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

SC 17/2019
SC 18/2019
[2019] NZSC Trans 30

BROOKE CHRISTIE ROLLESTON

BRANDON JAMES ROCHE

Appellants

v

THE QUEEN

Respondent

Hearing: 13 November 2019

Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	E Huda for the Appellant Rolleston A J Bailey for the Appellant Roche M J Lillico and M H Cooke for the Respondent

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CRIMINAL APPEAL

MR HUDA:

If Your Honour pleases, counsel's name is Huda, I appear for Rolleston.

WINKELMANN CJ:

Tēnā koe.

MR BAILEY:

May it please the Court, Bailey for the appellant Roche.

WINKELMANN CJ:

Tēnā koe, Mr Bailey.

MR LILLICO:

May it please the Court, Lillico for the respondent along with Ms Cooke.

WINKELMANN CJ:

Tēnā kōrua, Mr Lillico.

MR LILLICO:

Tēnā kōrua.

WINKELMANN CJ:

Mr Huda. So we've read all the various bits of paper, Mr Huda.

MR HUDA:

Yes, the matter should be fairly concise this morning. We've obtained, as Your Honours are aware, the statement from the juror following an order by this Court. The question really arises, where to from here?

An issue that was pertinent from the perspective the appellant was that on some broad way a degree of impropriety was being alleged against the juror and we've got a response only from the juror.

O'REGAN J:

That's what you asked for.

MR HUDA:

Well, there was the juror and the other 11 jurors that –

O'REGAN J:

You asked us to get a report and we got a report.

MR HUDA:

Yes, I appreciate that.

O'REGAN J:

So why are you complaining?

MR HUDA:

Well…

WINKELMANN CJ:

So, Mr Huda, when you say the question is where to from here, I mean, what possible pathways do you suggest? Because your submissions don't seem to suggest anything other than – well, what other pathways do you suggest?

Because I'm not clear from your submissions what other pathways, other than dealing with the matter here today.

MR HUDA:
Well, the matter, in my submission, will have to be dealt with today. The issue is, unlike the UK, I don't think there is an opportunity to cross-examine jurors here and I don't take any issue with the format of the interview, it matters not whether it's sworn in affidavit form or not, but do not have the opportunity to cross-examine the juror. That brings into question the two critical points: first, the degree of recognition of the juror of the brother, Dante Rolleston, and the degree of recognition, degree to which the juror recognised the defendant and put two plus two together.

Now in terms of the factual matters which Your Honours are fair seized of, I say that Mr Rolleston and his brother, Dante Rolleston, attended with the juror only three years before the trial, so that's uncontroversial. Mr Rolleston and his brother knew the foreperson in different capacities, that's also uncontroversial…

WINKELMANN CJ:
Well, not knew. It is controversial they knew him. He said he didn't know them, he just, they were at the school at the same time. Knew them by sight.

MR HUDA:
Knew them by sight.

O'REGAN J:
Surely if they'd known him they would have raised it at the time?

MR HUDA:
When Your Honour mentions "they" you're referring to the brother and the appellant?

O'REGAN J:

Yes.

MR HUDA:

Well, Brooke – if I can use the first name it's going to be easier – Brooke says in his affidavit that he did recognise the juror after the complainant's brother gave evidence and did not seek to bring that up with anybody, so that's fairly and squarely there. There is the next issue, which is Dante. Dante says he recognised the juror and then went and corroborated that with the year book, that's before the Court. Now Dante didn't raise it at the time because he was at the courthouse from the second or the third sitting day of the trial, so he never would have heard the usual judicial warnings about if you know anybody raise your hand kind of a thing.

WINKELMANN CJ:

So Dante didn't really, Dante did more than corroborate, he said that the fact that – so he didn't look at the juror and think, "I know that guy from school," he looked at the juror and the juror was staring at him in a way which sparked his memory that he bullied this boy, on his account, because he'd stared at him in the same way, so he then went home and checked in the year book and saw him?

MR HUDA:

That's right.

WINKELMANN CJ:

So they didn't know each other so, Dante wasn't so familiar with that he immediately recognised him?

MR HUDA:

No, not nearly to the extent where I would recognise a Judge and I'd say, "That's the Judge I know," no, not in that way. He had to go and check that. But I also say that, following on from what Your Honour just suggested, is that it's difficult to put it into words, but he went and looked in the exact place

where the person was found, you've got to know where to look. So it wasn't just a case of, "It's a face, I know it from somewhere," he knew where to go and look.

WILLIAMS J:
Where does that take you though?

MR HUDA:
Well, it takes me to the position of perhaps, if we're talking about Dante's level of knowledge, it's a little bit higher than it's somebody who seems familiar as –

WILLIAMS J:
Sure.

WINKELMANN CJ:
Yes, so he thought, "This might be the guy I bullied"?

MR HUDA:
That's right.

WINKELMANN CJ:
"Because he's staring at me in the same strange way"?

