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

SC 116/2021
[2022] NZSC Trans 10

CHEYMAN LEE MITCHELL

Appellant

V

NEW ZEALAND POLICE

Respondent

Hearing:	10 May 2022
Coram:	Winkelmann CJ O'Regan J Ellen France J Williams J Kós J
Appearances:	K H Cook and P C McDonnell for the Appellant F R J Sinclair and Z A Fuhr for the Respondent

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CRIMINAL APPEAL

MR McDONNELL:

E nga Kaiwhakawā, tēnā koutou. Ko Cook ahau, ko McDonnell, mō te kaipīra. May it please the Court. Cook and McDonnell for the Crown.

WINKELMANN CJ:

Tēnā korua.

MR SINCLAIR:

May it please the Court. Sinclair and Ms Fuhr for the respondent.

WINKELMANN CJ:

Tēnā korua. Mr Cook?

MR COOK:

May it please the Court. When Mr Mitchell drove on a road with alcohol on his breath and was subsequently evidentially breath tested, Mr Mitchell was simultaneously liable for offences of driving with excess breath alcohol and breaching his zero alcohol licence. It's the appellant's submissions that in those circumstances section 46(1)(b) of the Criminal Procedure Act 2011 applied.

For 46(1)(b) to apply the issue is whether the Court is satisfied that upon being convicted of the excess breath alcohol offence, Mr Mitchell had already been convicted of an other offence arising from those facts of the excess breath alcohol. It's the appellant's submission that sections 46 and 47 of the Criminal Procedure Act heralded a change to New Zealand's law in this area, and that contention is not as far-fetched as it initially sounds, given the indications in the explanatory note to the Bill which resulted in these changes. I'd ask Mr Coad to bring up page 601. You see there that these clauses, which are the special pleas, replace those and the test for when a plea of previous conviction/previous acquittal or pardon is available differs from that under the existing law. The new test is intended to bring greater certainty as to the availability of those special pleas.

So the submission on behalf of the appellant is that the crucial question is whether the facts which constitute offence 1 are the same facts as offence 2. As has been noted by judges in the decisions cited around the world, the difficulty lies in determining the limits of the factual commonality.

So the submission is that section 46(1)(b) requires the focus to be on the facts. The comparison as between two offences with different elements and identical elements are not necessary, because identical elements will be caught by section 46(1)(a) meaning a test, as was imposed by the Court of Appeal in this case, which requires identical elements, renders 46(1)(b) redundant.

Obviously in terms of interpreting these new provisions the Court will have regard to the common law. *Pearce v R* [1998] HCA 57, (1998) 194 CLR 610 the Australian High Court decision, and the seminal decision of *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL), outline the history of the autrefois convictions. Put briefly, it is our submission that there was a divide between the strict sense of autrefois and what has been termed the extended sense and the extended sense is the situation that we're dealing with in section 46(1)(b). There has been in various cases cited a looseness of language in relation to what the prisoner, the accused or the defendant must not be placed in jeopardy of. Some cases talk about the same crime, then there's the same matter, same cause or the same facts. The seminal decision, as I said, of *Connelly* is the starting point and at page 252 of the joint bundle, that's the speech of Lord Morris, and just below the 1306 on the left-hand side, there is a, it says (8), His Lordship was outlining some principles and at (8) he says: "That, apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of res judicata applies."

The case in which that arises, and I'll touch on it in a moment, is *Wemyss v Hopkins*, and the appellant submits that that is the common law equivalent of section 46(1)(b). Now if we go to 259 of the bundle. Half way

down the page in *Wemyss v Hopkins*, that's the decision to which I was referring, and Lord Morris in his speech is quoting Justice Blackburn, as he then was. He says: "The case was decided on 'the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, transit in remember judicatum, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter'."

WINKELMANN CJ:
I'm finding it hard to hear you Mr Cook.

MR COOK:
Sorry.

WINKELMANN CJ:
That's all right. I know the masks makes it a little bit more difficult.

MR COOK:
Lord Morris, and I'm going to come to what Lord Pearce says about *Wemyss* in a moment, Lord Morris' quoting Justice Blackburn at that point and then he quotes a further common law case of *Reg v King*, just down the bottom, it says: "That was not a case where the principles of autrefois convict applied." Then Justice Hawkins outlined that "it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation."

The appellant's submission is that that is highlighting the common law equivalent of what we're dealing with here, because of the use of the word "facts". Now at the bottom of page 260 Lord Morris warns that the words of Justice Hawkins cannot be given a literal meaning and they must be considered on the context of what was being decided, but the submission which the appellant asks this Court to draw from that is that this is the common law equivalent of section 46(1)(b) and it's our submission that it's

supported by Lord Pearce's analysis in that case in his speech at page 281 of the bundle.

The backdrop for going through this is that the respondent seems to be suggesting that this is a big change for the common law and in our submission it's not when things are properly analysed. This is the speech of Lord Pearce at page 281.

WINKELMANN CJ:
So your submission is it's not a big change?

MR COOK:
No, in terms of the fact that the common law had this available to it, it's a big change in terms of the special plea. It did herald a change in relation to special plea, but it's not a doctrine that wasn't available beforehand.

So here Lord Pearce, in the paragraph beginning: "It is clear from several cases," again refers to *Wemyss v Hopkins* and on a more fulsome quote of Justice Blackburn's decision it starts with: "The defence does not arise on a plea of autrefois convict," and then further down: "The words of Justice Blackburn were approved in *Reg v Miles* where Justice Hawkins said: '… it is not strictly a plea of autrefois convict …'" and that's because, in my submission, in *Connelly* the House of Lords was at pains to emphasise the strict nature of the pleas in bar of autrefois acquit and autrefois convict. They were not denying the existence of another doctrine for a defendant to ensure that he or she was not convicted for the same matter.

WINKELMANN CJ:
And was that doctrine based on abuse of process?

MR COOK:
Yes, your Honour.

WINKELMANN CJ:

And the respondents say against you in respect of that, that it was not a well-established doctrine, I think, in that…

MR COOK:

I don't think I could dispute that it wasn't well-established and it's caused some angst around common law. I'm going to come to Canada, but his Honour, Justice Kirby, in the decision cited by my friend, *Pearce*, talks about the history of it and refers to a case called *O'Loughlin* where Justice Wells basically delivered an exegesis on this matter. *O'Loughlin* is not included in the bundle and perhaps on reflection it should have been, but I accept the proposition that your Honour has put to me a moment ago.

WINKELMANN CJ:

Well, I simply mentioned that the respondents had said that.

MR COOK:

Yes.

WINKELMANN CJ:

Are you accepting that it wasn't well established, because there are quite a few cases, English cases, that we've had cited to us that actually refer to it?

MR COOK:

Yes, they do but in each of those cases that they're talking about it's been misunderstood and it's not been applied properly. So I accept that there was some cloud about it and when I come to Canada in a moment hopefully I'll be able to remove that cloud and say why our submission is clearly that the statutory provision 46(1)(b) is a reflection of that common law.

So those UK cases have been cited by both parties and they highlight the split that existed in the UK since *Connelly*, well, even before *Connelly*, namely that autrefois pleas are narrowly construed and that the *Wemyss* principle is utilised as part of the abuse of process doctrine. *R v Beedie* [1998] QB 356

(CA), and I won't go through this, roughly pulled up explains *Connelly*, *Beedie*, that is the decision about the gas leak that occurred in the house, and it explains the strictness of *Connelly,* but at 307, I would ask that to be brought up please. Down just by E.

WINKELMANN CJ:
Is that the best report of *Connelly*, because it's a very difficult report to deal with.

MR COOK:
No, another one could be made available.

WINKELMANN CJ:
I find it difficult to deal with myself. I wouldn't mind another one, thanks.

MR COOK:
Yes. The appeal cases version can be made available for the Court.

WINKELMANN CJ:
Thank you.

MR COOK:
So in *Beedie*, so my E, says: "A stay should have been ordered – "

WINKELMANN CJ:
What page are we at in *Beedie* sorry?

MR COOK:
It's page 307 of the bundle.

WINKELMANN CJ:
Yes, but just the page of the judgment?

MR COOK:
Page 366 of the judgment at E.

KÓS J:

This is your highwater case. I must say it seems to me profoundly wrong.

WINKELMANN CJ:

You don't need to go as far as the Court went in *Beedie* though, do you?

MR COOK:

No, I don't. My submission in response to that is that we don't need to go as far as in *Beedie* but our statute has created a difference in this, and I come to talk about, or make some submissions on the *R v Kienapple* [1975] 1 SCR 729, which is the Supreme Court of Canada, and my submission that brings more clarity and supports the submission of the appellant in this case, and the high watermark, to use your Honour's words, is the paragraph I've just taken the Court too, which is: "A stay should have been ordered because the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions."

Now I don't need *Beedie* to persuade the Court of the appellant's case in this, but I do highlight that that is an example of the *Wemyss* principle being applied, although they're applying it under the abuse of doctrine – sorry, the abuse of process doctrine.

KÓS J:

I mean we're hunting for the organising principle here.

MR COOK:

Yes.

KÓS J:

What is it that defines the same facts? Is it, as *Beedie* suggests, the events that gave rise to culpability, or are they facts that are defined by the offence itself, which takes you to the actus reus and the mens rea elements.

MR COOK:

So my submission on that, I'll come to it again, I'm going through Canada, is that it's the Chief Justice Dickson in *R v Prince* [1986] 2 SCR 480*,* where he's discussing Justice Laskin, as he then was, judgment of *Kienapple*, and he says: "I believe the factual nexus requirement will be satisfied by an affirmative answer to the question 'does the same act of the accused ground each charges'." Now our submission is that it's not an element analysis, that's a factual analysis, but of course there's going to be a relationship between the facts and the elements, because otherwise the person would never have been charged in the first place.

