: “I’m going to have look at you more closely,” to paraphrase what the officer said, “because of the answers you’re giving me.”

KÓS J:

I wouldn’t have thought they were that anodyne, Mr Chisnall. The rather fantastic explanations, introduction of someone who grabbed him from behind, these are things that the jury would take into account against his interest.

MR CHISNALL:

And that’s, sorry, to be clear, the written statements themselves. The two statements are relatively anodyne in the sense that if you looked at them in isolation you might question what the point of the appeal ground is. It’s what’s said leading up to them that matters and I take your Honour’s point and agree with it. It’s what triggered, and that’s why I say if you’re looking at it through the lens of needing a nexus between police conduct and what was said and what was elicited, there’s no better example than the one your Honour just provided where that fantastical story, and that was the way that the Judge at trial described it as well which one would suggest must have resonated with the jury, given that that was the Crown case, that this was a man not capable of belief on something so fundamental and simple.

But the methodology that was adopted was not so subtle. More than one officer often at a time in the interview room, for want of a better term, a tag-in/tag-out system, where Mr Hall remained in an interview room throughout both periods he was interviewed while other officers went out to refresh while another one came in, a detective inspector that for 27 minutes, in fact 37 minutes, came into the room and nothing recorded about what was said, and the point is that all of these are things that we see in judgments more recent times which have caused this Court concern and the Court of Appeal, but this is an example where if one was to study it at law school you couldn’t pick a better case to show all of the ways in which a trial, an interview can turn into an interrogation which can lead to an unfair outcome.

WINKELMANN CJ:

So, Mr Chisnall, timing. I'm just thinking…

MR CHISNALL:

Timing. Well, I'll…

WINKELMANN CJ:

You've probably covered the point, haven't you?

MR CHISNALL:

I think I have, your Honour, and that's what I say, I was going to take it straight to the submissions. But in terms of the interviews, we know that the first one lasted for over eight hours in custody and that speaks volumes in terms of the test about whether this was a detainment. The caution only came at the point that the written statement was gathered or taken by an officer many hours after the real work had been done by police. The second interview on the 16th had many concerns and I've identified them but again that was an even more significant period of time where he was under scrutiny for over 10 hours and in fact 15. So it's again a significant period of time. And, as I say, we have the additional feature both of introducing another allegation which didn't, if there'd been a caution given and there was in the second interview it needed to be re-given, and we also have the identikit that – and Detective Sergeant Rickitt's use of that use of that identikit and what in my submission is a very clear example of a misleading statement in relation to the evidence that police had gathered, comparing that to Mr Hall's passport photo which is the way that the officer put it and you'll see the way he dissembled during his evidence at trial when he tried to answer Mr Williams' questions about why he'd said that to Mr Hall and came down to an answer, I didn't happen to have the identikit with me, which speaks volumes in terms of it being as Mr Williams said a tactical ploy on the part of the officer.

So as we say, there were manifold breaches by police of the Judges' Rules that applied during sustained interrogation by a series of officers and the gravamen of the complaint is about the fairness of the process. And as the

Court's well-aware that the litmus test for exclusion under the fairness rubric is one that reflects the general supervisory and disciplinary responsibilities of a court. Looking at the totality of police conduct overall fairness of the methods employed by police and in my submission this is a very clear example indeed of one where had the challenge been made in 1985 it may well have seen these statements and the commentary by police about them excluded but most certainly and today in this Court in my submission it's not one where it's tentative about whether exclusion would be the appropriate remedy. In my submission it's one where it clearly must be and that explains the Crown's concession.

So to summarise the point, the Crown exploited Mr Hall's plain vulnerability by having the interviewing officers depict him as someone prone to lying, as a man with something to hide, who was withholding the truth and who had foregone opportunities to be candid with police and as a person who did not exhibit ordinary emotional responses to upsetting information, which on the Crown case showed a callous indifference to the plight of the deceased and his sons. All of these things the Crown witnesses told the jury meant that Mr Hall was the murderer, and in my submission that really does for all of the examples pulled together demonstrate the unfairness in this case.

And the point I end on is that the Court of Appeal placed reliance on the fact that the Judge told the jury that the opinions of the officers don't matter much but in my submission that loses its rigour when it's remembered that his Honour also repeated several of those opinions when highlighting for the jury an important if not a crucial issue in this case, namely the truth or falsity of the explanations given by Mr Hall to the police. And so that in my submission really does banish any suggestion that the direction would have remedied particular concerns in this case.