MR HUDA:
In the same distinctive way, if we can put it that way. I'm saying that distinctive –

WILLIAMS J:
I mean, is your submission really, "We can't believe the foreperson on the basis of this all smells bad," or are you focussing now on your fall-back position, which is apparent bias?

MR HUDA:
No – well, just to clarify. All my submissions are directed towards appearance of bias, appearing bias, not bias actual.

WILLIAMS J:

Right. So if that's the case, one, you could have made that argument without the investigation of course and, two, does that depend on some sense of suspicion that the foreperson is lying, or is that irrelevant to your submission? Because I couldn't tell.

MR HUDA:

Well, I'm not very eager, as much as I would be in a colloquial sense, to say here we've got a lying foreperson. All I'm trying to say is that if the foreperson knew or recognised these people and he went through the trial, then it's not in his best interests to come and now say, "Look, I knew this all along, and by the way sorry." So in the context I find it quite, in my submission it's quite, somewhat unbelievable that it's only three years from school, I wouldn't say the word –

O'REGAN J:

I just don't think it's open to you now. We got a statement. You just have to accept it as you find it.

WINKELMANN CJ:

I mean, it is open to you to say there is sufficient conflict in the evidence. I'm not saying this is a successful submission you can make, I'm just saying you could say (inaudible 10:09:32) a position where the foreperson can't be cross-examined, but there is sufficient in the evidence that the Court be concerned, you could make that argument. But what I'm struggling to see is what is sufficient evidence, because you don't really have a direct conflict.

MR HUDA:

Well, in terms of the knowledge aspect – because it ultimately has to boil down to the foreperson's knowledge of some level, I think, depending on how the appearance of bias test is applied. In my submission he seems to have, the foreperson seems to have an inkling of recognition of both these people. Although, you know, the person in the gallery and one of the defendants, so we have that. We have a distinctive, somewhat distinctive name.

GLAZEBROOK J:

But that could happen in any instance and one wouldn't suggest that anybody, so one might have thought that looks like the person who's behind the counter in the corner dairy, but that wouldn't be sufficient to indicate an indication of bias.

MR HUDA:

No.

GLAZEBROOK J:

So an inkling of recognition has to be much more than that, doesn't it, to have any possibility of meeting the test, because in a small town you quite often will know, or have seen people in the street or, but have had very little to do with them, but have a certainly an inkling of recognition.

MR HUDA:

Certainly, and there are cases that say that in New Zealand and in terms of the appearance of bias, and perhaps to somewhat summarise if I'm doing so accurately, the Chief Justice's statement, that, look, the question is one of judicial tolerance, does this bother us enough. We've got a distinctive name in the Rolleston brothers. We…

GLAZEBROOK J:

What's the distinctive name sorry?

MR HUDA:

If he knew, if the juror recognised Dante Rolleston. Obviously he knew Brooke Rolleston, so putting the Rollestons together wouldn't be –

GLAZEBROOK J:

Okay. I understand.

O'REGAN J:

This is pure guesswork.

MR HUDA:

Sorry Your Honour?

O'REGAN J:

That is just pure guesswork.

MR HUDA:

Well, Sir, in terms of putting, the difficulty with that submission for me, and I accept, is one of whether he recognises Dante Rolleston as Dante Rolleston. If he recognises Dante Rolleston as Dante Rolleston –

O'REGAN J:

But he says he didn't so why are we making a conjecture based on something which he said didn't happen.

WINKELMANN CJ:

So the point is that Dante Rolleston says he'd bullied this person and this persons says, well look, lots of people bullied me but the people I remember are X and Y, and some other people along with them, but neither of those other people were Dante Rolleston.

MR HUDA:

Correct. That's what the juror says.

WINKELMANN CJ:

So there's not really any conflict in this evidence. I mean, because it allows the possibility that Dante Rolleston might have said rude things to him but they were so endemic at that high school, there is such an underlying niggle that it's possible he did but there are lots of people saying smart, rude, unkind things.

MR HUDA:

Absolutely, I must accept that. That is entirely, would be entirely consistent with the evidence. I think the Crown in its submissions, not the latest one but

the one before that, the one signed off by Ms Kensington, say the same point. That look, Dante may have said, may have thought he was a bad bully but there are worse bullies and those bullies stick to his mind and not the others.

WILLIAMS J:
Yes, he faded into insignificance by comparison.

MR HUDA:
By comparison so –

WILLIAMS J:
You're stuck with that, aren't you? Because, I mean those two propositions, one from the foreperson, one from Dante are not inconsistent.

MR HUDA:
No, not necessarily so, in fact, not at all so.

WILLIAMS J:
So your apparent bias argument has to be on the basis of the idea that the foreperson has some vague recollection but doesn't recall being bullied. You're stuck with that. Otherwise, you know, you have to unpick what he says and you need a cleaner for that, you don't have that, without having cross-examined him and I suspect if you did you wouldn't have got anywhere anyway, but that's my conjecture.

