IN THE SUPREME COURT OF NEW ZEALAND SC CRI 3/2004

IN THE MATTER of an application for leave to appeal

BETWEEN **POURSHAD MARCO ARVAND**

Applicant

AND **THE QUEEN**

Respondent

Hearing 7 July 2004

Coram Elias CJ
Tipping J

Counsel W Lawson for the Appellant
J C Pike for the Crown

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**TRANSCRIPT OF HEARING OF APPLICATION FOR LEAVE TO APPEAL**

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Lawson If the Court pleases, this is an application for leave to appeal. It is submitted that it is in the interests of justice that the Court hear this appeal as the appeal involves a matter of general and public importance. The reference is in relation to section 13(2)(a). The matter of general and public importance, it is submitted, is the right to a fair trial, and that is identified by section 25A of the New Zealand Bill of Rights Act.

It is submitted that the appellant did not receive a fair trial, particularly that he was not afforded the right to cross-examine a complainant at trial in the presence of the jury. It is submitted that that is in breach of section 25F of the New Zealand Bill of Rights Act.

More generally, it is submitted that the appellant was not given adequate time for preparation of his defence and that that was in breach of section 24D. What that is referring to is the fact that there was a complex and detailed brief of evidence provided by the Crown some three working days prior to the commencement of the trial.

Tipping J That is the Begg deposition or brief.

Lawson Yes, that is the brief of evidence of Professor Begg. Finally, the third point is that there was no proper opportunity for the appellant to pursue his defence; in particular, that he was not afforded a full opportunity to advance an alternative

theory to explain what the Crown referred to as similar fact evidence and identified it as a consistency of complaint.

Elias CJ The theory being that the complainants had been prompted by the police.

Lawson Yes, ma'am. The theory being that the police, because of the language difficulty, assisted, for want of a better term, with the preparation of briefs of evidence. Also, it is inter-related to the issue of the diazepam matter, because there is some suggestion that some of the women who were under the influence of drugs were not in a position to give and full detailed statements to the police to the extent that they did.

Tipping J When did the intervention come which prevented your client, in your submission, from fully advancing this theory? What did the judge do or not do that prevented that?

Lawson There were a number of examples, Your Honour. One particular example was that one of the witnesses was a Japanese national. First of all, that witness was in contact with another prosecution witness who was a complainant in Japan. It became clear that this woman had extreme difficulty with the English language, but the police were, according to their version of events, able to take a detailed brief of evidence from her over the telephone. What was required at trial was a demonstration of her English language ability so that it could be determined whether or not she was able to give sufficient information to the police officer, who didn't speak Japanese, over the telephone to form the substance of the brief.

Elias CJ That wasn't a complainant, was it?

Lawson Yes, it was, ma'am.

Elias CJ Which complainant was it?

Lawson That was—

Tipping J Miss H.

Lawson Complainant H.

Tipping J I know this is all a rather difficult environment, this trial, because of the language, but was there any cross-examination of her to suggest that she had really been led by the police?

Lawson Yes, there was cross-examination to that effect.

Tipping J That was allowed?

Lawson Yes, on a limited basis it was, yes.

Tipping J And you then wanted to call defence evidence or put up some sort of

demonstration, you say?

Lawson What was requested of the trial judge was for her to give a demonstration to the jury in English of the conversation that she had with the police officer to form the basis of her brief of evidence. So, in simple terms, her evidence was being given in Japanese and interpreted to the Court in English.

Tipping J Yes, I understand.

Lawson So, on a more particular basis, coming back to—

Elias CJ Was the statement she had made to the police introduced in evidence?

Lawson No, it wasn't introduced in evidence, ma'am.

Elias CJ I am struggling to see the relevance of the line of questioning.

Lawson The material that formed the basis of her evidence—and it was some time later, of course; it was taken some time later, and it was provided to her with the interpreter before she gave evidence in court. The point being, simply, ma'am, that it was suggested that effectively the police were filling in the gaps on the detail surrounding the similar fact evidence, i.e.—

Tipping J You are saying she refreshed her memory from a tainted document.

Lawson Yes.

Tipping J Is that the sort of argument?

Lawson Exactly, sir. That was just one aspect of the defence wanting to put or demonstrate what was going on behind the scenes, because of the difficulty with the language issues.

The main point on appeal relates to—

Elias CJ Sorry. I didn't understand from the Court of Appeal decision that matters were put on that point in that way—that she had refreshed her memory from a tainted document.

Lawson That was the whole approach that we were stopped from pursuing. There was a ruling by the trial judge in relation to that whole process. And what was requested at trial was that this demonstration be given, so that we could then make the submission that His Honour Justice Tipping has indicated.

Tipping J But your key point, really, in this application, as I understood it, was the combination, if you like, of the reading of the deposition plus the Begg prejudice.

Lawson Yes, that's exactly—

Tipping J I am not saying that this is a make weight, but this is a somewhat subsidiary point to those two.

Lawson I agree, sir, yes, it is definitely subsidiary to the two main points.

Elias CJ And today you put that on the basis of breach of the New Zealand Bill of Rights Act, but the respondent makes a point that that is not the way matters were advanced in the Court of Appeal; that it was an argument simply based on trial fairness.

Lawson That's right. And although there was no specific reference to the New Zealand Bill of Rights Act, the appeal was certainly brought on the basis of trial fairness and generally the right to a fair trial. Of course, there was a more particular consideration of the rulings made by the trial judge. But my main point really relates to the point on appeal in respect of the complainant S, who had her deposition read at trial.