So if I come back to what the Crown says that there's a reasonable proposition or a reasonable foundation for the proposition that the content of the statements would be excluded on the basis that they were unfairly obtained. In my submission it's a case where clearly these techniques used

by police were oppressive and unfair and the Court can be far from tentative about that. This is a clear-cut case in my submission where the jurisdiction to exclude on the basis of unfairness is clearly engaged. It's one where this Court can and should be more definitive to be blunt about the issue. And like I say, the concession by the Crown which explains why it says that there should be no retrial is to be commended but in my submission we can be more clear about it. It's not a case to end on the point where it's easy to carve away the inadmissible from the admissible. It's not one where you can say, well, up until this point nothing was done in a way which should concern the Court. In my submission the theme very early on was developed when those officers attended at Mr Hall's place of employment. What their intention was that he was a suspect and every step they took was designed to break him down and I end on the point that perhaps needs to be made. It's fortunate that we are not dealing with this case on the basis that Mr Hall succumbed and actually – and made a false admission of guilt. It makes this case different to that of Mr Pora and that shows the integrity that Mr Hall was able to maintain about the fact that he wasn't the offender but it doesn't excuse the way that the police conducted themselves.

And I will just briefly conclude and then deal with the jurisdictional point so that my learned friend for the Crown can pick up on that point perhaps. Mr Hall as we said has unyieldingly maintained his innocence, notwithstanding the many setbacks he has faced, satisfying the State that he is a victim of a miscarriage of justice. He recognises as we say in the written submissions that an Appellate Court, except in those rare cases in which the Crown seeks to rely upon the proviso, is not directly required to engage or assess for itself whether an appellant is guilty. He accepts that the establishment of innocence of course is not a function that falls to an Appellate Court. That being said, it is submitted that the preponderance of evidence that the jury heard in 1986, combined with what is now known about the deceitful way in which the prosecution secured Mr Hall's convictions, he has been persuasively vindicated and why his supporters have continued to stand behind him for over three decades, that he has proclaimed his innocence throughout and that the case persuasively demonstrates why that is. As the Crown properly says,

the first remedy available is that in this Court to Mr Hall which is vindication through quashing of his convictions and that will of course be something that we invite the Court to do. But in my respectful submission it is important that the Court doesn't in any way sanitise what happened in this case and that's why I've spent so much time and valuable time of this Court addressing why we say it is that this was not some mere slippage on the part of police. This was an intentional course of conduct. In my submission it's a case where clearly the Court should quash Mr Hall's convictions and order no retrial as the Crown proposes.

WINKELMANN CJ:
Thank you Mr Chisnall.

MR CHISNALL:
Turning last because it was the difficult issue and I apologise for being found wanting on it. The jurisdictional issue didn't occur to us. And I say "us" in the global sense of the parties. What we do agree on is that if the Court has jurisdiction it really turns on whether there is jurisdiction of course to appeal to the Privy Council and that really turns on what was made of a decision declining leave and whether that was perhaps a customary way in which to deal with these types of issues because with respect to the Court of Appeal I cannot think of a more substantive judgment simply declining leave. It's one which fully engaged with the grounds of appeal and reached concluded views on it. So it doesn't –

ELLEN FRANCE J:
In the legislation as it was at the time though there was no right of appeal in relation to appeals in relation to mixed questions of law and fact or of questions of fact. The only appeal as of right as I understand it was in relation to a question of law alone.

MR CHISNALL:
Yes, that's' right.

ELLEN FRANCE J:

That may well have just then reflect – that's what they were asked to deal with.

MR CHISNALL:

Yes.

ELLEN FRANCE J:

Leave.

MR CHISNALL:

Leave. And so leave became the, as we know from various decisions in relation to leave in legal aid, an important issue in terms of the right to address the merits. And it's not where I seek to simply say well it's the vibe or the interests of justice trump all but it doesn't in my submission look like a leave decision and it may be that the answer's found in whether the Privy Council took a view on what a decision is that can be appealed. I appreciate of course what this Court has said about there being no right of appeal in relation to a refusal of leave but in my submission this just doesn't look like a leave decision of the type that has concerned this Court in more recent times. I apologise that that's not a satisfactory and concluded answer but it may be that we can provide a more – further submissions or a memorandum, joint memorandum on the point if the Court requires us to.

KÓS J:

Well I assume your discussions over half an hour didn't produce the Crown's standing on this point.

