ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES A AND B PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

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

SC 109/2018
[2022] NZSC Trans 24

GEORGE ROBERT JOLLEY
Applicant

v

THE KING
Respondent

Hearing:	01 November 2022
Court:	Winkelmann CJ Glazebrook J Ellen France J Kós J William Young J
Counsel:	J D Munro, J N Olsen and J W Wall for the Applicant M J Lillico and T C Didsbury for the Respondent

---

CRIMINAL HEARING ON RECALL APPLICATION

MR MUNRO:

Tēnā koutou, e ngā Kaiwhakawā o Te Kīngi. Ko Munro rātau ko Olsen me Wall, mō te kaitono. May it please the Court, Munro, Olsen and Wall for the applicant. Mr Wall will be running the argument today for the applicant.

WINKELMANN CJ:

Tēnā koutou, Mr Munro.

MR LILLICO:

E te Kaiwhakawā, tēnā koe. Ko Lillico ahau. Kei kōnei māua ko Didsbury mō te Karauna. May it please the Court, Lillico for the Crown along with Ms Didsbury.

WINKELMANN CJ:

Tēnā kōrua.

So, Mr Olsen or Mr Wall, sorry?

MR MUNRO:

Mr Wall.

WINKELMANN CJ:

Mr Wall. So I should indicate our expectation is that – well, how long do you think you'll be, Mr Wall?

MR WALL:

If we follow the submissions, should be through it probably in about half an hour.

WINKELMANN CJ:

Excellent. Go ahead then. That sounds like a pleasing length of time.

MR WALL:

But I guess it depends on how interesting my submissions might be.

WINKELMANN CJ:

How provocative.

MR WALL:

Tēnā koutou, e ngā Kaiwhakawā. I'll start by hazarding to suggest that there are two points that we all can agree on. That is that in recall applications there does need to be a filter and there needs to be a way to separate the wheat from the chaff, and the second point that I'm sure we all agree on is that the effect of an injustice and enduring sense that an injustice has been done is profound, both in terms of the subject of that injustice and on the Court and the administration of justice as a whole, and that's why there needs to be flexibility in the way that the Court approaches its jurisdiction to recall and also the exercise of that discretion.

1005

So the issue in this case is whether the Court of Appeal has allocated that filter in the right place.

WILLIAM YOUNG J:

Well that's *a* question. It's not really the question in the case, is it? The real question in the case is whether we recall our judgment.

MR WALL:

Yes, that's it.

WINKELMANN CJ:

Well, that's one question. We have asked that question to be addressed.

WILLIAM YOUNG J:

Yes, I know that. I said it is one question.

MR WALL:

One of the –

WINKELMANN CJ:

Mr Wall will come to the other question, I'm sure. Carry on, Mr Wall.

MR WALL:

The key question I think we're here to answer is where that filter goes and also the method by which the Court should separate the wheat from the chaff and work out whether it can exercise its recall jurisdiction.

The four points set out in the submissions in answer to your Honours' questions in the minute, and if your Honours please, I can go through those in order, unless there's any other matters that need to be addressed at the start.

The first submission is that, having been given the benefit of a flexible common sense approach by this Court in *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286, the Court of Appeal in *Lyon v R* [2020] NZCA 430 and then furthermore in *Jolley v R* [2022] NZCA 295, has applied a more stringent test (inaudible 10:06:46) by two ways, by elevating the standard for the existence of the jurisdiction, and it's also augmented the jurisdiction by enunciating a number of principles or propositions that have made it more stringent and prescriptive in making that filter sit closer down the spectrum. That's not going to be responsive to cases where there may be a probable injustice.

The first point within that submission is that the Court of Appeal in *Lyon* required that the applicant must show that the "previous judgment has probably occasioned a substantial injustice". Later in *Lyon*, that was added to by saying that it needed to show not only that it was probable substantial injustice but that it was a significant injustice.

WINKELMANN CJ:

Was that later in *Jolley* that they get at that?

MR WALL:

Correct, Chief Justice.

As a further point, in *Lyon*, the Court erected the principle that the applicant must impeach the previous judgment in order for there to be jurisdiction.

KÓS J:

Although that's tricky because they also said there could not be a direct challenge to the judgment.

MR WALL:

That's right.

KÓS J:

I was having some difficulty working those two points through.

MR WALL:

That's right, and in a case of fresh evidence, by its very definition, it's never going to impeach the previous judgment. That's the problem. It becomes a circular argument. That seems to be a freestanding condition that has come about from the legacy of cases where a procedural error had to be shown, some sort of defect in that decision that goes back to the procedure.

But given that we have a third ground set out in *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 and as caught in *Uhrle*, it makes it wider and that simply, to respond to cases of fresh evidence, because they're never going to impeach in the way that the Court of Appeal was suggesting the previous decision. The fact that there is fresh evidence shows there's something new that was not argued, could not have been argued, and therefore the recall application can never impeach that aspect of the judgment.

1010

So in my submission, that is a fundamental problem with the approach taken in *Lyon* and it's been carried over into *Jolley*, and with the deepest of respect it doesn't make sense in the context of a case like this.

The other aspect is that, as I understand it, the approach the jurisdiction requires an evaluative exercise to determine the probability and extent of an injustice and the second stage requires the balancing out of discretionary factors, most important of all being the principle of finality. The way that the Court of Appeal in *Lyon* went about structuring that discretion is it loaded up with controlling force those discretionary factors. It said that finality is of such importance that cases can just be diverted off to the Criminal Cases Review Commission, and that, at least on my reading, appeared to be the default position in most cases and it means that in following that test the filter has been placed far too short.

WINKELMANN CJ:

High perhaps. Yes. It's too restrictive a filter.

MR WALL:

It's certainly our position, and I'm not sure whether this is perhaps jumping the gun a little bit here but we have some difficulties in assessing the effectiveness and the efficiency of the Commission at this stage, and I make that submission with no disrespect whatsoever to the Commission. It's there for a purpose and no doubt it is going to serve that purpose, but at this stage we simply have no metric by which we can assess how efficient that alternative remedy might be or how effective it might be. I'll make this submission quite clearly now. I'm not saying that forever this Court cannot do that. It's just at this point in time. As far as I can tell there hasn't been a referral made to the Court of Appeal yet. There could be one pending. But there hasn't been that body of referrals that are coming through where the Courts can understand what sort of deep dive the Commission has been able to make into a case, what sort of investigative powers it may have exercised during assessing those cases.

WINKELMANN CJ:

Well, we know it's deep investigative powers though, don't we?

MR WALL:

We know they exist but we don't know how they are being actioned and used at this stage and, more importantly, we don't know how long it is going to take for the regular run of cases to go through.

Now in the United Kingdom they have a body of referrals, body of case law of the outcomes for those referrals, that goes back to around about 1996 or '97, and so the Courts in the United Kingdom can approach that question about efficiency and effectiveness far better because they have that institutional memory that has built up.

ELLEN FRANCE J:

Why can't we just take it at face value in terms of looking at the statute and the powers that the Commission has?

1015

MR WALL:

We could all go for a leap of faith. That's fine.

ELLEN FRANCE J:

Well, they're a statutory body, aren't they? They're not –

MR WALL:

Correct, yes. When – at least at this stage, we simply don't have any basis to conclude how long it is going to take, and whether, if there is an immediate pressing need because there's an injustice whether it's going to take three months or 18 months or longer for that referral to bounce back to the Court of Appeal.