Tipping J That's where the Court of Appeal's judgment at paragraph 24 is the essence of it, isn't it, where they say that it must only be in truly exceptional cases. I don't think you can complain about that.

Lawson No.

Tipping J And then they go on to say in effect that this is a truly exceptional case. So it is not a matter of law you are really complaining about, but the way they applied the law vis-à-vis these facts. I just would like some help with that thought.

Lawson What my point really is, Your Honour, is that there was, in my submission, no appropriate grounds in law to make the distinction between the two complainants that they did.

Tipping J But they haven't got the law wrong; they've just simply misapplied it to S—

Lawson Yes.

Tipping J —by finding that her case was truly exceptional. Do you accept it is of that ilk?

Lawson Yes.

And related to that, in my submission, the application does not give due weight to the principles set out in the New Zealand Bill of Rights Act, particularly section 25F.

Tipping J Well, the reasoning of the Court of Appeal for this truly exceptional conclusion, which is inferential rather than express, is caught in the act, which is a shorthand way of saying the evidence was so sort of cut and dried that, really, it was not prejudicial to have that complainant's deposition read. Now, what do you say about that?

Lawson Well, on the face of it, it is a really seductive argument, because it appears that this man was caught in the act, as I think was how it was put. But what that does not consider, in my submission, is that it doesn't take away the defence of consent. The point really is that the appellant admitted that he gave Miss S diazepam. He admitted that he had been performing massage on her. He admitted that he took her back to the hotel room—

Tipping J So he was caught in a consensual act—

Lawson Exactly.

Tipping J —is your argument.

Lawson That's exactly right.

Tipping J Or that's the thesis that you would wish to address.

Lawson Yes. No more than that.

Tipping J So to say he is caught in the act really begs the ultimate essential question.

Lawson Yes, which in my submission then makes it absolutely crucial, because of the credibility issue, for a jury to observe the witness giving evidence. It goes to the crux of the jury trial system. I can add little to that, unless Your Honours have any further questions about the evidence of S.

The next matter is the late brief of Professor Begg. This was an extremely complex brief, with very technical information about calculating back rates of metabolism of diazepam from amounts of diazepam in the blood stream at a given time. It became obvious immediately that this was complex, controversial new material that had not been previously foreshadowed.

Tipping J When was it first foreshadowed? Was it foreshadowed at the same time as it was delivered?

Lawson Exactly. I think I received the facsimile at 5.10 on the Tuesday night, when the trial was set to commence the following Monday.

Tipping J What was the explanation for such an important piece of evidence being submitted so late?

Lawson Well, in my submission, sir, there was not an adequate explanation. As I understand it, the Crown suggested at the time that they had been talking to a local pharmacist, but that material had not been disclosed to us either, so we had no indication, from a defence perspective, that any evidence was going to be given to suggest that these women had ingested up to at least four diazepam tablets. On some occasions the suggestion was as many as 10 diazepam tablets. Now, that was significant and very, very prejudicial to the defence, where Mr Arvand had made a statement saying he gave these women

one or two diazepam tablets and they voluntarily took them. It became obvious very, very quickly that there was room for the assertions to move, and there was room for a significant difference in the calculation, for a number of reasons. But the focus immediately came on some very technical pharmacological evidence, and it required a significant amount of time taken away from ordinary trial preparation to try to focus on this issue. The trial judge at the time effectively put the onus on defence counsel to remedy any prejudice which was created by making investigations, by taking what steps they could to perform an adequate cross-examination.

Tipping J When was the matter first raised with the trial judge?

Lawson Immediately. The following morning by telephone. There was a telephone conference about it.

Tipping J With the judge?

Lawson Yes.

Tipping J You say she put the onus on you.

Lawson She effectively said that I was to make what inquiries I could, see if I could get myself an expert on board and find out what material—

Tipping J With two-and-a-half working days' notice?

Lawson Yes. And fortunately I was able to get in touch with a man from Perth, who was very helpful. But, there were a number of difficulties. I spent most of my time understanding what is very complex material. I'm no scientist, but he was very, very helpful—

Tipping J Well, you did your best in the circumstances, but you still say there was prejudice.

Lawson I say that the decision should have been made right there and then to say no, that this evidence is too late. The fact that I was able to make some adequate attempt at a cross-examination of this man in the circumstances should not, in my submission, remedy the prejudice that occurred at the time.

Elias CJ What was the prejudice?

Lawson Well, the prejudice, ma'am, was that this was new information which effectively—

Elias CJ No, I mean ultimately what was the prejudice?

Lawson Well, the prejudice was that the pharmacological evidence was suggesting that there were far more diazepam tablets ingested than Mr Arvand admitted to in his evidence, and that effectively meant that it was more likely that he did not voluntarily give these women the tablets and that they were voluntarily

ingested; rather, that they were surreptitiously given to them.

Tipping J Well, the greater the number, the worse it was, from your point, wasn't it?

Lawson That's it in a nutshell, sir.

Elias CJ I mean, however, what ultimately was the prejudice? Could that evidence have been countered if you had more time?