MR CHISNALL:

No and the Crown certainly takes the view that there is jurisdiction –

WINKELMANN CJ:

Sorry Mr Chisnall, you've got to speak into the microphone.

MR CHISNALL:

Sorry, I apologise. My voice is steadily declining. Yes. We certainly reached the view that we are in agreement about there being jurisdiction. It's just a question of how and I made the point I'll say it, whether there is that catch all leapfrog interests of justice provision in the Senior Courts Act that captures it, where if it's the interests of justice and this Court agrees but I'm reluctant to simply jump to that as an answer. I would obviously want to know the answer myself.

WILLIAMS J:

There is authority for the proposition that there is an inherent right in the subject to petition Her Majesty –

MR CHISNALL:

Mmm.

WILLIAMS J:

In the Privy Council there's a couple of cases on it that are old and have fallen into disuse (inaudible 12:27:18) but it's the same as the leapfrog provision in the Senior Courts Act.

MR CHISNALL:

Yes and where the central tenet must be the interests of justice and not tabulated legalism to prevent –

WILLIAMS J:

Something like that.

MR CHISNALL:

– the last right of appeal I suppose. Which I imagine is, even though it's an old old line of authority it remains applicable –

ELLEN FRANCE J:

And there must have been pre-*Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577 applications for leave to appeal to the Privy Council in relation to these leave decisions.

MR CHISNALL:

Well *Taito* itself is probably the best example isn't it?

ELLEN FRANCE J:

Yes.

MR CHISNALL:

It's a leave decision which – where there was, declined by the Privy Council still fully engaged –

ELLEN FRANCE J:

That's right.

MR CHISNALL:

– so that's why I feel somewhat assured that there is jurisdiction even if I can't provide a complete answer on it. Unless the Court is –

ELLEN FRANCE J:

That was part of the issue in *Taito* isn't it?

MR CHISNALL:

Indeed and that's why I say that that creates the context in which the issue was decided ultimately and may provide the answer here. Unless the Court has any questions, those are my submissions.

WINKELMANN CJ:

Thank you Mr Chisnall.

MR CHISNALL:

As the Court pleases.

MS LARACY:

May it please the Court. I wish to start if I may by acknowledging the presence of Mr Hall the appellant in this case, his whānau and family, his supporters, his lawyers and Mr McKinnel who have worked so hard on this case for so long. Equally I understand that the Easton family are attending virtually today. I haven't been able to confirm that this morning but I acknowledge the members of the Easton family. They are victims of this miscarriage and are now innocent bystanders in the unravelling of the criminal process if that is what occurs.

With the Court's leave I propose to only say a few brief things. I'm not going through my written submissions, but perhaps the best thing to do first at least is to address what might be outstanding issues in relation to the questions the Court has posed.

On the question of jurisdiction we did spend half an hour discussing this together and I don't believe that I can improve upon what my learned friend, Mr Chisnall, has said. My submission is that if there was a right to appeal to the Privy Council, which all I can say at this point we are sure there was, notwithstanding that leave was not granted by the Court of Appeal, then there is a right to appeal to this Court and the Court has jurisdiction.

We were, just so the Court understands, somewhat limited in the research we could do due to problems with either Wi-Fi challenges or connecting back with our systems at work, so I have got someone currently trying to check for me that route and if that comes through, some advice on the route of criminal appeals from a failure to obtain leave to the Privy Council, during the course of me addressing the Court, I will obviously let the Court know.

The other matter of jurisdiction can be dealt with, in my submission, fairly conclusively, and that was the scope of the appeal. The Court of Appeal's decision talks about the murder conviction being before it and not granting leave in relation to that. The important factor, in my submission, is that Mr Hall's original notice to the Court of Appeal identified both convictions, both

the murder and the wounding, so little can be read into the shorthand terminology with which the Court of Appeal disposed of the appeal by understandably focusing on the far more serious conviction. It does not suggest the other matter was not before it and equally disposed of.

The admissibility of the statements, if I can address this in two ways. One is if this matter was before a court for trial today or if this Court were to order a retrial and the issue today on a new trial was whether these statements, and if for the moment I can leave aside the admissions made prior to the formal interview commencing, namely the acknowledgement that the bayonet and the hat were Mr Hall's, if I can leave that aside for a very short period of time, if the issue was admissibility under the Evidence Act today the Crown has no doubt that these statements in their entirety would be ruled inadmissible. My submission is that in the circumstances they would meet the test in section 28 of the Evidence Act for being unreliable but they may also meet the test in section 29 for inadmissibility on the grounds that they are oppressive and the oppressive elements are those factors which we have discussed at length this morning and are summarised in my submissions, but it's the nature of the questioning, the length of the interviews, taking account of the way Mr Hall presented and what was known to the police at the time which was not that he had a diagnosis of autism spectrum disorder but it must be taken that they understood that he was at the very least naïve and out of his depth and would have been struggling and was trying to be compliant and needed more assistance in those interviews. That's the position today.

