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

SC 114/2024
[2025] NZSC Trans 13

RAYMOND IVEAGH JURY

Appellant

v

THE KING

Respondent

Hearing:	5 August 2025
Court:	Winkelmann CJ Glazebrook J Ellen France J Kós J Miller J
Counsel:	CWJ Stevenson KC and S J Parry for the Appellant Z R Johnston and Z R Hamill for the Respondent

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CRIMINAL APPEAL

MR STEVENSON KC:

Tēnā koutou, e ngā Kaiwhakawā. If the Court pleases, counsel's name is Stevenson and along with Mr Parry we appear for the appellant, Raymond Jury.

WINKELMANN CJ:

Tēnā kōrua.

MS JOHNSTON:

May it please the Court. Tēnā koutou, e ngā Kaiwhakawā. Ms Johnston appearing together with Ms Hamill on behalf of the respondent.

WINKELMANN CJ:

Tēnā kōrua. Mr Stevenson, so a few things there. Firstly, you'll be finishing by 11.30 I think?

MR STEVENSON KC:

Yes, if your Honour pleases. I discussed with my learned friends that precise suggestion that we'll endeavour, Mr Parry and I, to finish by 11.30, which would mean I have around an hour to deal with the admissibility issue, the hearsay ground 1, Mr Parry 15 minutes or so. My learned friend is on after the morning break for an hour or so and we have some time for a brief reply if that's convenient.

WINKELMANN CJ:

That sounds excellent. Secondly, your submissions don't address the application of the proviso.

MR STEVENSON KC:

No, I intend to do that in the course of my oral argument. The short point is we say the errors which occurred in this case couldn't be said not to have been capable of affecting the outcome but we'll talk to that respectively as we deal with the two grounds.

WINKELMANN CJ:

Right. The third thing, both parties will be addressing the issues we raised in our minute yesterday?

MR STEVENSON KC:

Yes, Chief Justice, I thought it might be convenient to deal with that first.

WINKELMANN CJ:

Okay, all right, and then the last thing is we note that there is some suggestion Mr Nabney thought he recollected a discussion about the need for a direction with the trial Judge. Did anyone search for a recording because normally the FTR is on recording?

MR STEVENSON KC:

Yes. So we did search the recording for something else. Mr Nabney, of course, said he searched his trial file and found no record of it. I think the answer though is no that that hasn't been done.

WINKELMANN CJ:

Right. The Crown might know. They can deal with that when they address the Court.

MR STEVENSON KC:

Presumably any such discussion would have been shortly prior to the summing up or counsel's addresses.

KÓS J:

It's just it's such an unusual thing for an experienced, careful judge. It suggests to me there must have been some kind of consensus about it.

MR STEVENSON KC:

Well, I think if there were some consensus, Mr Nabney would have recalled that. My take was that it was, for whatever reason, just an omission and when I first spotted it reviewing the case, I wrote to the Crown and said this is such a

serious error that the Crown might want to give thought to its position on this because I was so surprised and, of course, noting what your Honour also points to the experience of that particular judge, particularly in the criminal law, but these things do happen. But, of course, it was, we say, aggravated by the fact there was no discussion at all about the hearsay nature of the evidence really in the overall addresses to the jury. Crown counsel, and I'll come to this in the course of my argument, referred to it as evidence in his opening and spoke to Mr Maney's statements in his closing, never referring to them being hearsay, and trial counsel for the defendant didn't really touch upon it at all and, of course, the Judge didn't so.

Perhaps then if I just pick up on the minute from the Court and counsel if I can say, I suppose, are now slightly embarrassed between us that we didn't take the obvious step of searching links or something like that for the sentencing notes. Mr Parry and I have discussed why we wouldn't have done that and I think our position was we rather thought that this was likely to have been a District Court sentencing and that the notes would have been transcribed but, of course, it wasn't, it was in front of the High Court, Justice Asher. What we did do, however, and we've just looked for this last night, is we made a number of quite detailed disclosure requests of the Crown leading up to the Court of Appeal conviction hearing and one of those was for the summary of facts relating to Mr Maney's conviction for perverting the course of justice and we will be circulating through Mr Registrar that email correspondence shortly I think. And we were told that, at least from the police officer we were communicating with at that time, that no material subsisted because it was an archived file and it had been lost.

There were discussions regarding the prior conviction history of Rex Maney in the admissibility hearing, and we can see that Justice Powell referred to his prior conviction history but wasn't swayed by that, but he never particularly spoke about the fact that he had this rather in the context of the application a startling conviction for perverting the course of justice and it doesn't appear to us that counsel focused on that either. We identified that again in the course of our preparation.

Now what should be the position. We had adverted to this in our written argument in terms of any obligations on the Crown to take extra steps in investigating the credibility of somebody like Mr Maney when they seek to have deceased hearsay statements admitted. In the appellant's submissions at, I might just bring this up on the ClickShare if we can get that going, at page 22, I beg your pardon we're at *R v Horncastle* [2009] UKSC 14 first, so this is what we rely upon in terms of the submission which I'll come to in a moment.

So this is the *Horncastle* decision in the appellant's bundle of authorities. It's the United Kingdom Supreme Court in 2009 at paragraph 36. The position in the United Kingdom under the Criminal Justice Act 2003 is that a defendant who's posed with hearsay evidence may adduce evidence through other witnesses relevant to the credibility of that person who had made the statement sought to be admitted as hearsay and the Court in *Horncastle* said, if the Court pleases, we can see here that that places an extra onus on the Crown. And, importantly, the final paragraph we've highlighted there, the defendant, in we say what should be the New Zealand position in such cases, "will be entitled to ask the Court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it." And to speak to the note, I beg your pardon, the minute which came through last night, here we say is the answer: "That exercise will ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose what is already in its possession…" and undergo an "active investigation."

KÓS J:

So your point here is what exactly because obviously it was in front of the defence and the Judge at the pre-trial?

MR STEVENSON KC:

Well, the evidential vacuum was the lack of detail about that prior conviction which we now have and I don't think the Court has, which we've just located this morning and will also circulate, the sentencing notes. I'm not sure if –

WINKELMANN CJ:

We don't have them.

MR STEVENSON KC:

No, and so the context, of course, is trial counsel described Mr Maney's conduct, particularly in relation to the letter, as "quite calculating" so calling into account his credibility and suggesting that he had been quite manipulative with his dealings with police and his various statements. Now, all Justice Powell had before him, as far as we can ascertain, was the bare record of the conviction but we know more about it from the sentencing notes which shows that Mr Maney was involved in pretty serious, somewhat sophisticated manufacturing of methamphetamine and was picked up on intercepted prison calls attempting to have somebody else take responsibility for it and swear an affidavit, although that never came to fruition but that was the basis of his conviction.

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Now these sorts of enquiries, we would submit, shouldn't be left to the vagaries of trial process and different levels of diligence of trial counsel for example. The better and safer approach is that one posited by the Supreme Court in the United Kingdom in *Horncastle* which is, and it's rational in my respectful submission, the Crown having the onus to demonstrate the reliability which involves an assessment of credibility almost inevitably.

WINKELMANN CJ:

That's a statutory requirement in England, is it?

MR STEVENSON KC:

It's a statutory allowance for a defendant to adduce further evidence around the credibility, and building upon that really I would suggest, Chief Justice, the Supreme Court is saying, well if that is so, then there is this further obligation upon the Crown. I'm not sure that we would say we necessarily need a statutory enabling for a defendant to adduce evidence relevant to the credibility or reliability of a witness like Mr Maney. I would have thought that would have

been of no difficulty for a defence in New Zealand to be able to do that, but the important position is what the Supreme Court has said about the onus imparted on the Crown in such circumstances, and it's just –

ELLEN FRANCE J:

Sorry, there's nothing in the New Zealand cases about that obligation?

MR STEVENSON KC:

I can't promise there's nothing your Honour, but nothing that I've seen.

ELLEN FRANCE J:

And you haven't seen cases where the Judge has made it a stipulation of admissibility? That, for example, if evidence, this evidence goes in, then it's to be accompanied by here, for example, the conviction details? I mean I'm not suggesting there's any bar to that, I'm just interested to know if that has occurred in the past.

MR STEVENSON KC:

No. I don't know. But if I was the trial counsel in this case I wouldn't have thought for a second really that I would have had any difficulty in adducing the prior conviction of the deceased hearsay witness through, say, the officer in charge. I just can't imagine that that would have caused any problems whatsoever.

ELLEN FRANCE J:

No, it's more making it a requirement.

MR STEVENSON KC:

Indeed. No.

WINKELMANN CJ:

On the Crown?

ELLEN FRANCE J:

Mmm.

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

On the aspect of fairness that you're talking about

MR STEVENSON KC:

Yes, because they are the, I mean the cases in New Zealand don't necessarily talk about an onus on the Crown, but it's implicit really in the sense that the Crown is making the application. They do have the onus to establish reliability, and that carries with it a concomitant obligation the appellant would respectfully say to undertake these sorts of investigations, just to make sure we don't get into the position which has arisen in this case, which is an unfortunate situation, all of these years down the track, our email requesting the summary of facts was 2022.

I'm not sure if the Court wants to hear from the Crown on this, or perhaps I just then turn to the substantive argument.

WINKELMANN CJ:

I think just turn to the substantive argument.

MR STEVENSON KC:

So I'm dealing, if the Court pleases, with ground 1, which is the question of the admissibility of the hearsay statements of Rex Maney. Now the appellant's essential proposition in this case is that there has been some slippage or one might say degradation of the approach to the admissibility of hearsay in New Zealand and that this case is emblematic of that. We say that the reasonable assurance of reliability in section 18 of the Evidence Act 2006 has ben unacceptably diluted, both in terms of the way those words have been characterised, and it necessarily follows in the application of them. We also say that unreliable hearsay evidence is being wrongly admitted on account of apparent corroboration, and again we say this case is emblematic of the problem with that approach, which has been deprecated, and I will come to this,

in very robust language by the Canadian Supreme Court, the Australian senior appellate courts, and by President William Young, as he was then, writing for the Court of Appeal in a case called *Mills v R* [2010] NZCA 286, who also said that's not the right approach.

Now there is a conflict in New Zealand on that question at the moment, and we say that this Court will probably resolve it in terms of the approach to this appeal, but we say the idea of corroboration when there could be another explanation for that evidence, will often lead the Court into error and result in questionable evidence getting through the gate when it shouldn't.

So I wanted to start then with some high level statements about hearsay relatively briefly, just skip through a few of the cases to frame the appellant's argument. I will then, if it's convenient to the Court, go to the general trial evidence and just thumbnail sketch that, and then of course speak to Rex Maney's evidence in particular, and if helpful go to particular details of that, but the essential facts will be familiar to the Court. I will then speak to the way we say the test under section 18 should be articulated, go to the question of corroboration, and finish with the question of whether or not a miscarriage occurred as a result of this admission of this evidence in this case.

So section 17 of the Evidence Act in New Zealand confirms that hearsay is presumptively inadmissible, and this is a point which ought not to be lost sight of, respectfully, and it should be articulated in decisions, and recognised as the starting point that the hearsay provisions in New Zealand are exclusionary rules of evidence, and that hearsay is presumptively inadmissible, and only, as section 17 puts it, only admissible if the bar is cleared, which is set by section 18.

Now I wonder if we can bring up *R v Hughes* [1986] 2 NZLR 129 at page 51. This is the appellant's casebook, and I'll just bring these up on the ClickShare for ease of reference. Justice Richardson, albeit in the context of a witness anonymity case said: "The right to confront an adverse witness is basic to any civilized notion of a fair trial."

Then *R v Bain* [1996] 1 NZLR 129 at page 153, which was a decision written by Justice Tipping: "Certain points need to be stressed… it is to be constantly borne in mind that the question whether such evidence is sufficiently relevant and reliable to be admitted… falls to be considered" as I have said "as an exception to the hearsay rule. The evidence must be of such relevance and reliability that it can reasonably be said that the dangers inherent in hearsay evidence does not exist, or do not exist to an appreciable extent…".

Following *Bain* the next high level important statement the appellant wishes to reiterate is *R v Manase* [2001] 2 NZLR 197 at page 169, again in the appellant's casebook. Speaking to *Bain* the Court of Appeal in *Manase* said: "The single issue which the Court in *Bain* saw as deriving from the concepts of sufficient relevance and reliability, was equated with whether the dangers inherent in hearsay evidence were reasonably displaced. That, in a sense, is the ultimate policy issue."

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Then *Conway v R* [2000] FCA 461 at page 933, this is an Australian case, the Australian statute requires that the proponent for the admission of hearsay demonstrates under section 65 of the relevant legislation that the hearsay statement is highly probable to be reliable and the Federal Court, I think it was of New South Wales from memory, said the onus, the requirement I beg your pardon, is an onerous one and it is easy to see why that should be so because the exception has the, or the admissibility of hearsay has the potential to operate unfairly against an accused person.

And then three more references, the next one is the English Court of Appeal in *Riat v R* [2012] EWCA Crim 1509, 1296 of the appellant's bundle which we haven't highlighted: "The common law prohibition on the admission of hearsay evidence remains the default rule but the categories of hearsay which may be admitted are widened." Again a consistent theme here. "It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does not make it the same as

first-hand evidence. It is not. It is necessarily second-hand and…very often second best…it is that much more difficult to test and assess. Those very real risks of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to its management." A statement we say apposite to this case. "Sometimes it is necessary…for it to be admitted. It may not suffer from the risks of unreliability" and not highlighted but the final point is important: "Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all…" because of the risk of the unsafety to verdicts. Then the final case mentioned –

KÓS J:

One question, which in due course I'd like you to come to, is whether that test is different in this case because the defence ran an argument that Mr Maney was the killer and were the interests of justice therefore required that his statements be included? Deal with that in due course.

MR STEVENSON KC:

Well I'm happy to speak to it briefly now. It's an important question and, of course, it's the Crown thesis that that is important here and militates in favour of admission. I suppose that may be so but section 18 isn't framed generally like it is in the UK interest of justice. It's framed so that the applicant seeking to admit hearsay evidence must establish there is a reasonable assurance of reliability. What your Honour Justice Kós is talking about is relevance and one can understand conceptually the attraction to getting that in under the relevance rubric but that's not what section 18 is concerned about and that may just be the way it is in the complete answer. I'm not sure on what other basis unreliable, we say, unreliable hearsay evidence would come in to rebut a defence case.

L (SC 80/2023) v R [2024] NZSC 153 which, of course, from memory was this Court's decision last year about hearsay but unavailability and I think your Honour Justice France wrote for the Court on that occasion and this is at 65, page 65, and this Court said, albeit in a different context of assessing relevance of demeanour "…this Court in *Taniwha v R* referred both to the 'fundamental importance of transparency in the administration of justice through the courts'

and the assumption that the fact-finder 'is likely to benefit from seeing and hearing witnesses give their evidence.'"

Final point, and then I will move to the evidence, and this is a reference to Professor Garavin who contributed an article and a recent text on the question of the treatment of the admissibility of hearsay in New Zealand as against the approach of cognate jurisdictions. This is in the defendant's submissions at page 20, footnote 71.

WINKELMANN CJ:

Respondent's?

MR STEVENSON KC:

No, no, the defendant's. I beg your pardon, the appellant's.

WINKELMANN CJ:

Yes, right.

MR STEVENSON KC:

And perhaps this quote, given the importance of it, shouldn't upon reflection have been demoted to the footnotes but Dr Garavan opines that section 18 –

WINKELMANN CJ:

Gallavin?

MR STEVENSON KC:

I'm sorry.

WINKELMANN CJ:

Dr Gallavin.

MR STEVENSON KC:

Dr Gallavin, yes: "…opines that s 18 enshrines a 'narrow view of reliability which the New Zealand courts have treated as undemanding'" and as this Court will have seen from our written submissions that's really our thesis also. "Assessing

the New Zealand against the position overseas he concludes that 'New Zealand's narrow approach to testing reliability combined with a broad unfettered judicial discretion represents perhaps the weakest protection of the hearsay exclusionary rule and the associated right of a defendant to cross-examine witnesses.'"

Perhaps that's a good point to pick up on what the appellant has said in our submissions and we've identified a couple of cases to make this point but reasonable assurance of reliability we maintain is still a high threshold and should be described as an exacting test. Generally the position in New Zealand has to describe the question as whether or not evidence is reliable enough to go to the jury and various cases put it as the question is only whether or not it's reliable enough to go to the jury.

A High Court judge in one of the decisions we've included *R v Liu* [2015] NZHC 732 described the threshold as a low one. Now, that in our submission does a disservice to the historical position regarding hearsay. The intent of the reforms and the language of section 18 assurance is qualified with the word "reasonable" but nonetheless the focus must be we say on the assurance of reliability. Again, I'm jumping ahead a little here but, and I'll come back to it, but the Australians, albeit in a statutory form, have a threshold of a high probability of reliability and the Canadians of course take an equally strict common law approach describing the onus on the applicant to establish inherent trustworthiness.

An overview, if I may, in relation to the evidence and, of course, if I'm going too quickly or…

WINKELMANN CJ:
No, that's all right.

MR STEVENSON KC:
So essentially at trial in terms of viva voce evidence there were two accounts. There was the account of Ms Eketone, Lauren Eketone, and the account of

Raymond Jury. Ms Eketone was living at 796 Te Ngae Road with the deceased Mr –

WINKELMANN CJ:

Can you just help us with your diagram which is very helpful, thank you, but could you tell us, can we go down and write down the names of which –

MR STEVENSON KC:

Yes, we predicted that that was an omission of ours. We've got a better version and we'll bring that up on the ClickShare. We've also got hard copies to distribute if I may.

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So as we look at this bird's eye view of the relevant locations.

WINKELMANN CJ:

So Rotorua township is on our left is it?

MR STEVENSON KC:

Correct, and so we see the airport in the middle, and if you come in to the airport and are heading into the city, you'll come out of the airport onto the main road, Te Ngae Road, and as we look at it head left, or as it's been described, head south, into the Rotorua township. Now Mr Rex Maney is, as we can see, at 1029 Te Ngae Road. Trevor Rikihana was living with Lauren Eketone at 796, which is accessed by a paper road we can just see beside the CCTV Superior Storage, Pukepoto Road. So Pukepoto Road you'll see reference to that and, in our table schedule, takes one down to Ms Eketone's where Trevor Rikihana was living.

Now the next important address is to the far left, the chap referred to as Nini, Mr Te Aonui. That is where Mr Rikihana was left and found by Mr Te Aonui and taken to hospital.

So broadly Ms Eketone claimed that she was at home. Mr Jury turned up. He was looking for Mr Rikihana. She heard them begin to argue and then she says she never claims to have seen any of this importantly, and I did wonder whether or not voice identification warnings were required, but probably not. She then claims to have heard Mr Jury administering a beating, as she put it, and that he has then left with Mr Rikihana. Now Mr Jury gave evidence, and gave a diametrically opposed account of all of this.

KÓS J:

He says two other things. First, that she took Mr Jury to Mr Rikihana.

MR STEVENSON KC:

Yes, down the side of her house.

KÓS J:

Yes, and secondly, that she saw Mr Rikihana I think being kicked by Mr Jury's car, by Mr Jury.

MR STEVENSON KC:

Kicked by the car?

KÓS J:

Beside the car.

MR STEVENSON KC:

I'm not sure about that. I'd need to check that. She certainly claims to have been out the front of the house and seen him being put into the car.