Lawson I accept that I was able to get some concessions from the professor in terms of the possible range of ingestion, of the number of tablets ingested. However, my focus was purely on understanding that. What I didn't do was spend more time on issues surrounding what effect those tablets would have on the complainants, and that is, whether they would have been able to give statements to the police when they were under the influence of such a high level of drugs. So the point simply was, on the one hand, there was an allegation that they were taking up to as many as 10 tablets, and shortly thereafter the police were taking a statement from them which appears to be quite a lucid and logical statement. So the police, in my submission, couldn't have it both ways; either they were under the influence of a significant number of tablets, in which case it would have been very difficult for them to give the statement in the detail that it was given.

Elias CJ You are answering me in terms of the dynamics of the trial. We have to decide that it is necessary in the interests of justice to give leave to appeal. Are you able to point to any ultimate prejudice through lack of preparation time?

Lawson No, not directly, ma'am, no. My point about this issue is that it should not be incumbent upon defence to remedy prejudice created by the Crown by the provision of such a complex brief at a late stage.

Tipping J Could you just help me by just referring to the way the Court of Appeal dealt with this point. It seemed to me that, like the Chief Justice has been exploring with you, they primarily focused on actual prejudice.

Lawson Yes.

Tipping J Now, I was just wondering about that. The test in the section, which is 368, isn't it, is that you are taken by surprise in a manner likely to cause prejudice.

Lawson Yes.

Tipping J What I wondered was whether the Court of Appeal had, in the circumstances, correctly directed themselves. They weren't actually applying the proviso. They weren't saying, oh well, there may have been something a bit wrong here, but no ultimate actual prejudice. They seem to be jumping straight to that question, but not under the aegis of the proviso. Are you following what I am wondering about?

Lawson Absolutely. That's really my point. There doesn't appear to be an application

of the proviso in this case.

Tipping J And the test for the trial judge must be likelihood of prejudice. I see no-one—no part of the court system; the judges—actually directing themselves to that issue.

Lawson No, there wasn't.

Tipping J Neither the trial judge, seemingly, or the Court of Appeal. If the Court of Appeal had said, look, the trial judge misdirected herself, she didn't approach it in the correct way, but we are going to apply the proviso because we don't think there was any ultimate actual prejudice, that would be a correct sequence.

Lawson Potentially, yes.

Tipping J But that doesn't seem to be what's happened. I don't know whether that's going to get you anywhere, but I'm just thinking out loud.

Lawson Yes. That's exactly correct, and I couldn't have articulated it better myself. The point really is, from an application for leave to appeal point of view, was that, in my submission, it is clearly wrong, on the basis of the law, to require the defence to remedy the prejudice. That is not what the law says. And from an adequate preparation time point of view, it is simply unsatisfactory for the Crown to provide such complex late briefs at such a late stage, and as a matter of policy.

Tipping J Well, the Court of Appeal seemed to be sort of three-quarters, seven-eighths with you on this point, but then ultimately came against you on this no actual prejudice proposition. They inferentially said she should have granted you at least an adjournment.

Lawson Yes.

Tipping J Possibly even excluding the evidence; they didn't say specifically. But in the end you didn't suffer any actual prejudice. Well, there are different issues in the application of the proviso, I would have thought, than those which the Court of Appeal addressed themselves to. They sort of merged it.

Lawson Yes.

Tipping J But I am only thinking aloud, Mr Lawson. Don't get too optimistic.

Lawson No, no. I have learnt from bitter experience not to get too optimistic.

Elias CJ But just in terms of the sequence, remind me: did you renew your application to exclude the evidence at the beginning of the trial—

Lawson Yes.

Elias CJ —but not again when the evidence was being called a week later?

Lawson No.

Tipping J But you had had a ruling—

Elias CJ Yes, you had had a ruling.

Lawson It was fairly clear there had been far too many resources gone into the trial for me to be granted an adjournment.

Elias CJ The third point, I think, perhaps you could move to.

Lawson The third point, ma'am, we've largely covered in my preliminary comments, and there is very little else I want to add to that. My submissions are reasonably full on that issue. As has been clearly indicated, it is certainly a secondary point to the other two matters. So unless Your Honours have any further questions, that's all I have at this stage.

Tipping J There's one point that's not raised, Mr Lawson, but I just think it would be appropriate to give you an opportunity to address it, if you can. It derives from what the Court of Appeal did by, as it were, distinguishing between the two deposition complainants. The trial judge was at least all or nothing; she let both in. The Court of Appeal said that the complainant K shouldn't have been in, but S should have been. Now, the niggle I've got derives from the similar fact consequences of that, that the judge directed the jury that they could use K, if believable, against S. But K shouldn't have been there. So how could it be proper, in the event, to use K, as the judge said, against S?

Lawson The distinction clearly creates significant downstream consequences.

Tipping J Well, this point isn't expressly raised. It is, frankly, if I may say so, a point which in my mind is at least as problematical, if not more so, than the ones you have raised. Now, it's not for the Court, as it were, to dream up points for an intending appellant, but I must say I do have an underlying anxiety about how he could have had a fair trial, arguably—this is just thinking aloud—if the judge has said you can use K against S, but K shouldn't have been there at all. That's to assume S should have been against you on everything else. Where does that leave one?

Lawson Well, in all sorts of difficulties in terms of the direction that the trial judge gave.

Tipping J Yes. They've been encouraged, if they took a particular view, to rely on the witness who should never have been there—according to the Court of Appeal, not according to the trial judge. She was perfectly consistent, because she thought they should both be there. But now we find out that K shouldn't have been there. That's a problem, isn't it?