Under the Judges' Rules in 1912, I've dealt with this very briefly at footnote 41 of my submissions, the position is perhaps less clear but the Crown's submission which we don't resile from is that there certainly came a point, looking at the interviews in their totality, where even at the time, had the matter been challenged, and it wasn't, a court could well have, I would go so far to say probably should have or indeed should have, ruled the interviews inadmissible on much the same grounds.

The question is which of the Judges' Rules from 1912 as they applied is definitely engaged. That's one way of looking at it. My submission is that rule 7 of the 1912 Judges' Rules was engaged. Just to assist the Court in this, I've given a citation at footnote 41 of a case of *R v Hoggart* [2019] NZHC 927 which was a case that came out of the Red Fox prosecution that dealt with a crime committed at a very similar time, the same –

KÓS J:
I'm not sure what's happening to numbering but that's footnote 23, so Mr Chisnall's disease seems to have got you as well.

WILLIAMS J:
It's 41 on mine.

MS LARACY:
Footnote 41 of my substantive submissions cites *Hoggart*, and what I have in front of me and what I am citing from is from that decision of *Hoggart*, and if I can just read rule 7 of the Judges' Rules as it applied at the time: "A person making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing any ambiguity in what he has actually said." That is what it says, and then the rule goes on to explain that questions for clarification to clear up a point are acceptable but in the context of a voluntary statement cross-examination is not acceptable, and we have accepted in the written submissions that there were aspects of these interviews very early on where the police interviewers contradicted Mr Hall and challenged him and expressed opinions on the veracity of what he was saying and engaged in other interviewing techniques which are cross-examination.

So that would be the position if they were voluntary statements. In my submission that is the right way to look at this in terms of the analysis of when a caution was required back in the late 1980s and in terms of when a person is in custody.

Rule 1 of the Judges' Rules makes it clear that a police officer in endeavouring to discover the author of a crime can ask any person any questions.

Rule 2 explains when a caution must be given and that point is when the police officer has made up his mind to charge a person. Now as we know Mr Hall wasn't charged until a number of days after the second interview here.

Rule 3 which talks about the nature of the questioning that may be engaged in applies to persons in custody, and I've heard the exchange of the Court between your Honours and my learned friend about whether Mr Hall was in custody. It appears that the definition of custody was perhaps more rigid than it is today in terms of the definition of "detained". It is addressed in rule 3. A person in custody and prisoners are identified as being the same thing. It applies to persons arrested before they are confined in a police state or a prison.

My point is that rule 7 in any event is engaged, that whether or not at the time he was considered or could now be considered to have been in custody which under modern law, under contemporary law, is a mixed subjective/objective test, did the person consider they were free to go, and, looking at all the circumstances objectively, were they free to go, the law wasn't so nuanced back in 1986 but, in my submission, the point is reached that the interviews very quickly got to the point where this Court would be right to label them cross-examination and that was a breach of the Judges' Rules.

ELLEN FRANCE J:
My very quick look at Adams from that period of time did indicate nonetheless that "in custody" had a broader meaning than strictly speaking, you know, did in – that might have been suggested by the reference to "prisoners", for example.

MS LARACY:
Yes.

WINKELMANN CJ:
That's my recollection also of the law at the time.

MS LARACY:
So the actual distinction that is made in rule 3 is that custody means both in the care of, care or custody of jailers as well as police officers but it appears – I would accept your Honour what your Honour says about the Adams commentary.

In terms of –

WILLIAMS J:
Your point is the rule 7 control is the more apt in terms of the underlying justice of the situation.

MS LARACY:
Yes it was.

WILLIAMS J:
Does that, and does that conclusion lead you to go through a filleting process in the interviews or does it – or do you say however and whenever it happened the lot's got to go?

MS LARACY:
I submit that fairly early on and I don't have a –

WILLIAMS J:
Yes I thought that was a nuanced comment, that's why I'm testing you.