MR HUDA:
True Sir, true. All of the above statements. So the issue really is that whether it, ultimately it boils down to whether there is a level of concern in the circumstances, looked at it in the round –

GLAZEBROOK J:
Can I just put it to you that there isn't level of concern on the basis of what the report says in terms of what the foreperson says. So isn't that submission absolutely dependent on an application to cross-examine? Because if we

take what the foreperson says at face value, there is nothing in that whatsoever that would cause any concern, and I don't think you're suggesting otherwise, because I don't think you could. So really is it that there's sufficient conflict, as the Chief Justice said, to say that you should be able to cross-examine, is that what the submission actually is?

MR HUDA:

Well in the usual course of events, yes. I mean I'm just, I haven't come out with the cross-examination submission in –

GLAZEBROOK J:

But if you can't shake what the foreperson says, then there is nothing in this whatsoever.

MR HUDA:

That's right. I'll have to accept that.

GLAZEBROOK J:

Well so it has to be an application to cross-examine, doesn't it, and then you have to convince us that that should be granted.

MR HUDA:

That's right, which is perhaps the biggest hurdle.

GLAZEBROOK J:

So there's nothing else you can say about that.

MR HUDA:

Well –

GLAZEBROOK J:

I'm not trying to put you on the spot it's just –

MR HUDA:

No, jurors have been cross-examined in the UK, *R v Baybasin* [2014] 1 WLR 2112 (EWCA) is the case where there's a conflict of evidence and they apply fairly standard and settled principles. If there was a conflict before the accepts the evidence it's all known, it flows from the ruling *Browne v Dunn*.

O'REGAN J:

But there isn't a conflict here, is there. I think we've been through this. There isn't a conflict. He just doesn't recognise him. It's like I recognise you, you don't recognise me. That's not a conflict.

MR HUDA:

No but Sir if I can use an analogy, recognising its imperfections. A defendant gets into the witness box and says, I did not intend to do X or Y. That's the defendant giving evidence of their mens rea. Crown counsel legitimately cross-examine them routinely as to the circumstances to show why their assertions are implausible or should be rejected. I appreciate –

O'REGAN J:

Yes, but that's in a trial. We're talking about a juror here. That's just a completely different situation. I mean I just, the analogy just doesn't stand.

MR HUDA:

Well the issue for me is that, or for the appellant really is –

O'REGAN J:

Again I come back to what I said at the beginning. You asked us to do this and we did exactly what you asked us to do, and now you come along and say, well we didn't get what we wanted so now we want something else. Where does it stop?

MR HUDA:

I take Your Honour's point, and that's something I've pondered on myself to be honest. The only point here is it's unchallenged evidence. That's the only

point I make. That it's uncontroverted evidence. So effectively the question is, does the Court accept it, and say look, obviously there's going to be no cross-examination, or we're not going to put him in cross-examination, what we're going to do is try our best –

WINKELMANN CJ:

Well hang on. So this is what Justice Glazebrook is saying to you. No one said we don't permit cross-examination. To be fair to you we've made no determination that we don't permit cross-examination. That's not an indication that we will. But what Justice Glazebrook has said to you is that really you seem to be falling over in your submissions, this problem, obstacle that you've given yourself, that there's no cross-examination. Are you actually saying there needs to be cross-examination?

MR HUDA:

Absolutely, otherwise I can't see how we can go past this.

GLAZEBROOK J:

Well then you have to tell us why we should cross-examine in these circumstances and I think one, you've said it's been done in the UK. Two, you've said there's a conflict of evidence, you were challenged on that so you perhaps need to go a bit further in terms of what you say the conflict is, and then I don't know if you've got other points but if you do it would be useful to have them.

MR HUDA:

One of the points that the juror makes in the statement is the courtroom was fairly empty during the trial. That is in conflict with, and technically it's hearsay, but my understanding, and Crown counsel's understanding of the Court of Appeal, so case on appeal page 37, the Court of Appeal found at paragraph 31, and this is the first decision where an order was sought to interview the juror, and they go on to say, "It is not in dispute that the public gallery of the courtroom was full during the course of trial." There is – after the juror statement there –

GLAZEBROOK J:

But that, the juror statement actually makes it more rather than less likely that he would have recognised Dante in the public gallery, doesn't it? So in fact it's actually…

MR HUDA:

It's helpful.

GLAZEBROOK J:

So that's not a conflict that would mean you need a cross-examination, is it?

MR HUDA:

No. All I'm pointing out is –

WINKELMANN CJ:

Have you moved on from conflict, because what we're saying to you is you need to deal with the point that I made to you, that there really isn't a conflict on the evidence, and what you need to say is there is a conflict on the evidence.

MR HUDA:

Well, the distinctiveness of the staring is what brings about everything.

GLAZEBROOK J:

I'm sorry, distinctiveness of…?