Lawson I agree, sir, and I haven't, for the purpose of this application, gone into any

detail, except to identify the distinction. To be entirely frank with you, I hadn't completely analysed fully the consequences of the distinction.

Tipping J But you've had a lot of other points to think about, and I've had the opportunity of looking at it more broadly. At least arguably I would have thought it didn't feel quite right about that, in the event. The Court of Appeal, I think, basically disposed of that point. It wasn't as if it wasn't there. I think it is paragraph 30 something, wasn't it, that they very, very briefly dealt with that point, but only in a sentence. They basically said they couldn't think of any reason why there was prejudice in this respect as a result of their ruling K out.

Elias CJ 33.

Tipping J 33. Thank you. "Prima facie, we do not consider there has been any undue prejudicial effect arising from the jury hearing Miss K's recorded evidence in relation to accounts concerning other complainants." Well, prima facie, with great respect, that sort of leaps off the page at one a bit. They've heard an inadmissible—according to the Court of Appeal inadmissible in the sense that it shouldn't have been allowed—witness, and a pretty cogent witness too I would have thought, if you took that view of them. They both supported each other almost identically. And one shouldn't have been there.

Lawson Exactly, sir.

Tipping J And the prejudice could be said to be even greater because they are only having S's evidence read rather than having an independent opportunity to assess S. I'm really sort of putting a point in your favour—

Lawson I'm grateful, sir.

Tipping J —if it's got any moment in it. This is all embryonic.

Lawson Yes, sir, as I say I didn't articulate it—

Tipping J Well, understandably, Mr Lawson. But I would like to have the Crown's assistance on this point. No doubt, Mr Pike now may not be able to say much about it. But it is sort of semi subsumed in your not making proper distinction or making a false distinction between the two.

Lawson Yes.

Tipping J Anyway, thank you.

Elias CJ Thank you, Mr Lawson. Mr Pike.

Pike Yes, may it please the Court, the starting point for both counsel, of course, is the same in relation to section 13 of the Supreme Court Act, as the governing text, I suppose one could say. The Crown's overall submission, as foreshadowed in the written factum, is that we have here substantially, in

effect, an invocation of the Court sitting as a second court of criminal appeal, rather than one which is seeking to find principle of sufficient strength in either of 2A or 2B of section 13.

In relation to the first limb, the matter of general public importance, the Crown's reply to the applicant's submission lies in the fact that the case was not put in the Court of Appeal on the basis of raising directly and squarely the relevant sections of the New Zealand Bill of Rights Act, the fair trial rights of the Act, and pointing to the Court as to what particular provisions were breached and why that might be so, and seeking a remedy in respect of that.

Elias CJ — But those principles in here are in the common law, in any event, Mr Pike. So the New Zealand Bill of Rights Act, if anything, is a make weight—a powerful one—in relation to a more general argument as to trial fairness.

Pike — They do, with respect, Your Honours, there is no question that the Bill of Rights, or much of it, is the common law codified and given a special importance. But the submission is, with respect, that it is nevertheless important for the development of Bills of Rights jurisprudence to identify the right and the evidence in relation to it to get a consistent approach—or at least, certainly get an overarching approach that this Court is asked to give. This Court can rule on fair trial rights at common law, and undoubtedly in the future will do so on many occasions without invocation of the Bill of Rights Act necessarily.

But here it is submitted that one of the principles, at least, that we have seen and from what we can learn from overseas jurisdictions where one is dealing in the final appellate tier that it is seen as at least important that the court below, that is, the appeal court, has had seized of the issues and has evaluated and adjudicated on them, so that if there is error it can be illustrated by the appellant—or the applicant in this case—and ruled on by this Court in a principled and orderly manner. The difficulty here is that, really, to renormalise the fair trial rights in that constitutional sense, one needs some evidence as to what particular prejudice there was and how the fair trial rights arose, which requires much greater traversing of Her Honour the trial judge—

Tipping J — But, Mr Pike, when it is a question of not hearing from the complainant directly—hearing only in writing—how can you demonstrate actual prejudice? Surely, it can only be a question of the level of risk of prejudice. We can't get into the minds of the jury.

Pike — It is true; that is so. But the test for presumptive prejudice and actual prejudice is really a matter of degree, it is submitted; that one can at a late stage—and certainly at this level—review the record to see that despite what was said by the Crown the real risk of prejudice was so great that whether one calls it "potential" or "actual" doesn't much matter. Here, the submission is, with respect, that it is the Court of Appeal's task to determine whether there was prejudice, whether or not it invokes the proviso, I must say, with respect. It is for it to determine prejudice in the sense of reviewing the trial process. That it has done and, of course, has decided that there was no matter which by

inference or otherwise would get the curative provision, would not withstand the proviso. So this Court has to determine—

Elias CJ They don't put it on that basis, Mr Pike.

Pike They don't, no. But the law, as I submitted, would require the Court to be conscious of that constantly, so that the Court of Appeal may, with respect, be forgiven for perhaps not necessarily invoking in a formalistic sense these provisions, the provisions of the proviso to 385, but it must constantly have it in mind.

Tipping J The proviso would have required them to say, according to present law—whatever happens in *Howse's* case—that the result would, without doubt, have been the same had the jury heard the complainant. Now, that's not the approach they took at all. They took the view—which, I suppose, is another way of possibly putting it—but they haven't directed themselves, if one is talking about proviso.