MS LARACY:
By about, and this is a little loose, I can find a particular point if that helps, but certainly by about page 2 its looking like cross-examination on the interviews. Perhaps what was – certainly Justice Prichard in summing up to the jury considered that the jury needed to take note of the inconsistencies and some

of the statements that Mr Hall made that he did not consider were particularly credible. So weight was put on –

WILLIAMS J:
Yes.

MS LARACY:
– them and I don't resile from the proposition that had those statements not been before the jury they may well have weighed the evidence differently. However, the more compelling evidence in my submission insofar as it related to statements made by Mr Hall were the very early admissions he made prior to the interview starting in the car these admissions were – and admissions gives a particular colour to them. He acknowledged that, which is what it was, he acknowledged that the hat, the beanie and the bayonet were his or were very similar to ones he owned. Now my submission is that part of the interaction between police would not be inadmissible if we were to be applying the standards of the day in terms of the admission of evidence that it appears from the record we've got, which I can take the Court to, that these were voluntary statements. Rule 1 allowed voluntary statements to be made in the context of police interviewing. Police could question anyone about the possible author of a crime. I don't consider it's apparent that there was any oppression or impropriety obviously in the way those questions about those items were put and the information appears to have been volunteered. Also I would refer the Court to this Court's decision in *Chetty* simply for the proposition that almost always is it necessary for the Court to find a causative link between the impropriety and the obtaining of statements if they are to be ruled inadmissible. Now the evidence of a causative link between any impropriety at that point is not obvious in my submission..

ELLEN FRANCE J:
If though it's accepted that there were issues in terms of intellectual ability and therefore some vulnerability, even at that point in time might that not have meant that Mr Hall should have been offered the opportunity – should have

been told first of all that the police were just, were coming to see him at work and offered him some – the ability to have a support person?

MS LARACY:
I would agree that that should have happened as a matter of good practice.

WINKELMANN CJ:
So there's also the general rule which excluded unreliable evidence. So you could – there's no – if you accept the Crown submission no breach of Judges' Rules in respect of that initial questioning in the car, you still accept that there is an issue of reliability about his evidence.

MS LARACY:
One of the difficulties there is it's – I don't understand the appellant to resile from those acknowledgements.

WINKELMANN CJ:
Mmm.

WILLIAMS J:
The question, I agree this – those two statements are not unreliable it seems.

MS LARACY:
Mmm.

WILLIAMS J:
But do we have to as Justice France suggested take a more sensitive view of what amounts to voluntary where you're dealing with vulnerable interviewees? Because the prospect of oppression is, sometimes even inadvertent oppression –

MS LARACY:
Yes.

WILLIAMS J:

– can be present in those circumstances.

MS LARACY:

My understanding, and looked at through the lens of contemporary standards of good policing and fairness and recognition of the diversity of intellectual ability and capacity to cope in different circumstances that humans have I would agree. The more difficult question is, given the Evidence Act lens doesn't apply retrospectively if we're asking should even those very early volunteered acknowledgements about those items be excluded, if we have to look at that through what was known about the way the law approached statements at the time I don't have beyond the reference to *Chetty* and *Hoggart* anything before me today, but my submission would be that the law was more robust and less accommodating –

WINKELMANN CJ:

But as we sit here today when we're dealing with something to do with the reliability of evidence we're not constrained to apply the standards that applied at the time are we? We can say we now have this knowledge. It's artificial for us to exclude that knowledge from our assessment of a reliability of any statement.

MS LARACY:

I certainly agree with that. The Court now is looking at, this appeal is before you today to determine whether by today's standard, when it has come to you, there is a miscarriage of justice and it is open to the Court to find that these statements are as a matter of fact inadmissible if that's what you do indeed conclude. My submission on that is that those early acknowledgements are not unreliable and are not inadmissible, albeit I do accept that even back in 1986 and '87 more care should have been taken by the police to make sure that Mr Hall when he was about to be questioned about something so significant was equipped to deal with that and –

KÓS J:

Well more that surely. They – by the time he hopped in the car they knew that he was the owner of a bayonet and the hat or they believed he was. So at the very least he should surely have been cautioned at that point before they embarked on any questioning relating to those two items.

MS LARACY:

Well that takes us back to the Judges' Rules and specifically the requirement that police need to caution if they have made up their mind to charge. As we know at the point of the first and second interview police had, it would appear from the record, police had not made up their mind to charge. That happened some days later. Indeed Mr Hall wasn't arrested at the end of the second interview despite I think it was 15 hours of being in police custody. The police were extremely interested in him but there is a basis to say on what we know, which is on this issue limited, police had not made up their mind that they would charge.