WINKELMANN CJ:

Well, your submissions put it higher than they say the indications are that it will take long, a long time. Don't your submissions put it that way?

MR WALL:

I think as far as – described as being – the Commission is somewhat in its infancy at this stage. I don't think there's too much controversy around that given the lack of referrals so far. The submissions do address some issues around the procedure and the fact that the Commission itself can't compel attendance by witnesses. It does have enforcement powers, but it's got to go back to District Court to do that. But at this stage, we just don't have any idea about exactly how long things are going to take within that process.

KÓS J:

Might we approach it another way? Do you think it is ever appropriate for this Court or the Court of Appeal to have witnesses cross-examined on a recall application?

MR WALL:

It's that it's less than desirable in this Court. In the Court of Appeal, in the right case and the context of a recall application, yes, it is. The reason for that is that if the decision of the Court of Appeal has, through no fault of anyone, bypassed a matter or overlooked a matter –

KÓS J:

Well, it's not really overlooking the matter. We're talking about the raft of fresh evidence-based recall applications that occur in the Court of Appeal. The Court of Appeal is not necessarily the most appropriate place to undertake an investigation of the credibility of witnesses in a case like that. It may be that the Commission is the better repository.

MR WALL:

I think each case is going to have to be addressed on its own circumstance. I know that's an unhelpful submission to make, but we will go back to the principle, is that if a decision is left hanging in the Court of Appeal and there is something of such pressing need that it meets the test for recall, then there is a point where the Court of Appeal does need to step in and say we have to

address this now, because the longer that that sits there, it perpetuates the perception of an injustice and undermines the integrity of the process as well.

We can also look at certain cases in addition to fresh evidence like non-disclosure. In a way they –

KÓS J:

Well, those are easier, and those are the ones that the Court of Appeal alone suggested pragmatically could be addressed on recall. But the examination of evidence, I mean, whether there is or is not an injustice ultimately depends on the Court's assessment of the evidence.

MR WALL:

Correct, and I draw a line between certain cases. On the one hand, where the Court ought to step in and address something is a case like this in *Jolley* where there is a refined issue. In this case, it's about identification of the offender. It's stark. It's a critical issue. It goes to the heart of the Crown case. Moreover, it's an area which this Court has described as somewhat troublesome in terms of the reliability of evidence. So this is a clear case.

Across the other side of the line may be cases where there is quite compelling evidence, but they still might be better dealt with in the Commission, and the two examples that we say are ones with very complex expert evidence which might take days to pick through. That might be more effective or figuratively dealt with in the Commission because they have more time, they may be able to adapt procedures for hearing the evidence of those two or three or however more expert witnesses, and also place that within the context of the case as a whole.

1020

KÓS J:

Well, the context in which we typically see evidence traversed in the Court of Appeal is trial counsel error allegations which are relatively confined on matters on an assessment of the credibility of the appellants and of the

counsel, can be made reasonably readily. The evidence of the two Pereiras will take some picking through. It's clearly not accepted by the Crown, so there is going to be quite some time needed to be spent on their evidence being called and cross-examined. Possibly other evidence in response called. So you're talking about a day, perhaps more.

MR WALL:
Without jumping too far ahead –

WINKELMANN CJ:
Well, because I was going to say, aren't we dealing with a matter at the moment – because I've lost shape of the thing and I think it was you who took us into the detail – and I say it in a non-critical way, Mr Wall – because we were dealing with that the Court of Appeal had constructed the filter wrongly and then we talked about the efficiency and effectiveness of the alternative.

Do you say – I mean, although they say they got it wrong in relation to the Criminal Cases Review Commission, is there any error of principle there or are you just saying they're wrong, that the Criminal Cases Review Commission is an appropriate, effective, and efficient alternative? But what else have you got to say at the level of principle? Because we've identified the two aspects you say are the wrong kind of filters that the Court of Appeal has constructed, requiring that there has probably been occasioned a substantial injustice and that the applicant must impeach the judgment subject to recall. Is there anything else you have to say about the general filters they constructed? Is that it?

MR WALL:
That's really it.

WINKELMANN CJ:
What about the question about whether it should be the Court of Appeal or the Supreme Court who – one of the things the Court of Appeal took into account

in this case is they said the application should be made to this Court. What do you say about that?

MR WALL:

Well, that's, I think, by default, in the procedural route that this case was taken through the Courts, that the Court of Appeal has effectively said, well, we're not going to deal with this by way of a recall. There has been an application for leave to the Supreme Court. It's been declined.

WINKELMANN CJ:

Yes. I'm asking you, do you say that they could've dealt with it?

MR WALL:

Yes. Oh, it'd be far more effective having dealt with it in the Court of Appeal than having the situation where this Court has to deal with it, but that's simply by default and that is the problem. With *Lyon*, if you take too restrictive approach, then this Court's going to be saddled with recall applications, and if this Court finds that there is merit in the arguments that are made in support of recall, there's nowhere else for it to go. That's the problem.

KÓS J:

Well, that comes out of the impeachment, non-impeachment observation that the Court of Appeal made at paragraph 21. But the point of principle and the shape of argument that you and I were investigating for a moment is the suitability of the Criminal Cases Review Commission and I was suggesting to you that might depend still on the suitability of the Courts to examine the evidence. That was the shape of the argument, the point of principle that we were addressing.

MR WALL:

No doubt there are practical considerations to be made around, say, time and the manner in which that evidence might be tested, but that rubs up against some pretty strong principles as well, and if there is – if we are talking about a case that has gone through to the point where the Court has determined that it

has jurisdiction, that there has probably been a substantial miscarriage – sorry, a substantial injustice, then the weight of discretionary factors or pragmatism or practical factors is going to fall away somewhat because the risk to the Court is that it is simply sitting on a case where there has been probable injustice occurred.

WILLIAM YOUNG J:

What do you mean by "probable"? More likely than not?

MR WALL:

That's… Yes. It's a quite hard one to pitch and as the Supreme –

WILLIAM YOUNG J:

Then, do you mean by that, more likely than not that your client didn't fire the critical shot?

MR WALL:

Yes.

1025

WINKELMANN CJ:

Isn't it simply – would you want to pitch it that high? Wouldn't the Court have to be concerned that there are indications that a miscarriage has occurred? I mean, which is not a particularly low threshold in my mind, although I suppose whatever threshold you choose you can argue about it, but…

MR WALL:

I mean there is a – when you're allocating words to this test, they seem to double up a fair bit and –

WILLIAM YOUNG J:

Is it the same test at this stage when you're applying for recall as it would be if you were appealing on the basis of new evidence?

MR WALL:

Yes.

WILLIAM YOUNG J:

You say it's exactly the same?

MR WALL:

That there is a probable –

WILLIAM YOUNG J:

Sorry, I meant, I'm not submit – I mean, all these words, "probable" and "miscarriage" are indeterminate, but are you saying we should apply the same test to this recall application as we would've applied to an application of leave to appeal on the basis of new evidence?

MR WALL:

There would be some continuity in that approach and –

WILLIAM YOUNG J:

So we just ignore – and I agree a leave decision perhaps doesn't have the same degree of finality as one on the merits, but are we to just ignore it?