MR HUDA:

Of the staring, how…

GLAZEBROOK J:

Oh, okay.

MR HUDA:

So…

ELLEN FRANCE J:

But that's in fact consistent, isn't it? There's no conflict there.

MR HUDA:

Well, he's saying that the only person – sorry, when I say "he", the foreperson – is saying that he had recognised somebody only after or just about when he's about to read out the verdicts. Whereas Dante is saying that this was going on during the trial. So if it's going on during the trial for a period of, for a considerable period of time, that helps the appellant, as opposed to foreperson standing up, looking around, and saying, well, "These are the results in relation to these charges."

WILLIAMS J:

You're arguing, I think, that the denial of recollection of bullying is so inherently implausible it should be tested, and the reason it's implausible is that Dante gave him hell at school because he was a starer, and turns out the reason he recognised him was that he was staring at him?

MR HUDA:

That's right. So the distinctiveness –

WILLIAMS J:

But that's the best you can do, isn't it? There's nothing else.

MR HUDA:

Well, that would obviously be the key point in terms of conflict, but I could go further and seek to find out the other people that are mentioned. Because one of the inferences that arises, one of the problems that arises, is that he does recognise people who bullied him, that's the…

WILLIAMS J:

So you want a trial?

GLAZEBROOK J:

Yes.

ELLEN FRANCE J:

If this had been raised at the time when it should have been raised, that is in the course of the trial, the matter would have been dealt with by the Judge presumably asking the juror the questions that have been asked in the course of this process and the Judge would have made a decision on that. That would have been the end of it in terms of process. We're only in this position now because it hasn't been raised before conviction, so we have a process by which an officer of the Court makes enquiries on the Court's behalf. How does cross-examination then fit into that? It just, it would provide an incentive, presumably, to leave these things till after trial.

MR HUDA:

Your Honour's right, there is always the risk of the idea that something is left after the trial and the floodgates come away. But that cannot necessarily always be so because it just happened in a set of – often in trials matters are raised on the spot and, just to give an example of a case that this Court may remember, was *Winter v R* [2019] NZSC 98, that Mr Bailey and I were here for. There was an issue raised with the trial, the Judge did exactly as Your Honour pointed out, questioned the jury, sort of we got rid of all the jurors because that juror said, "Yes, I did talk about what I said to Your Honour to other jurors," and the matter was put on the side and a new jury was empanelled. So often those things are dealt with in the trial.

ELLEN FRANCE J:

Yes, but why have an enlarged process now?

MR HUDA:

Simply because if we say that there is a, or if this Court accepts that there is a conflict or allows me to put the theory the Justice Williams put quite accurately and finely, that will allow a Judge to make a determination of the facts, that in the circumstances does that give us a level of concern, and that's where I go

to the English case of *Baybasin* who, they go through the process and they say, well, had the Criminal Cases Review Commission interview certain jurors, “It’s in a state where we think in order to accurately resolve the matter we would need to hear from the jury and then we will make a determination.”

ELLEN FRANCE J:
But that's a different process again, isn’t it, from the present?

MR HUDA:
That's right. I mean, the jurors were summonsed and they were cross-examined and then the Judge made a finding of fact as to where things are.

Now obviously, to go back to what Justice Glazebrook said, that if this Court, the need to identify a conflict, is to persuade the Court that the Court can’t engage in a fact-finding task on the as is/where is basis now. Hence the need to spot the conflict and say, “Where is the conflict in evidence,” and I couldn't take the matter any further than the inherent implausibility, if I can encapsulate what Justice Williams said in that label, to say that we could put that to the juror.

WILLIAMS J:
Well, I guess if this had occurred at trial, which is where it really should have occurred, and the Judge questioned the juror either in the presence of counsel or separately, got the answer that was reported to us, it would have been open to counsel to say, “Well, we’ve got some issues here, Judge, would you mind making a further inquiry?” I guess, it would never have got to the point of cross-examination.

MR HUDA:
No, it wouldn't have.

WILLIAMS J:

So if you think of this process as an analogue of that, the best you could ask for – and it would require some justification – is to say, “Can you send reporting counsel back?” But you haven't really constructed anything that would provide a basis for that. If at trial you said, “Look, Judge, my client has real concerns about this, here’s the background. I don’t think you can take that answer at face value. Can you ask a couple more questions for us?” that is not an implausible trial outcome.

MR HUDA:

No, it’s not.

O’REGAN J:

It’s different at the trial because you don’t know what the verdict is when you're having this debate.

WILLIAMS J:

No, no, that’s true.

O’REGAN J:

It’s quite a big difference when you do.

WILLIAMS J:

Yes, that’s true. But we’ve got to be careful not to reverse-engineer this.

So if you were going to get counsel to go back, what would you get them to ask?