Pike No, indeed. Implicitly they have decided that Ms K, as we are calling her here, that the evidence of Ms K can be lifted out. They agreed with the appellant in the Court of Appeal that it was unsafe that primarily, it is submitted—and this might or might not be important—on a review of the Court of Appeal's decisions, what troubled the Court much more than the fact of lack of cross-examination was the fact that Ms K's evidence was the subject of strange dealings with the interpreter. And that seemed to be as much as anything that really threw the Court into that mode of thinking, well, even if we were to marginally say that the trial judge was right in her assessment, we've got real difficulties with the interpreters. They were troubled by the—

Tipping J If the truly exceptional test is right—and, if anything, favours the accused, doesn't it—

Pike Yes, it does.

Tipping J If it is right, surely, you could only have a truly exceptional case if the hearing of the witness orally couldn't rationally have made any difference.

Pike Well, enough difference to raise a potential miscarriage of justice, yes. Some difference, perhaps. There must be some difference, but it must be of sufficient difference that the Court is not satisfied that it was fair to allow in the deposition. I'm sure counsel could always say that they could make some difference in cross-examination; the test must be that—

Tipping J Mr Lawson quite rightly says that he can't complain about the test—if anything, it is favourable to him—what he complains about is this "caught in the act" reasoning. That's the essence of it, Mr Pike. Whether that's a sufficient point to justify a second appeal, I'm frankly rather dubious because it's case specific, rather than general.

Pike It is case specific, sir.

Tipping J But it could be said to raise risk of substantial prejudice or miscarriage.

Pike I would submit, sir, that this case would be perhaps different if there hadn't been—my friend faces a repetition of what we would call glaringly similar fact evidence. It is not the looser R v P territory—

Tipping J Well, that's what makes my last point so worrying.

Pike It's really that in each case there has been stupefaction, and there are a lot of cases, not just these two, and they have all been through the medium of Just Juice and the question of injecting diazepam, and so on. So this is through the whole of the trial, and there were more than two complainants. If there were two or even three, and this were so, I would suspect that the Court of Appeal would have been much more likely to say that the whole matter had to go back to the jury.

Elias CJ There were four in this category, weren't there, because the Crown divided the case up into two categories. So those who had little acquaintance with the accused were four, is that right?

Pike Yes, I think that's right. I think there were four and then another tranche of complainants who had a much more fleeting acquaintance, if we can call it that.

Elias CJ No, I think this was the fleeting acquaintance, wasn't it. There were some who had a closer relationship.

Pike Yes.

Tipping J K and S were in the fleeting bracket?

Elias CJ Yes.

Pike Yes. But all had been stupefied, as I understand it, in both brackets.

Elias CJ Yes, but if there were four in this category—and that's the way the Crown chose to present its case; presumably that had an effect on the similar fact development and submissions that were put to the jury—if there were only four in this category and two had their evidence read to the jury, and one the Court of Appeal said shouldn't have been read to the jury, I wonder whether it has inevitably some impact, given, as you say, the significance of similar fact evidence in this case?

Pike Well, with respect, the answer is that it may not have. Even on that basis its impact may not have been sufficient. Certainly now—here and now—to see the Court of Appeal as having gone wrong in principle to such a degree that it is necessary to invoke the jurisdiction of this Court—

Elias CJ That's not the test.

Pike No, it's not. It's whether it is necessary—

Elias CJ Necessary in the interests of justice.

Pike With respect, it comes back to the point that primarily K's evidence, in the Crown's submission at least, went out for two reasons. The main reason, it is submitted, on a close reading of the judgment of the Court of Appeal, really was the fact that on the issue of consent, when the interpreter talked to her at some length on the crucial question at the deposition stage, the Court thought there that the appellant had a point, that it was not safe to rely on—this was the critical area. That's why it really rejected her evidence and thought that the trial judge wrongly admitted it. The submission for the Crown is that had there been no issue of interpreter issues, K's evidence could well have been admitted as well as S's evidence on the deposition.

The point, with respect, is this, that the law recognises that a person, as in R v L and other cases, may be faced with a trial from an absent complainant, the depositions may be read at trial. The Court of Appeal in L traversed the Bill of Rights implications for that, so there is no point arising now, a new point, about that possibility. Essentially, there was a discretionary judgment by the trial judge within the law. The Court of Appeal—my friend accepts that the principles were right—also said that the discretionary judgment was largely right but flawed in respect of K's evidence primarily, it is submitted, because of the interpreter difficulties on that critical issue of consent.

Tipping J No, what Mr Lawson says is that there was no logical basis, at least apparent on the face of the judgment, why if K went out S shouldn't have gone out too. That is part of what he says.

Pike It is part of it, sir. The submission in relation to that, with respect, is that what the Court of Appeal was searching for was certainly a distinction between the cases and the fact that the police had come into the room and found an obviously stupefied Ms S, was at least something to indicate the state that the person was in. Because, of course, part of the issue at the trial, and also under dispute, was that the diazepam wasn't anything like as affective as was submitted by the Crown. But here it is submitted that what the Court of Appeal took comfort from was the fact that S was plainly in a state of complete befuddlement and stupefaction. Now, that at least gave the case some air of reality, or her evidence at least was true to that degree. What Mr Lawson says, of course, is well, aha, she had consented to being stupefied to this degree and it was all part of consent.