Now Mr Jury said that he arrived up to the district, he was in living in Christchurch at the time. He went into Mr Maney's to start with, who wanted him to go and pick up Mr Rikihana. He says he's gone down to Mr Rikihana, or Ms Eketone's address. Nobody has been home. He said he's doubled out to see Mr Te Aonui. He's not been home, but he's seen some associates.

He eventually comes back to the Eketone address and encounters Ms Eketone and Mr Rikihana.

Now he says that the three of them socialised for some time, and smoked cannabis and methamphetamine, and he says Rex Maney then arrives after a period of time. He says there is some dispute he doesn't quite understand, but it's related to money, Mr Maney claiming Mr Rikihana owes him money, and I should say also the evidence reveals that Mr Maney had lived at this address previously, Ms Eketone's address, so there's certainly something of a close relationship between the two of them, and that's relevant, of course, given the defence theory at trial, that she was giving an untrue account, covering for Mr Maney, and Mr Maney, as we noted in our submissions, began residing with Ms Eketone after these events. Furthermore his son, Mr Maney's son, Damian Maney, was living next door.

Now Mr Jury says that the three of them are socialising, as I have said, consuming drugs including methamphetamine. Mr Maney turns up. He's upset. An altercation of sorts begins between Mr Maney and Mr Rikihana. Mr Jury says he told them to take it outside, and pushed them out to the area where no doubt Mr Rikihana was assaulted because his blood is on the grass outside the side of the house.

Mr Jury says that as he follows out, he's struck in the head with a hammer, and he assumes that was Mr Rikihana. Under cross-examination I think he says he believes Mr Rikihana must have thought he was part of some plan to be involved in the assault being dished out by Mr Maney.

ELLEN FRANCE J:

He doesn't say it's a hammer at that point in time?

MR STEVENSON KC:

He doesn't know. He says he was struck in the back of the head. He remembers a flash.

ELLEN FRANCE J:

He said: “Something solid.”

MR STEVENSON KC:

That’s right, and of course he ends up at the hospital with the injury later in the evening. He then says, Mr Raymond Jury, that he helped move Mr Rikihana, who has not succumbed to his injuries at that point, but has been seriously assaulted, but the assault is not finished. He helps Mr Rikihana with Mr Maney to his car. They take him back to Mr Maney’s and he eventually gets Mr Rikihana out of the car and he says that the two, I think in his words, are going at it again when he leaves them. That Mr Maney is continuing to assault Mr Rikihana.

So those are the competing claims, and I should say at this point that of course the Crown says, well, if anything went wrong in this trial, it didn’t matter because essentially Ms Eketone’s account was overwhelming so far as Mr Jury was concerned, and we say, first of all, that rather overlooks the fact Mr Jury gave a not implausible account of events. It was relatively cogent, and a striking thing the appellant says, for example, if he were manipulating a false narrative to exculpate himself, is why did he not say that he had dragged Mr Rikihana across the grass, because the pathologist and the scene examination revealed there were drag marks through the blood, and he said he simply carried him and couldn’t recall any dragging. So that’s an example, the appellant would say, which suggests that he’s, as best as he could, given a true account of events, and not simply tailored it to the evidence that he’s already heard.

Now the evidence which was an addendum at the very least we would say one of some centrality was of course Mr Maney. I have already mentioned to your Honours, and I don’t think I need to go through it, unless you’d like me to, but it was described as evidence by Mr McWilliam the Crown prosecutor in opening, page 59 of the casebook, and then in closing he went through in some detail unsurprisingly, there’s no criticism of that, but suggest it wasn’t a feature of the trial. Certainly we can see in his closing he went through and

endeavoured to rehabilitate effectively that evidence, and didn't remind the jury that it was hearsay.

Now just a couple of final points in terms of these competing contentions as to how events played out between Mr Jury and Ms Eketone. First of all, as I've already mentioned, the appellant's case was, and it was put to her of course by trial counsel through the course of a couple of different propositions covering some different aspects, that she was loyal to Mr Maney who was the offender, and she was covering for him. At one point, and the Crown picks up on this, she says: "Well, that's nonsense he's dead. Why would I be covering for him?" And the appellant's response to that is, well, he wasn't when she made her statements, and she was locked into those, and if she'd given a false narrative then, there was obviously likely to be some disinhibition on her part in acknowledging that she'd effectively perverted the course of justice. So we see that oftentimes. I mean the focus is on the original count, the context and timing of it.

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So loyal to Mr Maney, which potentially undermined her account. He had lived at her address. He came to live with her after the death of Mr Rikihana, and also if Mr Jury's account is correct, she is smoking methamphetamine with Mr Rikihana, joined by Mr Jury when Mr Maney arrived, and although it was only a proposition put and rejected at trial, trial counsel put to her that they were sourcing their methamphetamine from Mr Maney and that would potentially be the source of some sort of debt, and Mr Maney's anger in relation to Mr Rikihana.

KÓS J:

The difficulty, Mr Stevenson, is the jury has weighed these two competing accounts. The question really here is how is the weighing process being polluted by this statement as inadmissible. But as to the two accounts, the jury has formed a view. It doesn't help your client.

MR STEVENSON KC:

Well I suppose I'm endeavouring, as I touch upon this evidence, to simply demonstrate one can't take Ms Eketone's account as unvarnished and unimpeachable, that there were actually quite serious problems with it, and if one accepts that Mr Maney's evidence shouldn't have gone in, or if it did there should have been a direction, then we do come back to that question which is really the approach finally taken by the Court of Appeal, well, look at Ms Eketone's evidence, none of these errors mattered. They weren't material.

Now Ms Eketone, of course, has Mr Jury as the offender, and the sole offender. Now Mr Jury was in bare feet, the evidence reveals that. He gave evidence he was in bare feet and he's seen in bare feet at one point in the evening on CCTV. The –

MILLER J:

That's afterwards, right?

MR STEVENSON KC:

It is afterwards, yes.

ELLEN FRANCE J:

And at some point he does accept he's got, he's wearing sandals.

MR STEVENSON KC:

On a previous occasion I think, no, not on the evening.

ELLEN FRANCE J:

Not on the evening?

MR STEVENSON KC:

But that he has worn sandals before. I think Mr McWilliam was putting to him, so, you know, you're suggesting you never use footwear at all, and he said, well occasionally sandals.

The pathologist, Mr Tse at 233 of the evidence, agreed that some of the injuries would not appear to have been capable of being caused by bare feet, and that boots could have caused them, and the scene examination, I'll just give your Honours the reference because it's quite important, demonstrated that there were boot prints walking through the blood, consistent with the offender wearing boots. That's at page 255 of the evidence.

WINKELMANN CJ:
What page sorry?

MR STEVENSON KC:
Page 255 of the evidence. So the evidence absent Mr Maney the appellant says respectfully was not as cogent or at all overwhelming as suggested by the Crown and the Court of Appeal in the way it resolved the case.

Now I'll then turn to the evidence of Mr Maney which we describe as RM1, 2, and 3, and I don't propose to go to those statements unless the Court wants me to, but I'll just speak to him. First of all we have the letter which was suggested to have been written contemporaneous with events by Mr Maney, which is found around a couple of weeks later when police execute a search warrant at his address. A search warrant executed by his cousin Herbie, last name escapes me, who he'd grown up with and there's probably nothing in that, but trial counsel of course suggested, and we endorse the proposition, that the letter was calculating, and it was seeking to exculpate Mr Maney and left in plain view for the inevitable arrival of police at some stage in relation to all of this. The letter suggests, and perhaps we can just bring it up, it's in the appellant's bundle of materials filed with the Court of Appeal, in the Supreme Court casebook.

Just while we're going to it, the letter proposes that Mr Jury has showed up, and this is at paragraph 76 of the appellant submissions, this is where we are now. So he's suggesting to have commenced a letter to go to his son, who's in custody, and we say this whole thing's implausible, that he'd be writing about these events in a letter that's going to go to a prison, knowing that it would be

read. But if we scroll down. So talking about charges as between the son and father. Son in jail, father facing some new charges, and then the brother Gooie the Rogue just turned up with Uncle. Tied down in the back of his car. Uncle had attacked the Mighty Gooie with a hammer in the face. He's tied up in the back. Just carry on down to the reference to taking him to Nini's. Just leaving with uncle tied down in the car, going to Nini Rogue's. Now preceding this, of course, Mr Maney had given a statement saying that he knew nothing at all about the events of the night in question.

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As a result of this letter he's then questioned, and perhaps we go to statement number 3, which is in the evidence from around page 77, the Court of Appeal evidence. So page 80 is in fact the last statement. So penultimate lines as shown essentially towards the bottom: "Can I show you a copy of the letter…discussing the same letter." Then over the page, down to: "So tell me what happened," in the mid-portion of that document as we see it. "Gooie came and knocked on the door and we sat at the kitchen table. Gooie told me that he got the cunt. I knew because after Trevor smashed him with the hammer Gooie had come to my place." So this is important from our point of view that he's saying that Mr Jury has already been assaulted by Mr Rikihana with the hammer and he's come over. Uncle had attacked him with a hammer. He's going back to get him and then good police questioning. given the nature of the letter, bottom third: "So how many times did Gooie come to your house that night?" "Twice." Next page, so towards the top third: "So Gooie leaves your place to get the cunt being Trevor?" "Yeah." And then how long before he comes back, he doesn't know what happened when he comes back, so this is the version of two trips by Mr Jury. He's asking for a rope. "I told him there was one in the wash-house." And then towards the bottom of that page the questioning we've mentioned in our submissions, again which was natural given what had been said in the letter, that he was taking Mr Rikihana to Nini Rogues or Te Aonui. "How did you know… was going to Nini Rogues?" "I just thought that…why wouldn't he just take him home?" "I don't know." And over the page, the third line: "Did Gooie say he was taking him to Ninis?" "No."

So the problems evident from all of that are first of all in the letter there is a claim that Mr Rikihana is already tied up in the car on this one attendance version and when he arrives, according to the second police statement or RM3, he's asking for rope. We don't know why such irreconcilable narratives would arise if the account was reliable and true. The one trip version in the letter as opposed to two trips in the third statement, the confident assertion in the letter that Mr Jury took Mr Rikihana to Nini's and statement 3 no idea how he would know that. Well, one reason he would know it, if he was involved in it. But the letter we say is implausible sitting there for a couple of weeks just strains credulity that this proposed letter to a son incarcerated would include such details.

And then the important point, we say, which has been picked up by the appellant, is the irreconcilability with the final statement with the CCTV, and perhaps if we just go to the appellant's submissions where we've set out a table. This is from page 37 of the appellant's submissions. So just to orientate everyone, and of course we've got the map as well just to remind us what we're talking about, this is a summary of the evidence given by the chap, the police officer Mr Collier, who analysed the CCTV for the police and then produced a PowerPoint. We've included an abridged pictorial version of that in our materials.

For present purposes we are looking at the windows available for Mr Jury to be at Rex Maney's (RM) or Mr Rikihana's (TR). Now statement 3 describes Mr Jury arriving at Mr Maney's having already been at Mr Rikihana's and bashed in the head with the hammer. You'll recall that from the statement we've just been through. So that would mean that first visit to Mr Rikihana when he was assaulted with the hammer would have to have occurred during TR window 1 which we can see on the right-hand level there at about 11.01. Now that means Mr Jury has to come to Mr Maney's twice after that to say he's been bashed and he's going back and to come back with him in the car. Now there are only two possible windows after that first visit to Mr Rikihana during which that could have occurred, RM window 2 and RM window 3. That is impossible because RM window 3 can be conclusively excluded. Mr Rikihana was

admitted to the Rotorua Hospital, I think we've said in our submissions, 114. Yes, RM window 3 can be excluded conclusively because Mr Rikihana was taken to Rotorua Hospital by Mr Te Aonui at 3.18. So Mr Jury can't be driving southbound past the ANPR camera with Mr Rikihana in the back of his car away from Mr Maney's at 3.26 am.

ELLEN FRANCE J:

Sorry, where do you get the 3.18 from?

MR STEVENSON KC:

That was in evidence. Although it's not referenced, we'll get that reference for you, but it is in the evidence.

ELLEN FRANCE J:

Could you just check that against what's in the agreed statement of facts for me at some point?

MR STEVENSON KC:

Yes. Now the Crown has not, and we criticised the Crown position on this in the Court of Appeal, the Crown has not directly confronted this as the appellant sees it. Although they do now say in their submissions if it was only one visit as suggested by the CCTV then it didn't matter and we struggle to understand that. If we're wrong in our analysis that's fine, but the Crown has never directly confronted the detail of the proposition I'm putting now and in my submission it needs to and if Mr Maney's final statement cannot be true, having regard to the CCTV analysis, then we just deal with the reliability impacts that follow.

So I propose then to turn to the admissibility question as against what we would describe as serious, grave reliability concerns with Mr Maney's evidence hardly a reasonable assurance of reliability. Respectively, the appellant would say, more likely a reasonable assurance of unreliability but not an assurance having regard to the dangers present in relation to hearsay evidence and the inability to cross-examine. Now the Crown at paragraph 28 of their submissions say: "The distinction between threshold reliability… and ultimate reliability… is

material." When of course we acknowledge that. The distinction is obvious, ultimate reliability is for the jury. The Crown goes on to say: "The 'circumstances' inquiry goes to the threshold that evidence must meet to be sufficiently reliable to be admissible at all." That's at 28.

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Goes on, paragraph 29: "Threshold reliability" and this is the sort of language that the appellant respectfully deprecates and spoke to earlier on in submissions, but which is persistently seen in the case law "simply means the evidence is reliable enough for the fact finder to consider and draw conclusions as to its weight."

That is, we say, the degradation of the approach to the admissibility of hearsay in New Zealand that was never intended to be the test. It was not the common law at the time of codification, and it is inconsistent with the language of section 18, denoting the requirement for assurance which we say, having regard to reputable dictionaries, is closer to something like certainty. Now we're not saying that a proponent for the admissibility of hearsay evidence must demonstrate it's certainly reliable, but equally the current approach, using the language just mentioned, is closer to something like all that's required is an indication of reliability and it can go to the jury, and in our submission that must be wrong.

Now we are fortified in those submissions by just a few brief mentions of the case law, which I might refer to, Canada, appellant's casebook, we'll bring these up again –

WINKELMANN CJ:

Can I just ask. So you're saying that the Crown's approach allows you to leave the, you know, to look to see that there is some difficulties with evidence and say, ultimately that's for the jury.

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

It's more like the threshold reliability test under section 7 for relevance.

MR STEVENSON KC:

Yes, yes, an appearance of relevance. An appearance of reliability indeed.

KÓS J:

I'm not sure if I, for my part, am much helped by the Canadian authorities. I'd be much more interested if your degradation theory has any legs, for you to show me how the degradation has occurred in the New Zealand authorities. In other words, as it, at the time of the Evidence Act, was a higher threshold applied, and has that stopped?

MR STEVENSON KC:

Well I've endeavoured to show the threshold was higher in the words used by the Court of Appeal both *Bain* and *Manase*. In terms of what's happening now, of course, there will be a plethora of cases we've identified too by way of example. In our submissions, not a definitive answer of course Justice Kós, but the case I mentioned previously, the High Court, *Liu* Justice Moore describing a threshold as "low" and then the admission of hearsay evidence in another case which we've recounted in our submissions, which really reeks of unreliability, and the language in cases like *Adams v R* [2012] NZCA 386, and I think *T* in the Court of Appeal, is that picked up by the Crown. It's just a requirement to demonstrate it's reliable enough to go to the jury, and we say that's wrong. We say the Courts should be articulating its presumptively inadmissible, it's an exacting standard, and there must be some assurance of reliability.

WINKELMANN CJ:

I am interested in the Canadian authorities, but I've read them so if you can just take us, highlight…

MR STEVENSON KC:

Yes, briefly, yes. *R v Khelawon* [2006] 2 S.C.R 787 at 806 of the appellant's bundle. Page 805 I beg your pardon. So this is a Supreme Court of Canada, unbelievably a hearsay statement from somebody who provided the statement during the course of a Mr Big operation, but anyway it's the statement of principle which is important. "The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely" and these are the words I mentioned before, the Canadian words, "on the inherent trustworthiness of the statement."

WINKELMANN CJ:

In that regard you're saying you can't look at it and say, this is coherent with the other, consistent with other evidence. You can't…

MR STEVENSON KC:

I'll come to that in a moment.

WINKELMANN CJ:

Okay. Don't let me take you out of order.

MR STEVENSON KC:

Now 806, so about five or six lines down on page 806. So just six lines down we can see the reference to the case *Smith*. "The circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination." Case specific, I agree, but, or I can see, but of course that's the appellant's case here.

So inherent trustworthiness in Canada, I don't need to go to any of the other cases aside from briefly *R v Bradshaw* [2017] 1 S.C.R 865 at 825. Again that same language, if the Court pleases: "A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy."

Further down: "… the trial judge must be satisfied that the statement is 'so reliable' that contemporaneous cross-examination of the declarant would add little if anything to the process'...".

Then some pretty important statements referring to other Canadian cases at page 826. "Substantive reliability is established when the statement 'is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken'…" sort of dying declaration or a child statement for example, "under such circumstances that even a sceptical caution would look upon it as trustworthy… when the statement is so reliable that it is 'unlikely to change under cross-examination… when 'there is no real concern about whether the statement is true or not because of the circumstances in which it came about'… when the only likely explanation is that the statement is true." Compared to the New Zealand position.

Finally Australia at page 1076, section 65 in Australia, which is the requirement to establish a high probability of reliability. "The section operates on the footing that the circumstances in which the representation was made may be seen to be such that 'the dangers which the rule seeks to prevent are not present or are negligible in the circumstances'."

Just to comment that the High Court in that case noted that: "Evidence by an accomplice against his or her co-offender has long been regarded as less than inherently reliable…" and of course this Court has looked at that issue previously. "Statements by an accomplice afford a classic example of a… plan of falsification" and so forth. There is something of a thread running through the cases in my submission which is those who are either plainly an accomplice in one fashion or another, or potentially connected to the offending, are less likely to have their evidence admitted for obvious reasons. That the nature of the position of that person raises reliability concerns. Now that's not a generalised statement of principle but the point made by the High Court of Australia here is relevant to this case, at least on the defence case, that

Mr Maney had a high level of motivation to say what he did because in fact he was at the centre of events.

1115

WINKELMANN CJ:

Which case is the Australian High Court?

KÓS J:

Sio v R [2016] HCA 32.

MR STEVENSON KC:

Yes S-I-O.

WINKELMANN CJ:

S-I-O, thank you.

MR STEVENSON KC:

The aggravated robbery gone wrong with a brothel and somebody was killed and a proposal to admit a hearsay statement that Mr Sio had the knife or was aware of the knife.

ELLEN FRANCE J:

We've captured those sorts of things in the definition of circumstances, haven't we, and in addition to that the fact that you'd still have to look at in terms of section 7 and 8.

MR STEVENSON KC:

Indeed and, as I've said, I'm not suggesting this is to be elevated to a general principle of law but it must be true, as other courts have observed and as we say in this case, that somebody in Mr Maney's position, at least on the appellant's case, runs the risk of reliability issues because of his potential involvement.

Now to go then to the point put to counsel by the Chief Justice regarding corroboration and it's a general question which the appellant has put some work into because we think it's important. The general, well the position, often times in New Zealand, and we've seen it in the admissibility ruling by Powell J in this case, is that reliability concerns are met by apparent corroboration. So well Mr Maney's statement does have reliability concerns, as Justice Powell said, but for example it's consistent with the scene and the pathology.