MR HUDA:

Well, Sir, again I take the view that I actually should have said that I want an interview and the transcript of said interview. What we have is a statement. So forensically –

WILLIAMS J:

Yes, but that's not going to work for you, is it, because you're saying, “I want some proof about the process.” That horse has bolted.

MR HUDA:

That's right.

WILLIAMS J:

So now what?

MR HUDA:

On the basis of the statement the way it is, my preference would be for appellate counsel, so ie me and Mr Bailey, to put the implausibility theory to the juror.

WILLIAMS J:

Right. But since you would never get to do that in a trial, why would you get to do it here? It’s always going to be via the filter originally of the Judge and if, on a best-case scenario from your point of view, the agent of these Judges, that’s all you’d ever get.

MR HUDA:

That was the question that I, that’s why I sort of started out by saying cross-examination, I wasn’t quite sure as to what extent this Court would entertain that.

WILLIAMS J:

Okay. So accepting that there needs to be a filter, as there would have been at trial, what would your next inquiry be, if you were able to request an inquiry of the Court’s agent in this process?

MR HUDA:

Well, Sir, the agent as my proxy – well, it’s not at my proxy, it’s Your Honour’s proxy.

WILLIAMS J:

Correct.

MR HUDA:

The Court's agent will have to put this theory, I mean, effectively it has to be done the other way round, the implausibility theory will have to be put through the agent. I'm sure, however, aside from putting aside what Your Honour said about the trial, that, look, in a trial only the Judge would get to ask the questions, and I accept that. But given that we're not in a trial, we've come here now, things have slightly changed and it's a post-conviction issue, any cross-examination would be done in the presence of a Judge and the Judge will be entirely entitled and, as Judges do, would quite correctly control the process.

WILLIAMS J:

Well, any intervention at this stage would have to be proportionate, given the values in play, including re-traumatising jurors and having a trial after trial of the decider, all of which are potentially corrosive outcomes unless carefully managed, which is why it's usually done by an agent.

MR HUDA:

That's right, and that's why I refer to the case of *Baybasin* where this sort of scenario did come by, and then there was the situation where, "Look, we need to resolve this," and the way to resolve it would be through cross-examination.

ELLEN FRANCE J:

Where do we find that case?

MR HUDA:

Certainly.

WILLIAMS J:

Tab 16. Rolleston materials, tab 16.

O'REGAN J:

When we started today I thought you said you accepted you couldn't cross-examine. Have you changed your position?

MR HUDA:

I said that I thought I could not at all, until Justice Glazebrook, the Chief Justice said that –

WINKELMANN CJ:

Yes I did because it did seem to me you were making an assumption.

MR HUDA:

I was.

WILLIAMS J:

Yes, we'll call that a side-step.

GLAZEBROOK J:

Well, I mean, the fact is unless you can make that case I think you've accepted there's really nothing in what the foreperson says that would actually ground an implicit or actual bias allegation.

MR HUDA:

That's right. If we take the foreperson's words as it is, he's saying he doesn't recognise, the name Dante Rolleston doesn't mean anything to him, and insofar as Brooke Rolleston the only thing is that he, a defendant in a trial, so full stop, ends there. No knowledge so doesn't matter and, if he did get bullied, may have, but wasn't bullied bad enough, remembers the people at the higher threshold as opposed to not the lower one, all of which is bad from the appellants' perspective.

O'REGAN J:

So really you're saying, "We got it reported, it didn't say what we wanted it to, so now we want another one"?

MR HUDA:

Well, Sir, I was always in that position when we get a report, I would never know what the report would say, and although I didn't put it quite accurately the last time, when I was seeking the report, and I said, "Oh, do we ask the biased juror whether he or she is biased?" I didn't put it quite right there. The question is I was alleging some sort of impropriety, so my client was alleging some sort of impropriety against a juror and all we have is the juror being questioned. Now the question is if the juror did engage in some sort of improper conduct the assumption we're making is just because we send another lawyer he will definitely own up to it. Now I understand that the response to that will, "Mr Huda, you asked for this and we gave it to you," but I had to as part of the process ask for it.

O'REGAN J:

Well, we made an inquiry to see if there was any reason for concern. The answer we got was no, there wasn't any reason for concern. Isn't that the end of it?

MR HUDA:

If you accept what the juror said unequivocally, then yes, I will have to accept that that's the end of it. If you just ordered the inquiry, "This is what the juror said, we accept what the juror says," then there are significant problems, even with the appearance of bias arguments.

WINKELMANN CJ:

What was the case you were referring us to, Mr Huda?

MR HUDA:

B-A-Y-B-A-S-I-N.

ELLEN FRANCE J:

That's a reference under 23A of the Criminal Appeal Act 1968 to the Criminal Cases Review Commission for them to conduct an investigation. So that is a different process, isn't it?

MR HUDA:

Well, Ma'am, I went through and looked at the cases, and there is another few. What happens is that interview, or the investigation, is being conducted by the CCRC, so they're effectively in that case in Mr Rapley's position and they get this information back to the Court, although in the UK there has been, they're in my submissions, so…

WINKELMANN CJ:

All right. So is there anything else, Mr Huda?