WINKELMANN CJ:

Well of course we don't also. We say that there's no issue taken about the reliability of those initial statements but we don't really – I don't think the appeal's been brought on the basis that Mr Hall has attempted to explain all of that material. He's simply pointing out as is proper –

MS LARACY:

Yes.

WINKELMANN CJ:

– the deficiencies in the processes. So we don't really know what the reliability of any of it is I suppose.

MS LARACY:

It may or may not assist the Court but the way the Crown has examined this aspect in reaching its position on appeal is to think about the Solicitor-General Guidelines for charging and for – and applying those in the

context of a putative retrial and the first part of the guidelines is is there enough, is there enough evidence for a trial to go ahead? Now for reasons to do with the public interest in this case my submission and my decision is that it is not. The decision in terms of the Solicitor-General's role I mean obviously, not the Court's decision.

In terms, at this point, just on evidential sufficiency, at best the Crown would have the independent evidence that Mr Hall lived nearby, the evidence that he was out walking nearby that evening and therefore had, in principle, opportunity and, depending on whether the Court relied on the statements made to the police officer, there might be that evidence from Mr Hall's own mouth but failing that there was also independent evidence that he owned a bayonet and a hat that were or were like the ones that were found. Now both of those items had some significance attached to them because of the fact that they were in limited circulation in New Zealand.

The evidence was that there were only 50 hats in that colour of that type and his brother had given evidence that he had purchased one of these and given it to Mr Hall. So there was that route for the hat evidence.

In terms of the bayonet, a bayonet importer gave evidence that Mr Hall had ordered one and there were only a few hundred of that type of bayonet in the country.

Now when I say it like that it might sound like I'm suggesting there's a lot of evidence. In fact, that's not a lot of evidence. But also what we now have to do is we need to look at the contrary evidence in deciding whether there's sufficient, whether there would be a reasonable prospect of success. My submission is there is no doubt when that is taken into the equation that there is not sufficient evidence.

There's obviously the evidence of Mr Turner which, as will be apparent from what we have said to this Court in our submissions, the Crown considers that

that could have, probably would have resulted in a different verdict had that been before the jury.

There was the evidence that the blue sweatshirt that Mr Hall owned was bought after the murder.

There was the Easton boys', or boy, whichever one actually made it, initial statement that was more consistent with the offender holding the knife in his right hand. Mr Hall, of course, is left-handed.

There's also the fact, which is enormously useful for the defence, as we now know, that after the police reconstruction the Easton boys' evidence about critical aspects of the offender softened, if I can just put it that way. That would be a powerful element in undermining the, I would submit, honestly given but damaged evidence from the Easton boys.

WINKELMANN CJ:
So if the evidence of the reconstruction had been fully disclosed it would, you suggest, have been useful to the defence?

MS LARACY:
Would have been, yes. It would have been a powerful basis for the defence to challenge the accuracy or the – to the extent there were inconsistencies between their initial statements at the time of the killing and the evidence they gave at court.

WILLIAMS J:
And there was evidence as yet unresolved and still warm of an alternative?

MS LARACY:
Likely suspect.

WILLIAMS J:
Correct.

MS LARACY:

Yes.

WILLIAMS J:

That's important, isn't it?

MS LARACY:

Yes.

WINKELMANN CJ:

Can I ask you a question?

MS LARACY:

Yes.

WINKELMANN CJ:

Because I feel we've moved off the statement, but I just wanted to ask you about the evidence which, when you read it, is reasonably striking from the police officers about the detail of the questioning which includes statements such as: "Come on, Alan, that's crap and you know it," "With all the lies I have to start taking a hard look at you," "It's your bayonet that killed Arthur Easton and your brother's hat," et cetera. Anyway, the commentary, it's quite overwhelming and I don't know that that fits into the Judges' Rules but do you accept that at the time that would have been outside what should be led or…

MS LARACY:

Yes, I do, and while I haven't said at what line in the transcript of the statement that point is clearly reached I do accept that it was fairly early on and by the standards of the day the questioning was unacceptable.

KÓS J:

Just to rewind a second, you put the analysis a moment ago in terms of insufficient evidence to charge. I take it it would also follow that you accept on that analysis there will be insufficient evidence on which to convict?

MS LARACY:

If the matter were, yes.

KÓS J:

You accept that?

MS LARACY:

Yes. That involves imagining the entire course of the trial and the role of the defence in undermining what are the planks in the Crown case. But what we do know from what has subsequently been disclosed and came out is that there was very powerful material not available to the defence counsel, very experienced, very effective defence counsel at trial to use which is now available and if we imagine how that could have been used it is no – it does not require guesswork.