WINKELMANN CJ:

So the question that probably is at the centre of this case is whether a person's status is a critical fact for these purposes. So a person's status with a particular licence, or a person's status subject to a particular court order?

MR COOK:

Yes, and in this case though, specifically this case, it's the binding of the fact that it's the alcohol that makes that, that affects that status. So the same act of the accused, driving with alcohol on the breath, grounds the charges in that case. Now if we're using the *Prince* dicta in talking about that, we would say that if *Prince* is held to be good law in our statutory context, then the alcohol amount is really a particularisation of that fact. So you can't split those facts because that would be too great a level of distraction. A person by consuming alcohol and driving, that's the fact which has been adjudicated upon by the conviction entered in relation to the excess breath alcohol.

KÓS J:

Well it's not, it's doing so at a level beyond 400 milligrams.

MR COOK:

Yes, but then it would be, in our submission, it's unfair and it goes against what section 46(1)(b) tells the Court to do, to then allow that same fact to be utilised to get to the breach of the status.

WINKELMANN CJ:

Can I just say I was finding your roam through the cases helpful, so perhaps if it would help you, because you say you're coming back to this later, if it would help you to take us through the cases then come back to this, it's fine to do so.

MR COOK:

So the next case we touch upon is the decision of *R v Phipps* [2005] EWCA Crim 33, 312 of the joint bundle. This is where, at paragraph 21, it's talking about that the authorities, the English Court of Appeal is talking about the authorities not considering detail what is meant by the same or substantially the same facts but Lord Pearce makes clear, and there's a reference back to the speech that I took your Honours to before, "…they essentially mean that the Crown should not be permitted, save in special or exceptional circumstances, to bring a second set of proceedings arising out of the same incident as the first set of proceedings after the first set of proceedings has been concluded."

They're talking about the sequential trials there, which is that *Elrington* principle. At the bottom of that same page in paragraph 27, the Court coming to answer the issue there says: "It is of course true that the offences are different, but that is always true in this kind of case; otherwise the second proceedings would be determined by a plea of autrefois convict or autrefois acquit, as the case might be."

The paragraph continues on over the page, and the appellant submits that that is an example of the factual analysis required by section 46(1)(b) as opposed to the elemental analysis undertaken by the Court of Appeal in this case.

WILLIAMS J:

Does it say anywhere that the appellant's success depends on the discretion of the Court by way of some sort of abuse of process analysis, or is it just one side of a line or the other?

MR COOK:

In England it is an abuse, it is a discretionary, an evaluative process in England.

WILLIAMS J:

What does this case say about that?

MR COOK:

Phipps rules that it should have been – the second proceedings arose out of the same or substantially the same facts as the earlier proceedings, and it should have been stayed.

WILLIAMS J:

Right.

WINKELMANN CJ:

They take into account, don't they, that the prosecutor could have charged it differently and taken away the problem.

MR COOK:

Yes. I'm going to move now to Canada.

WILLIAMS J:

Sorry, can I just explore that point a little further?

MR COOK:

Yes.

WILLIAMS J:

Does the case say that whenever a second charge arises out of the same facts, it's an abuse of process?

MR COOK:

No, England, my understanding creates, the first paragraph I took you to in *Phipps* at the Crown is allowed in special or exceptional circumstances to

bring a second set of proceedings arising out of the same incident as the first set.

WILLIAMS J:
What are those exceptional circumstances?

WINKELMANN CJ:
They've covered by Lord Justice Devlin in *Beedie* aren't they?

MR COOK:
Some of the circumstances. *R v Wangige* [2020] EWCA Crim 1319, [2021] 4 WLR 23 is another case, but our submission is that the carve out that we have in 46(2) is an example of special or exceptional circumstances.

WILLIAMS J:
Well, of course, but what does the common law saw? Is it reflective of the common law or is it creating a new exception?

MR COOK:
Reflective is our submission.

WILLIAMS J:
Right, so is your argument that the way to read section 46 is that it codifies both autrefois and the abuse of process point?

MR COOK:
Yes.

WILLIAMS J:
And leaves the discretion under that subsequent subsection or under section 1-5 whatever it is?

MR COOK:
Yes and our submission is that the discretion has been identified in the English cases as really an evaluative judgement and once it seems that save

in the exceptional circumstances, that the facts are the same matter, that's where the judgment comes into it, and it seems to have followed the cases that we've provided that a stay will follow.

WILLIAMS J:
Unless.

MR COOK:
Yes. Now I accept that the plea as in our statute, apart from that carve out, is black and white.

WINKELMANN CJ:
Lord Devlin's discussion of special circumstances is at 1360 of *Connelly*. Not really helpful to us but that's what the UK position is.

MR COOK:
I was intending to move to the Canadian decision of *Kienapple*, which begins at page 430 of the bundle. This is a case where the appellant was charged, two counts, rape and unlawful carnal knowledge of a female under 14 years. A decision of the Supreme Court of Canada. The majority judgment was delivered by Justice Laskin, as he then was, and it is that judgment upon which the appellant relies in this case to say that section 46(1)(b) is the statutory embodiment of the proposition that was being put forward in that case.

At page 435 at the bottom, the final paragraph, the appellant was stating that nobody can be convicted more than once in respect of the same act. At page 438, I should have said so, this is Justice Richie's judgment, *King* is cited. The same decision *Pearce* referred to in the House of Lords, *Connelly*, and the bottom of page 438 of our bundle, the text Spencer-Bower and Turner *Res Judicata* was quoted. At 445 in the judgment of Justice Laskin, bottom paragraph, beginning: "The rationale of my conclusion," his Honour says: "… that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law."

KÓS J:

But in the preceding paragraph he makes it clear that these are true alternative charges and that's the critical point of distinction here. Beginning: "It is plain, of course".

MR COOK:

Yes, but at the bottom of that page 446 his Honour says that: "Of course, in a strict sense, *Cox and Paton*," which he's just been through, "was no more a case of multiple convictions for the same offence than is the present case. Rather" –

WINKELMANN CJ:

Can't hear you, Mr Cook. Bottom of what page?

MR COOK:

Sorry. Page 446: "Of course, in a strict sense, *Cox and Paton* was no more a case of multiple convictions for the same offence than is the present case. Rather it was a case, as is the present one, of multiple convictions for the same matter." It's a distinction, in my submission, between "offence" and "matter".

At 447 Justice Laskin was quoting Baron Pollock from *Queen v Miles* which again has been quoted in *Connelly* as well, and Baron Pollock says that by whatever name they might be called, were the same as those to which the indictment referred, and therefore the rule of nemo debet bis puniri pro uno delicto applies, and that's the point that we're relying upon.

WINKELMANN CJ:

So it comes back to the simple point really which is certainly it's the same act, driving a car whilst blood alcohol, breath alcohol is over a certain limit and the same, that same is, when you have breath alcohol, that same act gives rise to two offences, but the question on which the Court of Appeal decision turned was whether his status as a person subject to a special licence placed it outside that category of cases you've just referred us to.

MR COOK:

Yes, and our submission, a simple one in answer to that, is that it's not, because the status is just that. It's a background fact such as the age in *Kienapple*. The age of the girl, 13, wasn't the acts; it was the acts to look at the age as an elemental focus which is not the focus that *Wemyss* or the multiple conviction on the same matter principle is looking at which is a factual focus.

WINKELMANN CJ:

So if we take another scenario, if he was subject to a bail condition that he not commit offences, and there have been bail conditions imposed like that in the past, would you charge that separately?

MR COOK:

Can't be charged with the crime of breaching a bail condition but imagining there was one.

WINKELMANN CJ:

No, that's right. I'm trying to think of a comparable one and the Crown cite "protection order" but that's not – because a protection is breached not by the assault but by coming within proximity typically, isn't it? It's a separate act. Well, what do you say to the Crown's point regarding protection orders?

MR COOK:

So the submission is that section 46(1)(b) focuses on the facts, so it depends upon the facts of it. If the breach of a protection order is by assaulting someone, so the protected person consented to the person against whom the protection order was issued coming there, so there's no issue about proximity, but then it's the assault, to charge with an assault and a breach of protection order would infringe against this rule because if the person pleaded guilty to the breach of the protection order on the basis that they had assaulted the protected person then they have been convicted of offence 1, calling that the breach of protection order, and offence 2, the assault, arose out of the same facts. It's another offence which arose out of those same facts and this –

ELLEN FRANCE J:

What's the public policy reason for saying you can't charge for breach of the protection order in that situation?

MR COOK:

The policy behind it is the same as the policy behind autrefois with some refinements. It's unnecessary duplication, it's stresses, it's cost and time, and then the person's actually being punished for their acts because the breach of protection order will be accounted for in the sentencing of that person.

WINKELMANN CJ:

Which is the case, which is the point made in one of the earlier English cases you took us to, wasn't it?

MR COOK:

Yes.

WINKELMANN CJ:

Phipps.

WILLIAMS J:

I'm just imaging the prosecution's final address in such a case. Prosecutors are very likely to say: "It's enough, members of the jury, that he entered the address for you to be satisfied that he's breached the protection order but we say more." Prosecutor's never going to leave it on the basis on he breached the protection order by striking her because he or she will know that that's – you don't have to prove that to get a breach.

MR COOK:

Yes, that's why when I gave the example I prefaced it on that the protected person had allowed the person against who the protection order was issued to come so there was no suggestion that it was a different act that was forming that because in your Honour's example if there was doubt, so the prosecution did charge that the breach of the protection order was about proximity without

the consent of being there and an assault, then absolutely, it is a different fact which grounds the charge.

WINKELMANN CJ:

So the public policy reason you explain sounds – it sounds more convincing when you create a different timeline than exists in this one which say that the conviction is for the assault one year and then the police decide to charge for the breach of the protection order the next year based on that.

MR COOK:

I agree, it sounds louder and –

WINKELMANN CJ:

And this is acute because it's in the same indictment and he picks a charge sheet and he just picks one offence and it sounds – the public policy reasons don't sound all that convincing because of the trick of timing.