Now, against that, it submitted, if one looks at the overall trial—and I do submit that one can come back to the fact that all of the similar fact evidence, the complainants and similar fact testimony, that everyone had been stupefied surreptitiously. So there is not a great deal of reality, it is submitted, to say, look, two people consented, happenstance that the both of them aren't the ones before the court. They consented to being stupefied and having sexual contact while stupefied. Now, with respect, the Court of Appeal is entitled to

say, well, at least to the extent we are satisfied the policeman saw a very stupefied Ms S in those circumstances, at least lines up with all the rest of the similar fact evidence and so on, it is unlikely that a jury would see her as likely to have consented to being in such a groggy state—

Tipping J Or that the consent was a true consent.

Pike Or was a true consent, yes. That is the point. The Court of Appeal is looking at the whole reality of the case, and in that, it is submitted, it had a legitimate and rational basis for distinction. It is not a 100 percent unarguable distinction, but it was open to the Court, it is submitted, to rationally make that distinction and say we think Ms S's evidence is at least safe to that degree, because we've got all the rest of it—that is, all of it, and not Ms K, which, of course, in their minds they had already excluded as unreliable.

Tipping J But the point really is that the undeniable fact of her state—well, this wasn't the attack, of course; the attack wasn't on this day.

Pike No, it wasn't.

Tipping J It was so strongly suggestive of lack of true consent that the Court of Appeal were entitled to take the view that there was that very strong external support for the validity of her evidence that she didn't consent.

Pike That is the submission, sir.

Tipping J That's it, really, in a nutshell.

Pike It is.

Tipping J And that's a point of fact in this particular case. No point of principle involved. Open to that view. End of story.

Pike It is the Crown's submission on the point, with respect. Perhaps if I could move on—I am conscious of the time.

Tipping J No, no.

Elias CJ We haven't been.

Tipping J We haven't been, Mr Pike, so you can take—

Pike If I can formally perhaps seek extension and go through the other point. With respect, the other principal point was Professor Begg's evidence. Again, this is case specific, it is submitted. The starting point is that a trial judge has a discretion whether or not to allow or disallow evidence on the basis of whether there was a surprise and likely prejudice. And I take Your Honour Justice Tipping's comment made to my friend about whether the test was right. But, of course, the trial judge, Justice Potter, had to consider. It could only be on the basis of potential prejudice. So while the wording might not

have been quite in that vein, what the trial judge considered was that there was time enough, with the help of the Crown, to cure the prejudice.

Tipping J What do you mean "with the help of the Crown"?

Pike Well, I understand—and my friend might correct me; I hope does correct me—the Crown played some part in facilitating Professor Joyce's coming on and assisting.

Tipping J But if in a case like this, Mr Pike, you get landed with a detailed medical brief three working days before the trial—the Court of Appeal seemed to be saying that, really, it wasn't on, but in the end they wouldn't do anything about because there was no actual prejudice. Now, what they meant by actual prejudice I would have thought extraordinarily difficult to say, because we don't know what weight the jury put on. We don't know if Mr Lawson had had more time and more opportunity to investigate, whether that might have made a difference. How can you talk about no actual prejudice? There has to be the risk of prejudice, doesn't it?

Pike Well, at the trial level there is certainly the risk of prejudice, but again when the Court of Appeal comes to view the matter, the submission, whether it can be accepted or not, is that it must do so at least in the light of the fact it is looking for real trial and not potential miscarriages. It may come to the point that it feels that the potential was always there, and the fact that it cannot be seen as a real miscarriage is neither here nor there. We've had many cases like that where the court cannot get past the fact that there was obviously potential miscarriage and there is that lurking doubt about the safety of the conviction.

But here it is submitted that what the Court was entitled to do, and did do, was first to consider—although it did not do so in so many words—that the ordinary response to fair trial right deprivation like that is for the appellant to come to the Court of Appeal with fresh evidence to say, look, since trial—we've had hundreds of these cases over the years—we gave discovered that Professor Begg is wrong. We've got a professor from England, we've got something else, and to bring it before the court as fresh evidence. If it was clear that that couldn't have been obtained in time—in three days it probably would be clear—then the Court of Appeal is in no position to do very much except usually to allow a new trial.

But here, with respect, the point is made that my friend really candidly accepts that he did, with Professor Joyce's help, manage to make inroads into the evidence. There is no suggestion that further inroads could be made, and the complaint really is that he ought not to, as a matter of principle, have been put into a position where he was up against a deadline of three days to get rebutting evidence. The difficulty with that submission is that it becomes really absolute because it would mean almost in no case, even in one where counsel—good, solid trial counsel, as he is—is able to rejig his defensive position and deal with the professor, that even if that is so, there will be mistrial if the time is too truncated.

And this is the essential difficulty, it is submitted. It is really invoking jurisdiction to say that there ought to be something of an almost punitive or corrective approach to a breach of the fair trial right, even although in reality it appears to the Curt that undue stress was placed on the defence but it did not lead to any potential, real miscarriage of justice. And that is probably—

Tipping J Is that primarily based on the fact that there is no evidence that further damage could have been done to Dr Begg had more time or resources been available?

Pike That's one of the issues. The other issue is that, with respect, it would have to be clear to defence counsel—and I am sure it was—that the Crown to succeed in the case had to overcome the argument from Mr Arvand that he had only supplied one or two diazepam tablets, in tablet form, to all of the complainants. Now, it would be evident that the Crown was leading evidence to show that if they were stupefied—because those were the charges—two diazepam aren't going to do it. So, for whatever the case, the Crown had to prove stupefaction had occurred. That meant that one had to work out how much diazepam had been given, because—

Tipping J But why on earth didn't the Crown at least tell counsel that they had Dr Begg, as it were, working on the matter?