Now the legal position in Canada is articulated in *Bradshaw* which described that case as being about this issue, whether or not corroboration ought to be utilised in that way. If we could go to 830 please of *Bradshaw*, Supreme Court, Canada, the Court analysed this issue closely and concluded with statements as follows: "Limiting the use of corroborative evidence as a basis for admitting hearsay also mitigates the risk that inculpatory hearsay will be admitted simply because evidence of the accused's guilt is strong. The stronger the case against the accused, the easier it would be to admit flawed and unreliable hearsay evidence against him." 831 please, the next page: "A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case," this is the important bit "that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement." 833: "Thus, to overcome the hearsay dangers and establish substantive reliability, corroborative evidence must show that the material aspects of the statement are unlikely to change under cross-examination. Corroborative evidence does so if its combined effect, when considered in the circumstances of the case, shows that the only likely explanation for the hearsay statement is the declarant's truthfulness." Carrying on: "Otherwise, alternative explanations for the statement that could have been elicited or probed through cross-examination, and the hearsay dangers, persist." And 48: "In assessing substantive reliability, the trial judge must therefore identify alternative, even speculative, explanations for the hearsay statement. Corroborative evidence is of assistance in establishing substantive reliability if it shows that these alternative explanations are unavailable, if it 'eliminate[s] the hypotheses that cause suspicion.' In –

MILLER J:

This is a remarkably abstract series of propositions that the Court is putting here and to say that the stronger the evidence against the accused the more likely it is to be admitted, the hearsay statement is to be admitted, sort of begs the question it's not about how strong is the case against the accused, it's about the particular hearsay statement that we're concerned with.

MR STEVENSON KC:

Yes.

MILLER J:

And the Court's reasoning seems to, as I say, proceed in the abstract rather than by reference to the particular statement that we're interested in.

MR STEVENSON KC:

Well they do get into the nitty gritty so to speak and in a way that's important in relation to Mr Maney's evidence as well, for example, the scene, the pathology, the injuries are good examples. Well there are reliability concerns in both of these cases but what he is saying is consistent with what's seen at the scene. And pathology, the problem with that is the logical error, if you like, because it's also just consistent with him being the offender.

WINKELMANN CJ:

So there's a statutory interpretation issue here, isn't there? What does the circumstances relating to the statement mean?

MR STEVENSON KC:

Yes, I think that was probably answered by President William Young in *Mills* and we'll just go to that. There were some further statements in the Canadian materials but I think we've got the gist of it. *Mills* is at 193 of the appellant's casebook, 193 at paragraph 21.

ELLEN FRANCE J:

It seems to me though that you have to look at the whole of that paragraph because what the Court of Appeal says there, which is the same point made in Mahoney, is if you look at (a) and (b) of the definition of circumstances so the nature and contents and then also the reference to veracity, you do get to the point, as Justice Young says: "It is not possible to approach the reliability assessment in a complete vacuum." So while I accept he's obviously not saying you look at everything, he is accepting, or the Court is accepting that some context may be relevant –

MR STEVENSON KC:

Yes, and that must be –

ELLEN FRANCE J:

– and that may be case specific as well.

MR STEVENSON KC:

I beg your pardon. That must be so. The question is how does one go about it and the Canadians say well care must be exercised that you don't use apparent corroboration to allow unreliable hearsay to get in because if there are other explanations for apparent corroboration then that's leading everyone astray. An example of when for example corroborative evidence would be helpful to reliability is if, for example, Mr Jury said in a police statement, I'm just sort of trying to conjure up an example here, that he'd never been at Mr Rikihana's at all and we had Mr Maney saying that he had been there and brought Mr Rikihana back. Now if there was CCTV as to identifying Mr Jury going to the address then that would be appropriately relevant corroborative evidence but not the corroborative evidence that can go both ways and that's the concern identified by the –

ELLEN FRANCE J:

Well it can go both ways in another sense, can't it, because if you look at (c) the circumstances relating to the making of the statement so, for example, that might be an issue about say sobriety, wouldn't you potentially want the Court to

be looking at the evidence that might be being advanced about the consumption of alcohol or whatever it is? I mean I'm just not quite sure how you say the line is to be drawn.

MR STEVENSON KC:

Well, I mean, it will always be case specific. Our concern directly here is the approach by Justice Powell and the apparent corroboration which really only just got this across the line because it's clear from Justice Powell's decision he was not going to admit this hearsay evidence but he was fortified by what he saw, or the Crown suggested, was the corroborative nature of other evidence, and we would say on a close logical analysis of that evidence we can see that it's not sufficient to displace the reliability concerns already identified because it's equivocal in the sense there are other alternative explanations for those things.

1125

WINKELMANN CJ:

So is your submission yes you can look at the circumstances that are plainly relevant, that plainly apply to the making of the statement because that's clearly within the circumstances relating to the statement so that encompasses who it is, their credibility, whether they're drunk, whether they're an extremist, so unlikely to lie, et cetera, and you can look to other external corroboration but before you do you'd be satisfied that corroboration is obviously of a rock solid nature so that's not likely to be shifted or exposed on cross-examination which I think is what Justice Karakatsanis says in one of the Canadian cases.

MR STEVENSON KC:

Yes and I –

WINKELMANN CJ:

So you need to proceed very carefully.

MR STEVENSON KC:

Yes. That encapsulates our submission and I don't want to undermine that by saying anything more.

KÓS J:

What's left for the jury then?

MR STEVENSON KC:

I beg your pardon?

KÓS J:

What's left for the jury to do then if such a high level of certainty is required at this pre-trial stage?

MR STEVENSON KC:

Well I mean we're only talking at this stage about admissibility or otherwise. What the jury does with the evidence is a completely different question. Unless I'm misunderstanding your Honour's question. I mean our concern at this stage is ostensibly unreliable evidence getting through when it shouldn't because of apparent corroboration.

ELLEN FRANCE J:

And do you say the same approach applies if it's the defence seeking to introduce hearsay evidence which is, which I think is the logic of the majority judgment in *L v R* that you would apply the same standard to the defence?

MR STEVENSON KC:

Except with the –

ELLEN FRANCE J:

In this, in terms of this aspect.

MR STEVENSON KC:

Yes, with the qualification and having not thought that through necessarily, there might be a different constitutional framework in the sense a defendant has

a right to present an effective defence and the United States Supreme Court, for example, and other courts have said the approach is different if it goes to potential, as they put it, innocence or the defence essentially sought to be advanced.

ELLEN FRANCE J:

Well I raise it because in *L v R* the point made by the majority is that –

MR STEVENSON KC:

I beg your pardon, yes.

ELLEN FRANCE J:

– that where the Act wants a different standard –

MR STEVENSON KC:

True.

ELLEN FRANCE J:

– to be applied it is quite specific about that.

MR STEVENSON KC:

Yes, I beg your pardon, I did read that and that's the authoritative statement, the law I suppose on that point at the moment, although from recollection we advanced that same proposition in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 which remains reserved.

WINKELMANN CJ:

Section 8 also an ability to present an effective defence.

MR STEVENSON KC:

Yes.

ELLEN FRANCE J:

Yes, well I'm talking about the hearsay analysis as opposed to what you might do under section 8 but –

MR STEVENSON KC:

But a good example to wrap all of this up is the appellant's identification of what we say is evidence which unequivocally demonstrates unreliability and that's the CCTV analysis I've just spoken to about, the impossibility of the two visits after being assaulted by Mr Rikihana.

WINKELMANN CJ:

So the proviso –

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

Well you've got one minute left and you're already over time.

MR STEVENSON KC:

Well speaking in old terms *Matenga* which I suppose is effectively still the law, the codification and the articulation of that in I think *Haunui* by this Court, the question becomes well if there was an error in admitting this hearsay evidence, could it be said that it couldn't reasonably, or there's no reasonable possibility that that error affected the verdict. I would have thought that's a better question for the direction issue but in relation to the admission of this evidence, well we would say there's no, couldn't be any serious argument. If it was wrongly admitted it's so central and so detailed and so damaging for the defendant at trial with the inability to cross-examine that the wrongful admission –

WINKELMANN CJ:

And it's said against you that the case against your client was just simply overwhelming and the case against your defence implicating Mr Maney was improbable.

MR STEVENSON KC:

Yes, and that's why I started by saying well it's not so clear-cut. You have the two competing accounts. It couldn't be said that Mr Jury's, whatever anyone

wants to say about his account, it couldn't be said for example that it fails the error of reality test or that he said things that rendered the whole thing implausible. He gave, we would say, a cogent account and arguably credible account what happened. Ms Eketone has problems, the bias potentially we would say in terms of her relationship with Mr Maney, who stayed at her address before and after, son living next door and other factors and the inconsistency with her account or having regard to her account and the evidence I've mentioned, the pathology, boots and seeing boot prints. There was somebody else there the appellant would say not in bare feet conducting this assault which undermines her account and, as Mr Nabney said in cross-examination and closing, well if her account were true why wouldn't she just go next door or ring the police, why wouldn't she go to Damian Maney's house next door. He said the reason he didn't go next door to Damian Maney is because Mr Maney Snr was the protagonist in all of this.

I see it's 11.32. I should probably stop there if that's convenient and then…

WINKELMANN CJ:

Yes. Right, okay, we'll take the morning adjournment.

MR STEVENSON KC:

Thank you. If the Court pleases.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR PARRY:

Tēnā koutou e ngā Kaiwhakawā, ko Parry tōku ingoa. Māku te mahi e kōrero ki te take tuarua o te kaipīra, Raymond Jury. May it please the Court. Counsel's name is Parry. It falls to me to speak to the second ground of appeal for the appellant Mr Jury. I'm conscious your Honours about time and –

WINKELMANN CJ:

Yes Mr Parry. That's your learned leader's fault of course.

MR PARRY:

We'll discuss it afterwards over lunch. I propose to truncate my submissions somewhat and speak really to two propositions. The first proposition is that the state of the law so far as the application of section 122 of the Evidence Act is concerned is actually quite well stated by this Court's decisions in *CT (SC88/2013) v R* (2014) 27 CRNZ 422, [2014] NZSC 155 and *R v R* [2023] NZSC 132, and what I propose to do in respect of those decisions is go through what we say are the relevant principles of law, relevant to this case and to the hearsay context. From there what I propose to do is speak to what was required in our submission by way of directions having regard to the particular risks of unreliability presented by Mr Maney's hearsay statements. However, given the time, I'm happy to go straight to questions if that suits the Court better.

WINKELMANN CJ:

No, you make your submissions.

MR PARRY:

Thank you Ma'am. So as I said, this Court in *CT* gave some quite comprehensive treatment to section 122 of the Act so far as historical allegations of offending were concerned. Now, of course, evidence about events said to have taken place 10 years prior is one of the grounds, was one of the presumptively unreliable classes of evidence identified in section 122(2) of the Act, hearsay, and statements where the deponent has a motive to lie, also all within that subset of evidence classes. So *CT*, while very articulately put by this Court, it evidently wasn't followed consistently by the lower courts, which necessitated a restatement of the principles in the judgment of his Honour Justice Williams in *R v R*, and very helpfully his Honour at paragraph 49 of that judgment lay down those propositions for ease of reference for the Courts and for counsel. Now I've highlighted the passages that I submit are particularly relevant, and relevant generally, beyond the

immediate context of historical allegations of offending, and I'll go through those now.

So the first proposition, and I quote: "…the whole premise of s 122 of the EA is that it is not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence. Judges must take responsibility for identifying such risks and, if necessary, warning juries about them. That is because the risks will be more apparent to the judge than to the jury."

So some points I want to make about those propositions. The position of my friend's for the Crown in response to Mr Jury's appeal is that, well, the Judge didn't need to give a direction as to the various ways in which Mr Maney's hearsay statements were unreliable, because it was canvassed, my friends' say, for counsel by the Crown, and trial counsel for Mr Jury. Now we would say, at least so far as hearsay is concerned, it wasn't canvassed at all, neither by the trial judge nor by either counsel, the hearsay character of Mr Maney's statements, and the particular risks that arose for reason of those statements being hearsay. Nonetheless, even if they had been, the proposition remains, the judicial – it's not sufficient to leave it to counsel to give directions, to instruct the jury as to how to treat this evidence. That is the role of the Judge and the reason, the policy reason underpinning that is the jury have a constitutional role to weigh up evidence, determine how much weight to attach to it, and thereafter make a decision, but the jury, while they're experts in day-to-day life, they're not experts in the sort of risks that present from evidence in the courtroom context, and particularly the classes of evidence that are identified in section 122(2).

1155

So my friends in their submissions refer to a comment from one of the Australian senior courts that directions are really necessary for lurking, and I quote, "lurking classes of unreliability". In my submission the risks associated with hearsay are precisely the sort of risk that will be apparent to a trial judge, but not to a jury. A trial judge in the course of their duties will, of course, see –

WINKELMANN CJ:

What do you say, Mr Parry, are the particular risks he should have pointed out?

MR PARRY:

A particular risk associated with hearsay, well –

WINKELMANN CJ:

This judge, what should he have pointed out?

MR PARRY:

Well, and I'm jumping a little bit ahead here, but I'll speak to that. What was required here is that the trial judge give a, ask the jury to give, to take particular care with the evidence and identify the reasons why such particular care was necessary, having regard to each of the indicia of unreliability, and there are three, in my submission. The first is that it is hearsay. The second, is that it's given by deponent as a motive to lie. The third are the circumstances in which the statements were given, and that, of course, dovetails with the circumstances we've discussed for the purposes of section 18 of the Act.

So going to hearsay, we've cited in our written submissions the case of, my apologies, the passage of the *UK Bench Book* which sets out the three risks, three main risks which refer to hearsay, which is to say the evidence is not given on oath. There is no opportunity for the jury to assess demeanour, and the jury, and the evidence is not tested on oath before the jury by way of cross-examination. So those are the risks that need to be pointed out in the context of hearsay.

WINKELMANN CJ:

In this case would you say the Judge had also referred to the previous record of, the previous conviction.

MR PARRY:

Absolutely, and that, in my submission, comes in under the, I suppose, the risks attached to the circumstances in which the hearsay statements were made,

which of course includes Mr Maney, the deponent's history of previous criminal convictions. So to jump to what I say ought to have been said in respect of that class of unreliability indicia, what needed to be said is that the hearsay statements were internally inconsistent. That that needed to be pointed out by the Judge to the jury in our –

KÓS J:

That's blindingly obvious Mr Parry.

MR PARRY:

Yes but –

KÓS J:

It was the whole basis of the attack on it.

MR PARRY:

Yes, but I would submit, your Honour Justice Kós, that the warning needed the judicial imprimatur, which is the thrust, in my submission –

KÓS J:

There's nothing lurking about the inconsistency. The jury can work that one out themselves.

MR PARRY:

Yes, but I suppose the, and there's a comment in *CT*, that absent a direction from a judge all that is left for the jury are the competing submissions of counsel, and they can be of varying quality, and delivered with varying force. I, in my submission, say that what's required here is that there be some judicial imprimatur to the sort of permissible reasoning that can be brought to bear by a jury when assessing the weight to be attached to evidence, particularly hearsay evidence, because they haven't had a chance to assess demeanour and have it tested. But yes, I accept it's not –

KÓS J:

That seems to be a broader argument, but carry on.

MR PARRY:

Yes, well thank you. I mean what I'd say Sir is that – well section 122 is two tier. There's a requirement, what it contemplates is a warning for any manner of unreliability that presents, and then there's an additional onus, perhaps not an onus, but it's an additional step so far as the presumptively unreliable classes of evidence are concerned. I would submit that the sort of lurking species of unreliability require particular caution by the Court, but that doesn't preclude the need for judicial directions for classes of unreliability that are perhaps not as covert.

GLAZEBROOK J:

When you say lurking unreliability you're referring to the specific things that are outlined in section 122 as being, if you like, not necessarily presumptively unreliable, but where there could be major concerns about reliability. Have I understood that right?

MR PARRY:

Yes, that's right. So these, so Parliament has identified, and of course that reflects the common law, that these particular classes of evidence give rise to perhaps not quite presumptively, but in that ilk, concerns about reliability which warrants particular concern, and so far as hearsay is concerned, it's a classic example, I would submit.

GLAZEBROOK J:

And you also say that they are probably types of unreliability that juries may not be quite as aware of, as they would with just general reliability concerns.

MR PARRY:

Precisely. While I do make that submission, that's not to negate or undermine the more general proposition.

GLAZEBROOK J:

Of course.

MR PARRY:

Which was irrespective of how the reliability presents, and how cryptic that is, I think the judicial imprimatur as to what permissible reason, what reasoning is permissible so far as evidence is concerned, is properly the domain of a trial judge.

So going back to what needs to be said, in my submission, so far as the circumstances of Mr Maney's evidence, well not evidence, his hearsay statements are concerned, the internal inconsistency needs to be brought to bear and pointed out by the Judge. The implausibility that a letter drafted to a certain prisoner, purportedly at the time of a murder, could be sitting unsent and open on a kitchen table some two weeks after the fact, and so those are the ones that are immediately apparent just on the face of what was said at trial, but of course it goes further than that, having regard to our first ground of appeal in the sense that the jury also needed to be directed about the inconsistencies between the hearsay statements and the CCTV. Now it's unfortunate that wasn't brought to bear before the jury by counsel, but nonetheless sitting here in the appellate context I think it needs to be said that that needed to be pointed out to the jury, because it is a fine point. It's quite difficult to articulate it, and we're taking pains in our written submissions to make that point out.

Finally, to your Honour the Chief Justice's point, yes, the jury absolutely were required to be directed as to the fact of the hearsay declare, and Mr Maney having a conviction for perverting the course of justice, and what we've discovered overnight is that that instance of perverting the course of justice involved an attempt to draft a fraudulent piece of written evidence –

KÓS J:

Have we seen this? Have you got the sentencing notes?

MR PARRY:

We've got the sentencing notes, yes Sir.

KÓS J:

Have we got the sentencing notes?

MR PARRY:

No, they've not been provided as yet I don't think.

WINKELMANN CJ:

Is there some reason for that? Building suspense?

GLAZEBROOK J:

We've just got the pre-trial.

MR PARRY:

Yes, we located these this morning. It's just been, matters have been moving rather quickly, but my apologies, it ought to be before your Honours, and I can undertake to provide that to you.

WINKELMANN CJ:

Does the Crown have them?

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MR PARRY:

Yes, it's the Crown who provided it to counsel. So perhaps to round matters out, I've spoken to what was required so far as the hearsay character of Mr Maney's statements were concerned. I've spoken to what was required in our submission as to the circumstances in which those hearsay statements were made. What I haven't spoken to is what needed to be said so far as the motive to lie was concerned. Now in some respects the motive to lie is obvious. It's the defence case that Mr Maney is responsible for the death of Mr Rikihana and what follows from that is, of course, it is fairly obvious, I accept, that there is some motive inherent in making an exculpatory statement. But it goes further

than that and in that respect the judgment of this Court in *Jetson v R* [2023] NZSC 150 assists. I'll go to that passage and it's at 461 of the appellant bundle and this is a passage that discusses incentives to give false evidence in the context of cellmate confessions, which I accept this is not a case of cellmate confessions, but nonetheless I think it illustrates the point that a suspect in a murder investigation can expect or might expect, particularly if they've got some history as Mr Maney did with the criminal justice system, all manner of class or many classes of favourable treatment from the justice system that might accrue as a result of providing testimony. That, I submit, is something which is not going to be within the knowledge of a member of the public sitting on a jury. So there is something to be said for a judicial direction advising the jury as to what type of advantage might derive from giving evidence and that's true not only –

WINKELMANN CJ:

Well a judge couldn't really speculate too much in that regard could they in this sort of area? Could they just start freestyling on this point?