MR HUDA:

No, aside from the cross-examination point. If the evidence as it is does not raise any concerns, and I'm talking about the evidence as a whole, putting the jurors into the mix, then no, there's nothing further that I can add.

WINKELMANN CJ:

Thank you. Mr Bailey.

MR BAILEY:

Your Honours, obviously the appellants still have the same interests, and I certainly won't cover any of the matters which have been discussed by the Court and Mr Huda this morning.

The way I've approached the appeal on behalf of Mr Roche is that, as I've said in my written submissions, firstly, when the leave judgment was issued this Court noted that there'd be a hearing, the first hearing, to determine whether there would be inquiries made of the juror or jurors by an independent practitioner. So that set the scene as to how any evidence, if there was to be additional evidence, would come to the Court.

To the extent that it may, in light of receiving that evidence through Mr Rapley's interview, it may be open to the appellants to seek essentially for that to be revisited or seek for cross-examination to take place or something similar to it, then I've assumed, rightly or wrongly, that that is unlikely to be,

such an application to be granted by the Court. Now of course that doesn't prevent the Court making such an order just because my assessment might not be the same as the Court's. Therefore the way I've hoped or submit that the Court should approach the matter is if we broadly accept the proposition that the juror may have recognised the Rolleston boys, or at least one of them, more than he has stated in his statement, then we don't know with any degree of certainty whether –

GLAZEBROOK J:
Why would we do that?

MR BAILEY:
Well, if we look at the appellants' evidence that obviously provided an evidential foundation for at least the proposition that he may well have known, in a concerning way, the Rolleston boys or brother. Hence why, no doubt, perhaps leave was granted in the first place.

GLAZEBROOK J:
But why wouldn't take what he says in the statement as what he, what the case was? Why would we assume something more?

MR BAILEY:
I'm not saying you should assume it's correct or incorrect. I'm saying, certainly on the evidence that the appellants' provided, it wouldn't be surprising, for example, if he did recognise the Rolleston brothers.

WINKELMANN CJ:
Is your submission that should we decide that it's not appropriate to direct cross-examination, there's still another pathway for you which is if the Court says that cross-examination is not appropriate here, but the Court can nevertheless, not appropriate in such a circumstance, the Court can nevertheless reach a view that it's troubled by the overall evidence.

MR BAILEY:

Yes, and in terms of making that assessment my point is if we say, right, he could have recognised them. The fact that he's given a statement which, as I've submitted at least in my written submissions, he may have an interest to not make statements against his self-interest, so we don't know. The fact that that statement has been provided doesn't prove one way or the other whether he had the degree of knowledge that he's claiming, or not. Then we have to take into account that we haven't got the benefit of cross-examination, so we don't have the benefit of the facts being easier to determine through that process, and all I'm saying is the Court should make an allowance for that particular fact, that particular position that we don't have the benefit of a cross-examination or anyone being able to ask him direct questions or additional questions.

O'REGAN J:

But if you strip that back that's basically saying if someone who's been convicted raises a problem about a juror, puts in evidence saying the juror knew me in some way, and the juror denies it, the Court should still assume the concern is well founded?

MR BAILEY:

Well, for example, if there was insufficient evidence that they even went to the same high school, then I don't think this cased would have got leave, for example, or gone this far, and of course the cases are littered with allegations of –

O'REGAN J:

But it's hardly worth getting a report. If you're getting a report that says, "No, I don't recognise him," and then you still allow the appeal, why get the report?

MR BAILEY:

Well, for example, he might have said, "I didn't go to the high school" or whatever.

O'REGAN J:

Well he was in the yearbook so we knew he went to the high school.

MR BAILEY:

Yes, that would have seemed likely that would say, but we just didn't know what he'd say but, yes.

WINKELMANN CJ:

So this is a hypothetical which is based on the assumption the Court describes that it won't be ordering cross-examination in such cases and the question youv'e got to address, which Justice O'Regan has asked you to address, is well what's this alternative pathway for you in that circumstance to have any appeal allowed, and it can't simply just be that there's a minor conflict or you're asking us to invite – you're inviting us to disbelieve the foreperson's evidence. There has to be some credible narrative that sits outside that foreperson's evidence that leaves us trouble about it in the absence of cross-examination, doesn't that?

MR BAILEY:

Yes, well I'm not asking to disbelieve him or believe him. As was said before, Mr Huda was giving submissions, if the Court says we unequivocally accept his statement then I entirely agree this appeal shouldn't go any further at all and it be quickly struck down, but I'm saying you can't unequivocally accept his statement. It would be unfair and in light of the other evidence speculative. So that's what I'm left with. I'm saying there's still a degree of uncertainty as to whether –

WINKELMANN CJ:

All I'm saying to you, is you have to tell us what's so troubling about the evidential picture we're left with, and it doesn't seem to me that it is that troubling, so what is so troubling about it?