MR WALL:

I beg your pardon, Sir?

WILLIAM YOUNG J:

And ignore the effluxion of time? Are we just to ignore it, the leave decision? And ignore the effluxion of time?

MR WALL:

Yes. In that context, I think you do. Yes.

WILLIAM YOUNG J:

So do you say the very special reason as referred to in *Uhrle* is simply the same reason as would justify granting leave to appeal in the first place?

MR WALL:

Yes, it would. Yes.

WILLIAM YOUNG J:

So recalls are pretty – getting a recall has a pretty low threshold. "I've got a new argument. If I advanced it at the time, I would've got leave, so give me leave now"?

MR WALL:

I can understand the –

WILLIAM YOUNG J:

Scepticism.

MR WALL:

– hesitation around them and it is most likely going to occur in a situation of fresh evidence. But it is a consequence of this Court creating a standard that is very flexible, and it has to be, to respond to a wide variety of circumstances, and that goes back to the first submission that I was making that if you place that filter too close down the spectrum –

WILLIAM YOUNG J:

But there's no filter on your argument. We just ignore the earlier decision. There's no filter. You just say we apply the same approach as we would've applied if an application for leave had been made in the first instance on the basis of new evidence. The filter just disappears.

WINKELMANN CJ:

That's inconsistent with your earlier answer anyway which was that every case has to be decided on its own terms because it brings into account the effectiveness and efficiency of another alternative. That answered that question that Justice Young's asked you, doesn't it? You can't answer the *Uhrle* question without considering the effectiveness and efficiency of another alternative, and therefore it may not be sufficient – it may not be the same

threshold that you apply in a particular case as you would on getting a grant and leave to appeal. It would depend on the facts of the case.

MR WALL:

Yes, I may have got mildly confused about the question as to whether we're dealing with the threshold for the existence and exercise of the jurisdiction to recall by the Court of Appeal, and the second point is, well, whether the alternative remedy is to pursue leave.

WILLIAM YOUNG J:

I have taken your argument to be that you have established enough to justify a recall subject to alternative route arguments if you can show that we would've granted leave to appeal had new evidence been raised first time around.

MR WALL:

Yes, and my answer was that there is a degree of continuity between approaching both issues in a similar –

WILLIAM YOUNG J:

I thought your answer was "yes", actually.

MR WALL:

The reason is there is at least a degree of continuity between the two, but of course, this is buttressed by the proposition that a recall application is in itself exceptional.

WINKELMANN CJ:

My point, I suppose, is I thought you couldn't possibly be saying that, and it's inconsistent with *Uhrle* because *Uhrle* requires you to take into account the efficiency and effectiveness of alternatives as Justice Kós was saying.

MR WALL:

But that's the –

GLAZEBROOK J:
You say it's two stages.

MR WALL:
Yes.

GLAZEBROOK J:
So you say when you're looking at whether you should consider exercising the jurisdiction to recall, that would be enough, but once you get to the second stage, at that stage, you look at the alternatives.
1030

MR WALL:
Correct, and I – thank you, that perhaps rounds out my argument, is that this isn't strictly speaking like a leave application because you have that second stage where you counterbalance things, the finality and the effectiveness of alternative remedies and those provide the more elevated standard that's required of a recall application.

WINKELMANN CJ:
So can we take you down then again, do you think we've dealt with those points adequately which are the first two which is the test, then the efficiency and effectiveness of the alternative, then the next issue is whether the Court of Appeal could have dealt with the application of recall. Do you say there's any procedural obstacle to them having dealt with it?

MR WALL:
That it's, well, it's now in this Court and unless – there's no –

WINKELMANN CJ:
No, no, when it was first there.

MR WALL:
No. No, there wasn't.

WINKELMANN CJ:

In the hypothetical.

MR WALL:

There wasn't anything at that stage and the problem is that once the recall application has been declined there's no right of appeal on that to this Court, so it can't be sent back to the Court of Appeal and that's the reason that it's here and that too stringent an approach to these things means that more of them are going to be coming to this Court, and this Court is then faced with the very difficult question, if indeed it finds that there is a probable injustice occurred, what to do with them.

KÓS J:

And when do you say that probable injustice? Does it do that or the Court of Appeal on a recall application? Does it do it looking at it on the papers and say: "Ooh." So it's a case like *Chapman* (citation 10:31:36) which we dealt with recently. You know the *Chapman* facts?

MR WALL:

Not particularly familiar with it, Sir, but…

KÓS J:

It's the one where there was suppression by the Crown of, the police of evidence and of witnesses, and the Crown accepted in that case that the evidence was cogent and the appeal had to be allowed. Now on the papers, if that had been a recall application, the Court of Appeal could have reached that conclusion. There was no contest. But it's hard necessarily to intuit an injustice in this case because it depends on how the Pereiras stand up. It may or may not be. So how do we do it? On the papers? After a hearing?

MR WALL:

Well, there will be certain cases which are no doubt amenable to being dealt with on the papers but a case like this really does require then to engage with the merits.

KÓS J:

Through evidence?

MR WALL:

That's correct, Sir.

KÓS J:

And cross-examination?

MR WALL:

If there is a contest, and my understanding is that the Crown does not accept certain aspects.

KÓS J:

There'll usually be a contest, Mr Wall.

MR WALL:

That's right, exactly, and the only way to unpick that is to assess the evidence and if need be test it.

KÓS J:

So then the question arises because you have to go through that process to find a probable injustice, so therefore to recall. Whether the – the alternative more effective remedy is the CCRC.

MR WALL:

And that is something of a void at this stage. We can't…

GLAZEBROOK J:

Do you make anything of the fact that the only thing the Commission can do is actually send it back to the Courts anyway?

MR WALL:

Yes.

GLAZEBROOK J:

Well, just do you make anything of that, because one could argue that if all the Commission can do is send it back to the Courts and if it's something that the Courts can deal with, they should deal with it and circumvent that initial – if it's something, however, that the Court can't deal with, and I'd suggest something that might require further investigation, the Courts can't deal with that because they're not a Commission of Inquiry that can ask for – that, well, actually, that has any investigative powers or processes.

MR WALL:

I make two points on that is that the basic structure of this process where the recall application might be declined in the Court of Appeal and on the basis the alternative remedy is to go to the Commission, go there, however long that takes and that boomerangs back to the Court of Appeal, now that may just end up in exactly the same point on exactly the same argument that was with the recall application in the first place but we've just lost, however long, we don't know. But here's the risk, is that when it boomerangs back to the Court of Appeal on exactly the same basis and the appeal might be allowed at that point, the public's perception is going to be relevant because if it is a profound injustice at that point in time there's going to be questions as to why nothing was done the two or three years prior.

1035

WILLIAM YOUNG J:

There are reasons which we're going to have to get to a little later, but for instance, your client could've run this defence at the first trial. He could've said: "Yes, I was there with a shotgun. Crikey, I have to admit, I fired into the ground and then I handed it to Dashwood who fired the shot." So, that defence was available. It wasn't that, I'll put it this way, satisfactory because it would've left him open to conviction of attempted murder on the basis of being a party as an alternative. But he could've run this defence and he chose not to, and even now, he hasn't gone on oath and said: "Yes, I was there. Yes, I had the shotgun. Yes, I fired it, then I handed it to Dashwood who tried to kill these blokes." Now, there is a sort of a gaming element in this.