MR PARRY:

Well I think this is an archetypal instance of where the Judge has knowledge that the jury will not. I don't think there needs to be any point in evidence as to the specific advantages that Mr Maney was or was not or may or may not have been seeking but I think –

ELLEN FRANCE J:

Well, I mean, it was discussed. It was put to the police witnesses, wasn't it?

MR PARRY:

It was, yes.

WINKELMANN CJ:

But more broadly are you suggesting the Judge should go more broad than that about all of this systemic possibility of hidden advantage that people are seeking?

MR PARRY:

I think so, yes, because that is, for better or for worse, the practice of the justice system in this country that people do obtain favourable treatment at various stages of the justice process for having co-operated or giving evidence but that's not saying it's going to be apparent to members of the public sitting on a jury so I think – and I think a good illustration of that is the drugs that were found at Mr Maney's house when he was searched. The jury weren't to know the seriousness of that offence on –

ELLEN FRANCE J:

Well the witness, the police officer, was cross-examined about that in terms of quantity and so on and he said he did address, made the point that it was below the level for the presumption to apply so there was some evidence before the jury about that.

MR PARRY:

Yes, I accept, your Honour, that there was, however, again I think this is something that a trial judge, it falls on them to appropriately ensure that the jury understands what is at play, particularly so far as these "lurking classes of unreliability" are concerned.

GLAZEBROOK J:

Mr Jury's whole theory of the case was not that Mr Maney was trying to get some deal on his drugs dealing, it was that Mr Maney was actually the murderer and so I mean there's an obvious motive to lie there that the jury perhaps don't need reminding of but one wonders about these other warnings that might be given that are actually, in fact, inconsistent with that whole theory of the case.

MR PARRY:

I don't – well in my respectful submission, I wouldn't say this is inconsistent with that theory of the case. Your Honour is quite right that Mr Jury's theory of the case is that Rex Maney is responsible for the death of Mr Rikihana but the hearsay statements, which is what we're concerned with here, of Mr Maney were unreliable and the jury wasn't properly informed of that and they were

unreliable because they were hearsay. They were unreliable because he had a motive to lie in respect of the death of Mr Rikihana, they were unreliable because of the circumstances in which they were made and, finally, they were unreliable because Mr Maney could probably expect some type of favourable treatment in respect of the presumptively dealable quantities of class A drugs he was found with. In my respectful submission, that's not inconsistent with the theory. It goes straight to the heart of unreliability.

Really stepping back, my ultimate submission is this. There are serious problems with Mr Maney's hearsay statements, not least of which the fact of them being hearsay. Our position, so far as the first ground of appeal is concerned, is they ought not to have been admitted in the first place but having been admitted it was incumbent upon the trial judge to make sure the jury were properly informed as to how to treat that evidence. No such assistance was rendered to the jury and as a result, in my respectful submission, a miscarriage has occurred.

GLAZEBROOK J:

And what do you say, assuming that the Court isn't with you on admissibility and the statements are admissible, it might be not fair to ask you this, it might be Mr Stevenson would prefer to answer this, but assuming that the statements are admissible and the only thing that went wrong was this failure to warn, what do you say about the proviso in those circumstances?

MR PARRY:

Well I'm happy to address that and, of course, Mr Stevenson has already addressed that in part but the simple point is this. In my submission, Mr Maney's hearsay statements purport to be eye witness accounts of a murder. It simply isn't plausible to say that such prejudicial evidence could possibly be said to not create a risk of changing the outcome of the jury's determination.

GLAZEBROOK J:

But if it's probably admissible then it can change the outcome because it's evidence like any other evidence subject to the warnings, so if the only issue is whether there's been warning or not what do you say about the proviso?

MR PARRY:

Well I'd say that if a warning is not required here and the absence of a warning can't be said to give rise to a miscarriage of justice, then that risk seriously undermining the intent of section 122 –

WINKELMANN CJ:

Is what you're saying that all the reasons why it shouldn't be admitted if it is admitted carry through to the importance of the direction?

MR PARRY:

Yes, thank you, your Honour the Chief Justice. I won't say anything further on that point at the risk of saying it less articulately.

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WINKELMANN CJ:

I don't know it was that articulate, but anyway, I think it's what you're saying.

MR PARRY:

Thank you. As the Court pleases. So two final points. One, responding to your Honour, our submission is, irrespective of the position so far as the first ground of appeal is concerned, the failure to direct on the various ways in which Mr Maney's hearsay statements were unreliable, in and of itself is sufficient to create a miscarriage of justice, and in our respectful submission it can't be said that the failure to give that direction could not have affected the outcome of the jury's deliberations.

And this point isn't determinative, but just in response to the submission of my friends, that there was limited treatment given to the hearsay statements by the Crown in closing, and therefore the provision of a direction or not is of no

consequence. Respectfully, I disagree. It was spoken to in closing by the Crown. There was an attempt to rehabilitate, as my learned friend has said, and stepping back I think it's a difficult submission for the Crown to make that on one hand the Crown prosecutor can make an application over opposition to have this hearsay evidence adduced in support of the guilt of Mr Jury, but on the other hand, at the appellate stage, say, well, it wasn't that important so let's just disregard the failure to warn. I just don't think the Crown can have it both ways in my respectful submission.

But summing up, the last point I want to make is this. When we talk about what was required by way of a direction for the jury, is exemplified in the statement of Lord Bingham in *Grant v The State* [2007] 1 AC 1, before the Privy Council, that: "…*the judge should point out the potential risk* of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and *should invite the jury to scrutinise the evidence with particular care*." And that is precisely what didn't happen in this case.

A final point, that's replicated in the *New Zealand Bench Book*, that statement so far as scrutinising evidence with particular care.

WINKELMANN CJ:
Thank you.

MR PARRY:
Thank you. As the Court pleases.

MS JOHNSTON:
May it please the Court. I propose to start by just explaining to the Court how the Crown propose to use its time to respond.

WINKELMANN CJ:
We're not going to cut you short, so if you need longer after lunch, if that suits, that's fine.

MS JOHNSTON:

Thank you. We'll do our best to make our submissions focused, and obviously we'll be guided by the Court. I'm proposing to start by me briefly addressing the Court on some of the procedural history, an explaining to the Court why the detail of Mr Maney's conviction wasn't before the Court of Appeal, and wasn't before the Court until yesterday, and to offer the Crown's apology for that. I then propose to hand it over to Ms Hamill, who's going to address the hearsay admissibility matters, and returning to me to deal with section 122, and we'll do our best to avoid any overlap.

So just to start with the apology/explanation and some procedural history. The fact of Mr Maney's conviction was disclosed by the Crown. It was known, obviously, at the time that Justice Powell considered the admissibility of it, so that was what happened at the trial level, and it wasn't adduced at trial. In the appeal phase my learned friends have put before the Court that an email –

KÓS J:

That was partly because defence counsel made a mistake.

MS JOHNSTON:

Yes.

KÓS J:

That's quite an important factor, it's one of the reasons why it wasn't explored.

MS JOHNSTON:

Yes, yes, so Mr Nabney knew about it, and he made a conscious decision on instructions, says the Crown, not to adduce it, and I certainly accept that there was a misapprehension on his part, and certainly in terms of what happened at trial, and I'm jumping ahead a little here, but what happened at trial, it would have been reasonable, I think, for the Court to expect that counsel would have discussed that, and we have no record of that discussion as to whether, there

was any discussion between counsel as to whether Mr Nabney wanted the Crown to adduce it.

But in terms of where we've got to the embarrassing position that we're into now, my learned friends have obviously put before their request for disclosure, what happened as a result of that, is the police then looked on the police system, they couldn't find any summary of facts on NIA, requested the file from archives and the summary of facts could not be located on the file from archies, and at that point what should have happened obviously is searches on Westlaw were undertaken. I acknowledge that, as my learned friends have, and perhaps there was an assumption that it was a District Court offence of some time ago. That's not an excuse for not looking. The unfortunate other acknowledgement that I have to make is that it transpires that Crown counsel who had the file at the time, did find the decision, and file noted it existed, and then Ms Hamill and I took over the file, and we didn't find the file note. It was unfortunately saved to a bail file. It's no excuse, but again, that's what's happened.

WINKELMANN CJ:

It's all right Ms Johnston. We've got it now.

MS JOHNSTON:

Yes, and just to complete the explanation, when our learned friend's submissions were filed in the Court of Appeal, we then made the enquiry of police as to what's happened, and were simply told that they'd looked for it in our archives and couldn't find it, and that's the position that we communicated to the Court in our supplementary submissions. I think it's perhaps important, although not determinative, for the Court to know that prior to the Court of Appeal hearing there was an argument that Mr Maney's conviction was relevant to threshold admissibility – sorry, threshold reliability, relevant to the admission of hearsay, and it was in that context the enquiries were made. It was only in reply submissions in the Court of Appeal that this argument was made that the actual fact of the conviction should have been put before the jury, and a miscarriage of justice resulted from that. So that is not an excuse but it is an explanation for part of the tangled position here. So it was then at that point

that the Crown sought leave to file further submissions. The Crown sought an extended waiver, an extension of a waiver to ensure that Mr Nabney could respond, and that he provided the explanation which the Court has seen.

WINKELMANN CJ:

Mr Stevenson took us – because that's interesting in relation to this individual file – but Mr Stevenson took us to the approach in England in terms of Crown investigating and putting information before the Court that bears on that threshold enquiry. So just interested in looking forward what your thoughts are on that.

MS JOHNSTON:

Yes, and I'm sorry to pass the buck on that, but I will leave Ms Hamill to address that, she's best equipped to address that in terms of the admission of the hearsay, so that might be an appropriate moment to hand over to her, unless the Court have any questions about the Crown's procedural history that's left us in this position?

WINKELMANN CJ:

No, thank you for your candour Ms Johnston.

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MS HAMILL:

It might be the most practical to just pick up from where Ms Johnston was speaking before turning to the substantive ground of appeal concerning the hearsay admissibility. To an extent this topic is also relevant to whether a miscarriage of justice has occurred and the admission of the hearsay, and that's something that I was also intending to address as part of my submissions in that regard but just to address your Honours on the UK case law that my learned friend has addressed.

So the UK has a different statutory regime to New Zealand and one in which, through section 124 of the Criminal Justice Act, there requires or enables credibility information to be put before the Court that might usually only be used

in cross-examination of a live witness and the Courts there have interpreted it as giving the Crown a special obligation to investigate matters of credibility of a hearsay witness' evidence to be offered or statements rather to be offered in evidence. That duty or requirement to investigate is a requirement to investigate rather than a requirement –

GLAZEBROOK J:

You're not suggesting that's a statutory requirement to investigate or are you saying it is a statutory requirement to investigate?

MS HAMILL:

The Court's have interpreted it –

GLAZEBROOK J:

That's what I'd understood, yes.

MS HAMILL:

Yes, yes, that's right. So in the context of the Crown, it's been interpreted as requiring the Crown to make those investigations. In the context of defence offering hearsay evidence, it's been interpreted as the defence must give the Crown enough information to make its own enquiries.

WINKELMANN CJ:

So do you think, what do you think about the Crown's approach to New Zealand because the Crown is the person who's in charge of the information, most likely to be in charge of the information, have the best access to it, as that approach in the English Courts recognises, does place them in an important role, doesn't it, as Ministers of Justice to check out whether there's anything that bears on the credibility of witnesses whose statements are proposed to be admitted through the hearsay exception. Exception to the hearsay rule.

MS HAMILL:

Yes, and on the facts of this case that is what happened.

WINKELMANN CJ:

Exactly.

MS HAMILL:

Obviously what also happened was human error and it happened on behalf of everybody because everybody has, or lawyers have, access to the legal databases that contained the sentencing notes. On the files held by the police and therefore the prosecutor for the purposes of the Criminal Disclosure Act 2008 those were searched and no information was found.

KÓS J:

But what should have happened I think is really what the Chief Justice is getting at and I'm very interested in, what should have happened, what should the Crown have produced here?

MS HAMILL:

Well the Crown has disclosure obligations and those on the facts here were fulfilled in the sense that the Crown looked for information that only it held that it would be obliged to disclose to the defence and found none.

ELLEN FRANCE J:

Well let's assume that you found the sentencing notes, do you accept that the Crown should have made those available then to the Court?

MS HAMILL:

Yes.

ELLEN FRANCE J:

At the time?

MS HAMILL:

Yes, if there was material on the file that the Crown held that was relevant to this issue, the Crown could have disclosed it but there wasn’t and that's the facts that we have here but all parties could have accessed the legal databases.

It just didn't, it would seem, occur to anyone to do that. Now what I don't have is information of what enquiries were made at the trial level because this issue arose last night. So I can only speak in quite a limited way about that because, of course, here we are all dealing with it at appeal level, when it would appear from the record that what was before Justice Powell when he ruled on the admissibility of the hearsay statements was the fact of the conviction, and his Honour does not refer to the underlying facts of what happened in the conviction, and that is material that through the course of this appeal until last night we all essentially just assumed we didn't know. So that's where we are on the facts of this case.

WINKELMANN CJ:

What I'm really interested in is in future cases what approach we should be expecting of the Crown, and you may not want to deal with that on your feet, you might want to think about it over lunch, because we don't want to set obligations of the Crown so high that they're not achievable but there does seem to be some basic fairness at play here doesn't there and that's why in this case the Crown did take the step of disclosing that.

MS HAMILL:

Yes, well the Crown's disclosure, and your Honour I am grateful for the opportunity to reflect on this, so I don't want these to be the final words said because this is something that's been a bit of a moving feast I think, but the Crown has disclosure obligations that will give in a large part effect to this issue that is –

WINKELMANN CJ:

They don't extend to a search obligation though do they or do they?

MS HAMILL:

Well they don't. They would require the Crown to disclose anything that is relevant to an issue in the proceeding.

KÓS J:

I don't think it's a question of disclosure. You're seeking to advance hearsay evidence. I would have thought you had a duty to locate any reasonably accessible relevant information that affected the credibility of the maker of the statement. That might be stuff on your files, but it might not be. It might be stuff you have to look for. That's something to think about I think.

MS HAMILL:

Yes, I think that's something, thank you, your Honour, I think that is something that would be helpful to think about rather than attempt to offer a conclusive view.

WINKELMANN CJ:

And if you need more time on it that might also be appropriate because it seems to me it's quite an important thing. Well it's an important thing. I don't need to qualify it.

MS HAMILL:

Yes, thank you, your Honour. Now that is really just some brief points on the comparisons with UK case law. I'd like to revisit this point in the course of the substantive submissions unless your Honours would be assisted in addressing it further now bearing in mind, of course, that we will take the opportunity to come back to it. having further thought on the procedural matters that your Honours have put to us today about the extent to which the Crown had duties or obligations to put that information before the Court.

So I'd like now to turn to the ground of appeal concerning the admissibility of the hearsay that's ground 1 on which this Court granted leave and I'm mindful of the time. I will attempt not to stray into unnecessary matters but what I would like to take the Court through, in response to my learned friend's submissions, is first some of the evidential context in which this hearsay statement was offered and that includes looking at the Crown case and where it sits within the Crown case and also looking at the statements itself. Second, I intend to look at the existing legal position in terms of admissibility of hearsay and my learned

friend‘s proposition that it has been diluted and that this Court ought to depart from existing jurisprudence and the respondent’s position is that’s not necessary. I am also going to refer your Honours to the overseas jurisprudence as part of that discussion and finally look at the question of whether a miscarriage of justice occurred through the admission of Mr Maney’s hearsay statements.

Now because my learned friend spent some time dwelling on the facts of the case, I propose to do so now as briefly as I can but I'm going to address your Honours also on what the Crown says are some salient facts that contextualise his evidence. So the starting point in the narrative is around midnight just gone 30 January 2019 when Mr Jury arrived at the house of Trevor Rikihana and Lauren Eketone in Te Ngae Road. Now Ms Eketone said that she was asleep at the time, is awoken by Mr Jury when he arrived and she showed him through to Mr Rikihana. They went to the kitchen and they had a meal together and when they were there Ms Eketone heard arguing that started at first in a whispering tone and got louder and she could hear Mr Jury talking about a car, money, things that he had given Mr Rikihana and evidential references for this can be found in the additional materials at 68, 89 and 91.

Now Ms Eketone was also aware that the pair had earlier in the year travelled to Hamilton and that Mr Jury’s car had broken down while they're there and she surmised they were talking about that. Now the argument got louder and it moved outside to the back of the property and Ms Eketone said she heard a fight break out with Mr Rikihana saying: ”You don’t want to do this, you don’t want to do this” and moaning like he was getting punched. Ms Eketone heard them move around to the front of the property and she thought it sounded like Mr Rikihana might have been dragged and that reference is at page 100 of the additional materials.

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Now this account was corroborated by the forensic and pathology evidence that was also offered by the Crown. So the forensic evidence established that there was heavy staining with Mr Rikihana’s blood in the back lawn.

Forensic examination of the property also showed a trail of shoe prints and large areas of probable staining that continued around from the back of the property, around the right side of the house, round the side, and to the front of the house where Mr Jury's car had been parked, and again forensic evidence showed it was consistent with a person or an object being soaked in Mr Rikihana's blood being in that front yard with extensive staining in that front yard too.

Now this was also consistent with pathology evidence about tearing to Mr Rikihana's t-shirt, and abrasions to his elbows, upper back, and torso, that all were consistent with his body having been dragged. Now my learned friend referred to boot prints in the blood, and the proposition that some of the injuries inflicted on Mr Rikihana couldn't have been inflicted by bare feet. The pathology evidence as I understand it, and here I'm referring to the notes of evidence at 235-7, was that it would be easier to inflict injuries with boots, but not impossible with bare feet. But in any event, the evidence –

WINKELMANN CJ:

Sorry what was the page of the pathology evidence?

MS HAMILL:

Page 235 to 237.

WINKELMANN CJ:

Thank you.

MS HAMILL:

In any event, there was evidence that while there Mr Jury had removed items of clothing when he was at the car. He himself –

KÓS J:

You referred before to "shoe prints". What was the nature of the prints? Were they boots or shoes?

MS HAMILL:

I would have to double-check that your Honour. My notes say shoe prints but let me come back to that.

KÓS J:

Perhaps after lunch. Thank you.

MS HAMILL:

As I was saying, there's evidence that Mr Rikihana – sorry, Mr Jury removed his shirt while he was standing by the car. He himself said this in evidence at page 326, and while he was standing by the car he was also seen by Mr Robin Iorangi who gave evidence, whose nickname was Scoota, and it's often helpful to refer to the witnesses by their nicknames because that's how they're referred to in the evidence, and Scoota also said that he pulled his car up the driveway, interestingly enough at about one in the morning intending to return a lawnmower, and in the headlights of his car he could see boots sticking out of the back of a car at the top of a driveway, and he could see a man wearing no shirt standing beside the car.

WINKELMANN CJ:

So boots sticking out of the car is Mr Rikihana?

MS HAMILL:

Yes. That appears to be the inference. Also, and just jumping ahead a little in the narrative, but to address this idea about whether shoes were worn or boots were worn or not, Mr Jury's car was found burned out a day or two after the offending, or the homicide I should say.