MR COOK:

Yes, I –

WINKELMANN CJ:

What do you say about that?

MR COOK:

No, I accept that, but if – so if he pleads guilty at the first call, first steps to be encouraged if he is guilty of the offence, then if they are to continue with the other matter that is still having a drain on judicial resources, it still is putting pressure on him, the stress and those sorts of things. I agree that in the scenario you gave of successive prosecution it does sound louder, those policy reasons, but in our submission they still sound in the example that's before the Court.

WILLIAMS J:

Do protection orders usually say "without the consent"? I thought they didn't.

MR COOK:

There is –

KÓS J:

No, that's right.

WINKELMANN CJ:

It's prosecutorial discretion, isn't it?

MR COOK:

I also think, and I'm just –

WILLIAMS J:

No, it's a Judge's order.

MR COOK:

I'm just reluctant because I just haven't looked at it this morning but my memory of dealing with breaches of protection order is that the protected person is entitled to say: "I still want you to come round on this day," but it's when they withdraw that consent that the illegality kicks in.

WILLIAMS J:

Well, that'll depend on the terms of the protection order, and I don't recall them ever saying "with the consent of", "except with the consent of the applicant". I would be wrong.

MR COOK:

I absolutely accept that because I think that a judicial order can be drawn with more conditions is my vague memory of a protection order. I'm talking about the standard conditions.

WILLIAMS J:

Sure.

KÓS J:

But you've got a sequence of events there which give rise to a point of distinction. First of all, arriving on the premises, breach of protection order. Secondly, assaulting her. Different in time, different offence.

MR COOK:

Yes.

KÓS J:

And if those were to be charged at separate times then you might have an abuse of process argument to say, well, the assault has been the subject of conviction; it's now an abuse to try and harass this man with further charges. But in this situation your argument is that both offences are completed from the moment he jumps in the car, at which point he's got whatever it is, 640-something milligrams. So you don't have different points of time. The same distinction doesn't apply.

MR COOK:

No, and Chief Justice Dickson in the case of *Prince*, which we're going to next, talks about that that's a very good indicator is whether it's the same fact or matter that you're dealing with. He talks about proximity being a ready indicator, and so *O'Reilly v Chief Executive of the Department of Corrections* [2018] NZCA 313, [2018] NZAR 1327, the Court of Appeal decision which dealt with the person who was the subject of the child sex offender register and the extended supervision order, those are not the same acts because there's a proximate difference because the failure, the omission then, was once he moved the address he breached one of them but the omission in relation to the other was the failure within a certain time to tell whoever it is he's required to tell.

WINKELMANN CJ:

Just to be clear though, on Justice Kós' example, which is the Crown's example, if you simply breach a protection order by coming into proximity and

then assault the person, it wouldn't be autrefois convict, would it, because it's the facts, it's different acts?

MR COOK:
Yes, and it also we say wouldn't be 46(1)(b).

WINKELMANN CJ:
Exactly.

MR COOK:
It's different acts.

ELLEN FRANCE J:
But here, if you jump into the car as we were talking about, with 300 milligrams, you're not committing the other offence, you're only committing the zero licence, alcohol licence one.

MR COOK:
Yes.

ELLEN FRANCE J:
So that suggests the facts are different.

MR COOK:
He'd only be charged with one offence. We wouldn't be here arguing about it. He would have pleaded guilty to the offence of breaching his zero alcohol licence.

ELLEN FRANCE J:
Yes, but doesn't that suggest that there are different facts involved in terms of 46(1)(b)?

MR COOK:
But the situation which presented itself to the Court was one where you couldn't split those facts up. He had, at the same time, committed offence 1

and out of those same facts, very same facts, committed offence 2, because the fact that we had was once an evidential breath test was taken, the reading 600 and whatever it was, is that fact, and it's merged –

ELLEN FRANCE J:
Well, that's if you don't see the elements as having any interrelationships with the facts.

MR COOK:
I agree, if I – well, if –

WINKELMANN CJ:
Well, that is a question for you to address, Mr Cook.

MR COOK:
Yes. If you see the elements as having a detailed relation with the facts. We still say that they've got a relationship but we don't say it's the detail that the respondent says it is. But it might –

WINKELMANN CJ:
What do you say it is?

MR COOK:
It might become more apparent when I go through to the next –

WINKELMANN CJ:
Okay, right.

MR COOK:
Is – no.

O'REGAN J:
Your argument though seems to be saying that when the reform was, or when the Criminal Procedure Act was passed, there was a decision made to

combine into one place autrefois and abuse of process, but there's absolutely nothing in the explanatory note that says that.

MR COOK:

No, apart from the words of the statute we say.

O'REGAN J:

Well, yes, but the explanatory note just says we're trying to make autrefois more certain. It doesn't say we're trying to bring into autrefois things that have previously been dealt with as res judicata or abuse of process.

MR COOK:

Yes, and autrefois is a subspecies of the res judicata in a way and we're saying, well, whilst it hasn't been made clear in the explanatory note, it's clear on the wording, and that's why I took the Court through the speeches in *Connelly* to show where that principle has come in. We say that that's been folded into our law pursuant to this statute and that's why there is a new test.

O'REGAN J:

But wouldn't you expect the reform bodies to have actually said so if that's what they were doing, because that's quite a major change to the statutory criminal law and all the explanatory note says is we're trying to make it clearer.

MR COOK:

My answer would be it would be very helpful if Parliament made itself explicitly clear with explanatory notes in all new legislation, they don't, and as part of the constitutional conversation, or constitutional kōrero, if this Court thinks that they have mis-stepped then it will let Parliament know that and they'll make some changes if they think that there's the democratic mandate to do so, but our submission is on the wording of this new provision that it is a statutory embodiment of the common law test. But I accept the point that –

O'REGAN J:

With some differences though because it's a "drop dead" thing rather than discretionary.

MR COOK:

With no discretion, I accept that, but the way in which Parliament, our submission, says that the Court is to make those evaluative judgments, necessarily the identification of facts, and then being the same facts, and if you look at the cases in England, the United Kingdom, our submission is that the discretion is really informed by the level of distraction that's taken to the facts because then when it goes back to the guiding principle about whether it's the same matter that's vexing the person, if I can use that word, that's where the judgment comes in by deciding whether there's the same facts, and so when her Honour, Justice France, put to me before, if that's more of an elemental focus, or if we're wrong about that we lose the appeal.

WILLIAMS J:

So your argument in terms of what section 46 was designed to do, it was to crystallise both res judicata and autrefois convict and to remove the fuzzy edge around the first one I mentioned and to take out the discretion and codify the exceptions, to stop the sort of jurisprudential filly-fallying you say occurred within the House of Lords and in other places?

MR COOK:

Yes. So autrefois is very strict. Now autrefois convict's really an embodiment res judicata merger, but we say as your Honour has just put, that that is what has occurred in this case.

So at 451, still at *Kienapple* and Justice Laskin's decision, the paragraph: "I cannot view", his Honour says: "The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences."

KÓS J:

I don't really know what that means.

MR COOK:

Well, that was the view shared by, in a way, by Chief Justice Dickson when he said that *Kienapple* caused some consternation.

WILLIAMS J:

It was a very prickly *Kienapple*.

WINKELMANN CJ:

So "cause" and "matter" are confusing words.

WILLIAMS J:

But if you apply the principle in *Kienapple* then the question, the only question in this case, is whether the age of the girl has the same status as the status of this man's licence.

MR COOK:

Yes, Sir.

WILLIAMS J:

As long as you agree with the principle in *Kienapple*.

MR COOK:

Yes, Sir, and you agree that section 46(1)(b) is the statutory example of the principle in *Kienapple*.

KÓS J:

Is the unlawful carnal knowledge charge, is that an included offence in effect?

MR COOK:

I don't know the answer to that, no.

WILLIAMS J:

No, because…

MR COOK:

Well, it wasn't left, I don't think. As I'm answering this question I'm looking at the start of to the decision. It wasn't left as an included offence. It was a separate offence, is my understanding, in the indictment or whatever the equivalent was in Canada in 1975.

WILLIAMS J:

Yes, I think the directions were if you find Kienapple guilty of rape then you are bound to find him guilty of unlawful carnal guilty, but if you find him not guilty of rape then move on to the next question.

MR COOK:

That would be the way that I'd understand it.

I was going to move to the decision in *Prince*.

KÓS J:

I mean there is an obvious measure of abuse in *Kienapple* because if the complainant was 17 as opposed to 14 then he would have one conviction in that context unless, I mean to be convicted of both in that situation in a sense over punishes because we have a, you have the age of the girl as being, or the age of the complainant as giving rise to a second conviction. If she'd been 17 that charge couldn't have been preferred.

MR COOK:

Yes, our response is that then that would be a different factual matter that you're talking about, and so in our case Mitchell has driving with breath alcohol at that level is his action, his fact, and he is guilty of one or other of the offences, pursuant to section 46(1)(b), or pursuant to the principle in *Kienapple*, because it's the same matter that you're vexing him for, and the

timing, in our submission, is not important despite my accepting that the rationales sound louder the longer the gap is.

WINKELMANN CJ:
On your case it's a prosecutorial decision to make sure they charge the right thing?

MR COOK:
Yes, and it's a wonderfully academic one now considering there is section 57AA.

WINKELMANN CJ:
Although the Crown say that there's a gap, don't they?

MR COOK:
Yes, but again if there's a gap in my submission that's a Parliamentary issue. *Prince*, if I can move to it, was a decision in the Supreme Court of Canada, and this is the stabbing of the pregnant woman, and turn to page 463 which is the judgment of the Chief Justice Dickson and under the heading "The *Kienapple* case" it says: "Since this Court's decision in *Kienapple,* there has been considerable controversy about the nature and scope of the principle of *res judicata* articulated for the majority by Laskin J., as he then was."