WILLIAMS J:

Much imagination.

MS LARACY:

No.

WINKELMANN CJ:

Can I ask you another question which is that Mr Chisnall put to us on a number of occasions that there was – that deceitful strategies were pursued to secure conviction. So can you respond to that?

MS LARACY:

The strategies. I accept that the strategies that were put in place by the prosecution were aimed at securing a conviction. What –

WINKELMANN CJ:

Well you accept there were strategies first up then? Because it looks quite – leaving to one side whose brain was operating directing the strategies there does seem to be such a conjunction of circumstances to suggest a strategy to

suppress the evidence about, the significance of evidence about aspects of the identification of the offender.

MS LARACY:

The difficulty with the word "strategies" is that the Crown has deliberately not expressed any view about good faith or bad faith or any individual's motivation. What the police knew, what the Crown prosecutor knew. We don't have the material for that and it will no doubt – it will be subject of an inquiry on another day. But we use the word "concealed," evidence had been concealed –

WINKELMANN CJ:

Oh well that's got an intent element I have to say.

MS LARACY:

Concealed at best out of a mis – at best out of a belief that there was no perhaps, no obligation to disclose it, that the prosecution was best placed to assess the reliability. That's where the question of motivation comes in. Perhaps that would be, if we had all the evidence before the Court about what was going on in people's minds perhaps that would be the case that would be put up, that there was no bad faith in that sense. But what I do say is that there were such serious departures from the accepted legal standards and fairness that it was either a number of steps of extreme incompetence and ignorance of legal obligation or, amongst some people involved in this prosecution, there was a strategy to ensure conviction notwithstanding the legal obligations on those people.

WILLIAMS J:

Can you insert the descriptor "improper" before strategy?

WINKELMANN CJ:

Or wrongful.

MS LARACY:

Yes.

WINKELMANN CJ:

I mean it follows, yes I suppose, yes.

MS LARACY:

Yes. And the key part of understanding this and as will be apparent in the efforts of trying to deal with this matter expeditiously we have tried to look at it from the point of view of what is unarguable, what is uncontentious. And a very important feature of that is that the disclosure obligation was clear as a matter of law at least since the decision in *Wickliffe* in cases like that. The Court of Appeal released its decision in *Wickliffe* nine months prior to Mr Hall's trial and in that case, a bit like here, the Crown acknowledged to the Court of Appeal without too much prompting that material in a police job sheet which indicated an inconsistency that may have been useful to the defence, it was by no means as compelling as the material in this case, but it may well have been useful to the defence and that was a matter for the defence to assess. That failure led to a miscarriage of justice and the questions that the Court says have to be asked in terms of disclosure prior to Mr Hall's trial are: is there a relevant inconsistency between a prior statement and the proposed evidence of a witness that the Crown is aware of? Is the Crown aware of that inconsistency and, if so, is it material? And what we also know objectively and unquestionably from the summing up in this case is that the Judge told the jury that Mr Turner's evidence was highly significant, and although Mr Turner's evidence had been read at trial the Judge re-read that brief in its entirety in the summing up.

There was also a passage that I wanted to draw the Court's attention to in the summing up which I hadn't highlighted in my written submissions but was aware of when we wrote those and I think it is relevant. It's on page 96 of the case on appeal.

KÓS J:

Which page of the summing up?

MS LARACY:

And it's page 46 of the summing up.

WILLIAMS J:

Page – and 90 of the case on appeal?

MS LARACY:

The introduction to this passage is the Judge, Justice Prichard, dealing with the Easton brothers' evidence and the Judge acknowledges that Kim Easton told the police that the intruder was a Māori and gave a certain height description and then the Judge goes on to say, well, if those aspect of the description are correct then obviously the intruder was not Mr Hall, but this is the bit I wish to draw the Court's attention to. "In criminal cases where identification is in issue the defence is always given access to the description first given by the witness to the police. That is because, for obvious reasons, the first description may well be more accurate than later recollections and it enables the defence to test the evidence relative to identity which is given by the witness later on. So they are always given this first report or statement by the witness and that is the reason for it, because it is more likely to be accurate than later recollections. Mr Williams," for Mr Hall, "did not go so far, I think, as to suggest, if not in his address then in his cross-examination, that the police had been instrumental in persuading these boys to alter their descriptions to fit the accused."