KÓS J:

How is that connected to the boots?

MS HAMILL:

It addresses my learned friend's submission that Mr Jury was in bare feet and that there was essentially no evidence about him wearing shoes. The two

points are, Mr Jury did change his clothes while he was there, and a lot of evidence could have been destroyed when the car was burned out.

WINKELMANN CJ:
It's speculative, isn't it? The last point.

MS HAMILL:
It may not be your Honour, a slam-dunk point, but it's a point just in response to my learned friend's point.

ELLEN FRANCE J:
Sorry, is your main response to the submission relating to him being in bare feet, apart from what the pathologist said, that he changed his clothing?

MS HAMILL:
Yes, so there was evidence that he changed at least his shirt at that point in time.

Now Ms Johnston has pulled up for the Court on ClickShare on the screen the evidence around whether it would have been a shoe or a boot, and she's highlighting the point for your Honours.

WINKELMANN CJ:
So it's a shoe or a boot.

MS HAMILL:
Yes. So this is really just addressing the point of whether Mr Jury was in bare feet unequivocally that night or not. And also the point my learned friend made, which was if there are boot prints down the side of the house, there must have been another person there, not Mr Jury.

WINKELMANN CJ:
But it's shoe or boot prints?

MS HAMILL:

Yes. The point I'm attempting to make is just the fact that there were shoe or boot prints doesn't mean that Mr Jury himself was not wearing shoes or boots when matters moved down the side of the house.

KÓS J:

Mr Rikihana was wearing boots you've said to us.

MS HAMILL:

Yes. He was also wearing boots.

KÓS J:

So are they eliminated from these marks?

MS HAMILL:

Again, I would need to check the evidence on that your Honours. Now Ms Eketone said that as matters were moving round the front of the house, she could hear Mr Rikihana "moaning and groaning and suffering" in her words, and became fearful for the safety of herself and her young son, who was also at the property, so she went out the back to hide because they'd moved around the front of the house at this point. She said she could hear Mr Jury swearing, and it sounded like Mr Rikihana was being repeatedly kicked on the ground, and she could also see, she said, Mr Jury's long hair, standing by his car, but she couldn't see Mr Rikihana, which is why she thought he was on the ground, and the evidential references here again are the additional materials, page 54 and 101 to 102.

KÓS J:

In your submissions at 10.1 you say: "She described Mr Jury standing by his car, kicking Mr Rikihana." Is that correct?

MS HAMILL:

So that can perhaps be refined to what I just referred your Honours to, which is that she was standing – she could see Mr Rikihana – sorry, Mr Jury standing,

she could tell him by his hair, and she thought she could hear the sound of kicking, and she couldn't see Mr Rikihana.

KÓS J:
Right.

MS HAMILL:
So she assumed he was on the ground. So that was happening at the front of the house while she was at the back.

WINKELMANN CJ:
So what are the pages of the transcript sorry?

MS HAMILL:
Pages 54 and 101 to 102.

KÓS J:
Okay, so that's her police statement?

MS HAMILL:
Yes, those are in her two evidential video interviews.

KÓS J:
Which were played?

MS HAMILL:
Yes, they were played.

KÓS J:
Right.

MS HAMILL:

So that's her statement of what she saw, and it's at around that time, when they're at the front, that Scoota arrives and sees legs sticking out. So at that point Mr Rikihana has been placed in the back of the car.

Now as I said earlier, forensic evidence established that an object wet with Mr Rikihana's blood, or Mr Rikihana himself, had been on the ground for a period of time leaving visible bloodstaining over an extensive area at the front of the house too. So that's at the notes of evidence at page 260.

Now pathology evidence established that Mr Rikihana had sustained multiple blunt force injuries consistent with punching, stomping, or kicking, and that a hammer handle, or an implement like a hammer handle had been used causing lacerations to his head and shoulder. A hammer was found out the back of the property when the forensic examination was done.

The two mechanisms that could have caused death were a brain injury caused by blunt force trauma, an second pressure to Mr Rikihana's neck with accompanying carpet burn like marks, which in the evidence was said to be consistent with a rough surface, which the pathologist accepted could be like a towel used in a garrotting-type manner, and here the evidence, the evidential references are pages 212 to 213. Now the forensic examination of Mr Rikihana's property also located a red towel with Mr Rikihana's blood on it, consistent with this type of injury, and as I said, a hammer was found in the backyard too.

Now my learned friend referred to propositions put to Ms Eketone in cross-examination about a desire to cover up for Mr Maney who she knew, and the possibility that they'd been smoking drugs together and so on. These were rejected by Ms Eketone, and there was no other evidence, as I understand it, to support them. So that proposition really takes us nowhere at this point, but what we do have from Ms Eketone's evidence, which is, was that it was very closely matched with the forensic and pathology evidence about what happened at that scene.

1245

Now Mr Jury's evidence, when he gave it, was not consistent with that forensic and pathology evidence. He said that after he arrived he had a meal with Mr Rikihana and then Mr Maney arrived complaining that he'd been waiting, kept waiting and demanding money, and he and Mr Rikihana got into a very loud argument. They moved outside and Mr Rikihana struck both Mr Maney and Mr Jury with an object. The fighting continued while they were out there, but Mr Jury – out the back I should say – but Mr Jury convinced them both to take the fight away from the property, and he said that he carried Mr Rikihana to his car because he was struggling to walk and breathe, but he had no discernible injuries other than a nosebleed, and Mr Maney had no discernible injuries. He denied that he had dragged Mr Rikihana around the side of the house. Now the fact that Mr Iorangi, Scoota, arrived and saw Mr Jury standing at the –

KÓS J:

Sorry, when you say "he had no discernible injuries", that's Mr Rikihana?

MS HAMILL:

Sorry, that's Mr Maney had no discernible injuries. At most, Mr Rikihana had nosebleed.

KÓS J:

What about Mr Jury himself, who obviously did have some serious injuries?

MS HAMILL:

He had a, he said, an injury to his eye area where he had been struck.

KÓS J:

Right. Well I think he said it was, that he was struck so badly he lay on the ground unconscious.

MS HAMILL:

Yes, yes, the point here is Mr Rikihana's blood was the blood that was found out the back of the property, around the side, and at the front, and in large quantities, and what's not consistent with Mr Jury's account, and the forensics, is simply that. He doesn't account for there being a large and extensive and bloody fight in any of these locations, nor the prospect that Mr Rikihana was dragged in any way around to the front.

Now there's no dispute Scoota arrived and saw Mr Rikihana in the back of the car, Mr Jury said he had helped him there, and that Mr Jury's account was simply that Mr Maney wasn't in view at that time.

Now Ms Eketone said that she heard Mr Jury rush around the property after Mr Rikihana was put in the car, or at that point sorry, which she – and she saw him turn a light switch on and off in the process of looking around the property, and his blood was found on that light switch during a later forensic examination.

Then at 133, and that's established by CCTV footage, Mr Jury's car left the property and headed north, and my learned friend Mr Parry has put before you a diagram, which I commend him, that gives some of the locations that are referred to here, and it is a useful visual aid. So the car heads north, and that north direction is in the direction of Mr Rex Maney's house, which is at 1029 Te Ngae Road. 51 minutes later, at around 2.25 am, the car is picked up again heading south. It doesn't stop on this occasion at Mr Rikihana's property. It travels further south past of the CCTV points seen in this diagram, such as the Eastside Electrical, and Superior Storage, and it continues on in the direction generally speaking of Mr Nicholas Te Aonui's property.

KÓS J:

Where did Mr Jury live?

MS HAMILL:

Mr Jury did not live in Rotorua. He lived in Christchurch but he travelled a lot, I believe, and his next destination following Rotorua was Napier. So at 2.50 am,

or thereabouts, is when Mr Te Aonui said that a noise awoke him, he went outside, and he saw Mr Rikihana lying on the driveway at that point unresponsive. He took him to hospital where he was pronounced dead at 3.35 in the morning. So that's Mr Te Aonui's evidence, again relatively uncontroversial.

So 2.50 is when he was woken. At 2.53 is when Mr Jury's car returns past those same CCTV points, this time going back up Mr Rikihana's driveway at 2.54. Ms Eketone said that she had been there still at that point, she'd been packing up and tidying up, but when she heard the car coming back up she panicked and she fled the property, and she made the decision to flee to one that wasn't, a family member's address that wasn't associated with the Mongrel Mob at all, and again evidential references there are the additional materials 48 and 58.

Now after that Mr Jury's car is seen, again, picked up by the CCTV at the base of the driveway at 2.59 heading north again in the direction of Mr Maney's house. He drove south again at 3.25, this time leaving Rotorua, and when he arrived in Napier he sought treatment for a hammer injury to his eye, which he said he got around 2 am, and while receiving that treatment he received a text message from Mr Maney telling him that Mr Rikihana was dead, and as I said earlier in my submissions, Mr Jury's car was found burned out by police the next day.

KÓS J:

What was the evidence as to what other text messages Mr Maney had received from which he might have found that information out if he was not involved directly?

MS HAMILL:

On the exact point of text messages, I can't answer your Honour on my feet. I'd need to make an enquiry about that. There's some discussion of this in Mr Maney's statements themselves, to which I'll come.

KÓS J:

Thank you.

MS HAMILL:

So the point really of outlining these movements, is to show both what was the central part of the Crown case here, which was essentially Ms Eketone's evidence, which aligned very closely with the forensics and pathology evidence, and which was to some extent bolstered by the CCTV which depicts various independently established movements of Mr Jury's car, and Ms Eketone's evidence was that Mr Maney was not there. It was only Mr Rikihana and Mr Jury.

So where does Mr Maney's evidence then fit in to all this. It fits in in that window of time when Mr Jury's car was seen heading north, and then 51 minutes later heading south again, before Mr Rikihana's body was discovered by Mr Te Aonui. Now that's significant insofar as my learned friend in his written submissions has talked about this evidence as crucial evidence.

WINKELMANN CJ:

Can you just repeat that. Where does it fit in?

MS HAMILL:

It fits in as the CCTV footage would have it, around the time that Mr Rikihana was in the back of the car, Mr Jury's car, and he left at 1.33 and headed north in the direction of Mr Maney's home, and then returned again 51 minutes later heading south to Mr Te Aonui's, in the direction of Mr Te Aonui's house.

KÓS J:

This is what Mr Stevenson called "RM window 2"?

MS HAMILL:

Yes. Now I'm conscious that we're coming up to the lunch adjournment. What I'd like to do before we get there is just take your Honours briefly, and you've seen them already so I don't plan to dwell on them, but take your Honours back to Mr Maney's statements themselves, and if I can start by looking at the Supreme Court's casebook at page 311. So this is the letter that was found following a search warrant that was conducted on the 14th of February, that's two weeks after the murder, and I have written down for ease of reading the relevant passages of this letter. So I'll just read them out for the Court's benefit: "The brother Gooie" Mr Jury "the Rouge just turned up with Uncle Trev tied down in the back of his car. Uncle had attacked The Mighty Gooie Dog with a hammer in the face. He's tied up in the back of The Rogue Dog's car asking me what to do with the Dude. I don't want nothing to do wif this shit, got enough problems myself wif out this. Hear Uncle yelling please no more Mongrel and Gooie's just giving him heaps of kickings. His own fault thinking he can do that to a Mongrel that's been around forever."

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And then later at 313 he says: "The Dog's just leaving with Uncle tied down in his car going to Nini Rogues. Fuck nos what's gonna happen there. The Mongrel is all geared up prepared for whatever and whoever." So that's his letter as is found when the search warrant is conducted two weeks after the murder.

And then going to the notes of evidence at page 81 if I can is Mr Maney's statement that he gave to police after this letter was found and he was interviewed under caution, and I'm just going to take your Honours to some of the salient points which I'll identify for you, but they can be found over the course of 81, 82 and 83: "Gooie came and knocked on the door and we sat at the kitchen table. Gooie told me that he got" and apologies, your Honours, but I'm just reading out the record, "he got the cunt. I knew because after Trevor smashed him with the hammer Gooie had come to my place… Uncle had attacked him with a hammer he said he was going to go back and get" him. He came over twice. The first time he came for half an hour. Gooie said that Trevor

hit him with a hammer over something to do with a car. He came back after a time but Mr Maney couldn't establish how long. "He stayed outside and he asked for a rope." Mr Maney told him there was one in the washhouse. He went back to bed but he heard yelling. He assumed it was from Trevor but he didn't see him. He could hear "please no more." It sounded like Mr Jury was giving him heaps of kickings. He didn't go to help because he didn't want anything to do with it. Mr Te Aonui told him later that Trevor had died. Mr Te Aonui knew because he'd taken him to hospital.

There's some ambiguity there but what I'm looking to establish for your Honours, just before we wrap up for the break, is what it is that Mr Maney actually said here. So to some extent it's been pitched that Mr Maney said Mr Jury murdered Mr Rikihana but what Mr Maney actually says is an account of Mr Jury arriving at his house, telling Mr Maney that Mr Rikihana had hit him in the head with a hammer and that he was essentially acting in retribution for that and what, in particular, the letter suggests when it says: "His own fault for thinking that he can do that to a Mongrel that's been around forever" and that he says in both statements: "I don't want to be involved with" it doesn't give the absolute tenor that he thought that Mr Rikihana was dying at that point. What he's speaking about is a violent altercation between two senior Mongrel Mob members that he doesn't want anything to do with.

So his evidence is a part of the narrative of this case because it tells the story of what happened in that window when Mr Jury drove in the direction of Mr Maney's house and then he returned but it's not evidence that, of that moment, of the fatal beating that Lauren Eketone talks about for which there is this forensic and pathology evidence. So it's irrelevant and it's part of the narrative and that's the basis on which the Crown sought to admit it but when my learned friend styles it as the key plank, the crucial evidence of the Crown case, that is perhaps overstating it. It is, as I said, part of the narrative.

Now just to briefly address the inconsistencies my learned friend referred to in that second statement, it refers to these two visits that occurred on Mr Maney's second account. Mr Maney does not say: "Mr Jury said I am going back to

Mr Rikihana's house where I am going to get him." He says: "I am going to go back and get him" and that he'd already been hit by a hammer and he says he came back at a time, he doesn't know when, he couldn't tell the length of time between the two visits. Now my learned friend says that the only available inference from that is that Mr Maney's second statement is he left, he drove south past all these CCTV cameras and he came back again and the CCTV shows that he didn't do that and therefore that's an irreconcilable inconsistency. There's ambiguity there about exactly what happened between these two visits and whether Mr Rikihana was already in the car or not or exactly where Mr Jury went.

WINKELMANN CJ:

That's a hard one though, isn't it, to make the case for since he's going back to get him. If he's already there with him, why is he going back to get him?

MS HAMILL:

Well never – at no point was he taken out of the car. Mr Rikihana remains in the back of the car and Mr Jury is the one who comes into the house and then leaves again.

WINKELMANN CJ:

But they are different accounts.

GLAZEBROOK J:

But why does he have to go back and get him if he's already in the car?

MS HAMILL:

Well I mean the key point here is there's an ambiguity because he does not say: "I'm going back to his house." That's not the inescapable conclusion on Mr Maney's statement but nor is that really what the Crown offered the evidence for. The Crown offered the – the relevance of the Crown case was that Mr Jury at some point showed up with Mr Rikihana in the back of his car and –

WINKELMANN CJ:

So what's said against you is that these are inconsistent. They are because they're different narratives. I mean you could say as an ambiguity about whether he's there, Mr Rikihana, but you might have some difficulty with it. But the point is that they're different accounts of events and irrespective of why, what the Crown is offering it for, the point that's being said against you is that these are indicia of unreliability in terms of the statutory test.

MS HAMILL:

Yes, yes, and I will after the break address your Honours more on that but just to make a point about the nature of the statements and I'll conclude on this before the lunch adjournment. Mr Maney didn't say that Colonel Mustard did it in the parlour with the lead piping and then a second statement Ms Scarlet did it in the library with the candlestick. These are not two completely different accounts like that. These are accounts of Mr Maney said Mr Jury showed up with Mr Rikihana in the back of his car. There is some ambiguity around the circumstances of exactly what happened when he showed up and how many times he came but the fundamental core narrative remains the same and there is a consistency in that. For threshold reliability purposes, the Crown says that that was enough for it to be admissible and for the jury to consider what weight it wished to place on it and that's something that I would like to come back to for your Honours after the lunch adjournment.

WINKELMANN CJ:

Thank you. We'll take the lunch adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.16 PM

MS HAMILL:

Your Honours, I'm going to move now to talk about the law, the hearsay itself, and it's application here, and in that sense I'm going to address both the approach to date that the Courts have taken to hearsay and the approach

advocated for by my learned friend in terms of modifying the requirement, the reliability requirement in particular, and my learned friend's contention that the wording of the statute has been effectively diluted.

So just to start with the wording of the statute, section 18(1)(a) refers in general terms to the circumstances relating to the statement providing a reasonable assurance that the statement is reliable, and of course as your Honours know those circumstances are set out in a non-exhaustive list in section 16 of the statute, and the law as it has been developed in terms of the approach the Courts have taken in assessing this are set out in both parties' submissions.

In the Crown's submissions starting at paragraph 27 of the submissions, so in the interests of time I'm not going to recite that in detail, but as I understand my learned friend one of the issues taken in this appeal is with the Court's characterisation, typically in the cases that have come before, of what reliability means at this threshold level of determining admissibility, and here just referring to the Crown's paragraph 29 the general definition of "threshold reliability" in this country has been described as simply meaning the evidence is reliable enough for the fact-finder to consider and draw conclusions as to its weight.

Like I said, my learned friend argued that this was an impermissible dilution of the statutory wording and purpose, and it's important to bear in mind the context of this, which is set out and quoted at paragraph 27 of the Crown submissions, which is that in the context of admissibility the Judge is a gatekeeper. The Judge is not determining ultimate reliability, and as quoted in that paragraph the Courts have approached this exercise as "…quite different from the jury's role in assessing the credibility of witnesses and the reliability of evidence given at trial." The Courts have described this as "…distinct constitutional functions… must not be conflated."

WINKELMANN CJ:

So that's sort of like the language of section 7, isn't it?

MS HAMILL:

Yes. Ah…

WINKELMANN CJ:

Well I'm just thinking about, is it, it's not just like section 7, is it, which Justice Moore's suggestion might have suggested that it's a low threshold. The Court has to be satisfied about reliability, doesn't it?

GLAZEBROOK J:

Reasonable assurance.

MS HAMILL:

Yes.

WINKELMANN CJ:

Reasonable assurance for reliability.

MS HAMILL:

Yes, that's right. So the Court does have to reach that view to admit the evidence under section 18, and to do that the Court has characterised its exercise as determining that the evidence is reliable enough for the fact-finder to consider and draw conclusions as to its weight, and my learned friend says that is essentially to dilute a standard at this early threshold stage. But my response to that is, it is recognition of the different roles that the Court takes, as opposed to the fact-finder, and admitting the evidence in the first place. And again, the rationale for this distinction being observed is set out in paragraphs 27 through to 29 of the Crown submissions.

1420

KÓS J:

I had asked Mr Stevenson to indicate the highest standard at the outset of the Evidence Act. He referred to *Manase* in vain but those decisions both predated the Evidence Act so they're not really directly relevant –

MS HAMILL:

No.

KÓS J:

– as setting a post-2006 standard.