Justice Kós, that's the point you were making, and he recognised that there had been some issues about it. At 467 the bottom of that first paragraph which is there next to B: "What was always new was an express recognition that the test for the application of the rule had to be framed not in terms of whether the offences charges were the 'same offences' (or 'included offences') but in terms of whether the same 'cause', 'matter' or 'delict' was the foundation for both charges."

WINKELMANN CJ:
That's not all that helpful, is it?

MR COOK:

It still draws back to the point that your Honour the Chief Justice put to me right at the start, it comes down to whether you decide that the status is one of those matters or not. That's how this appeal is going to be decided, but in terms of general principle there is some more things that can be said. At the bottom of that same page 467, paragraph: "Unfortunately some commentators and courts have wrongly inferred from these words that there need be no substantial nexus between the offences for which an application of the *Kienapple* principle is sought, providing there is a common act of the accused underlying the charges."

Now the Chief Justice comes back to that at page 470, and I will as well, but over the page at 468 the Chief Justice is talking about the factual nexus and the essential condition for the operation of the *Kienapple* principle is that the offences arise from the same transaction. My submission to this case, the excess breath alcohol and zero alcohol offence have arisen from the same action of drinking and driving and then having your breath measured by an evidential breath test.

WILLIAMS J:

How then do you distinguish it from the stabbing?

MR COOK:

In *Prince*?

WILLIAMS J:

In *Prince*.

MR COOK:

So in *Prince* he, in my submission, the Chief Justice distinguishes it because of the difference in the matters, and I'll just find the position where that's quoted. So the submission factual nexus was satisfied because a single act of the accused grounded both charges, but there was no sufficient correspondence, which is the next point that I'm coming to because his

Honour Chief Justice Dickson believed that commentators and other judges had mistaken the *Kienapple* principle, "…there is no specific correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions. The first offence contains as an essential ingredient the causing of bodily harm to the mother; the second requires proof of the death of her child."

WILLIAMS J:
Can I just say that the first in this case required proof of 649, of more than 400. The second required proof of a certain kind of licence.

MR COOK:
And our submission that it's, I'll bring you to when his Honour the Chief Justice talks about separation. There is a sufficient nexus in terms of the offences in this case because it's the driving with alcohol and breath that's the delict, or the matter.

WINKELMANN CJ:
On that part on the previous page he's talking about possession of stolen goods et cetera as being sufficient when a person is being convicted of robbery, and then they are found in possession of stolen goods, that's sufficient for the application – that would be problematic in New Zealand, well, where we regularly have people charged with possession for supply, mmm, maybe not, because possession for supply and supply are actually in respect of two different things, aren't they, yes.

MR COOK:
Yes, now –

WILLIAMS J:
I suppose the equivalent would be you fire at someone at close range, the bullet enters victim 1, and then kills victim 2 behind victim 1, have you got two murders there or does the rule in *Kienapple*…

MR COOK:

No, two murders.

WILLIAMS J:

You'd think so, wouldn't you?

MR COOK:

Yes, and the reason that we're saying that the driving with alcohol bound up is it is, in essence, akin to for a single punch – the respondent trying to divide up the level of alcohol, is akin to someone for a single punch saying, the force that you used to this point caused an injury, that's how you get the injuring with intent, but then the force that went beyond that is the wounding, and that's how we get the wounding, and in our submission that's just too fine a distinction to draw.

WILLIAMS J:

So what I'm looking for is a nice clear line that would divide that sort of situation from the punch that injures the victim and smashes the shop window the victim falls into. I presume you would say is not caught?

MR COOK:

No it's not caught, and I'm hoping –

WILLIAMS J:

And what you're next about to say is going to clarify that, because a nice bright line would be very useful. In sufficiently, you know, precise is not a lot of help.

MR COOK:

I suspect, though, that given the amount of ink that's been spilt on the first common law jurisdictions around the world on this, that I'm not going to suggest a bright line that's going to be, untie this Gordian Knot, it's still going to require evaluative decision-making by a court, but there are going to be pointers towards how that decision-making should be made, with the major

principle being that guiding one which is, is the person being vexed twice for the same matter.

WILLIAMS J:
Yes, well the problem you have is that what the Crown is offering is crystal clarity, albeit against you.

MR COOK:
Yes, well –

KÓS J:
And so did Chief Justice Dickson at 498 to 499 in the paragraph beginning "I conclude." He said: "I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the precluded offence." That's pretty clear.

MR COOK:
Yes, it is, but can I bring your Honour back some pages because he talks about that and he comes to a process and he has some carve-outs in relation to that. So that 469, when he's talking about the first aspect, which is the factual nexus requirement, he says: "In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges?"

Now apologies to my year 9 French teacher, *Côté*, the decision he's talking about there, that was the decision where the person had committed a robbery, had been sentenced, went to jail, and then came back and basically went and got their plunder from the robbery, that was delineated by proximity, which is then what occurs – well then he talks about the nexus between the offences, which is the point your Honour Justice Kós, and I want to get to that.

WILLIAMS J:

It does seem, though, in those two cases the Judge is having a dollar each way. It's hard applying these facts where there is a distinctive element of course, to not say, well, the exception, the second element of page 497, makes this non-autrefois. Unless you can give me a bright line.

MR COOK:

Yes Sir. So…

KÓS J:

No, Mr Cook focuses on behavioural facts.

WILLIAMS J:

Yes.

KÓS J:

And the counter-authorities focus on effectively legislative facts, the elements of the offence.

MR COOK:

The point about –

WINKELMANN CJ:

Not necessarily, it could just be an evaluative exercise, you have to decide what are the critical facts.

MR COOK:

Yes, and that's the very point that Chief Justice Dickson makes. "There exists the possibility of achieving different answers to this question according to the degree of generality at which an Act is defined."

WINKELMANN CJ:

Yes.

MR COOK:

Which is in that same paragraph.

O'REGAN J:

Thank you for that assistance.

WINKELMANN CJ:

Can I just ask about that, Mr Cook, because it seems to me there must be some factors that inform it, because then the Crown says, well look it's going to leave a terrible gap in this particular area if you define it in this way, so that's the gap, the subsequent offences under section 32 where you're short of the amount, which you would say is a legislative gap and it's not relevant here, but we're dealing with legislative situations. Another issue is prosecutorial decisions. Here you could say the prosecutor should have charged section 57A rather than 56 and tied it all up. So I'm just interested how, when you're doing this evaluative exercise, whether there are any other considerations that can be brought to bear.

MR COOK:

Well, yes, I can. It's not a helpful answer I know but…

WINKELMANN CJ:

Well it could be if you go on to say it.

MR COOK:

I'm just trying to, if we move through this *Prince*, I'm trying to highlight how Chief Justice Dickson brought some factors into the broad test that was the *Kienapple* test and then how that applies to this case.

WINKELMANN CJ:

Because when you look at the abuse of process cases in England they do bring those factors into consideration.

MR COOK:

Yes and abuse of process, it does require judicial judgment, as does everything, but that is a very amorphous group here, and at least in this case we have, or at least in this provision there is some guidance in terms of what we're looking at, offence 1 and offence 2. So…

WINKELMANN CJ:

We're back to *Kienapple*?

MR COOK:

Yes, in *Prince* explaining *Kienapple*. So at the bottom of 469: "Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events (such as the robbery conviction in *Côté*), and whether the accused's actions were related to each other by a common objective."

WILLIAMS J:

What page is that sorry?

O'REGAN J:

Bottom of 469 of the casebook.

WILLIAMS J:

Right.

MR COOK:

Then what the Supreme Court in Canada says is that there has to be the presence of a sufficient factual nexus and explains that at the bottom where it says: "In my opinion, the application of *Kienapple* is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves."

Now 471, the bottom, under: “Numerous other cases can be cited,” no doubt the respondent will highlight that, in *Logeman*, that involved charges of driving while suspended and impaired driving. In our submission that’s different because in this case, and I’m going to explain why using the Chief Justice’s word, in this case it’s not just suspended, it’s the alcohol that means that they can’t drive. It’s the fact of the alcohol on his breath.

WINKELMANN CJ:
The alcohol is common in both, to both offences?

MR COOK:
Yes.

WINKELMANN CJ:
That’s *Logeman*, is it?

MR COOK:
Yes. Now sections 46 and 47 of our provisions don’t necessarily have that explicitly written about the common element test but it’s a submission on behalf of Mr Mitchell that identification of the facts will necessarily point towards a nexus with the offence because the facts are directly, or at least they should be, directly related to the elements of the two offences. Now, your Honours, Justice Kós, at the bottom of page 475 – sorry?

WINKELMANN CJ:
So I’m just thinking about this gap that the Crown says exists if you charge section 56 rather than – section 57A rather than section 32. But that’s because there is the decision of Justice van Bohemen saying you can’t charge both section 32 and section 57A, isn’t there?

MR COOK:
Yes, but our other response is that if there has been this distortion, and that’s the word that’s used, then that’s a matter for Parliament to figure out and it’s still going to be taken account of in the sentencing. Though you’ll be caught

by a ceiling, it's still a factor that's going to be taken account of and our submission is that 46(1)(b) is still an embodiment of the principle that we've been going through and which I'm hoping to provide some brighter lines on in a moment.

WINKELMANN CJ:
Okay.

MR COOK:
Now, so it was at the bottom of 475 which is where the Chief Justice from Canada concludes, therefore that "the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence".

At the bottom of page 476, the Court says: "Without purporting to be exhaustive, I believe that there are at least three ways in which sufficient correspondence between elements can be found…"

The first, this is on 477, "an element may be a particularisation of another element". In this case, *Mitchell*, the submission is that that's what has occurred, the level of alcohol is a particularisation, so the zero alcohol is a particularisation of another element, namely the excess of 400.

That's my submission. I'm hoping it is. I'll find out eventually.

ELLEN FRANCE J:
Well, it's just you've advanced it as though that's a given and I'm not sure that that is necessarily a particularisation in one offence of an element of another offence.