MR WALL:

A what, sorry, Sir?

WILLIAM YOUNG J:

A gaming element. Say he gets a retrial on the basis of what the Pereira brothers say and then he says, well, I don't really want to run that defence at trial because it's going to be in the frame under section 66(2), so I'll just deny I was there, and we have a re-run of the first trial. Not a very tasty outcome, palatable outcome.

MR WALL:

Counterfactuals that call into question a person's exercise of their rights –

WILLIAM YOUNG J:

Sorry?

MR WALL:

Counterfactuals that call into question a person's exercise of a right to silence are –

WILLIAM YOUNG J:

No, it doesn't. I mean, he's got a bit past the point. He's been convicted, he's lost his appeal, he lost his application for leave to appeal. There might be something to be said for putting his cards on the table at this stage when he's resorting to an exceptional jurisdiction.

MR WALL:

My response would be to say that – and whether or not it's a recall application or something goes –

WILLIAM YOUNG J:

Sorry?

MR WALL:

Whether or not it's not a recall application or something goes to the Commission or appeal, normal appeal –

WILLIAM YOUNG J:

Well, just for us, from the point of view of whether it's a recall application.

MR WALL:

But in any appeal, the same considerations might apply.

WILLIAM YOUNG J:

Well it might've, but it would've applied if it had been brought promptly. It would've applied within two or three years of the incident, not seven years or eight years later. Do we know if ever – if there was any evidence of the shotgun being fired into the ground?

MR WALL:

Having not been counsel at the trial, I don't have the confidence to answer that question.

WILLIAM YOUNG J:

It wasn't suggested at trial. This narrative wasn't suggested at trial.

MR WALL:

Perhaps if we might be able to just park that for a moment, Sir, and –

WINKELMANN CJ:

So Mr Munro might be able to answer us? Yes.

WILLIAM YOUNG J:

Okay.

MR WALL:

Having been in the trial. I don't want to attempt an answer at that and be wrong.

WINKELMANN CJ:

Can I take you back to something that Justice Kós was asking you about, about whether the Court would have to hear evidence to deal with a recall application? I think you said they would? Wouldn't it –

MR WALL:

In a case like this.

WINKELMANN CJ:

Yes. Wouldn't it depend – I mean that's for the Court to assess, wouldn't it be? The Court may assess it does not need to hear the any evidence it can deal with on the papers. It'd be a case-by-case basis, wouldn't it?

MR WALL:

Yes. That was –

KÓS J:

That's why *Chapman* was a good example.

WINKELMANN CJ:

So that is your answer?

MR WALL:

As a case-by-case basis. I'm sorry if I put it any differently than that.

WINKELMANN CJ:

No. It may have been just that I misunderstood you.

MR WALL:

In a case like this where you've got a contest and there's no backdown from the Crown about, then maybe it can –

ELLEN FRANCE J:

Well, I was going to ask you about that, Mr Wall, because the sort of alternative approach – well, one approach to your approach is for the Court, then, to look

at the evidence on the papers, let's say, and to say, well, for one of the brothers, won't say who it is, knows the person but won't identify him, not cogent. For the Court then, in a fairly preliminary way, to make an assessment of them, the merits, which is unfavourable to your client, do you accept that – I'm not asking you to say, yes, that'll be okay in this case as such, I'm just saying as an example, your approach, which is to focus on the Court dealing with it on a recall, might have some disadvantageous outcomes for a particular applicant.

I mean you could obviously then appeal and say, well, there needed to be cross-examination, et cetera, et cetera, but I'm just positing the idea that there may be other, more effective remedies.

1040

MR WALL:

I understand, and I'll put it this way. That there are going to be cases that are amenable to being dealt with on the papers, and that goes to the point of whether there is the existence of a probable injustice and also to determine whether alternative remedies are more effective and efficient in that situation.

But then there are going to be other cases where it is necessary to test the evidence before reaching conclusions on those two points. The trouble that we've had in this particular case is that hasn't happened. That the Court of Appeal in *Jolley* went through the evidence in a very summary way and effectively said: "Of controlling significance is the existence of the Commission. That's your remedy here." That is the issue with this particular case.

Now, without wanting to go too much into the merits of it, it is significant that the two deponents in this case are the purported victims of this shooting. From arrival –

WINKELMANN CJ:

You may as well go into the merits of it now. I think we've dealt with the principles, haven't we? Shall we move to the merits?

MR WALL:

These are the victims of the shooting and they're from a rival gang in the context of a trial where identification was of critical importance.

ELLEN FRANCE J:

One from a rival gang?

MR WALL:

Both Pereira brothers –

WILLIAM YOUNG J:

Not now, are they?

ELLEN FRANCE J:

Not now?

MR WALL:

Mmm.

ELLEN FRANCE J:

On their evidence, I mean.

MR WALL:

Yes. And there are certain defects which might undermine the reliability of the identification that was given at trial on that central issue about identification that supported the jury's –

WILLIAM YOUNG J:

Well, the narratives are broadly similar. The gun starts off in your client's hands, he fires a shot, he hands the gun to Dashwood, he fires another shot. So those are the narratives, except for the Pereiras are a bit reluctant to identify Dashwood as the man who fires the second shot. So they're not that different. They do provide – but they introduce this new development, what I think is a new development, and that is the first shot goes into the ground and the second shot misses.

MR WALL:

Yes, and –

WILLIAM YOUNG J:

Sorry, the second shot is successful.

MR WALL:

Yes. Whereas the narrative at trial was that the shot that hits him, 15, 20 metres away, and that there was a second misfire that occurred. But the other central factors around – that really call into question the identification is the colour of the eyes.

WILLIAM YOUNG J:

But these were trial issues.

MR WALL:

Yes.

WINKELMANN CJ:

Colour of the eyes? It's quite a distance to be seeing someone's – yes.

MR WALL:

Quite right, yes.

ELLEN FRANCE J:

20 metres, one of them, isn't it?

MR WALL:

Colour of the eyes, shorts versus pants, whether identification was achieved at the time by the two witnesses who gave evidence at trial, and whether they were labouring under certain conditions at the time that might call into question the reliability of them.

WILLIAM YOUNG J:

Are they still available, do you know?

MR WALL:

The?

WILLIAM YOUNG J:

Crown witnesses?

MR WALL:

(no audible answer 10:44:01).

ELLEN FRANCE J:

You don't know, sorry?

MR WALL:

I don't know whether… I think that this exchange does illustrate a key point that the merits are going to count and that in a case like this, there needs to be some engagement.

WILLIAM YOUNG J:

You've got engagement from me but not necessarily the type you want.

MR WALL:

Engagement, unless, I mean – compared to a matter that's being dealt with summarily and then flicked off to the Commission. That's the problem that we have.

WINKELMANN CJ:

So what's set against you, one of the things that are set against you is that you could've done this work at the time.

MR WALL:

Well, the affidavits were sworn in, was it December of –

1045

WILLIAM YOUNG J:

No, but your client could have given this narrative at trial. He could have put it up through his counsel but he didn't want to give evidence. So he is running a defence that was available at trial, though not supported by separate witnesses, and secondly, frankly, inconsistent with what seems to have been his general theory of the case at trial that it wasn't him and he wasn't there, or wasn't really involved.