MS HAMILL:

Yes, Sir, and in terms of what the Evidence Act set out to achieve, perhaps I could take your Honours now to, just in answer to that, to tab 35 of the respondent's bundle which is the Law Commission Report, the first 1999 report, that introduced the Evidence Act as it came to be. And just starting with paragraph 48 which is found on page 795 the Commission said that: "Consistent with the aims of reforming the law so as to increase the admissibility of relevant and reliable evidence, the Law Commission recommends rules that will provide a principled and much simplified approach to hearsay evidence."

Now earlier in the same report just up at paragraph 45, the Court also described the existing problem that it was seeking to address which was to quote Professor Friedman that: "The" existing rules "excludes much evidence that is helpful to the truth determining process; it fails to identify that hearsay which should be excluded to protect fundamental rights of a criminal defendant" and continues to list a number of ways that essentially mandate the radical transformation, as he says it, of hearsay law reform. So this is the foundation on which the Evidence Act came into being. So pre the Evidence Act cases are only going to have so much to say about the approach that should be taken in response to the statutory wording.

WINKELMANN CJ:

Well is your point though that the values that the old hearsay rule were said to be directed to, which is what the values that Justice Richardson is referring to in that earlier judgment, which is not *Manase*, I can't recall it, are you saying that those values are no longer informing the law as proposed by the Law Commission? Because they're pointing, you know, there were technical and quite frankly hard to reply rules and they're saying let's just drive through

that and get to the situation where there is a coherent basis for assessing the admissibility and Justice Richardson spoke in that judgment of what the rule was trying to prevent, what prejudice the rule was trying to prevent. Are you saying that prejudice, that concern remains, or has been shrunk?

MS HAMILL:

I don't have that judgment in front of me but will attempt to answer your Honour. The underlying concern –

WINKELMANN CJ:

What is the name of the judgment, does anyone…

ELLEN FRANCE J:

I think that is *Manase*, isn't it?

GLAZEBROOK J:

Manase.

WINKELMANN CJ:

Is it *Manase*? No.

ELLEN FRANCE J:

I thought…

GLAZEBROOK J:

I think we were referred to about three or four –

WINKELMANN CJ:

It was the one before. It was the first of the judgment –

GLAZEBROOK J:

– but Justice Richardson was in *Manase*.

KÓS J:

I don't think it was *Manase*.

WINKELMANN CJ:

It wasn't. It was the one before *Manase*.

KÓS J:

It was before *Manase*.

GLAZEBROOK J:

Well just to put it this way, cross-examination or the ability to cross-examine a witness is one of the fundamental protections and what's been put to you by, or what's been indicated by your friend, is that it is only when cross-examination is unlikely to result in anything different that the evidence can be admitted for example.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

So one of the fundamental protections in a fair trial is to be able to challenge the evidence by cross-examination and if admitting hearsay, apart from the sort of thing that's been talked about in paragraph 45 where secondary evidence would do, you know having to call a bank manager to say these records are whatever, rather than just putting the records in –

WINKELMANN CJ:

So it was *Hughes* and I see counsel –

GLAZEBROOK J:

– as the example of what might be being talked about at paragraph 45.

MS HAMILL:

Certainly a defendant's right to a fair trial remains a fundamental tenet of the Evidence Act and that's recognised in the Purpose provision in section 6 of the Evidence Act. It's also given effect in the context of hearsay by section 8 which essentially operates as a further step through which hearsay evidence is

scrutinised before it's admitted. So first there's the section 18 reliability inquiry and following on from that the Court also considers whether or not the admissibility of the hearsay statements would impact on the defendant's right to present an effective defence, or would unfairly prejudice the proceeding which also, if the evidence is offered by, the statements are offered by the defendant, goes to fairness to the Crown. So certainly the Evidence Act recognises and gives effect to fundamental rights but what the law reform was geared towards acknowledging was that the way in which this had been dealt with through the evolution of common law rules often simply resulted in evidence that was useful for the fact-finder to reach a determination of the truth, or of the facts, was getting convoluted and often missed through the way in which the rules had developed and were being applied and the Evidence Act was in part geared to meet this issue.

KÓS J:

But what it did do was recalculate the balance between admission and direction, so to the extent that the threshold for admission is adjusted and perhaps adjusted downwards, it must follow that the emphasis on proper direction and warning increases assuming the underlying concerns remain the same.

MS HAMILL:

Yes, the Evidence Act recognises that sometimes evidence that may be unreliable may be before the jury, and that's what section 122 is designed to deal with, which is also to say that the notion that evidence must be almost certainly reliable, to use my learned friend's words, sits at odds with that recognition within the Evidence Act.

MILLER J:

Are you going to take us to paragraph 52 of the Law Commission Report?

WINKELMANN CJ:

We're just trying to find that part of *Hughes*, aren't we? Mr Stevenson might –

KÓS J:

It's page 9 I think if I remember rightly.

MR STEVENSON KC:

Page 9, yes, page 51 it is of the paginated bundle, the appellant's bundle, page 9 of the judgment.

WINKELMANN CJ:

Of your bundle, yes. It doesn't have pages on it, does it, the paginated –

MR STEVENSON KC:

The bottom right.

WINKELMANN CJ:

Does it? 51.

MR STEVENSON KC:

Of the appellant's bundle.

WINKELMANN CJ:

Right, so that's page 9 of this document.

MS HAMILL:

Is there anything in particular that your Honours would like me to address in *Hughes*?

WINKELMANN CJ:

No, no. It's just you said you didn't know. So it was, so the point is I mean are those values, have those values been diluted? I suspect not. Well possibly. Certainly it allows – the evidence comes in when a person cannot be tested. The question is what's the principle that should govern when it should come in? So should it be relevant that the defendant will be prejudiced by a lack of ability to cross-examine if there are points to be made but they can't cross-examine, how does that bear upon the decision?

MS HAMILL:

Well the appellate courts grappling with that to date have tended to look at it through the section 8 lens and have approached it as can this evidence be effectively tested, and the question there then becomes, is there enough material before the jury for the issues that might arise in the particular facts of the case to be explored and one example of that is inconsistencies. If there are inconsistencies within statements that the witness has made elsewhere, are these before the jury in a manner that allows the issues to be tested and here, of course, we had Mr Maney's first statement in which he told the police he didn't know anything about what happened and that wasn't before the jury for the truth of its contents but it was there as context of all the things that he had said relevant to these events.

1430

ELLEN FRANCE J:

I appreciate it was in the context of, determining unavailability, but in *L v R* the Court talked about the underlying purpose of that enquiry being to mitigate the risks seen to be associated with hearsay and the importance in our adversarial system of ensuring evidence can be tested by cross-examination, and I can't, it's hard to see why at least that's not true also in terms of the current enquiry.

MS HAMILL:

Yes, no, it's had to see how that's not a principle that applies as an overarching principle to the enquiry. That's why there is an exception to the presumption against hearsay in the way that the rules work, but the way that the section 18 enquiry works in conjunction with section 8 is to give effect to these competing interests, including the defence ability to offer an effective defence.

WINKELMANN CJ:

So in this case the Crown says, well look, the central allegation is that it was – the central thing that is being recorded here is, by the witness, is, Mr Maney, is that it was Mr Jury who committed the – who was violent to Mr Rikihana. So that's, there maybe differences but it's consistent within the

last two in any case. But the defence might say, well yes, okay, fine. That's just the kind of submission the Crown will make and we can't test through cross-examination and show how remarkable a difference that is, how profound that should be in the jury's mind when they come to assess that evidence, because there's a world of difference between something flat on a page and a person in a witness box. So how do you deal with that in that assessment?

MS HAMILL:

Well what the, again the appellate courts have tended to say, is that is an inherent issue for the admission of hearsay evidence in all cases. That if the evidence is admitted there won't be cross-examination. So the exception to the hearsay rule that exists in section 18 essentially acknowledges that yes, evidence will sometimes be admissible without the ability to cross-examine the witness. That is where the section 8 analysis then comes in, is this unfairly prejudicial. Is the defendant capable of offering an effective defence notwithstanding the absence of cross-examination. Then the enquiry becomes how can this, how can the issues that arise on this evidence be properly tested.

WINKELMANN CJ:

Or another way of looking at the section is that you should be pretty sure that the statement is reliable before you let it in, as opposed to just saying, well, it's there, there's inconsistencies between it, and let the jury look at that, they can see the inconsistencies.

MS HAMILL:

Well if the issue is to safeguard the defendant's rights to a fair trial in the context of the Crown offering hearsay evidence, then it's got to be an enquiry that takes that into account. How can a defence offer an effective defence in response to this evidence being admitted. If the Judge is concerned really with pre-empting the jury's decision about whether it is reliable or not, it almost cuts that out of the equation. The emphasis becomes the Judge's assessment of whether or not it's reliable and the jury are likely to place weight on it, rather than looking at whether the defence –

GLAZEBROOK J:

That's what section 18 says. There has to be a reasonable assurance of reliability.

MS HAMILL:

Yes, and certainly there has to be that enquiry, but the question here is that what, to what level.

GLAZEBROOK J:

But if the enquiry only says, well, if a jury could possibly rely on some of it, that's enough. Is that a reasonable assurance of reliability?

MS HAMILL:

Well that is, of course, one of the issues here, is the Judge does, of course, have to reach a certain threshold to determine that it is admissible, and that threshold is distinct from the jury's fundamental role of deciding that ultimately is reliable.

GLAZEBROOK J:

That doesn't tell me what the threshold should be.

MS HAMILL:

No, it doesn't, but it does –

GLAZEBROOK J:

It tells me it's distinct, but it doesn't tell me what reasonable assurance means.

MS HAMILL:

Indeed. That proposition alone doesn't illuminate this point, but what it does say is there are –

GLAZEBROOK J:

So what do you say it is?

MS HAMILL:

There are two different categories and the question – essentially my, and I'm attempting to unpack this with your Honour, so bear with me if I've not directly answered the point, but if the answer is, well it must almost certainly be reliable before it's admitted, then (a) that appears to conflate the roles of the jury and the Judge, because it's essentially requiring of the Judge the same exercise the jury is supposed to undergo and, (b) it cuts across sections such as section 122 in the Evidence Act, which reflect occasions on which there maybe evidence that maybe potentially unreliable before the jury on which directions are required. So it's a matter of basic principle of the approach to section 18. The way it works does not appear to require that kind of standard before the evidence can be admitted. Your Honour is looking at me very…

GLAZEBROOK J:

Well I just want to know what you say the standard is. You say it's not that but…

KÓS J:

Well I was going to suggest, I think what you say, you've pinned your colours to paragraph 29 of your written submissions, which is the observation in *Rongo v R* [2023] NZCA 626 that threshold reliability simply means the evidence is reliable enough for the fact-finder to consider and draw conclusions as to its weight. I took that to be your statement of the standard.

MS HAMILL:

Yes your Honour. So the Crown supports the existing formulation, and doesn't say that it's, says it's not to dilute because it, well for a number of reasons, but one of which is the further section 8 enquiry which does look at how this evidence can be presented to the jury in a way that it can be properly tested.

WINKELMANN CJ:

The difficulty with the paragraph 29 formulation is it seems inconsistent with the statutory test because if there are indications of its unreliability it could still come

in under your test in 29. I assume you say that because there are indications of unreliability here but you say it still comes in under your approach in 29?

MS HAMILL:

Yes well that feeds into the broader approach that the Courts have taken to actually making this assessment, which as my learned friend has raised issue with, includes not only looking at the circumstances as listed in section 16 in a very literal sense, but also looking at the broader circumstances such as corroborating evidence, or evidence that, to put it the other way, does not corroborate the statement. Now that is very much, of course, a feature of my learned friend's submission. My learned friend has pointed to a number of aspects of the evidence extraneous to Mr Maney's statement that he says undercut it or do not support it, the most specific example that has been raised today is the CCTV footage. He asks the Court to look at the footage and to say, well that shows there cannot have been two visits in this period of time. Now for my learned friend to have recourse to that, suggests that there is value from both sides in looking at the extraneous evidence, including corroboration but also including those matters that count against the overall reliability of the statement. It's difficult to see how it could be had only one way, that is to look at only the matters that count against the statement –

WINKELMANN CJ:

Well he could say he was simply making the point, in fairness to him Ms Hamill, he was simply making the point that if he you're going to say, well look, the narrative facts support this evidence, you could also say the narrative facts don't. So he did make the point that looking at the surrounding facts is dangerous. But I take your point. Do, sauce for the, anyway, that one, sauce for the goose, et cetera.

MS HAMILL:

Yes, and the point can also be made, if the defence were offering a statement in evidence in support of the defence case, how would it then work if the principle was, well we'll only look at things that count against the reliability of this, and we won't look at broader circumstances that corroborate it.

Either there's got to be these two dual rules that operate for the defence and the Crown, which are not given effect to at all in the statutory wording of the Evidence Act, it has one rule and that one rule appears to apply equally to both the defence and the Crown, or the Court looks at the evidence in the round.

WINKELMANN CJ:

How, I think Mr Stevenson is prepared to admit, agree that you can look at some facts, you just have to be very careful about what it is. You presumably don't say you can look at everything, so where would you put the threshold or draw the line?

MS HAMILL:

Well as I understand Mr Stevenson was making the point that some evidence wont actually corroborate, it might go both ways, and that there's essentially a neutralising fact. Some evidence maybe particularly contentious and subject to cross-examination was I think another point he made. So drawing conclusions exactly about the weight or the significance of it at an early stage maybe difficult to do and apply to the evidence, the hearsay statements to assess. Those are, in the context of this case, relatively theoretical points. The evidence that was being, Mr Maney's statement was being compared to was in large part forensic and pathology evidence, CCTV evidence, and Ms Eketone's evidence. Now Ms Eketone was obviously subject to cross-examination and her credibility was not wholly accepted by the defence, but her evidence was very much supported by the forensic and pathology evidence, so it wasn't a statement just hanging out there with nothing else attached to it.

1440

Mr Maney said in his statement to the police following on from that search warrant that when Mr Jury arrived he had said that the argument, the blow with the hammer, had been precipitated by something to do with a car and, of course, you'll recall that Ms Eketone made reference to a car being broken down as part of the underlying argument between Mr Jury and Mr Rikihana.

WINKELMANN CJ:

And what Mr Stevenson would say to that is that it's in the nature of people who are deceptive and given to pervert the course of justice that they go and collect relevant facts and make their statements credible.

MS HAMILL:

Yes, although the idea that Mr Maney had gone away and interrogated Ms Eketone for her statement is at this point speculative. We don't have any evidence to suggest that happened.

KÓS J:

If Mr Maney was trying to leave a trail to avoid attention on him doing it in three different ways is probably not the best calculated method. I'm really interested in the legislative history here and Justice Miller earlier on was trying to take you to paragraph 52 of the Law Commission Report. I would like to track back to that when you're ready to.

MS HAMILL:

Yes, certainly. I'll just finish –

GLAZEBROOK J:

I'd also, when you're ready, like you to explain how reasonable assurance fits the tests that you say at paragraph 29 because I can understand that you say it's not absolute certainty because reasonable assurance isn't absolute certainty but I'm not sure it's also just admissible, which is what paragraph 29 would suggest, ie, relevant so that a jury could draw a conclusion from it. It can't just be relevance.

MS HAMILL:

Yes. I'll just finish the point that I was making earlier about Mr Maney's statement and then I'll come back and please tell me if I don't come back fully.

In terms of Mr Maney's statement, he also said that Mr Jury had asked him for some rope when he arrived and in his letter he said that Mr Rikihana was tied

down in the back of his car. Pathology evidence indicated that there had been some kind of ties to Mr Rikihana's wrists so that is another aspect of the evidence that is corroborated by pathology in some respect. Now I raise these matters just as again to indicate where Mr Maney's evidence or statements sit against the rest of the case. So this is not a case in which the – in response to my learned friend's point that well you can't rely on evidence that's going to be tested and may actually all crumble and fall away as mutually reinforcing of hearsay statements –

WINKELMANN CJ:

I have real problems with what you're suggesting though because if Mr Maney was a person who was implicated in it then he would know these things, so anyone would accept I think that you'd have to be careful about what you looked to for corroboration because I mean we've learnt that from the prison informant cases you have to be very careful. So there must be some need for caution as to what's acceptable. In cases that are difficult and circumstantial, and I'm not saying this is one, but if you get – you can end up with a confection of threads that crumble very easily under a little bit of scrutiny. It's kind of a miscarriage of justice risk, I suppose.

MS HAMILL:

Yes, and in those cases maybe that warrants not admitting the evidence but that is not this case.

WINKELMANN CJ:

But the test would still be the same.

KÓS J:

Or enhancing the directions.

MS HAMILL:

Yes. So –

WINKELMANN CJ:

But the test for admissibility would still be the same in either case, wouldn't it?

MS HAMILL:

Yes, but the result might be different so the test for admissibility would be the same but what you would look at is well as your Honour put it, or with this really becomes these diffuse threads that don't really tell us anything, or in a case like this you've got an admissibility ruling that's being made before the defence have disclosed their defence because, of course, they're entitled not to put the full details of their defence out there at the pre-trial stage, and what you're looking at is whether this evidence should be admitted as relevant to the Crown case, and the Crown case relied on the evidence of Ms Eketone and the forensic evidence and so on, the pathology to establish that a beating happened at Mr Rikihana's home. The other matter, of course, that was before the Court for consideration –

WINKELMANN CJ:

We're sort of mixing up this case and the general approach so I think we're just interested in you telling us about the general approach. So I think Justice Miller was taking you to that paragraph in the Law Commission Report.

MS HAMILL:

Let's go there now. So as I understand this paragraph was referring to is again the ability of the jury to test the evidence where criteria of necessity and reliability are met. Those are the criteria or that is the approach that is followed or has been followed to date by both looking at the section 18 criteria and also the section 8 analysis.

WINKELMANN CJ:

Can we scroll down to the next paragraph.

GLAZEBROOK J:

55 gives some indication of what, paragraph 55 there of what they're looking at in terms of reliability.

MS HAMILL:

Yes. There's another paragraph, it's quoted in my learned friend's submissions, I'll just attempt to find, maybe I don't have it. No, I'm thinking of a different report.

GLAZEBROOK J:

There were two earlier reports that went through all of this.

MS HAMILL:

Yes. I'll attempt to address a related point and, of course, your Honours please bring me back if I'm straying from what you'd like me to answer on this but I'd like to walk through what it means to really look at really nothing more than the circumstances in section 16 and those are quite, as I said, it's a non-exhaustive list, the section 16 list, but it's an approach that, if it was applied, quite literally doesn't necessarily mean that it would narrow the pool of evidence that's admitted through section 18.

So I want to take your Honours to a case called *Adams* which is in the appellant's bundle of authorities and I won't necessarily walk your Honours through it but if it's up it may assist if we want to look at particular paragraphs.

WINKELMANN CJ:

So to just give you some indication, I do have, I start to run into significant timing troubles myself at 3.30 today so it's now 2.48.

MS HAMILL:

Yes, fair enough, your Honour. I'll be as brief as I possibly can.

WINKELMANN CJ:

Yes, okay.

MS HAMILL:

And in that way I'm not going to walk you through *Adams* because I think that would just add to the timing issues.

WINKELMANN CJ:

No, but interested to see the case though.