MR COOK:
If it came across as being advanced in a given, then the confidence in my voice belies the shaking beneath me.

WINKELMANN CJ:

Your point is, isn't it, that if you were to charge the section 32 when it said it – you said that you were driving with alcohol, then you could particularise 400.

MR COOK:

Yes.

WINKELMANN CJ:

And Justice France might respond, well, you don't need to particularise it because there's no threshold. You'd just say driving with excess breath alcohol.

MR COOK:

But that's what our law is though, that that's the threshold, and in this case that's what's occurred. It's over. That's the level. His level is the level, 640 whatever it was, he's driven with that, and we say in our submission that there is a proximity between the offences in this case because zero alcohol is merely a particularisation of the excess breath alcohol that's required for the other matter. You're still only punishing him for the one act of driving whilst disqualified and there's no need for an additional conviction to be entered. The fact that he had a zero alcohol licence will be taken into account in sentencing and this comes within 46(1)(b).

ELLEN FRANCE J:

Well, if you go on to the discussion at 502 in *Prince* where the point's made that in applying the above criteria it's important not to carry logic so far as to frustrate the intent of Parliament or to lose sight of the overarching question which is whether the same cause applies, et cetera –

MR COOK:

I agree. That's 479 of the – yes.

ELLEN FRANCE J:

– and makes the point in the context of breach of a probation order that you do have, and this is my question to you earlier about the public policy, there is something else that's meant to be captured by that. You're punishing the – the idea of that offence is capturing something other than what you might do while you're on the property, for example, and I don't understand how your approach takes account of that.

MR COOK:

Our submission is that Parliament is, in setting – Mr Mitchell having a zero alcohol licence has been recognised as a repeat offender and he's ticked those boxes and therefore Parliament has said: "Our hope is that you won't drive with any alcohol in your breath, so we're gong to say that basically any alcohol is an impairment to your driving because of who you are and that's the evil which we're legislating against. We're just going to have – there's no arguments about whether you're impaired." But in a sense that's what Parliament is doing in relation to 400 in any event because they are setting that to deal with issues about deciding about whether someone is impaired because there's still an offence for impaired driving. They are saying that you're over 400 – it's in excess of – you're over 400, you're impaired. I don't want to get into niceties about whether you think you can drive; that's the line, and we say that that, the zero alcohol licence, is a particularisation of that issue. It's the same social evil that it's trying to be cured.

Now if it said that – if that's not accepted then I accept we've got some difficulties because that's –

KÓS J:

It seems a stronger argument if the charges were the other way round and he pleaded guilty to the zero alcohol. You might then argue more convincingly that the 400 is a particularisation of that. But he's pleaded guilty to the 400.

MR COOK:

He has.

KÓS J:

And we're now dealing with a charge which involves a distinct element, it seems to me, which is the existence of the prohibition, complete prohibition.

MR COOK:

Well, our submission is like *Kienapple* itself it's a state of affairs. It's like the age in *Kienapple*, and having a zero alcohol licence is not an offence in and of itself. So that status is not an offence. It requires drinking alcohol and then driving and requires that there's an evidential level ascertained by the investigatory body and then utilised by the prosecution. So it could be said that in Mitchell the presence of alcohol on this repeat offender's breath served as a substitute for impairment, which is exactly what the over 400 level does. It was a particularisation, and I accept what Chief Justice Dickson was saying at page 479 of the bundle, which is that: "It is important not to carry logic so far as to frustrate Parliament's intent or as to lose sight of the overarching question whether the same cause, matter or delict underlies both charges."

In our submission, and again it's to the central point which this court is going to determine in relation to the outcome of the appeal in this case, is that driving with alcohol in your breath is the matter or delict that underlies both charges.

The Court of Appeal's decision, turning now to the facts of this case, so I've highlighted the points that I wanted to highlight from those authorities, page 75 Mr Coad, thank you very much. Broadly an error in the Court of Appeal's decision is that the analysis of the facts of each of the offence, so offence 1 and offence 2, devolved into a comparison between the elements of the offences, and we say that they too sharply draw the distinction between the two. Obviously, as I submitted before, there is a rational connection between the facts and the elements of the offences but to focus too closely is to depart from the statutory language, which directs a courts focus to the facts. Section 46(1)(b) is a factual enquiry, whereas 46(1)(a) is the elemental in enquiry. The Court of Appeal said that a section 56 offence required a certain level of alcohol whilst the section 32 charge required only some

alcohol, and that neither pass or subsumed the other. However it is submitted that the parcels, as the Court used the term, are the elements of the separate offences and to so they emaciated section 46(1)(b) and it is artificial to divide the reading of alcohol into a reading of more than zero and then a reading of 649. There was not another fact of a reading of more than zero. The evidential breath test constituted the evidence for the breach of both of the sections. The Court of Appeal's interpretation provided no room for section 46(1)(b) to operate independently of 46(1)(a) and implicitly the Court of Appeal required a perfect resemblance between the elements.

We touched on the decision of *O'Reilly* before, which is that the breach of the Act about responsibilities you have as a child sex offender, the registered one, and the omissions in that case were each a set of offences. The breach of the extended supervision order was the omission not to receive approval for the charges that the person made. The breach of the reporting register was committed by the separate omission not to tell the Commissioner after you've made that change, and that difference, to use the words of Chief Justice Dickson, it was pointed out by the lack of proximity. The example in that case, which I'll just bring up, if you go to the last page of that case please. Quotes Ms Brook, counsel for the Crown, paragraph 18, which I think is page 132 of our bundle. So that's where a person driving a car is stopped by the police and is found the car has neither a warrant of fitness nor is it registered. There are two omissions there. There's an omission of getting a warrant and an omission of getting a registration.

The test in 46(1)(b) does mean that some of the older New Zealand cases would have a different decision now and our submission is that merely reflects Parliament's will in the change to the law. Mr Mitchell –

ELLEN FRANCE J:

Sorry, just to help me understand the submission, what would be the best example of one that would change, where the result would be different?

MR COOK:

R v Brightwell [1995] 2 NZLR 435 (CA).

ELLEN FRANCE J:

Right.

MR COOK:

Which is at 159. This is where Mr Brightwell presented a firearm. So he's charged with presentation and threatening. So the presentation was the threatening. Mr Mitchell, going back to the submission about this case, is being punished for his actions. His submission to this Court is that he not be punished twice by the entry of a conviction, and it's not necessary because it's for the same matter, and the Court of Appeal and the High Court were wrong to refuse him to allow him to avail himself of 46(1)(b) and the District Court was correct. In the cases that have gone to the Court of Appeal, *Rangitonga v Parker* [2015] NZCA 166, [2016] NZAR 768, *Filitonga v R* [2017] NZCA 492, [2017] NZAR 492, they're explicable in the way in which I have attempted to go through the *Kienapple* principle when analysed *O'Reilly* is a correct decision and in our submission *Mitchell* is incorrect and it should be overturned.

Unless there are any further submissions.

WINKELMANN CJ:

Thank you Mr Cook. Mr Sinclair?

MR SINCLAIR:

Excuse me, your Honour, I'm happy to make a start, although I realise that we're quite close to 11.30.

WINKELMANN CJ:

Well six minutes is quite a bit of time. Is Ms Fuhr going to present some submissions too?

MR SINCLAIR:

Well I was hoping she would but we arrived –

KÓS J:

So were we Mr Sinclair.

MR SINCLAIR:

We're hoping not to say much really and so the way we're proposing to proceed, if it's acceptable to the Court, is simply to refocus our submissions, I hope in a clearer manner, under five headings and I anticipate that will take me no longer than about 15 minutes.

WINKELMANN CJ:

I should also have said the same to Mr Cook of course, about junior counsel having an opportunity to present submissions. Well you might just want to outline the five headings in the next five minutes and then we can take a break before you launch into the detail.

MR SINCLAIR:

Yes so we firstly would like to offer what we say is the plain meaning of section 46 and then secondly come to our key proposition that a fact in common does not make the facts the same for the purposes of the provision. Our third heading is really to explore whether the notion of a fact-driven test came from and how the new test, the so-called new test was formulated in *Rangitonga*. Fourthly, the concept of core punishable acts. Then fifthly the conclusions that can be drawn from the Land Transport Act itself, so the more specific statutory context, and I think I can get through at least the first of those subjects in the remaining four minutes.

So to preface our submission on the plain meaning of section 46, it's clear enough that the purpose of the Criminal Procedure Act reform was to improve upon the Crimes Act formula to shorten, clarify the statutory definition of the special pleas, but there was no suggestion that the purpose was to depart from the principles of the existing law, or the techniques it used for ensuring

with certainty when the pleas did or did not apply, otherwise that would conflict with one of the clear policy objects, which was certainty in these matters, and as Justice Kirby remarked in *Pearce*, if a defendant asserts, as they do through the special plea, the right not to be tried on some matter, then the criteria must be clear.

Nothing in the Criminal Procedure Act signals that what we are now to do is start with an impression of the facts. To call a set of facts the same event, or episode, or transaction, and then hold that there can only be one charge per episode. Such an approach was condemned for its imprecision by the House of Lords in *Connelly*, and the High Court of Australia in *Pearce*, first because it was too vague to speak of factual episodes and the like, and to try and determine for instance when one ended and another began, and second because it needed to be recognised that the defendant's acts could involve more than one wrong against society. So while section 46 refers to two offence arising from the same facts, the first concept to grapple with is the concept of an offence. So as the section reads "an offence arising from the same facts", and as the authorities explained, the legal definition of an offence carves out certain factual ingredients. When applied to the defendant's alleged conduct, that definition reaches out, as it were, and claims certain facts. It is that legal definition that defines with certainty the facts that are engaged. So reading the text of section 46 in light of its purpose, in our submission, it simply describes two situations, the first of which must be very rare when exactly the same offence is charged again for the same acts. The facts, of course, must be the same because the factual ingredients are identical. So that's the situation covered in subsection (1)(a).