WINKELMANN CJ:

I think he said "did go so far".

MS LARACY:

"Did go". "Mr Williams did go so far," you are correct, your Honour.

My point is that the jury were assured that they had everything relevant to these very important initial descriptions. The Judge is obviously talking expressly about the Easton boys there but it applies just as compellingly to Mr Turner's evidence, and Judge assumes that the defence have been given everything relevant.

I'm conscious of time. It's 1 o'clock. I'm in the Court's hand.

WINKELMANN CJ:
Well, how much longer do you think you are going to be, Ms Laracy?

MS LARACY:
Does the Court wish me to deal with the sighting experiment or has Mr Chisnall addressed that adequately? That was one of the items on the list.

WINKELMANN CJ:
Oh, yes. So do you accept what he says? I think he said that it's open for us to conclude that the sighting experiment was either part of the justification that police gave themselves for amending the statement or was an ex post facto justification, but either way there is a natural inference there that it's causally connected.

MS LARACY:
So Mr Chisnall's position on this primarily focuses on the inference he says the Court can draw about the motivation for this sighting experiment. I don't comment on that. I don't necessarily disagree with it but I don't have a submission to make on that. My submission for the Court is that the sighting experiment was an illegitimate basis for the prosecution to determine that Mr Turner was an unreliable witness and on the basis of their assessment to decide it was not necessary to provide the relevant information about his statement to the defence. That was a quite improper, wholly unacceptable legal view to take of the disclosure obligation. The sighting experiment itself had evidence been led of that at trial had it been disclosed in my submission it's unlikely to have been admissible. It would have – or if it was it would have

carried no weight. There's no scientific basis for it. There's no guarantees that it, it could never have replicated the exact conditions, so –

WILLIAMS J:
Well the risk was Mr Turner would say he was actually a champion marksman and has excellent vision.

MS LARACY:
That's… There were many risks with it. So I say there's no excuse for that non-disclosure.

WINKELMANN CJ:
How much longer do you think you'll be, because we're just trying to decide whether we carry on and conclude your submissions. Of course Mr Chisnall may then have a reply. No reply?

MS LARACY:
I think I could be one minute.

WINKELMANN CJ:
Excellent. That's the right kind of answer.

MS LARACY:
There were things I intended to say in a particular order but I think they have come out in a different and just as useful order. Really I think two important points. One is that it's important from the perspective of the Crown that its approach to this appeal is understood. This Court no doubt doesn't struggle to understand it at all but there is an audience today for this appeal. And my point is that our approach has not been that there is anything legally innovative about this appeal. There's nothing legally unusual. It has been progressed with unusual speed. But the point is it's an ordinary application of settled law and that law should have been followed a long time ago and what's unusual is simply that it has taken too long to be resolved. What is unusual about the Crown's approach to this appeal is simply that the facts are

unusual in that as they present themselves on this appeal they're clear in a way that facts and the legal issues to which they relate are very rarely clear in a criminal appeal. So we have been able to jointly identify at a very early stage as I say what is uncontestable, what is on the record, what is unarguable and because it is only necessary for one ground of miscarriage to be identified for an appeal to succeed, that is the approach we have taken and that's to do with the clarity of the material before the Court on the record about what went wrong in certain respects and in saying that I also wish to note that the Crown does not disregard that there are a number – many other bases for strong concern on the part of Mr Hall's counsel and Mr Hall himself about things that they say went wrong in this case and the Crown doesn't disavow that there may be plenty of merit to those positions but it would have delayed resolving this appeal and would have delayed certainty for Mr Hall had those details and other grounds been gone into and we do consider that it is consistent with respecting at this late stage in the process Mr Hall's mana, the Easton family's mana and the interests of the community in having this matter resolved quickly to deal with it in this way.

On behalf of the Solicitor-General who has responsibility for prosecuting serious crime in New Zealand I do respectfully submit that this Court should quash Mr Hall's convictions and acquit Mr Hall and not order a retrial.

WINKELMANN CJ:
Thank you Ms Laracy.

MS LARACY:
As the Court pleases.

WINKELMANN CJ:
So Mr Chisnall, no reply?

MR CHISNALL:
No your Honour.

WINKELMANN CJ:

Right. So we thought what we would so is attempt to gather our thoughts so as to be able to deliver a judgment at 4 o'clock today.

MS LARACY:

If the Court pleases.

WINKELMANN CJ:

If that suits counsel. All right. we'll now retire.

COURT ADJOURNS: 1.10 PM