Pike I'm sorry, sir, I can't answer that. And if they were remiss in that, they shouldn't have been.

Tipping J It has the flavour of ambush, this. I feel the force of the points you've been making, but in my experience something like this is really extreme. Landing a detailed technical brief on someone three working days before trial—

Pike There are shades, I think, perhaps of *Calder*.

Tipping J No, nothing quite as extreme that happened in *Calder*. It wouldn't have been allowed.

Pike But here it is submitted that, yes, the starting point is, with respect, the law allows it to happen, the law guarantees a fair trial. The trial judge and the appellate body tasked with looking at it has considered that albeit the Crown cannot be justified in what it did, and was to be told that in no uncertain terms, and accepts it, that in the event it could not be said that any different position could have been reached by the appellant had his fair trial rights were indeed breached, been respected, he would have been in no better position. That's really what the Court is saying. It is submitted, again, that that is a matter of review of the record by a Court of Appeal, which view is open to the Court and which is rational and justified on principle.

Tipping J Perhaps you are arguing, Mr Pike, that in a case like this, prejudice has to be demonstrated by evidence?

Pike I would submit, sir, that this Court would have a long journey in determining

what is meant by a substantial miscarriage of justice at this level. We have yet to develop that, but it may well be that the starting point will be that the Court of Appeal, putting aside fresh evidence after the Court of Appeal, got it wrong in principle or so plainly wrong in principle or law or one of those factors that the matter needs to be looked at again, because appeals here are by way of rehearing still. But the threshold must be different. Again, it is submitted that the starting point must be that the Court of Appeal, for whatever reason, be it at law or principle or just, if those terms can apply at this level, plainly wrong, then this Court will say, yes, the trial record must be reviewed for a second time.

But it is submitted that, in any event, this Court is not in that position in this case, although the Crown must bear the responsibility and the criticism that came with it for the apparent lateness of what was after all an important piece of evidence. There is no watering down that proposition, and counsel does not seek to do so. It was a case of real lateness, but which was cured, said the trial judge, by Professor Joyce being made available and Legal Services coming and helping and so forth. Those are the mechanisms for dealing with it. Adjournment was another possibility. Apparently it wasn't in the event needed. Certainly adjournment costs would be another way of dealing with it.

Tipping J I would like to be clear on this, and no doubt we will have Mr Lawson's ratification or otherwise. Was the primary thrust to keep the evidence out? There was no fallback of adjournment.

Pike I don't know that detail, I am sorry, sir.

Elias CJ It appears not, because the Court of Appeal, I think, in its judgment said there was no application for adjournment.

Pike Sorry. No application had been made.

Tipping J That is the impression I had. It was an all or nothing approach.

Pike Counsel is submitting—

Elias CJ But there was an application for adjournment of the trial, I think, but not an application for adjournment in order to call a defence witness or something of that sort.

Tipping J There was an application for adjournment of the trial.

Elias CJ Yes.

Pike It was then refused. The other thing the Crown did, to try to make good I suppose, was to, as I understand it, was to call Professor Begg as late on in the piece as possible could be, so the defence team had time to look at the evidence with the trial going on other factual matters as well. I don't put them forward as being necessarily shining beacons of cooperation but it was the

Crown's response to the fact that it had something to answer, so it had to get Professor Joyce or help there.

Tipping J So the judge both ruled the evidence could be led and refused an adjournment.

Pike Yes. So far as the last point perhaps is concerned, I don't necessarily wish to take the Court through the short argument—this is the evidence, the trial ruling that the complainant be required to testify in English. The points there are really trial points. With respect, the judge is entitled to say when something is collateral. Her Honour didn't actually say that the matter would have been impermissible reconstruction, but counsel certainly would submit here that that would have been an issue—don't say decisive—as to whether the jury could properly hear evidence on the basis that this is how this witness, a long time ago earlier, must have spoken to the police on the telephone and—

Elias CJ If the point were directed at the credibility of the witness' account in court, it couldn't be said to have been collateral. Why do you say it was collateral?

Pike Well, with respect, the Court will know that the collateral evidence rule is one of the most difficult to actually get a grip on. Counsel's understanding is that even evidence as to credibility is not, per se, collateral but can become collateral at a certain point, and that is what trial judges have to do—determine when the evidence has gone beyond, is really retrying, is really opening up another matter, in the face of sufficient denial. It is a matter of judgment. Certainly, it is not—

Elias CJ Did it cross the line because the question was directed at what the witness had said to the police and therefore aimed to test a previous presumably consistent statement? Is that why it is collateral?

Pike Well, even then one can probe. Defence counsel especially in fair trial territory must be given, and are given, enormous latitude on credibility to press issues that might legitimately undermine the truth of what is being said in court. But the point, with respect, here, as I understand it, wasn't only a truth issue of whether she said something to the police officer but whether in fact the police officer could credibly himself have taken down the evidence in the form that it was taken down, and therefore there was something wrong. This officer, a person not on the stand, had done something about another witness' evidence which cast doubt on that witness' evidence. As I understand it, Miss H, I think was the one to undergo this, was to testify in English so that it could be said that another witness' testimony couldn't be right—i.e. taking the statement. At that point there is reconstruction and collateral issues, and I would submit that Her Honour may well have had that in mind, that this is now going to a dimension beyond a direct credibility attack on the witness Miss H, and for that reason, and others, may well have said that as a matter of judgment you can't go down this line anymore. I submit that was open to her, and the Court of Appeal dealt with it in accordance with principle and law.