The second is where a different offence is, in substance, picking up the same facts. The verbal formula may be different but the factual ingredients are the same or that different offence does no more than capture a subset of the facts encircled by the first. So it's like an included offence, and that, we say, is the situation covered by subsection (1)(b). This is the obvious reading of section 46 and it requires no departure from orthodoxy, no departure from the certain boundaries of the special plea, and no redrawing of the boundaries

between the plea with its mandatory consequences, and the more flexible remedy based on abuse of process, and listening to my friend this morning, the course he advocates would absorb what would have been discretionary, that's the abuse of process doctrine, which is applied to the problem of successive prosecutions, and would make discharge mandatory, and that, in our submission, is a radical change. That's 11.30 your Honour, and if I stop there I can move on perhaps to touch on what was said about *Connelly*.

WINKELMANN CJ:
We'll take the adjournment now.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.50 AM

WINKELMANN CJ:
Mr Sinclair.

MR SINCLAIR:
I'm not proposing to say very much at all about *Connelly* and some of the subsequent decisions of that kind.

WINKELMANN CJ:
Are you at 2 now?

MR SINCLAIR:
Not yet, I'm sorry, your Honour. This is a bit of a tidy-up point.

WINKELMANN CJ:
We're still on 1, okay.

MR SINCLAIR:
The position I hope will be clear from what I've set out at about paragraphs 12, 13 and beyond in the written outline, but there's no real question I think that *Connelly* expresses a very narrow conception of the

scope of the special pleas. I think any text would make that point. So it has to be, despite the reference to the substance of the offences being the same, or the substance of the facts, the test is that it must be the same offence in fact in law and that has almost invariably been treated as a requirement that the elements correspond, and the meaning of the speeches is very carefully examined by the High Court of Australia in *Pearce*, again with reaching the same conclusion. So I don't think I need to say anything more about that, but the counterweight, of course, always has been that where a defendant is prosecuted successively for what looks like, in substance, the same thing, the abuse of process doctrine may be invoked and that allows a more holistic appreciation of the situation, and, of course, that's discretionary as opposed to the mandatory effect of the special pleas.

WILLIAMS J:
So what happened to that discretion post-section 46?

MR SINCLAIR:
Still there, in my submission, your Honour. It's very much –

WILLIAMS J:
Any reports on its use?

MR SINCLAIR:
In New Zealand?

WILLIAMS J:
Yes.

MR SINCLAIR:
Can't think of one as I stand here.

WILLIAMS J:
Before even?

MR SINCLAIR:

Yes, I'm trying to think. I think Justice Katz in *Rangitonga* surveyed some of that territory and we may be able to come up with a…

WILLIAMS J:

That's okay. I can read that.

WINKELMANN CJ:

And would you say if it had occurred that, say, a year later Mr Mitchell was prosecuted for section 32, would the abuse of process option perhaps be invoked, capable of being invoked?

MR SINCLAIR:

I would have thought that would be a classic case for its application, your Honour, to haul a defendant back to try them for another aspect of the same incident, I think a second charge would very likely be stayed.

KÓS J:

One of the interesting changes in the legislative history was Parliament or the – can't remember but it might have been the department – well, the Bill that was presented I think talked about factual circumstances in clause 46 and they then retrenched that back to facts. So arising from the same facts, as part of the same factual circumstances. Do you make anything of that change?

MR SINCLAIR:

I suppose it could be said it's consistent with a narrower interpretation of the new provision, but as I'll come to in a minute it's actually quite hard to make or draw anything with confidence from the policy development of this measure.

Before the adjournment I touched upon the concept of an offence and where that leads and just to pursue that a little further, this is my second point, if two offences engage a common fact but otherwise define different factual ingredients, it must follow that they don't arise from the same facts for the

purposes of this section. One common feature does not make two things the same and if one offence encircles a particular fact, to adapt something that was said in *Prince*, doesn't exhaust the use of that fact for the purposes of the criminal law, and if one adds to that consideration of the wrong against society that Parliament has sought to address, and the two offences here address distinct wrongs, it reinforces the conclusion that section 46 does not preclude convictions on both. Just to be clear, we submit that the breach of a zero licence is a fact, a factual ingredient of the offence. It's not an issue of impairment as such; the zero alcohol licence is really a discipline imposed on a recidivist drink-driver who's coming out of the alcohol interlock system, and so what was punished here by the section 32 offence was really the breach of that discipline, not the impairment as such.

WINKELMANN CJ:
Do you accept that it is caught within (b) if a person is charged both with section 32 and section 57A?

MR SINCLAIR:
Yes. That's really the situation in *Ashworth v Police* [2020] NZHC 1587 isn't it?

WINKELMANN CJ:
Yes.

MR SINCLAIR:
I was going to end with a little comment about that if I can deal with it then, but yes.

WINKELMANN CJ:
You can deal with it then because I'm just interested to hear you say how this is different. But I don't want to take you out of order, Mr Sinclair.

MR SINCLAIR:
So that was our second point, a fact in common does not mean the facts are the same.

Thirdly, I'd like to address the idea that the new wording in section 46 has tilted the test towards the facts rather than the elements. The High Court in *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 sought to grapple with the policy background and it noted at paragraph 56 – I don't need to take your Honours there – that it raised more questions than it answered. The Court of Appeal considered that much of that material was inadmissible as an aid to interpretation but relying on a sentence in the explanatory note the Court accepted that a different test was to be applied and said the focus was now to be whether the previous and new charge involved a common punishable act determined by, and quoting here, "the substance of the facts … rather than a fine-grained comparison of each element".

Nonetheless, two paragraphs down in paragraph 43(b), the Court said that: "In most cases it ought to be straightforward to identify the central punishable acts or omissions by reference to the essential elements of the offences."

So elements remain the touchstone and in our submission this is unavoidable. One cannot conduct the factual comparison in section 46 without considering the factual ingredients of the two offences. There cannot be a stark distinction between the traditional approach, do the offences share the same elements, and the perceived new tests in section 46, do they arise from the same facts?

It might be said that – well, if one looks at this looking for cause and effect, the influential article, Professor Mahoney, suggested that the new test had opened wide the circumstances in which the plea could be applied, and that may have persuaded the Courts in *Rangitonga* to think that there now had to be a fact-oriented test. But having pushed the boat out in that direction, with respect, it seemed necessary to pull it back quite considerably by the paragraph in *Rangitonga* that I just read, that the concept of core punishable

acts was going to be determined by and large by reference to the elements which is not to shift the test very far at all.

KÓS J:

We seem to have a whole series of rather vague tests here. I understand what essential elements of the offence are, so I get that bit of 43(b). Substance of the facts? Common punishable act. What do you say comes in beyond the essential elements?

MR SINCLAIR:

Well, my first point, your Honour, was that one could read the new provision as not affecting any change of substance – I've used that word, I'm sorry – to the scope of the pleas at all and that what we really had, I suppose, rather like the situation that this Court dealt with in *Haunui* with the proviso that the wording has changed but the effect hasn't. So that is one of the…

WINKELMANN CJ:

Well, is that right? You're not saying it's as narrowly put as in *Connelly*?

MR SINCLAIR:

It's not clear. It depends how much one is influenced, I suppose, by the preceding policy material which doesn't point clearly in one direction or the other, in my submission. But if one looks at the words, how is one to determine when the same facts are – whether the facts are identical or not, the same facts? It's really difficult to conduct that exercise without interrogating the elements because they will identify with precision what the facts involving the two offences are. So it is possible to read section 46 as not materially changing the law at all. I'm not here to criticise the core punishable act test but I do submit that when that's examined arguably it's not effecting great change to what we had either.

WINKELMANN CJ:

So you would say the test is that if two offences engage a common set of facts but otherwise have different factual elements then they don't arise from the same facts, and that's the test, is it, that you'd say, is that correct?

MR SINCLAIR:

Well, yes, one can employ other perspectives on it and ask, well, is there a material difference between the two offences in the sense that they carve out a different cause, matter or delict, to use the Canadian terminology, and here in this case it seems very clear that they do.

KÓS J:

So do I understand your analysis to be that (a) deals with identical offence, so that's rape and rape, and (b) deals with a subsumed offence, so one that is completed by the prior conviction because the same facts complete the offence, same elements?

MR SINCLAIR:

Yes, and that would completely align with what was said in cases such as *Pearce*, for example.

WILLIAMS J:

I guess the question becomes how subjective do you get because that would be also the case here on these facts. The conviction for EBA on these facts also covers the zero alcohol constraint.

MR SINCLAIR:

Not on our interpretation, with respect, your Honour. If we look at the facts carved out by the breach of the zero licence offence –

WILLIAMS J:

Yes, I understand you say the elements are different and so they're not included. Objectively, that's of course true, but on these facts, subjectively, they are. If the question is core punishable act or is the fact, the relevant fact,

the very core of the offence, then driving with alcohol might be said to be that, with alcohol in your system.

MR SINCLAIR:

Yes, well, the law has traditionally been hostile to any aspect of subjectivity in relation to the scope of the pleas because of the mandatory consequences.

WINKELMANN CJ:

Can you just take us to – because that's a – the question that Justice Williams is asking you is do you take a subjective approach and look at the facts of this case and see whether it fits into that formulation Justice Kós proposed or do you just take an objective, zoomed-out, elements-focused approach? If that's the case, that's pretty critical, possibly the critical issue, and you say the law is clear it's an objective approach. Can you take us to where you say that is made clear in the cases?

MR SINCLAIR:

Yes, while I think of that, your Honour, can I introduce the example that we gave in our written outline of two drivers? If we imagine Mr Mitchell and a friend drinking together, hopping in their cars and driving off, both being stopped at the same checkpoint, both returning the same breath alcohol level or something like it, and ask ourselves are they legally and factually in the same situation? The answer clearly must be "no" because Mr Mitchell has not only driven above the 400 threshold but he has defied the terms of the restrictive licence that he was subject to.