MR WALL:

But it's not entirely inconsistent in the – the crucial conduct being the shooting somebody in the face with birdshot.

WILLIAM YOUNG J:

You see, it could have been put to the two Crown protected witnesses that the first shot had been fired into the ground, that it was the second shot that caused the damage and that that was fired by Dashwood.

MR WALL:

In the absence of having any evidence available at the time to support that – what in the context of this trial may have seemed like a rather bold line of cross-examination and submission without anything to back it up. There does seem to –

WILLIAM YOUNG J:

Well, it could've had your client's evidence if it were true.

MR WALL:

That also would be open to certain criticism, and in the context of this particular trial, unsupported by independent evidence, would seem farfetched and a bit grasping. The –

WILLIAM YOUNG J:

Why? Why would it have been farfetched?

MR WALL:

Because it's not supported by the fresh evidence.

WILLIAM YOUNG J:

Well, it might have been. Let's go and have a look at the ground and see if a shotgun's been fired into it. That might have been quite a telling point.

MR WALL:

I think –

ELLEN FRANCE J:

Yes, the Crown in closing, it's a bit unclear what it's talking about, say there's no DNA, there's no gunshot residue linking these defendants forensically to the scene. But it's a bit hard to tell from that quite what –

WILLIAM YOUNG J:

Don't think there'd be the suggestion of the gun being fired into the ground.

ELLEN FRANCE J:

No, no.

WILLIAM YOUNG J:

And probably a bit difficult to check now. It wouldn't have been very hard to check in 2015 or 2016.

MR WALL:

It's only after the fact that this evidence has come about, and it's come about from an unusual source. The victim's arrivals –

WILLIAM YOUNG J:

Is there a reason why your client hasn't given an affidavit?

MR WALL:

There is. I mean it's a rather feeble answer to that question, but change of representation since the time that the affidavits were sworn and the recall application was made.

WILLIAM YOUNG J:

That's not a reason for not giving an affidavit now.

MR WALL:

That's why I said it was a somewhat…

WILLIAM YOUNG J:

Not even a feeble one. No answer?

MR WALL:

No answer, Sir, well, not one that's informed by instructions or considered in light of the trial and the trajectory of this application. But the point still stands. We have evidence from a very unusual source in this case.

GLAZEBROOK J:

Where does that evidence get him?

MR WALL:

It creates a…

GLAZEBROOK J:

A doubt as to being a principal but what about a party?

MR WALL:

It would, in the context of this case perhaps, given the existence of a participation in an organised criminal group charge across the board…

1050

WINKELMANN CJ:

He'd just be an old-fashioned party, wouldn't he? Because he's got the shotgun, he's threatening it around, and it's provided to the person next to him.

WILLIAM YOUNG J:

In an extremely volatile situation, what do you think the other chap was going to do with it?

MR WALL:

I can't answer that myself.

WILLIAM YOUNG J:

Well, it's open to inference that he thought he would fire it with a range of intents that may include murderous intent.

MR WALL:

There's arguably a break in that connection, albeit not far enough that it might escape liability for participation in organised criminal group. It's the way that the charge was framed at the –

WINKELMANN CJ:

Not in an arson sense.

WILLIAM YOUNG J:

Well, he's in the frame for that anyway, isn't he, or –

MR WALL:

Yes, and there's perhaps little escape from that, but in terms of attempted murder charge –

WILLIAM YOUNG J:

But if this is the reason why he doesn't want to give an affidavit which, I again think is a conclusion that could be drawn by way of inference, and then a different defence will run at trial, wouldn't it make the administration of justice a mockery? Wouldn't it just make a mockery? Say he goes to trial, everything

happens goes to trial, and then at trial he says: “Oh, the Pereiras have got it entirely wrong. It was some other chap who fired into the ground. It just wasn’t me at all. I was, you know, nothing to do with it.”

MR WALL:

Well, the risk that a very unexpected mockery of justice might happen in a –

WILLIAM YOUNG J:

Well, it’s not unexpected. I can’t think of any other reason other than a desire to keep his powder dry for not giving an affidavit. So why wouldn’t – so if that’s the reason why he hasn’t given an affidavit, then it’s highly likely that at trial, he would persist in all possible lines of defence.

MR WALL:

As I say, I can’t answer that point, but I would say this, that the perceived risk, as you say, of mockery of justice occurring down the track can be pitched against the very real risk at this stage that the wrong person –

WILLIAM YOUNG J:

That he is convicted as a principal when it should’ve been as a party.

MR WALL:

The wrong person has been convicted of attempted murder on the basis of faulty identification evidence and that goes to the heart of this question, should –

WILLIAM YOUNG J:

Well, it’s not faulty ID, it’s faulty narrative. Because the Pereiras would agree with the two Crown witnesses that it was your client who started off with the shotgun and fired the first shot.

MR WALL:

Into the ground.

WILLIAM YOUNG J:
Sorry?

MR WALL:
Into the ground. Which we –

WILLIAM YOUNG J:
Yes, but it does provide some support for the – it's not really an identification case, it's a narrative case. All four witnesses agree that the shotgun starts off with your client and he fires it first. So it's not –

MR WALL:
Into the ground, and we can draw certain inferences from what it means to shoot into the ground when you've got a volatile situation.

WILLIAM YOUNG J:
No, of course you can. I'm just challenging the proposition that it's really about ID. I'm not sure it is. I think it's about the narrative.

MR WALL:
It's the identification of the person who pulls the trigger and shoots someone in the face with a birdshot. That's –

ELLEN FRANCE J:
Well, on this, on the fresh narrative, he is there, so when the witnesses say –

WILLIAM YOUNG J:
He's there.

ELLEN FRANCE J:
– he's there, then they haven't misidentified him. What this new evidence suggests is that when he fires the gun, it's not into the face of the – the head of the victim, but into the ground.

MR WALL:

The ultimate issue about who it was that pulls the trigger, the identity of that particular offender, is an issue, and it calls into question the reliability of what those witnesses have said.

KÓS J:

The narrative is not that he fired into the ground and then went and locked it in the boot of the car. The narrative is he fired into the ground and handed it over to Dashwood. I go back to the question that Justice Young asked you before. What did you think was going to happen then in that volatile situation? Where's the injustice?

MR WALL:

Well, he's been convicted as a principal for attempted murder when –

KÓS J:

He should be a party?

MR WALL:

Depending on the inference that can be drawn as to shooting into the ground, whether that was – you can draw an inference that it's a warning and then there's a withdrawal from what was occurring or –

WILLIAM YOUNG J:

By handing the gun to someone else there?

1055

WINKELMANN CJ:

Okay, so in terms of the other thing that Crown sets against you is that enquiries could have been made of these two witnesses at the time, the two victims. Don't pull faces.

MR WALL:

Oh no, sorry, I'm just – yes.

WINKELMANN CJ:
You're thinking.

MR WALL:
Yes.

WINKELMANN CJ:
All right.

MR WALL:
They are the putative central Crown witnesses as the victims, the complainants of something, of this incident, but they weren't available at that time.

WINKELMANN CJ:
In the evidence, there is indication that Ms Sykes had enquiries made of them.

MR WALL:
Yes, I can't go any further than to say that the affidavits themselves were sworn in December of 2021 and then provided to trial counsel. That's as far as I can take that. Whatever dealings that may or may not have happened with other counsel that were in the trial, I can't speculate or suggest anything based on that.