MR BAILEY:

Well I don't think, probably when Justice Williams said, we're saying the appellants' evidence would establish that it would be inherently implausible that the juror did not recognise Dante Rolleston and similarly his brother.

WILLIAMS J:

So you've got two paths open to you on that basis. One is there should be a further step taken, or two, the allegation itself, in light of the overall evidence, gives rise to apparent bias full stop?

MR BAILEY:

Yes, I'm pushing for two.

WILLIAMS J:

And the investigation was unnecessary?

MR BAILEY:

No, I wouldn't say it was unnecessary.

WILLIAMS J:

Well you certainly don't need it to make that submission, it would be enough to argue that on the basis of Dante's own evidence and the evidence of the teacher and so on and so forth.

MR BAILEY:

Yes but, for example, if he did come out and say, "Yes, I did. I accept I made a – "

WILLIAMS J:

Of course, but that's not what's happened.

MR BAILEY:

We wouldn't need to trouble ourselves with any difficult issues but –

ELLEN FRANCE J:

It does seem, though, that in part this is simply regretting having sought an enquiry because the result wasn't the one that you hoped it would be.

MR BAILEY:

Well that seems to be the view expressed this morning by the Court but –

ELLEN FRANCE J:

No, I'm asking is that really what you're saying?

MR BAILEY:

I don't think there'd be so much a regret, it's just, we literally didn't know what any of the paragraphs would say until we got the statement so…

WILLIAMS J:

I don't think you should hide from the idea that you regret the answer, it didn't help you. That's a matter for regret. If I were you, I'd regret it. I'm not sure where that gets you though.

MR BAILEY:

Yes. Whether I regretted it or not I think is irrelevant and all I'm saying is how the evidence should be overall assessed, and I'm saying you've got evidence that went through the Court of Appeal Rules in the proper way, there was an opportunity to cross-examine, and then you've got this additional evidence. Even if there's no major differences between them, or controversies, then overall is there a sufficient risk that the juror did recognise Dante and the brother to a degree of sufficient concern that he may not have brought an impartial mind to the job.

In terms of just a side issue in relation to that, I think the Crown used the word he voluntarily gave a statement and in one sense he didn't oppose, he engaged in the process and no further discussion was needed with the Court in terms of whether he could be summons et cetera, et cetera, but in my submission, and I think it's really been implicitly accepted by the Crown, if we

go back to the Criminal Procedure Act 2011, section 335, the Crown in their first submissions in a footnote said essentially if the Court does make an order it will be for enquiries to be made. It will be under section 335(2)(a) or (b), and that refers to compellable witnesses at the trial. If one references that to section 71 and 72 of the Evidence Act 2006 then at least with the permission of the District Court Judge, the juror would have been compellable, in my submission, to answer questions if the Judge wanted to, for example, work out whether he'd gone to [the high school]. So section 71 of the Evidence Act talks about any persons eligible to give evidence and then –

GLAZEBROOK J:
But that's not how the procedure works in those circumstances, is it? I mean basically… well.

WINKELMANN CJ:
I don't know where this is all going anyway.

GLAZEBROOK J:
Yes, I don't even understand it, but I mean what would happen with the Judge, the Judge would make enquiries of the jurors usually I'd say in the presence of counsel, and a decision would be made as to whether the juror could continue to be a juror or not.

MR BAILEY:
Well just based on my limited experience the juror might come out and the Judge would say, I just want to check did you go to [the high school], and do you know any of these two individuals, da da da, whatever. But all I'm saying is, and I may have read it wrong, the Crown submissions read to me that some weight can be placed on the fact that this juror has engaged in a process which he didn't necessarily have to –

GLAZEBROOK J:
What's engaged sorry?

MR BAILEY:

Well, given a statement, and they're saying he's freely and voluntarily given a statement.

WINKELMANN CJ:

It's a bit of a side issue though.

MR BAILEY:

Well, it's looking how the, in the round, how the evidence should be assessed, and all I'm saying is, well, if someone essentially could be forced and would be forced to give a statement, yes. So –

GLAZEBROOK J:

Well, I haven't actually.

MR BAILEY:

Right.

GLAZEBROOK J:

So if they could be forced to give a statement what?

WINKELMANN CJ:

They're not really voluntarily giving it because if they didn't give it they would be forced.

ELLEN FRANCE J:

So in this case if the juror for example had said, "No, I won't give a statement," Mr Bailey's submission, as I understand it, is under that section he could have been summonsed and compelled.

GLAZEBROOK J:

I still don't see what it's got to do with whether you believe him or not, or what other procedures there'd be.

WINKELMANN CJ:

And your point, Mr Bailey, is that the voluntariliness or otherwise doesn't really help us with whether we believe him or not anyway so that's probably enough, isn't it?