WINKELMANN CJ:

Well, the problem with that analysis on these facts is that the legislative scheme seems to suggest not that he should be charged with section 32 and section 56 but that he should be charged with section 57A.

MR SINCLAIR:

Yes, well, that's a feature of the Act which was to have been my final subject. But your Honour's earlier question to me was authority for the proposition that

the law, the common law which was reflected and is reflected in our statutory provisions, where it insists on certainty as opposed to subjectivity in determining the scope of the pleas, and I think the case of *Pearce* would be perhaps one of the clearest statements of that.

WILLIAMS J:
So you think – you would submit, I should say, that *Kienapple* is wrong?

MR SINCLAIR:
No. I was actually just coming to address that very point. As I said before, I'm not here to criticise the core punishable act test, and I hope it hasn't led us in a false direction, but the point about the Canadian rule is that it seems to cover something of what the Court of Appeal was striving for in *Rangitonga*, which was a step somewhat away from the rigidity of the autrefois doctrine. So *Rangitonga* emphasises the substance of the facts, relaxing the insistence on identical elements, but preserving some reliance on elements to determine what the core punishable act is, and that, it seemed to me, was rather like the Canadian rule against multiple convictions where the question is whether the two offences involve the same cause, matter or delict, and that's partly dependent on whether one offence has an element not present in the other, and that element is not substantial the same as, or not adequately corresponding to an element from the other offence. So there I suppose your Honour is the application of judgment or evaluation, which is less a feature of autrefois convict.

WILLIAMS J:
So in that case obviously the majority did take into account the subjective fact of the complainant's age?

MR SINCLAIR:
Yes, I must say that I find it easy to understand from the subsequent case of *Prince,* which is a single judgment, and that in some ways compared to what we have is a straightforward application of the doctrine. But what it's saying is that it doesn't matter that there's an element in common, and there may be

more than one conviction for the same transaction, but if we apply something of that thinking to the wording of section 46, if an element separates two offences so they can't be said to be substantially the same, it must follow that they don't arise from the same facts. There may be an element in common but overall they'll concern different matters or wrongs against society.

WILLIAMS J:
Yes, and in the case of *Kienapple* the answer to that question was no, correct?

MR SINCLAIR:
Yes. Yes.

WILLIAMS J:
On the facts, that's what I'm trying to get to the bottom of.

MR SINCLAIR:
Well they –

WILLIAMS J:
Not as a sort of a stand back assessment of the relevant elements, but on the particular facts it seems to me. Because if you applied a purely elemental assessment, that decision has got to be wrong.

MR SINCLAIR:
Yes. I think the decision rests on the point that having convicted the defendant of rape necessarily the underage sex charge must be made out where consent is irrelevant. So it should have been charged as alternative.

WILLIAMS J:
Yes, that's right.

KÓS J:
Well it has a different element. It has the status of complainant, but that's effectively a disregarded fact.

MR SINCLAIR:

Yes, and I suppose that's why if one did the strict autrefois equation you'd end up with different offences, and the doctrine of – or the rule against multiple convictions has been applied to correct that.

WINKELMANN CJ:

The legislative scheme has some similarity to this one, though, doesn't it, and I was quite interested in the focus in *Prince* against the legislative, was it *Prince*, upon the legislative schemes.

MR SINCLAIR:

Yes, that's –

WINKELMANN CJ:

And the similarity is this, that you can charge the offence including the aggravating fact, so there they could have charged it as an alternative, and here they could charge the offence as an aggravating fact, but they didn't. They could have charged 57A, so the separate offence which relates to the aggravating fact.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

And the legislative scheme which is relevant, the Court says in the *Kienapple* analysis, suggests that there isn't a – that it wouldn't defeat Parliamentary intent to say you can't charge both 32 and 56 because a prosecutor could always go to 57A, and make sure that the status of the offender is recognised in the charge.

MR SINCLAIR:

Yes. Can I come to your Honour's point directly, because I'm just about to come to the Act.

WINKELMANN CJ:

Yes.

MR SINCLAIR:

Before we leave the – my point really in introducing the Canadian rule was to suggest that if there's some attraction to the core punishable act test, it can be said that it has parallels with a doctrine that's proved serviceable in another jurisdiction over some decades now, and so it has that virtue. But what I perhaps haven't made adequately clear is that if one looks at the Canadian Criminal Code, it currently has a paraphrase of what we formerly had in the Crime Act, and so that is the strictly defined notions of autrefois convict and acquit. *Kienapple* sits alongside that as a rule, a somewhat ameliorative rule of the common law, and one might say, I suppose, that what has happened in *Rangitonga* is like a blending of the two things under the statute.

WINKELMANN CJ:

And your submission is that you're better to keep them apart with the abuse of process there to fix up in a discretionary way any overlap.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Any problem, any outlier problem.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Can I just take you back to the question you asked, "where does the notion", that was your three, I noted down your three was: "Where does the notion of a fact-driven test come from" and where, was the answer just *Kienapple*, because you're saying it doesn't come from the –

MR SINCLAIR:

No, I'm sorry, my theory is that it's originated with the academic literature, Professor Mahoney's article.

WINKELMANN CJ:

All right. Okay.

MR SINCLAIR:

Justice Katz sets out in some detail the policy background to the CPA reform, had difficulty reconciling parts of it, but everyone has been persuaded that there's been an intention to nudge the test towards a greater appreciation of the facts as opposed to a rigid elements comparison, and my somewhat tentative submission is that it's not clear actually that that is necessary on a plain reading of the provision, given that the clearest indication of purpose is that the new test is, sorry the new provision is simply a clarification, simplification of language, and was not designed to effect any sort of fundamental change in this area.

WINKELMANN CJ:

So your answer is, it doesn't come from the legislative material, that's really quite equivocal, it comes from Professor Mahoney's article and it doesn't necessarily flow from the language of the legislation?

MR SINCLAIR:

Yes your Honour, yes.

O'REGAN J:

Professor Mahoney's article was after the Act, though, wasn't it?

MR SINCLAIR:

Yes. Yes, there was an earlier Act – sorry, there was an earlier article on the special pleas. Sorry, I was going to make a point, which has just left me. Never mind.

WINKELMANN CJ:
It'll pop back into your head shortly.

MR SINCLAIR:
It probably won't. The final issue, and I hope I can now come to your Honour's point, is what maybe taken from the Land Transport Act. Driving, of course, has been a fruitful source of –

WINKELMANN CJ:
So we've dealt with the concept of core punishable acts then have we?

MR SINCLAIR:
Yes, I've moved on from that, yes. There are, as indicated in the submissions, quite a number of cases around the world where the problem with double, or the issue of double conviction arises in a driving setting. All seems to point towards the correctness of the decision of the Court below. Our Land Transport Act has some recognition that more than one charge may arise from the same episode of driving. That's to be found in the concept of concurrent offences, and it arises when a person commits, firstly, an offence that qualifies for the interlock sentence, and secondly, another offence. So you've got a qualifying offence and with that a concurrent offence. "Concurrent offence" is defined as, in the interpretation section: "… that occurred as part of the same series of events as the facts that gave rise to… a qualifying offence."

So we simply say that that's an indication that Parliament has recognised, that there may be, properly be multiple convictions for the same act of driving. It's cropped up because there was a need to explain how particular sentences will interact with each other, but arguably has broader implications than that.

WILLIAMS J:
I don't think Mr Cook would disagree with that proposition. The question, the tough question is, when they are very close to one another in nature, not just on the facts but in nature. You had some examples in your submissions of

drunk driving and careless driving in the same facts, and that seems to me to be reasonably straightforward.

MR SINCLAIR:
Yes.

WILLIAMS J:
This is much closer to the line, I would have thought?

MR SINCLAIR:
It might appear so at first sight. My friend's argument boils down, I think, to the role of the breath test, and I think his argument means that the test, once deployed, in relation to one offence, can't then be used elsewhere to –

WINKELMANN CJ:
I didn't think his argument boiled down to that. That was just an example of it, I think. His argument was that the same conduct on the part of the defendant gave rise to both offences.

MR SINCLAIR:
Yes, that's – the difficulty with that is that on this occasion the act of driving has involved two sets of conduct.

WINKELMANN CJ:
And the second set is driving, it's not conduct, isn't it his status is the, is your point?

MR SINCLAIR:
We say it's a fact your Honour, that it's a factual ingredient of the section 32 offence.

WINKELMANN CJ:
Yes.

MR SINCLAIR:

That he was subject to a zero licence in his case.

WINKELMANN CJ:

So on your analysis you would adopt the core conduct type approach. You'd say the status of a defendant is a fact which needs to be added in to, in this case, so his status as a person is subject to this licence is it a core fact or part of the conduct which differentiates to…

MR SINCLAIR:

Yes, we respectfully support the conclusions reached in the High Court and the Court of Appeal, that the punishable acts are different. So a person can commit the EBA offence and not commit the zero licence offence, and vice versa, but it's a mistake to –

WINKELMANN CJ:

The notional person can?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

So you're moving away from the subjective analysis of the facts which Justice Williams said to you wasn't that what was going on in *Kienapple*. Are you saying no, the notional person can do this in two different ways, because this person did the same –

MR SINCLAIR:

Well, if you applied *Kienapple* to this you would reach the conclusion that there's no situation of multiple convictions because there is a distinguishing element, let us say the zero alcohol licence, and one can see at once that these are offences that occur in different parts of the Act. One's a licensing offence, the other is a drink-driving offence. But two quite distinct wrongs are

addressed by those offences, so it would be no breach of the rule against multiple convictions to have convictions on both. Like –

WILLIAMS J:
They're both drink-driving offences, I mean plainly so. You have to have drink on board to get convicted of either of them. Where they are in the Act isn't going to help you with that, is it?

MR SINCLAIR:
Well, as I tried to submit earlier, the zero alcohol licence breaches is not an impairment offence.