WINKELMANN CJ:
All right. Are these your submissions?

MR WALL:
I'll just check my notes.

WINKELMANN CJ:
Did Mr Munro want to say anything to us about the trial? I mean, we've read the materials.

MR WALL:

Yes, I'm quite happy to hand over for Mr Munro to mop up anything that I've missed or messed up. Thank you, your Honours.

MR MUNRO:

Unfortunately, there's very little I can add. I wasn't trial counsel for Mr Jolley, I was trial counsel for another matter, another defendant in the case and I don't recall that defence being run, as your Honours pointed out, by Mr Jolley, but…

WILLIAM YOUNG J:

I had a look at the Judge's summing up. I couldn't see any real trace of it there.

WINKELMANN CJ:

Nor in the closing, the counsel's closing address, either. It's simply a "the Crown must prove" type closing address. It gives no alternative narrative.

MR MUNRO:

Yes. That's what I recall of it as well. I seem to have thought I remembered a passing off of the gun, but I'm trying to search through the notes of evidence now, but I can't find it. So it just couldn't have been that, it must've been a… But other than that, I can't assist. I'm very sorry.

WINKELMANN CJ:

Thank you. Thank you, Mr Wall. Mr Lillico?

MR LILLICO:

Just to begin with, perhaps if it pleases the Court, the point that was made initially at the very start of his address by my learned friend about this Court being concerned with the Court of Appeal's recall judgment, obviously, this Court will have to lead and the Court of Appeal will have to follow, but there are some caveats to that in terms of – the Court of Appeal deal with a different remedy landscape, of course, because they have the prospect of dealing with cases where there is a further right of an application for leave to appeal to this Court.

The second thing is a matter of volume and practical context. I've given you the statistics that I was able to get from the Ministry of Justice in my submissions about that. This Court will know its own statistics in terms of what's happening here, and I think, from other work that I've done, I may have overstated the difference in volume because I'm not sure entirely that it's so out of step because I've had a look at – and I might hand it up if it pleases the Court. It's simply a list of the decisions in the Court of Appeal post-*Lyon* and the decisions in this Court post-*Uhrle* in the criminal jurisdiction in terms of recall.

1100

One thing that I think we can take from that is that the numbers aren't too disparate because I think for the Court of Appeal there have been 13 recall in that sort of rough time period. There's been 13 recall applications in the Court of Appeal in that time period and nine in this Court. So bigger volume as you might expect in the Court of Appeal but not very much bigger. This was from a quick look at Westlaw last night, so I wouldn't bet my children on it, although maybe the eldest one, but I think it does give a rough idea.

WINKELMANN CJ:

That will probably enter into the family's annals of history.

KÓS J:

All strictly obiter.

MR LILLICO:

Supposed to be studying at the moment.

So that's the first point to be made about that, I think. It's a different context. There's no right of appeal. But, of course, this Court will lead on it, just bearing in mind that slightly different remedy landscape for the Court of Appeal.

KÓS J:

Yes. The Court of Appeal's not a leave Court in these matters. It's an appeal as of right which is said to have gone wrong, so that is rather different from leave here.

MR LILLICO:

Yes, your Honour, yes. But ultimately, of course, the Court of Appeal is going to have to follow. The…

WINKELMANN CJ:

It's interesting there's not exactly been an avalanche of fresh evidence applications though, has there?

MR LILLICO:

No. Just a note about the way I've categorised things. Re-litigation is either an outright re-running of the case and sort of arguing with the Court about the conclusions that it's reached, or a re-framing and running arguments that could have been run, and then fresh evidence is the situation you're familiar with, either new expert evidence, new evidence from lay witnesses, counsel competency type matters. Now, interestingly, just in terms of they've all been dismissed in this Court as far as I can see, two of them have been granted in the Court of Appeal. They both concern cases where there's some sort of information or evidence before the Court of Appeal that wasn't there in the first place. One was *Haden v Police* [2020] NZCA 498 which was simply that a case on all fours with Ms Haden's case wasn't in front of the Court of Appeal when it originally decided the case, and the other was *McMillan v R* [2021] NZCA 146 where the Court of Appeal did not have the full roster of charges that Ms McMillan had been convicted of, and that was important to her because – because of the result in the appeal she gained the ability to clean slate her convictions.

Now in terms of the, my friend says "prescriptive" but I tend to think that the Court of Appeal has attempted to give itself some guidance about how it ought to deal with this increasing number of applications that we see statistically the

registrar in a court faces and it's important, in my submission, to note that while the Court restates the test in *Uhrle* it makes some observations about the kinds of case that might be amenable to recall. It doesn't close the door on any type of application, and…

WINKELMANN CJ:
Well, it does, actually. For instance, it closes the door on any type of application which does not impeach the judgment at that level of the Court.

MR LILLICO:
Whatever that means.

WINKELMANN CJ:
Exactly.

GLAZEBROOK J:
Well, it also says if you have already applied here or can apply here then that's the end of it as well. What do you say about that?
1105

MR LILLICO:
Tends to end it, doesn't it, your Honour, because the Court says, for instance, it – this might be more in respect of fresh evidence rather than the right of appeal but the Court does remind itself that – and this is at paragraph 9.2 of the Crown submissions, the supplementary ones – so the Court of Appeal noted that the English and Welsh position that an application to the CCRC would almost invariably be the proper course in non-disclosure and fresh evidence cases, cautioned that Te Kāhui was a new entity and that the Supreme Court required courts to decide whether alternatives offered an effective and efficient remedy. So that's really why my submission to you is that the Court is giving some guidance and making some observations about the kinds of cases that might be suitable but…

WINKELMANN CJ:

But hasn't it actually also just – it's created an entirely new test, probably occasioned a substantial injustice?

MR LILLICO:

Well, that's because the Court attempted to grapple with how the test might be different from either the miscarriage of justice test that it patrols normally under the Criminal Procedure Act 2011 or the criteria under the Senior Courts Act 2016 to get to this Court.

WINKELMANN CJ:

So you accept it did come up with a new test?

MR LILLICO:

It's not dealt with by this Court, no, so that to that extent it's new, but it's putting some bones on this Court's – taking *Horowhenua's* third ground of very special reason, such that the interests of justice require the case to be recalled, it's putting some bones on that exceptional step.

WINKELMANN CJ:

Didn't this Court in *Uhrle* expressly say it wouldn't put more bones on it because the best way was to keep it a simple principle? I thought it had.

MR LILLICO:

Yes, although when you're dealing with volume perhaps the Court of Appeal didn't find that as helpful as it needed, given the number it's getting.

KÓS J:

The tricky question is where the fresh evidence cases should go. Where should Mr Lundy have taken his fresh evidence? To the Privy Council or back to the Court of Appeal?

MR LILLICO:

Ordinarily the Court of Appeal, and this probably gets to Justice Glazebrook's point about where cases go after they've been to the Commission, that they go to the Court of Appeal, and ordinarily the Court of Appeal is going to be – as an intermediate Appellate Court – is going to be a more suitable venue for picking apart fresh evidence, but not always.

KÓS J:

And if that is the case, Mr Lillico, shouldn't that also have applied here?

MR LILLICO:

That the Court of Appeal should have relooked at it?

KÓS J:

Yes.