GLAZEBROOK J:

Is that the only point?

MR BAILEY:

Well, that's just to counter the Crown's point that he wouldn't have given the statement if he had anything to hide, and I'm saying, well, he continued hide, so he essentially one way or another had to give a statement and say something. And again, naturally, he's not going to wish to make a – if someone has to give a statement and they don't naturally want to make a statement, as one would expect, against their self-interests, and again that's a matter the Court can take into account in assessing this…

GLAZEBROOK J:

So you just assume that everybody, if it's not in their self-interest, will lie?

MR BAILEY:

No, I'm just saying we haven't got cross-examination, he had to give a statement, there was reason for him not to make statements against his self-interest, then those are relevant considerations in assessing the weight that she be placed on the statement.

That completes my submissions, unless there are any further questions from the Court?

ELLEN FRANCE J:

Just in relation to that, he does say, "I realise I do not have to make a statement," the juror, and we don't know what advice he was given about that.

MR BAILEY:

That's a fair point I suppose, Ma'am.

WINKELMANN CJ:

All right. So we need to move on from that point. Is that pretty much your submissions, Mr Bailey?

MR BAILEY:

Yes, it is, thank you.

WINKELMANN CJ:

Thank you. Mr Lillico?

MR LILLICO:

May it please the Court. Subject to the Court's views I wish to address you very briefly on the cross-examination point, whether this Court could hear cross-examination of the foreman, which was really raised by Mr Huda as opposed to Mr Bailey.

The first thing I would say about that is that the Court could hear cross-examination or could order it. The Crown of course will say that that's the path that shouldn't be taken, but in terms of jurisdiction rule 40(1)(a) of this Court's rules allows on the application of a party leave for further evidence by way or oral examination in Court, that's a general ruling, doesn't of course refer specifically to jurors. But cross-examination of jurors has been contemplated by the New Zealand Courts before, and example being the case of *Tuia v R* [1994] 3 NZLR 553 (CA), where the Court might recall that that was a situation where, unusually, the Crown had asked for each and every one of the jurors to give affidavits on the question of whether they had seen a medical file in the jury room and whether they had read it. So the Crown, if you like, was trying to rebut the idea that there'd been a miscarriage, were hoping that the jurors would say, "No, none of us read the medical file," and the Court said, well, in respect of that, that's completely – and I think, Justice Williams, your word was "corrosive", the words that the Court used at

the time were, “It’s an extremely unattractive proposition,” and really referred to the policy, if you like, of conserving the resource that is a jury trial. So the Courts have –

WILLIAMS J:
But on the basis of an evidential context, wasn’t it that it’s implausible that a file sitting on the jury table for five and a half hours wouldn't have been looked at by somebody?

MR LILLICO:
By someone, yes, Sir.

WILLIAMS J:
So they just didn’t need it.

MR LILLICO:
Yes and so my answer really is that the Court does have jurisdiction, can be done, foreperson could be ordered to the Court and examined, and the Rules seem to contemplate that. We say, of course, that that shouldn’t be done, mostly for the policy reason that we’ve already averted to, but secondly, and there’s a third reason as well, but secondly because there’s no conflict on the evidence matter that has already been discussed in the dialogue between my friends and the Bench, that the statements of Dante, Brooke and the foreman can be all reconciled. The third reason is that, this wouldn't be the most important point, but in terms of *Baybasin*, and I take Justice France’s point that this was on reference from the Criminal Cases Review Commission, but although the Court carried out its own process, and this is at paragraph 44 of the judgment, although the CCRC carried out its own investigation and inquiries, the Court then did, in fact, it seems, have the jurors, or at least four of them, come before them and be examined.

But my point is that in that case there was quite a high level of allegation, if I can put it that way, against the jurors. It’s outlined briefly at paragraph 47 of the judgment, and you’ll see there that irrespective at least two of the jurors

there is an allegation taken quite seriously of course that the jurors had carried out their own investigations to do with the valuation of the house and other things and so not so much a conflict on the evidence there but a matter that struck to the heart of the Court's processes and could be seen as a contempt that the Court had obviously a great interest in that in this trial the jurors had in fact gone and without the rules of evidence to protect it, gathered their own evidence in fact.

So we have nothing like that here and although the Court, as I say, the Court does have jurisdiction to cross-examine. It's not an order that should be made in this case.

WILLIAMS J:
This case just isn't odorous enough.

MR LILLICO:
No Sir, no. Those are the matters I really wanted to raise but if I can assist further.

WINKELMANN CJ:
So your point is that there isn't some further pathway. It simply is the Court can do it but it shouldn't do it in this case?

MR LILLICO:
No Your Honour.

WINKELMANN CJ:
Thank you Mr Lillico. Anything in reply Mr Huda? Mr Bailey? Counsel, thank you for your submissions. We'll take time to consider our decision and release the judgment in due course.

COURT ADJOURNS: 10.58 AM