WILLIAMS J:
No, I understand that, but it's still a drink-driving offence.

MR SINCLAIR:
Well, at the highest level it –

WILLIAMS J:
You're not allowed to drink alcohol, any alcohol, and drive. It's got nothing to do with impairment. You're just not allowed to drink alcohol and drive.

MR SINCLAIR:
At the highest level I suppose they are both addressing the evil of people who drink and drive. But obviously one can commit one and not the other.

WILLIAMS J:
Yes.

MR SINCLAIR:
And that a person who's not subject to a zero alcohol licence is not legally and factually in the same situation as Mr Mitchell.

KÓS J:

I suppose the sensible person on the Island Bay bus might think that in *Kienapple* if the defendant was convicted both of rape and unlawful sexual connection, that was over-charging and over-prosecution. They might equally think that there's less to complain about if a person commits an EBA offence but also gets convicted of breach of the zero licence provision, because it would seem slightly odd that that person is put in exactly the same position on Mr Cook's argument as if they didn't have one.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Well, that would be the result of prosecutorial decision though, wouldn't it, not to charge them under 57A?

MR SINCLAIR:

Yes, and perhaps it's time for me to deal with that point. There's no explanation of why 57AA was enacted that we can uncover and no explanation of how it was meant to work with the existing offences and penalties. What we try to show in the submissions is that there exists a regime, sentencing regime, for third and subsequent offences, and for that to work effectively there needs to be proper recording of whether one is clocking up a third or subsequent offence for a licensing offence or an EBA type of offence. So there are valid reasons why one would not in some situations charge the blended offence in 57AA and *Ashworth* actually quite a good example of that because Mr Ashworth faced I think his third offence for drink-driving, also subject to a zero alcohol licence, but he was charged under both 57AA and 56(1). The problem with that combination is that the reading of over 600 is taken account of once under the 57AA offence, so that would be a reading over 250 micrograms, and then again under the 56(1) offence, being above 400 micrograms, and that's like the situation in which an element in one offence does no more than absorb an element in the other, and so it's the same delict of driving with a level of 600 that appears in both charges.

WINKELMANN CJ:

Isn't there the same difference between 56 and 57AA which is the status of the defendant?

MR SINCLAIR:

I'm not sure I've understood your Honour's question but…

WINKELMANN CJ:

You can only be charged under 57AA if you've got the zero or alcohol interlock licence, so it seems to me the same distinction.

MR SINCLAIR:

Yes, it's certainly one charging option, but we say, as did the Court below, that there are other charging options which might legitimately be pursued and it may be quite proper to split out the breach of the zero licence from the EBA aspect.

WINKELMANN CJ:

I don't know that you've answered my question though because Justice van Bohemen was satisfied that that was a situation in which section 46 should apply but really the same distinction could be said to exist between 56 and 57AA in terms of critical facts which is that there is the licence status of the person, and that is the distinction you draw between section 32 and section 56.

MR SINCLAIR:

Yes, with respect, we say that the result in *Ashworth* was correct because the same wrong was picked up twice in effect. So he –

WINKELMANN CJ:

So that's a subjective – no, it is objective, isn't it, because it's a level of driving?

MR SINCLAIR:
If we ran the *Kienapple* test over that we'd say the same delict.

WINKELMANN CJ:
Except –

MR SINCLAIR:
So he either should have been charged solely under 57AA or the better approach, given his status as a third striker, would have been to charge 32 and 56 as separate offences.

So there are, as the Court below observed, charging options and the existence of 57AA does not mean that every time there's a combination of zero alcohol and EBA that provision has to be relied on.

KÓS J:
So what is the practical distinction then between 57AA and 32 in these two combinations, one combination be permissible and one not?

MR SINCLAIR:
32, if one is charged under 32 it will potentially count towards getting into that higher penalty band for third or subsequent. But that applies to an offence under that section, and so I don't think it would be correct to use a 57AA conviction to count towards third or subsequent.

The point, just to go in a completely different direction, the point that I lost track of a few minutes ago was the role of the breath test. It's a means of proving a fact and it proves different things in the context of the two offences. So it's necessary for a breath test in the EBA offence to establish that the breath alcohol level is above 400. That has a different evidential role for the zero alcohol licence offence which is simply to indicate that some, merely some, alcohol is present on the breath. It's not the only way that fact could be established, and so it's an error, in our respectful submission, to say that the

breath test is at the core of this man's actions and once picked up under one offence can't be applied in relation to the other.

WILLIAMS J:
What's another way of doing it?

MR SINCLAIR:
Observation.

WILLIAMS J:
Really?

MR SINCLAIR:
Under the – there's still the old offence under section 58, driving while so impaired as to be incapable of proper control or something like that. One way that can be established is by the observations of –

WILLIAMS J:
A walking test?

MR SINCLAIR:
– an officer or medical, a medical person might be deployed to establish that the person has been drinking so much that they can't control a vehicle properly.

WILLIAMS J:
Yes.

WINKELMANN CJ:
Because the section doesn't stipulate breath alcohol, blood alcohol, et cetera, it just says contrary to their licence, is your point, I suppose.

MR SINCLAIR:
Well, the zero alcohol offence is made out when someone has –

WINKELMANN CJ:

Driven contrary to the licence?

MR SINCLAIR:

– alcohol in their breath or blood. The presence of alcohol in the breath could be established otherwise than by an approved device.

WINKELMANN CJ:

Is that right?

MR SINCLAIR:

Yes, well, section 58 and convictions under it will show that alcohol impairment can be established without the use of an approved device, so –

WILLIAMS J:

Is section 58 alcohol focused or just impairment focused?

MR SINCLAIR:

Well, it certainly covers alcohol.

WILLIAMS J:

Yes, but does it –

WINKELMANN CJ:

"Under the influence of drink or a drug, or both, to such an extent as to be incapable of having proper control".

WILLIAM YOUNG J:

So that won't get you there, will it? That won't get you there because you've got too many choices.

MR SINCLAIR:

Well, I thought your Honour's question was – we were discussing the role of the breath test result.

WILLIAMS J:

Yes. You said it could be done in other ways.

MR SINCLAIR:

Could be done another way, and it could be. So if the –

WILLIAMS J:

And you can observe someone walking a wobbly line or driving in an impaired fashion, but it's another thing to say: "And therefore it's alcohol."

MR SINCLAIR:

Yes.

WINKELMANN CJ:

I thought your point was simple which is that section 32 doesn't stipulate that it has to be proved. The offence is not driving when your breath or blood alcohol is over a certain limit or whether you have breath or blood alcohol. It's simply driving contrary to a zero alcohol licence.

MR SINCLAIR:

Yes, just simply requires some alcohol to be present in the breath.

WINKELMANN CJ:

But I come back to the point which is I don't think that is the essence of the appellant's case that the wrong is proved by breath alcohol. I think their essence of their case is that it's the same act on the part of the defendant which is driving it, driving the car, with blood alcohol, breath alcohol, at that level.

MR SINCLAIR:

Yes, I thought the point was on the appellant's case that the same punishable act is involved and that is having a breath alcohol reading at a particular level. That's the common act that can't be used twice. I thought that was the argument we were trying to meet.

WINKELMANN CJ:
Well, he'll tell us in reply, won't he?

MR SINCLAIR:
Yes. That's all I'd wish to say, may it please the Court.

Ms Fuhr has just given me a reference apparently in answer to a question from Justice Williams. Abuse of process cases referred to by Justice Katz are set out at paragraph 41 and footnote 23 on pages 93 to 94 of the joint bundle.

WILLIAMS J:
Just slow down a bit. 41 and 93?

MR SINCLAIR:
Footnote 23. Pages 93 to 94 of the joint bundle.

WILLIAMS J:
Thanks very much.

WINKELMANN CJ:
Mr Cook?

MR COOK:
Firstly, your Honour the Chief Justice encapsulated the appellant's argument. I only have two other points, subject to any questions. There was a submission about the discretionary nature of the abuse of process doctrine. I will try and articulate the appellant's proposition. It is that section 46(1)(b) has absorbed that doctrine but the point I was trying to make in my submissions was that query whether it is truly discretionary in any event, it involves an exercise of judgment, and the focus of the test is on the evaluative judgment of the Judge to see whether the statutory test is met, namely the identification of those same facts and even though it's described in the English cases as discretionary, other cases, *Pearce*, and no need to go to this, but Justice Gummow at page 364 talks about it being a rule of law, and my

submission is that a bright line is going to be difficult in these sorts of cases because it does involve an evaluative decision.

The next point is page 97 of the joint bundle. I think this was a question from your Honour Justice Kós about the change from factual circumstances to same facts. At paragraph 55 it outlines there that it was for the basis, it was "… said by the Committee to be 'for the sake of precision and clarity'."

Then the final point in reply was page 466 of the bundle, the decision of *Prince*. The final paragraph: "What cannot seriously be denied…" This was in relation to the statutory scheme in Canada, obviously section 11 of the Criminal Code there, "… (prohibiting multiple punishment for the 'same offence')…"

O'REGAN J:
Where abouts is it on that page? It's right at the bottom of the page?

MR COOK:
Sorry, yes.

O'REGAN J:
Right, I see.

MR COOK:
Your Honour, the Chief Justice, the appeal cases volume of *Connelly* has been provided to the Court.

WINKELMANN CJ:
Yes, thank you very much. I find that much easier to read.

MR COOK:
And did your Honour also want, I mentioned *O'Loughlin*, which was Justice Well's exegesis of this matter, which is Justice Kirby calls it a most thorough review. Did your Honour want that provided as well?

WINKELMANN CJ:

Yes, thank you.

MR COOK:

Unless there are any questions those are the submissions for the appellant.

WINKELMANN CJ:

Thank you Mr Cook. Thank you counsel for your excellent submissions. We'll take some time to consider our decision and we will now retire.

COURT ADJOURNS: 12.45 PM