MR LILLICO:

Not when on the face of it there was the available remedy, the investigative remedy of the Commission, coupled with –

GLAZEBROOK J:

Or would you say that that was because it did need investigation rather than mere cross-examination or – because sometimes mere cross-examination might give the answer without any further investigation, but are you saying in this case it is clearly a case where further investigation is required?

MR LILLICO:

Yes, because cross-examination isn't probably going to – these are useful questions you could ask the Pereira brothers, but you're not – you're reliant, aren't you, on the trial record and if the theory hasn't been run at trial, as it doesn't seem to have been, then we're not going to unpack from the judgment, and looking at the closing addresses, for instance, what the forensic situation with the firearms was, where the shots were gathered, what could be said about

shotgun residue and other things. So investigation from a body like the Commission is, is indicated really.

1110

WINKELMANN CJ:

And you say also that goes to finality because one of the principles of finality is that you run your arguments when you have a chance to.

MR LILLICO:

Yes.

WINKELMANN CJ:

And here this was a narrative that was not run, nor was any indication given to allow people to check it.

MR LILLICO:

No, and to that point, your Honour, it's in the affidavits that he was approached by Ms Annette Sykes who was counsel for one of the other, I think Mr McMeeking, one of the other accused, and so it seems that his hostility was to the Crown, not the defendants in the case despite whatever was said about the gang allegiances, and so again we are faced with, although we're drawing on evidence here, we're faced with a familiar recall situation where another plan B's been run on appeal, or plan C actually because plan B was run at the first lot of appeals, and so now we have plan C, and…

WINKELMANN CJ:

Well, plan B wasn't a different narrative though, was it?

MR LILLICO:

No, no, to be fair it wasn't, but we have a different narrative attempt with the help of the Pereiras.

KÓS J:

And so are you using the passage at paragraph 26 of *Uhrle* where the Court cites Lord Woolf in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 and says it has to be established that a significant injustice had probably occurred? Are you saying that that's the determinant for whether evidence should be investigated by the CCLC or taken on board and cross-examined in front of the recall court? In other words, there has to be something readily apparent to the Court to say, well, look, this is clear, relatively clear, probably, significant injustice has probably occurred, so we will embrace it. But if we can't say that, reasonably clearly, it has to go off for investigation. Is that essentially your argument?

MR LILLICO:

Yes. So the Court look at the Pereira affidavits, don't they, in the Court of Appeal, and you could've hoped, or the Crown could have hoped perhaps, for a bit more reasoning about the affidavit, but we know that the Court of Appeal, who are faced with this kind of argument day-in, day-out, in the criminal jurisdiction, look at the affidavits and say, well, we can have cross-examination or we would usually have cross-examination on something like this and we would be faced with questions about why we should prefer their ID, or their – not ID but their version of the narrative over what the two Crown witnesses, who are prepared to go into protection and said before a jury, why Mr Jolley might have been unearthed in a neighbouring basement and those sorts of things, and they would have anticipated that and we don't have – I'm not rewriting the judgment but that must have been in the minds of the Court of Appeal, that that kind of theatre would have been played out before them in cross-examination and perhaps also they would have known that the Court would have been confined to the evidence that was produced at trial in terms of anything surrounding these events in terms of forensics. So the judgment could certainly have been better because I think the practice of this Court and of the Court of Appeal is to at least enquire into, in the papers, whether the affidavits disclose any kind of cogency, credibility and freshness, and the Court would have been better to address those criteria, but…

WINKELMANN CJ:

So you concede that it should have done that?

MR LILLICO:

Should have done that, yes.

GLAZEBROOK J:

So in some ways you do seem to be actually accepting the test that's been proffered for Mr Jolley in a way that it really is going to be very dependent on what actually is in front of the Court and whether it should be for investigation for a further appeal or just dismissed altogether.

1115

MR LILLICO:

Yes –

GLAZEBROOK J:

Without – I mean I suppose nothing can stop someone going to the Criminal Cases Review Committee but – the Commission, sorry – but the Commission's probably not going to be putting something at the top of the queue that the Court of Appeal has said, for example, that there's absolutely nothing in this, like most of these that have been dismissed.

MR LILLICO:

Yes. 221 cases, your Honour, since it opened for business midway through 2020.

WINKELMANN CJ:

I don't know that they will be put off by the Court of Appeal's assessment, actually, because that's the whole point of the Commission, isn't it?

GLAZEBROOK J:

No, it depends what the assessment would say, but if clearly the… Yes.

WINKELMANN CJ:

Yes, if it seems an credibly convincing assessment, might be.

KÓS J:

I think the assessment followed cross-examination. That's got a great deal more significance than if it's simply a face view on the papers. Then we wouldn't want to discourage the Commission in that context.

GLAZEBROOK J:

No, and I mean, we have issues with whether something is fresh in any event, which the Commission is not bound by at all.

MR LILLICO:

I don't know if it assists Justice Glazebrook's point, but we probably don't have to look further than *Uhrle* itself. It is buried in the footnote. I think –

ELLEN FRANCE J:

I was just going to say that footnote 35… Mmm.

MR LILLICO:

Yes, and I –

WINKELMANN CJ:

What does it say, for the rest of us?

MR LILLICO:

It's important because it says this Court held that they may – well, it doesn't say that, that's my submission. This is at paragraph 5: "This Court held that there may be cases where the evidence of miscarriage is sufficiently clear that the court considers the processes under s 406 of the Crimes Act 1961 or under the Criminal Cases Review Commission Act can be circumvented." So I, you know, you get a Crown pathologist to recant and says: "Look, I'm not at all sure about the mechanism for death now," and that will be clear, but this is sort of a workaday kind of exercise where the Crown have got a series of questions

about all three of the *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 criteria and the Court would've been anticipating a bit of a stoush, frankly, which might not have assisted the Court of Appeal too much.

Just while we're on statistics and as just a bit of an aside, really, to my friend's "leap of faith" –

WINKELMANN CJ:

Can I just say one thing about statistics is that, you know, the Court doing its usual business in dealing with the case load and concerns regarding statistics can't be allowed to undermine the fundamental principle that's established in *Uhrle* which is a principle formulated so as to avoid miscarriages of justice getting lost in the inundation of intermediate appellate Courts.

MR LILLICO:

No, I know, and I was only raising it to explain why the Court of Appeal might've wanted to give some guidance.

But I was going to say about the – sorry, your Honour?

WINKELMANN CJ:

Would you accept the guidance can't go so far as to change the test?

MR LILLICO:

I'm not sure it does change the test because it doesn't seem to have been thus far and I'm sure that will be corrected, but thus far, it doesn't seem to have been ruled on by this Court.

WINKELMANN CJ:

Right. No, but do you accept it can't go so far as to change the test (inaudible 11:18:56) –

MR LILLICO:

No, your Honour, I can't. No. No.

I was just going to say that my friend's submission that our brand-new statutory entity, the Te Kāhui, the Commission, required us to make a leap of faith. There is some continuity here of course that the Commission has essentially removed the function from the Ministry of Justice under section 406 where officials in that Ministry gave advice, perhaps sometimes with an independent King's Counsel and gave advice to the Governor-General, and we're all familiar with cases which have come back to the Courts via that mechanism, and there are a number before the Courts at the moment. It's simply a continuity of that. Now there's probably been a bit of a pause.