MS HAMILL:

Adams is a case in which the defendant was offering hearsay evidence of a deceased witness or a hearsay statement of a deceased witness through another person. So he was accused of manufacturing methamphetamine and a mutual friend while in prison had spoken to a co-accused who said: "Yes, it was mostly me that did it" and that co-accused then died so it was a hearsay statement that was being offered through this third party. There had been some modifications to the statement over the time before it was formalised in a written down statement for the purposes of admissibility so there were some consistencies but the approach that the Court took in this case was really to simply look at the factors in section 16, the circumstances there, and it looked at, for example, the fact that the statement had been written down. So the witness who was going to give the hearsay statement, his statement, had been written down and given it some formality and this is at paragraph 36 of the judgment. It observed that the statement maker had a criminal record that could be adduced to go to veracity of the Crown wished to attack veracity that way, and it says: "As to the accuracy of Mr Grant's observation, it could be said that, as the person alleged to have undertaken the manufacture of methamphetamine, Mr Grant was in a position to comment on whether the appellant also participated…". So Mr Grant being the deceased hearsay statement maker, and if he had made the statement, and if so it was true, all matters for the jury to decide.

1450

In my submission that narrow approach enabled this statement to be let in without any broader consideration of the circumstances, so quite a literally application that could equally apply here to say, oh well, Mr Maney gave these statements that are made very soon after the event. One of them was written down and he claimed that it was on the night of the actual homicide, and he was in a good position, in terms of accuracy, to describe what he saw because he says that Mr Jury came to his house, and he spoke to him, and he knew him, and the rest is for the jury to decide. So if you take a very strict down approach

like that it doesn't necessarily mean that the Court is going to find, apply a more rigorous or onus standard to admit evidence.

What the Court in *Adams* then did is look at section 8 and go through whether the evidence could be tested and whether there'd be any unfairness on the Crown. Now like I said, the difficulty with removing corroboration or broader circumstances from the analysis is that it cuts both ways. It means that the Court doesn't necessarily consider credibility factors against the hearsay statement maker, just as much as it considers ones that go towards it.

Now my learned friend has approached the overseas jurisprudence I want to briefly address your Honours about that too, as bolstering the case for a higher threshold to be applied in New Zealand. But the difficulty with applying overseas jurisdictions is that they all take in their own approach to how to approach hearsay, bearing in mind that there have been reforms in countries that give slightly different weight to different parts of the analysis with hearsay evidence. So in Canada, as my learned friend went through, there is a very high standard imposed typically to the admission of hearsay evidence, which is that it must be inherently trustworthy. Now that was most recently commented upon in *Bradshaw*, the Supreme Court's decision in *Bradshaw*, but there was also a minority decision in *Bradshaw* of Justice Moldaver who said, essentially sounded a note of caution about how close that's getting to encroaching on certainty, a certainty requirement that is essentially a fundamentally, a jury's, a jury role. But again the Canadian approach developed through case law can only tell us so much when we're working with a statute in New Zealand that was the subject of considerable law reform.

Australia is another example of limited application. Australia has its own statute, and in that statute it retains a list of exceptions that are more similar to the old common law approach. So just to pull up the Australian section 65, which is in the respondent's bundle. There the Court has at subsection (2) a list of criteria in which hearsay can be admitted. Includes when the statement maker was under a duty to make that representation. (b) is essentially a res gestae exception. (c) is the exception my learned friends have taken

your Honours to in their submissions, and (d) is a further exception with particular criteria.

Again, this just simply reflects quite a different approach to hearsay than we have in our own statute, but one of the cases that is referred to by my learned friends, and again I'm not going to take your Honours through it in detail given the time, it is a case called *Conway* and in that case the appellant had been accused of essentially organising the execution of his wife through a heroin overdose being administered forcibly, and part of the underlying evidence was that he had attempted to put heroin in her coffee to make it look like she was a drug user in the leadup to that matter, and she had given statements to neighbours saying things like “I think I've been drugged” that were relatively close in time to the actual drugging. The Court admitted the evidence, said it was admissible under the res gestae exception, but decided it was not admissible under this subsection (c) highly probable representation is reliable requirement, but because it was admissible under (b), there was no problem, and that just really reflects again one of the issues that our law reform attempted to address, which was to rationalise and make a coherent system rather than having these kind of graded exceptions. So Australia again I submit doesn’t take us very far.

The UK is the most similar in its approach and its objective, but again it’s statutory wording is quite different from New Zealand’s. So the UK reform was given effect to around the same time as New Zealand, and again in the interests of time I won’t take your Honours through some of those, the statements of principle that underline the reform, but they were, in broad terms, quite similar to New Zealand’s objectives.

In the UK, as I understand it, the evidence of a certain character will fit into a category of exclusion from the general rule against admission of hearsay, and that includes deceased’s evidence, a deceased’s statement, deceased witness’ statement, who could have given evidence if alive, and who is identified before the Court. So that becomes admissible, or an exception to the rule against admissibility, but then the Court goes through a series of enquiries that are very

similar to the enquiries in New Zealand under section 8. So it looks at a number of factors that would go to the broader reliability assessment including often considering corroboration and whether the evidence can be tested, and in that respect I will take your Honours briefly to the case of *Riat*, which I think is in the appellant's bundle at paragraph 25. So there the Court makes that point that the "hearsay must not be simply be 'nodded through'", and at the end of the paragraph it says: "It follows that considerations such as the circumstances of the making of the hearsay statement, the interest or disinterest of the maker, the existence of supporting evidence, what is known about the reliability of the maker and the means of testing such reliability are all directly material at this point, as is any other relevant circumstance."

And what the Court also does in *Riat* is address a series of fact scenarios as it's dealing with multiple appeals where it takes into account the broader circumstances of a case including corroborative evidence, and making its own assessment of whether reliability has been established. So the UK is, in my submission, an example of a very similar approach to that taken in New Zealand. Corroboration is not a mandatory consideration but it is a factor that can be taken into account.

So where I'm taking these submissions is essentially to the fundamental point that New Zealand's 20 years of jurisprudence that has been developed to date is not fundamental out of step with overseas approaches. It merely reflects the reforms that came into effect in the 2006 Evidence Act and the values and the objectives and purposes that underpin it. It still gives effect to the defendant's right to a fair trial, and it very explicitly through the section 8 enquiry that the Courts have developed as part of the analysis, looks at the effect of testing of the evidence, and whether this can be properly achieved as part of that enquiry.

Which is to say, to come back to that section, that paragraph 29 of the respondent's submissions, that the threshold reliability is not, as the UK Court of Appeal has put it, a matter to be nodded through, and nor it is nodded through in this jurisdiction. The Courts have considered the broader evidence, and have

considered it in the round, not all cases involving hearsay automatically get admitted just because it's written down and because the accuracy of the statement has been, is something that could be tested, it's this broader enquiry that the Court makes.

1500

WINKELMANN CJ:

I'm just a bit worried though that your analysis really doesn't pay sufficient attention to the words of the legislation. which takes us back to your paragraph 29, and also the definition of circumstances, statutory definition of circumstances which, as Justice Young makes the point in *Mills*, does focus on the circumstances of the making of the statement rather than this broad kind of checking against the other facts.

MS HAMILL:

It does and insofar as the enquiry was limited in that regard which of course, as I've said, it's not an exhaustive list in section 16 –

WINKELMANN CJ:

No.

MS HAMILL:

– but that would possibly lead more often than not to a very narrow enquiry, one which really doesn't take into account credibility factors at all because credibility is not, veracity is a matter that's in there in terms of –

GLAZEBROOK J:

Well it's part of the definition of circumstances, veracity.

MS HAMILL:

Yes, but it's open to the Court either to take a view that accuracy and veracity are very limited and narrow enquiries because we're just going to look at these five factors, or that it includes a broader enquiry into where this evidence actually sits within the case. Now I can't shy away from the fact that the

circumstances are listed here are what they are and they are directed to particular matters but, like I said, the approach that the Courts have taken is to look at the context of the evidence through section 8 as well as section 18 and section 18, as I attempted to illustrate through the case of *Adams*, will not always actually mean that there is a higher threshold to the admission of hearsay. In some cases it may actually be taken as well the person was in a good position to comment, they saw what happened according to their statement, so we will admit it. It's written down. All of these things go to a threshold level of reliability. And, like I said, the difficulty with attempting to impose a higher standard is first reasonable assurance doesn't mandate a higher statement, those words are not defined, and they do not require the reading that my learned friends have attempted to attach which is almost certainty. But also that does cut both ways. It does mean that for defendants the admission of hearsay evidence would also need to reach the same standard to be put before the Court, and considering that the underlying rationale of the Evidence Act was to rationalise and simplify and ensure that relevant and reliable evidence was before the Court, this approach would appear to undercut the overarching purpose of the reforms in the Evidence Act.

GLAZEBROOK J:

Well you just said "reliable."

MS HAMILL:

Yes, because we don't suggest that reliable is irrelevant.

GLAZEBROOK J:

But your definition of reliable seems to be relevant just in a section 7 sense so what does section 18 add?

MS HAMILL:

Well it's not as limited as that. That would simply be does it have anything to say about – has a tendency to prove a fact in issue in this case and that's not the enquiry the Crown's encouraging the Court to limit the analysis to. It goes beyond that and it looks at where the evidence sits in the case, whether it's

consistent with other evidence or not. As I said, my learned friends make a point about consistencies counting against it going to reliability. These are factors that go beyond –

GLAZEBROOK J:

So you're adding something onto your first sentence of paragraph 29?

MS HAMILL:

Well my first sentence at paragraph 29 merely quotes the existing position in the jurisprudence. It's not the Crown's formulation but the Crown doesn't say that this is equivalent to saying well it has a tendency to prove a matter in issue therefore it's admissible.

WINKELMANN CJ:

The Canadian case that Justice Karakatsanis wrote in, I can't remember the case, but she talked about a case specific kind of analysis and when you think about the purposes of section 18 which is, sorry the hearsay rule, which is to avoid miscarriages of justice, so low quality evidence coming in and the defendant prejudiced by that, it would probably – what you're having regard to as corroborating its reliability would need to be case sensitive, wouldn't it, because you'd have to be mindful of in the context what could lead to a miscarriage of justice. So, for instance, if the allegation was that he was actually an offender then the fact he knew details would not necessarily be reassuring as to the reliability, the fact he knew details that were consistent with the forensics but some other aspect might be. Would you accept that?

MS HAMILL:

Yes, yes and of course at the pre-trial stage when that allegation hasn't actually been made, the defendant hasn't given evidence and the defence hasn't been disclosed, the Court may just not be in a position to actually make that assessment. It's something that can only come into bearing if there's actually a credible case on the Crown's evidence that maybe this person was the real killer.

WINKELMANN CJ:

But it's suggested what Justice Young said in *Mills* is probably right, the need for caution. Well he doesn't actually say that but his approach of a cautious approach to other evidence might be the appropriate one because of the risk of a miscarriage of justice that you're adding something that's unreliable on the basis that it's corroborated by other stuff that might actually prove to be just the sort of thing that allowing them to cross-corroborate leads to a miscarriage of justice.

MS HAMILL:

Yes, if it was limited to that maybe it would give rise to a greater risk of miscarriage of justice but that's where the testing of the evidence is another important factor. So taking an entirely different example, if you've got someone whose bare statement said: "I saw a person X rob person Y" that in itself as a hearsay statement would be very difficult to test about say lighting, accuracy of how far away the person was, limited details about the colour of the shirt or something, you know, that's a classic hearsay problem where you've got such limited detail and limited detail to actually test that evidence that it might appear to be reliable on a sort of basic level of it's written down immediately afterwards and the person appears to be at the scene and so on but you've got some fundamental issues with testing the evidence whereas –

WINKELMANN CJ:

Well it's eye witness too.

MS HAMILL:

Yes. Whereas if you've got –

WINKELMANN CJ:

It's identification.

MS HAMILL:

If you've got a case like this where the issues raised are fundamentally credibility issues, oh well this could have been an inducement issue because

he left the letter out when a search warrant happened, or he wrote the letter in the first place when he knew that Corrections would read it if he actually sent it and, of course, Mr Maney didn't know at that time that Mr Rikihana was dying. He describes a violent altercation between two senior Mongrel Mob members.

WINKELMANN CJ:

Depending on when he wrote the letter.

MS HAMILL:

Depending on when he wrote the letter but on his account he wrote the letter at the time and then he didn't send it, maybe because Mr Rikihana died and corrections officers would read it. It's very difficult – these are matters of submission that go to credibility and they were matters that were very thoroughly ventilated during the course of the trial. The search officer was cross-examined about this, the matters that my learned friend has raised around the prospect that he was the real killer and Ms Eketone was covering for him, these are all matters that were ventilated. The inconsistencies were very much a feature of the defence closing.

So this is not one of those cases where testing is difficult. In fact, testing here was achieved including advancing the submission that Mr Maney was the real killer without the need to actually put it to Mr Maney and there is nothing to suggest that Mr Maney would have necessarily crumbled and admitted his guilt if cross-examined. There was equally a risk that he may have staunchly denied it and that testing could take place without needing to put it to him.

ELLEN FRANCE J:

We're talking, aren't we, about a test that has to apply in the civil context as well as criminal?

MS HAMILL:

Yes, yes, because it's a test that applies across the board.

ELLEN FRANCE J:

And that might mean that you can't always rely in the same way on section 8 in terms of things like the right to have an effective defence?

MS HAMILL:

Correct, but those matters don't have such significance in the context of a civil trial given the contest between parties is so different there and the fundamental right to a fair trial is not engaged through the Bill of Rights Act 1990 in the context of a civil trial.

ELLEN FRANCE J:

That's right but it probably brings you back to the idea that what you're trying to avoid is the risks associated with hearsay and the inability to cross-examine because that obviously does apply across the board.

1510

MS HAMILL:

Yes, yes it does.

KÓS J:

I'm just a little concerned we have 20 minutes to hear from Ms Johnston on two topics.

MS HAMILL:

Yes. I'm also concerned about that. I had intended to address your Honours on miscarriage. I'll keep it really brief.

WINKELMANN CJ:

Because you've got your written submissions?

MS HAMILL:

Yes. I have my written submissions so I won't repeat them in great detail. Perhaps the matter worth exploring at this point is Mr Maney's conviction and whether the facts of that conviction, if they had been before the jury, would have

made a difference, and of course we have Mr Nabney's affidavit that said he had decided not to put it in issue. The Crown doesn't contest that. It was on perhaps a mistaken basis about the fact that it would then put Mr Jury's convictions in issue too. But in the context of this case, this being a defence call, it shouldn't, it doesn't really, how am I going to put this, this really goes to the question posed by your Honour's minute about whether the Crown should really put it in evidence anyway, and the Crown's response to that is that there is no bright-line principle that would require the Crown, or mandate that the Crown ensure this evidence was before the jury, given that it can in some occasions be a tactical decision of defence to leave it out. So, for example, in *Adams*, the case I referred your Honours to, the Court said the hearsay statements maker's evidence – voracity could be challenged through his criminal conviction history which included an extensive history of drug offending, but as the Court in *Adams* said, it cuts both ways because that really just puts before the Court a propensity to commit drug offending, and the issue here was whether he was the real drug manufacturer. So there are occasions on which the Court has acknowledged there are tactical reasons why you might not want to go there in terms of challenging a witness' voracity. Is the person responding to the hearsay evidence. Also from the Crown's perspective the defendant is not required to disclose their defence to the Crown. So while you might expect discussions about whether the defence want this evidence in issue, if the defence does not, the Crown enquiring too closely as to why is starting to infringe on the defendant's right not to disclose their defence. Tactically there might be other reasons why you wouldn't want it before a jury, so taking a hypothetical if the facts of the underlying conviction actually drew the defendant into the mix, or if they were so far remote from what they were dealing with in the trial it may not add much, which –

WINKELMANN CJ:

I suppose in this case the reason that the conviction didn't go in was Mr Nabney's, his admitted mistaken view that he if he placed that before the jury he would put his own client's, be in jeopardy of his own client's record being placed before the jury.

MS HAMILL:

Yes, and we accept that that wasn't necessarily the, that wasn't going to be the result.

WINKELMANN CJ:

And I suppose I'm interested in hearing – in a system which doesn't depend upon the accuracy of assessment of defence counsel, but really just one where the Crown front foots in an open way. But as you say the need, such a system would need to be sensitive to the fact the defence may not want it dealt with that way, and this is something I think you're going to give some thought to.

MS HAMILL:

Yes, yes, that's right. The other thing that Mr Nabney said in his affidavit was that he just didn't think that offending in 2006 was, had such significant bearing on enquiry about a homicide in 2019 as to need to go there. Of course a comment made in the context of his broader observations. But in terms of –

ELLEN FRANCE J:

Well he doesn't know at that point what it actually involves, does he?

MS HAMILL:

No he doesn't know that. We don't understand that he knows that. We haven't made the specific enquiry. But the Crown would say as well that what the jury did have in front of it was Mr Maney's first statement in which he had lied to the police on the Crown case because he said he didn't know anything about it, didn't know anything about the homicide that happened, about Mr Rikihana's death, and then subsequently we have the accounts we do have. So the jury that attacked Mr Maney's credibility directly on the issue before them. This was a 2006 conviction, and while it may be that the defence would have wanted to make submissions about the facts of the conviction, submissions could be made both ways by both parties, and ultimately what the jury would have had to have assessed is to step back and look at the evidence that it had heard that goes well beyond Mr Maney. So it's the evidence of Ms Eketone. It's the evidence about was there a reasonable possibility that Mr Maney could have

done it. Two weeks later, police went and searched his house, described him as frail, decrepit, and slow in his movements. Is this a man who could have run or walked four kilometres from his own house to interrupt the meeting between Mr Jury and Mr Rikihana, violently assault them both, Mr Jury himself being a man of something over six foot, Ms Eketone described him as muscly, she described him as having a larger build, and then –

WINKELMANN CJ:

Where's the evidence that Mr Maney was in bad shape?

MS HAMILL:

The evidence is from the search officers. So Mr Maney was experiencing terminal lung cancer at the time and died five months later.

WINKELMANN CJ:

What was the timeframe between the…

KÓS J:

He died six months later.

WINKELMANN CJ:

No, from the offending to the search.

MS HAMILL:

Two weeks. Mr Maney was a disqualified driver, there was no evidence he had a car, and somehow he had to get Mr Rikihana to Mr Te Aonui's house, six kilometres down the road. There was no forensic evidence of any blood found at Mr Maney's house where allegedly Mr Jury left them both, and at some point a fatal assault had occurred, Mr Rikihana at the time apparently having a nosebleed but no other injuries, notwithstanding the significant amount of blood found at Mr Rikihana's own property. So these are all factors that the jury would have considered when looking at, oh well, Mr Maney also had a conviction for perverting the course of justice, and in the Crown submission, as covered in its

written submissions in some depth, it would not have made a difference in the circumstances of this case.

Now ‘m very mindful of the time. I think I've given my learned friend some 14 minutes to speak so I better sit down, but if there’s anything else I can assist your Honours with.

GLAZEBROOK J:
Do you have any comments on the use of the proviso if the statement is inadmissible?

MS HAMILL:
Well my learned friend, Ms Johnston, is going to also address the proviso, but the Crown’s fundamental submission is the one just made, that in the context of this case it would not have made a difference. There was no risk of miscarriage of justice.

MS JOHNSTON:
One of the things I'm supposed to work on in my advocacy is not talking quite so fast, so I'm grateful to be given the opportunity to not worry about that, and have an excuse to talk fast. Just one point of a broad principle before I go into the Crown submissions on section 122. The focus here is obviously on what the jury wasn’t told and whether what the jury wasn’t told is an error, and whether it was an error capable of affecting the result aka a miscarriage, and that should, stepping back, be viewed in light of, of course, the constitutional role of the jury, provided evidence is relevant and admissible, that the usual rule is that juries hear it, it’s for them to weigh up. Reliability, it’s for them to weigh up. Veracity, credibility issues, there are specific rules obviously in the Evidence Act that say that there are limits on that. Some evidence that juries need particular assistance on.