WINKELMANN CJ:

Well, it has more powers, doesn't it?

1120

MR LILLICO:

Yes, and it's – the pathway, for instance, to appoint experts is clearer, to obtain documents and so forth, and just to put some substance on that, a leap of faith isn't required; they have to report in a transparent manner. That's how we know they have that number of cases. As you'd anticipate, a lot of old cases, if I can put it that way, came out of the woodwork, I would've though, and they have had –

WINKELMANN CJ:

Built up demand.

MR LILLICO:

Sorry, your Honour?

WINKELMANN CJ:

Built up demand.

MR LILLICO:

Built up demand, yes, and they've come out and now the Court is, sorry, the Commission, is anticipating, they say in their most recent report, the one for this

year hasn't come out yet, but they said in last year's report that they anticipated referring matters to the Court of Appeal in this quarter.

WINKELMANN CJ:

This quarter?

MR LILLICO:

This quarter, your Honour, yes.

WINKELMANN CJ:

So you adopt Justice Young's formulation of an absent narrative, at trial?

MR LILLICO:

Gratefully, your Honour, yes, and I also grasp the point that's been made by several members of the Bench about –

WINKELMANN CJ:

About party liability?

MR LILLICO:

Mmm.

WILLIAM YOUNG J:

Are the Crown witnesses still available?

MR LILLICO:

I don't know the answer to that question, your Honour.

WINKELMANN CJ:

Do you have anything extra to say about the absence – Mr Jolley's failure to put in an affidavit? Does the Crown have anything to say about that? Do you make a submission other than just adopting what's been said in questioning by the Bench of Mr Wall?

MR LILLICO:

Well, I share the frustration at retrials that are won and then the point that was made at the appeal is then dispensed with and the retrial is run on a completely different basis, but I'm not sure that there's any way to place any parameter on that.

WILLIAM YOUNG J:

Don't allow appeals.

MR LILLICO:

Don't allow appeals, yes.

WINKELMANN CJ:

Well, I mean it might go – his failure to put in an affidavit though might go to assessing the risk of a miscarriage, mightn't it?

MR LILLICO:

Yes, your Honour.

WINKELMANN CJ:

Part of the overall assessment.

WILLIAM YOUNG J:

Well, one way of avoiding it is requiring appellants to, as it were, pin their colours to the mast, so in this case an affidavit from Mr Jolley saying: "Yes, I was there. I had a loaded shotgun. I fired it once but it was only into the ground. Then I gave it to this other chap." Now that would eliminate a possibility of a – that the point on which he now argues simply being lost at the retrial and the retrial just going ahead on the original basis.

MR LILLICO:

Yes, and that might be consistent with two things, mightn't it? The exceptional nature of the jurisdiction, exceptional step is the term used, and also consistent with the kind of investigation that would happen in the CCRC.

WINKELMANN CJ:

Yes, because one of the reasons the Court exercises this exceptional jurisdiction is to maintain confidence in the administration of justice.

MR LILLICO:

Yes, your Honour.

KÓS J:

And certainly, at a trial counsel error case, it's almost impossible for an appellant to succeed without filing an affidavit. That's the instructions they gave. So that's consistent with the suggestion in this case, which is a general fresh evidence appeal, that the appellants should nail their colours to the mast.

MR LILLICO:

Yes, was he there using the gun or was he simply absent? And he ran, as far as I can see, a negative sort of defence –

WILLIAM YOUNG J:

Put the Crown to proof.

MR LILLICO:

– as you'd expect him to, an ID defence.

WILLIAM YOUNG J:

Yes, he put the Crown to proof effectively, as I understand.

MR LILLICO:

Yes.

I'm just trying to find my place, I apologise.

WINKELMANN CJ:

I think you've covered most things but…

1125

MR LILLICO:

Perhaps just to Justice Kós' question about the appropriateness in cross-examination in this Court. One of the recall decisions I've listed in the note that I've given you, *F v R* which was [2021] NZSC 166, in that case we did actually seem to have recanting Crown experts or at least Crown experts who were moderating what they were saying, and the Court commented at paragraph 10 – you don't have it in the bundle, I'm sorry – but at paragraph 10, the Court said: "Difficulties associated with the two factors just mentioned" – that's the expert witnesses in that case, was about automatism – "could, if necessary, be dealt with on appeal to this Court," that is, the Supreme Court. "But, although in rare cases [*sic*], similarly factual issues have been so dealt with" – I suppose *Ellis* (citation 11:25:38) and *Fairburn* (citation 11:25:39) spring to mind – "substantial evidential exercises of this nature are not a central part of this Court's role. The applicant has the alternative option of going to Te Kāhui Tātari Ture | the Criminal Cases Review Commission. It can inquire into the convictions and, if of the view that the interest of justice so require, can refer…to the Court of Appeal." So, just really reinforcing the point made.

Otherwise, I didn't really have much to add unless I can be of any further assistance.

WINKELMANN CJ:

Right. All right, thank you. Now, do you have anything to say by way of reply, Mr Wall?

MR WALL:

(no audible answer 11:26:41).

WINKELMANN CJ:

You don't have to reply. Or Mr Munro.

MR WALL:

Your Honours, I just want to pick up on one point and perhaps in a more fulsome answer to Justice Glazebrook's question part way through my submissions, it

was – the point about these referrals coming back to the Court of Appeal, what stock do I place on that, and I think it ties in to the anxiety about the Court of Appeal being the place in which this evidence is tested and ventilated.

Even on the process whereby recall fails and a person goes off to the Commission, and there's an investigation done and a referral made back to the Court of Appeal, the Court of Appeal's inevitably going to be hearing evidence and having to test it at that point in time, unless it's so dynamite –

WILLIAM YOUNG J:

It does assume a referral back, though.

MR WALL:

What's that?

WILLIAM YOUNG J:

It does assume a referral back.

MR WALL:

That's right, but we can assume that they're going to come through, and that provided the Crown doesn't roll with that point, that evidence will have to be tested.

WILLIAM YOUNG J:

But it's still quite a hurdle to get the Commission to refer it back. The Commission would only do that if it thinks there's substance in the case following investigation.

WINKELMANN CJ:

Well, Mr Wall, do you have a point to make or are you just making the point that they'll then have to hear evidence or is there a further point?

MR WALL:

The submission is the Court of Appeal is going to have to perhaps get used to hearing this type of evidence anyway, and in the context –

WINKELMANN CJ:

Well, look, the Court of Appeal does hear this kind of evidence, so I don't know if there's anything much in your submission. They hear this kind of evidence on conventional appeal, so.

ELLEN FRANCE J:

And under the section 406 referrals back.

MR WALL:

Yes.

WINKELMANN CJ:

I think they're quite used to it. Did you have –

GLAZEBROOK J:

You're just making the point that the Court of Appeal, which actually the Crown made as well, that the Court of Appeal is really the suitable place for this evidence to be cross-examined on if cross-examination rather than further investigation is what is required in a particular case.

MR WALL:

Correct.

KÓS J:

With, then, the potential for leave to appeal here on the basis of tested evidence, and that's important.

MR WALL:

Correct. Thank you, your Honours.

WINKELMANN CJ:

Thank you. Well, we'll take some time to consider our decision and let you have it in due course, and we'll retire.

COURT ADJOURNS: 11.29 AM