There’s a reference in some of the Australian case law to the seductive effect of identification evidence, that’s why the Evidence Act requires a particular direction in relation to identification evidence, because of those risks.

The Court is well familiar with the concerns about cellmate confession evidence and the particular way juries will place too much weight on that, there's a risk that juries will place too much weight on that because of information they don't know.

Also in the mix there is the need for our appellate courts, and my submission not to turn summings up into very lengthy processes where the jury are told everything that they need to do. Directions should only be mandatory. Directions should only be required where they're needed to prevent a miscarriage. Where they're needed to ensure a fair trial, and of course against that background section 122 envisages that there will be occasions when evidence that has reliability concerns about that evidence, is before the jury, and that in not every case a direction is required.

1520

Now given this Court has obviously heard a lot of cases about section 122 I will skip over the general principles that are, of course, in the written submissions anyway, and I'll focus really on what's missing here, what was missing from the jury, and fundamentally in my submission what's said to be missing is the word "caution". The jury weren't told you need to be particularly cautious about Rex Maney's statements. There was also no mention of the fact that he hasn't been cross-examined. The jury did hear submissions, and I won't go to the references, but I promise they're in the Crown submissions at paragraph 101 and the submissions of both counsel were summarised in the summing-up about the inconsistencies in Mr Maney's statements. So the submissions on that were made by counsel and summarised by the Judge in summing-up clearly before the jury for them to weigh up. The submission that Mr Maney had a motive to lie because he was involved, all the submissions about the implausibility of the letter being on the table and the fact that it was intended to be self-serving, those submissions were made before the jury and summarised by the trial Judge.

So in terms of them returning to what was missing, which is the caution and the lack of mention of the lack of cross-examination, the first point the Crown makes

in support of the submission that the absence of this did not cause a miscarriage is that there was a risk that in doing so the Judge would be overemphasising Mr Maney's evidence. Ms Hamill has taken the Court through the significance of Mr Maney's statements to the Crown case. It's part of the context. The Crown, yes, sought leave to adduce that evidence but it doesn't mean it was a fundamental plank. It doesn't mean the Crown case depended on it. The Crown has a duty to put relevant evidence before the Court and has done so here. And so there's a risk in a judge saying to the jury: "You need to be particularly cautious about this evidence. Let's all stop and let me tell you why you need to be cautious." There's a risk there that that would suggest to the jury this evidence is more important than we realised.

WINKELMANN CJ:

It's a hard submission to make I think because it was a part of the case and counsel had addressed it.

MS HAMILL:

Yes. May I maintain the submission that it was not a fundamental part of the Crown case. It certainly was a part of the Crown case and it's one of the relevant factors in section 122, one of the reasons why a judge can decline to give a direction if it's going to overemphasise evidence. Another way of putting it is that it's not logical for the Crown, sorry for the Judge, to tell the jury not to place too much weight on evidence or be cautious about what weight they place on evidence that the Crown isn't putting a lot of weight on.

The second reason is that there are, in my submission, risks in – well by inviting the jury to think about the absence of cross-examination here, that may not have necessarily assisted the defence here and that's relevant in my submission to the miscarriage test. So it may not have assisted the defence for the jury to be told to think about the absence of cross-examination essentially for three reasons. One, it invites the jury to think about the fact that Mr Maney hasn't had a chance to respond and perhaps –

MILLER J:

It seems to me that's slightly problematic. I notice the prosecutor said that at page 85 of the Court of Appeal casebook. It's very convenient to blame a dead person because they can't come along and defend themselves.

MS JOHNSTON:

Right.

WINKELMANN CJ:

That sort of doubles down the prejudice of the hearsay statement, doesn't it? When you attack it you're then criticised for – well not necessarily. What I'm really interested in, so you've got several reasons about that, you've got inviting the jury to think about the absence of cross-examination –

MS JOHNSTON:

The second point is it invites the jury to think about the defence reliance on things Mr Maney said. Now I don't think we have time for a technical discussion about whether the defence was truly relying on hearsay by Mr Maney but one of the things Mr Jury said is that: "I was told by Mr Maney to bring Mr Rikihana to him" and so that appears to be hearsay from Mr Maney that Mr Jury is relying on. Now we could have a debate about whether that's truly hearsay or it was something that was said for the fact that it was said, et cetera, and we could go back to law school and think about that but, regardless of where the Court might get to on that, the options are either to mention it to the jury or give the caution in relation to the Crown's reliance and then the jury might think about well hang on a second they've told us to be careful about things that the Crown says Mr Maney says, shouldn't we also apply that to things that the defence say Mr Maney says, and the other option would be then to give the jury a longer direction and actually say "and for each of them these are the ones that are relied on for hearsay" in which case you would get a very –

WINKELMANN CJ:

I mean so there's a few straws in the wind as to why you might say a judge might not direct but really there is quite a significant issue here that the Judge didn't direct and he didn't give his imprimatur to need for caution about a

hearsay statement, and also the jury didn't know about the prior conviction and I think those are two things you really need to confront head-on in your submissions.

MS JOHNSTON:

Ma'am, that's what I'm attempting to do and obviously failing but the third point as to why the absence of, mentioning the absence of cross-examination would not have assisted is that it invites the jury to think about who was extensively cross-examined and that's Ms Eketone. And so it does invite the jury to think about well she was extensively cross-examined and didn't shift, fundamentally we should place more weight on her, her evidence is bolstered by this direction to think about the importance of cross-examination.

WINKELMANN CJ:

Your main submission in response to the absence for caution would be though that the issues were ventilated before the jury about its inconsistency.

MS JOHNSTON:

Yes, and that the nature of the issues to be addressed in that direction, motive to lie and hearsay, are ones that the jury didn't need particular assistance about. General members of the public on a jury would understand the fundamental principle that well I think that –

KÓS J:

The point this Court made recently in its decision in *Tamati,* which no one has referred to, which involved intoxication and where we said –

MS JOHNSTON:

Yes, I think *Tamati* might have been released just after we filed submissions and we haven't…

GLAZEBROOK J:

But that was specifically in the context of juries understanding the effect of intoxication and therefore not needing the same sort of assistance and quite carefully worded I think.

MS JOHNSTON:

And I think what we would say is that what we used to call, we don't anymore, but what we used to call Chinese whispers, which is essentially hearsay that what someone's told somebody else might not necessarily be reported accurately, that concern is within the jury's –

WINKELMANN CJ:

Well not apparently because isn't that the whole thinking about the need for a warning in relation to it?

MS JOHNSTON:

Yes.

GLAZEBROOK J:

And I would have thought that's definitely under section 18, that it's been through five hands before you get it, then that would be circumstances that would suggest it may well not be reliable.

MS JOHNSTON:

And that's one of the reasons why – well the reason why –

GLAZEBROOK J:

It wouldn't be left to the jury, it would be look we have no idea it's gone through five hands and…

KÓS J:

Anyway, that's not this case.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

No, no, of course it's not but that was just the suggestion that you'd leave that to the jury and I think that would be the very thing you didn't leave to the jury.

MS JOHNSTON:

And that concern will be the reason why hearsay is listed as one of the types of evidence that you need to consider whether to give a section 122 direction and one of the factors that I say that the Court should take into account is the ability of the jury to be able to weigh up those types of issues. There's also of course, and this is addressed in more detail in the written submissions, that the lack of centrality of the evidence to the Crown case, and I'm really going to the fundamental miscarriage proviso here, this case stands in stark contrast to something like *Jetson*, which is that decision of this Court, where there was a cellmate, evidence of a cellmate confession and the direction was found to be insufficient there. There was some direction given but it was found to be insufficient that that witness there in that case was the only evidence the Crown had putting that weapon in that defendant's hands. So a miscarriage was found there and this case is in stark contrast, given that the main Crown evidence here was Ms Eketone's, who was the one who identified Mr Jury as coming to the house and then listened to him inflicting a beating upon Mr Rikihana in a place that was then found soaked in blood. To really rush through the peak of the Crown case. There's also the absence of a request for a warning. Now we have, the Court has Mr Nabney's recollection on that. In terms of the steps taken to figure out what happened there, the Crown at an early stage in the Court of Appeal requested a transcript of all the legal discussions that were recorded and those are in the additional materials before this Court and there's no trace of a mention of section 122. There's also, there's a note at the end of the summing-up in the materials where the Judge has asked if there's anything arising and there's one issue raised by counsel that's not relevant here but in my submission it is particularly relevant that an experienced counsel and an experienced judge considered it wasn't necessary. I accept that there should be a record, and it should have been discussed, and we can't say that there was because there's simply no record of it.

1530

WINKELMANN CJ:

What about the fact that the jury didn't know about the conviction for perverting the course of justice? Ms Johnston, did you hear?

MS JOHNSTON:

Yes I did sorry. I was just moving to my, my notes are in a different place on that one. The Crown filed supplementary submissions in the Court of Appeal on this, and there the Crown accepted that that, the fact of the conviction might have gone before the jury. The Court of Appeal concluded that it was not likely to have added much to the jury's consideration. The Crown has to accept, given the additional information, and the similarities perhaps in the attempting to pervert, similarities now known from the material found on databases, that adds some weight to that. The similar feature of writing a letter I suppose.

So the Crown certainly accepts that it might have gone before the jury, but essentially for all the reasons I've just addressed, the fact that that was not before the jury didn't cause a miscarriage of justice, isn't reasonably likely to have – I'm getting that test wrong. Isn't likely to have led to a different result because of all the reasons I've addressed as to the centrality of Mr Maney's evidence.

WINKELMANN CJ:

It's not central?

MS JOHNSTON:

The lack of centrality, sorry, and also the historic nature of the conviction.

WINKELMANN CJ:

Well…

MS JOHNSTON:

And the fact that the jury already knew that Mr Maney had a history with police. They were told there was fingerprints on file for him. The jury already knew that Mr Maney was somebody prepared to lie to police because –

GLAZEBROOK J:

Sorry, I didn't quite catch that?

MS JOHNSTON:

The jury already knew that Mr Maney was someone prepared to lie to police because he lied in that first formal statement, which of course has the solemn promise at the end.

WINKELMANN CJ:

Okay so, and we just rely on your written submissions proviso, or have you stopped, finished, sorry?

MS JOHNSTON:

I think I have said all I need to say, all I was planning on saying in a very rushed form.

WINKELMANN CJ:

I mean your case ultimately is that the Crown case was overwhelming against Mr Jury.

MS JOHNSTON:

Yes, and any concern the Court might have as to either the admissibility of Mr Maney's evidence, or if that was admissible, the directions that were given, are not capable of affecting the result, given the strength of the Crown case that depended on the other evidence.

WINKELMANN CJ:

We thought it may be a good idea to allow counsel further time to provide submissions on the obligation of the Crown in relation to hearsay evidence, and it sounds like the – and we were wondering about the FTS, the sound recording system, but it sounds like it's being searched already? Yes. Right. So perhaps 14 days.

MS JOHNSTON:

With the appellant to go first and then the Crown to file after, or did you just want to hear from the Crown on it?

WINKELMANN CJ:

I think it might be an idea if we hear from the Crown first because otherwise, just given the nature of it. What do you think Ms Johnston?

MS JOHNSTON:

I'm only pausing because of course we're in the position where, and this is why we're having supplementary submissions is obviously being raised by the Court so that the – my only concern is whether we'll have an opportunity to respond to anything the appellant says that we might not have apprehended would be raised.

WINKELMANN CJ:

Let's have the appellant go first, that would be the normal order of things anyway.

MS JOHNSTON:

Thank you, as the Court pleases.

MR STEVENSON KC:

I wonder if I could take perhaps just five minutes, possibly less.

WINKELMANN CJ:

Yes.

MR STEVENSON KC:

So we're now, if I just go to the nub of the case having heard from the Crown. We're now in the position whereby Mr Jury has stood trial, facing a murder charge. Unreliable hearsay evidence has been admitted at his trial. Nobody knew that that the final statement by Mr Maney in significant part just

couldn't be true, having regard to the CCTV evidence, which I've spoken about, and the Crown hasn't seriously taken issue with.

KÓS J:

But it couldn't be reconciled with the second statement, and I don't know what that adds.

MR STEVENSON KC:

Well it's quite significant that it's objectively false. I mean it's, they may just have thought, well he's come to his senses, he's thought more about it, and this is the full narrative. It was incredibly important, in my submission, that the jury know, the fact-finders know that this statement is objectively false, having regard to the CCTV. Now on that point Justice France I think enquired about the timings. The section –

ELLEN FRANCE J:

Yes, and I did find that subsequently, yes.

MR STEVENSON KC:

The section 9, yes, does say that the CCTV timings are correct. Your Honours don't have the photographs of Mr Te Aonui arriving at the hospital with Mr Rikihana. It's 3.15, so it's three minute earlier than we thought, but it makes the position implausible, as we suggested earlier. So the jury didn't know that. That that essential part of the narrative was simply untrue, and they didn't know that he had a conviction for perverting the course of justice, and they were told by Crown counsel in closing that as to Mr Maney's evidence, we've quoted this in our submissions, you just treat it like rest of the evidence. The fact it was hearsay was not mentioned by anybody, and they weren't given the warnings urged by the Privy Council in *Grant* scrutinise with particular care. Those should have been the opening words in terms of the direction, mirrored by the new *New Zealand Bench Book* which Mr Parry referred to. They weren't reminded with the force of the trial judge that they should be careful because cant' assess demeanour, hasn't been cross-examined, and so forth. Now we haven't suggested in those circumstances this was an unfair trial, but it's

respectfully getting perilously close to that, and your Honours might recall the Privy Council in *R v Howse* [2005] UKPC 30 dealt with the wrongful admission of hearsay and Lord Rodger, I think it was, albeit writing for the minority, the Court split three/two as to whether or not the trial was unfair, described the wrongful admission of hearsay in that trial as a trial going seriously off the tracks, and said we would express ourselves in more robust language, but with some difficulty do not so. I mean this is not precisely this case, but pretty much everything that could have gone wrong in relation to the hearsay evidence, in my submission, did.

So by way of reply the point of the reform, in my submission, very briefly, the point of the reforms were not to just simply open the door for expediency in terms of hearsay. The point of the reforms were to confront the reputational damage that was probably being done to criminal justice systems by the exclusion of relevant and probably reliable evidence. I mean that was the whole concern and that was, respectfully, the point of the reforms. We can't be not letting the fact-finders be exposed to relevant evidence that is, has an assurance of reliability.

GLAZEBROOK J:

So you're saying probable reliable is equivalent to the reasonable assurance, is that…

MR STEVENSON KC:

Yes.

GLAZEBROOK J:

That's without detracting from, I'm not making you detract from what you say reasonable assurance means, but it's not just relevant, it has to also be probably reliable or a reasonable assurance of reliability

1540

MR STEVENSON KC:

Well that was the angst that preceded the reforms in my submission was that the probably or inherently trustworthy –

GLAZEBROOK J:
I understand. Sorry, I get your point.

MR STEVENSON KC:
Yes, yes. Now in the appellant's materials we referred, the bundle of authorities, we referred to the earlier Law Commission Report which is in 1991. I'm not going to take your Honours to it now. I'll give you the page reference at 109. "The Principles Which Underlie The Exceptions." The Law Commission in 1991 referred to *Wigmore*, referred to admissibility gateways as a necessity and "circumstantial probability of trustworthiness" and for convenience we termed them the necessity principle and the reliability principle. So that has for a long time been the approach consistent with what the appellant has said, not just reliable enough to go to the fact-finder but something more akin to assuredly reliable, probably reliable, inherently trustworthy.

My learned friend says that defence recourse to CCTV could be undermined by the approach. We have urged upon the Court in terms of potentially corroborative evidence but, as I said earlier, we say that that was a good example of evidence that would meet the *Bradshaw* test because it was unequivocal. The CCTV evidence demonstrated, as I've said earlier, that Mr Maney simply couldn't be right in his final statement about the two trips.

As to perverting the course of justice, my learned friend said or suggested that may be a tactical decision or it could be in certain cases. Respectively, that just wasn't the case here. It couldn't possibly have been a tactical decision. This was an oversight by I would suggest all parties in that that information should have been before the jury. The defence case was not particularly nuanced. They were saying Mr Maney was not to be relied upon because he wasn't telling the truth. Well that information was highly relevant to that.

The Crown says as to Mr Maney well there's some unlikelihood of him being the offender because he didn't have his licence. What did he do? Run or walk down to the address where Mr Rikihana was. Well a couple of observations about that. It's a 32-minute walk from memory. That was established in evidence. So he could have. There was a significant effluxion of time between Mr Jury leaving his address and then eventually getting to Mr Rikihana's address on his account. You'll recall he said he went there first, he wasn't there and he went and socialised with others. He didn't know how long that was but he thought that it was about two joints worth in terms of how much time had passed him smoking some cannabis with his associates down towards Reeve Street. So there was time for him, that is Mr Maney, to walk down but also, as I understand the evidence, the CCTV analysis was focused on the movements primarily of Mr Jury and on the record doesn't exclude the possibility that Mr Maney could have been moving in another vehicle and we also have a curious feature of the evidence of Mr Scoota Iorangi turning up, perhaps euphemistically it's been put, to drop off a lawn mower. Well what was actually going on there? That was another vehicle coming into the address.

WINKELMANN CJ:

What time was that? What time did Scoota arrive with the lawn mower?

GLAZEBROOK J:

I think it's on the sheet but…

MR STEVENSON KC:

I think it's on our table. I'll just ask Mr Parry to have a look at that.

WINKELMANN CJ:

I think it's around one.

MR PARRY:

1 am.

MR STEVENSON KC:

Thank you. Sticking with Mr Iorangi for a moment, the Crown says his evidence is consistent with Ms Eketone and the general prosecution theory. Page 10 of the evidence is worth looking at. Mr Iorangi said he didn't get a look at the scene for more than a second. He only got half way up the driveway and it was a foggy night. Trial counsel was putting to him if there was another male, ie, Mr Maney at the vehicle he wouldn't have seen it so that was the most fleeting of fleeting glances. You can see that's adduced actually through examination-in-chief but focused upon in cross-examination. He only gets half way down a long driveway so some distance away. He describes, he volunteers it was a foggy morning and, as I say, he says: "I hardly looked more than a second."

The Crown says Mr Jury's evidence is inconsistent with the scene and pathology. Well as the appellant said earlier, he was knocked unconscious on his account for a period so plainly didn't see everything. It was dark and on his account everyone had been consuming drugs, cannabis and methamphetamine so this is not an environment for pristine recollections of events and one needs to take some care about that.

Yes, if the Court pleases, those are the matters I just wanted to respond to.

WINKELMANN CJ:

Thank you, Mr Stevenson. So how long will you need to do your first run at that submission?

MR STEVENSON KC:

Fourteen days should be sufficient. I mean our position is just building upon *Horncastle* so we probably don't need to say much more about it than that. That will be enough and we'll take a closer look.

WINKELMANN CJ:

Right, and Crown another seven or 14?

MS JOHNSTON:

Seven.

WINKELMANN CJ:

Seven. The Crown another seven days, all right. Well thank you counsel for your submissions and we will reserve our decision and now adjourn.

COURT ADJOURNS: 3.46 PM