Those are the submissions for the Crown, unless the Court has another matter.

Tipping J I think you've touched on the question of if K goes, what effect does that have on S.

Pike Oh yes, I have done that, sir.

Tipping J Your answer to that, really, is that they were so much similar fact evidence, in general terms, the fact that one shouldn't have been there is not really likely to make much difference, as I understand your argument.

Pike The other point was the striking similarity of the similar fact evidence, not just a loose similarity. The fact that—

Tipping J Just a moment. My point is, surely, this: say there had been only two. Obviously if K was wrongly there to support S that would be fatal.

Pike Yes.

Tipping J Your argument, surely, in short has to be that the numbers of people who gave a similar story, in broad terms, was sufficiently similar to qualify cures the fact that one shouldn't have been there.

Pike Yes, sir, and underpinned by the other point, to whatever strength it has, and that is that the Court of Appeal spent much more time troubled by the interpreter issue in K's evidence than the fact that it was given.

Tipping J But the Court of Appeal's reasoning on the point, frankly, is not all that pellucid. It just said simply said it couldn't really imagine there could be any prejudice. Well, frankly, I can imagine they could easily be prejudiced. The only point is that there was so much of it, the fact that there is evidence that shouldn't have been there, on balance, didn't make much difference. There's no reasoning of that kind at all.

Pike That is the underlying factual basis on which the Court was engaged.

Tipping J So if you've got some inadmissible evidence it's not a miscarriage if there is so much other evidence to support the complainant in question. That's really your argument, is it?

Pike Yes.

Elias CJ Yes, thank you, Mr Pike. Mr Lawson. Do you want to be heard in reply?

Lawson Just very briefly. It touches on that point, that last point. My submission is that in considering the exercise of the discretion pursuant to section 184, one must be very careful not to usurp the function of the jury, in my submission, particularly so when one considers that consent is at the heart of the defence. Much has been made of the similar fact evidence, but of course, in my submission, that must be seen in light of the fact that the defence were not fully allowed to pursue their defence that potentially could have explained that. Now, of course, it was open for the jury, potentially, to reject that

alternative theory, but, in my submission, as a matter of securing a fair trial and as a matter of protecting the rights to a fair trial, he should have been allowed to pursue that alternative theory.

In relation to not usurping the function of the jury when exercising discretion under section 184, I direct Your Honours to *R* v *Dagg*, which specifically identifies the importance of the jury observing a witness giving evidence.

Tipping J I think your most fundamental problem for me on everything, Mr Lawson, is this: the point made that the state S was found in was so strongly suggestive of lack of true consent that, really, ultimately, we should not be troubled that the substantial miscarriage of justice matter occurred on any basis.

Lawson And the evidence primarily of that, sir, comes from the detective, Detective Colby, who found her. Now, very, very shortly after this, apparently this woman was able to make, a I said earlier, a full and lucid statement.

Tipping J How long after?

Lawson It was a matter of hours, sir. I can't remember exactly.

Tipping J Not a matter of minutes?

Lawson No. But we are talking about a very short period of time.

Tipping J Was there any attack at trial—I presume there must have been—on his description of her state?

Lawson No, sir.

Tipping J Well, in that case that is the end of it. He presented a picture to the jury, as I read him, of this woman being completely out of it, to use a colloquialism. She was asked to dress and she couldn't dress properly. She had to be asked about three times and gradually managed to get on various garments, and was stumbling all over the place, and was completely out of it. Your client's assertion of consent, true consent, in those circumstances might be thought to be somewhat fragile.

Lawson Yes, except that the defence was run on the basis that consent was obtained before she was at that stage.

Tipping J But she consented to being stupefied to that extent in order to have sexual contact?

Lawson No, sir, it is a little more particular than that. The facts are that this man took this young woman to a lake in Rotorua and while they were there he gave her, in his version of events, a tablet, a diazepam tablet. During the course of the time that she was still lucid and able to communicate with him, they discussed him massaging her and they discussed the fact that they were going to return to the hotel for continued massage and sexual contact. So the timing which the

police officer saw this woman is not necessarily indicative of the lack of consent—or what the police officer saw, I should say.

Tipping J Doesn't the consent have to be continuing, up to the point of the conduct?

Lawson That's a matter for the Crown to prove, the continuing consent, beyond reasonable doubt, in my submission. It is given earlier on, as was put forward by the appellant. There was no evidence to suggest anything had changed later on.

Tipping J No direct evidence of that. All right, I hear your point. Thank you. It has helped.

Lawson The only other matter relates to the evidence surrounding Professor Begg. My learned friend was talking about the issue of stupefaction, and he was suggesting that that two diazepam tablets weren't going to do it. That is not the defence; the defence in relation to the ingestion of diazepam was that they were not stupefied. They weren't rendered stupefied for the purpose of commissioning an offence. They were given small amounts, and you will see that the cross-examination in relation to K and S both go into detail about their ability to recall and what they were able to recall and do, and therefore that they weren't at some point, at the crucial points, stupefied. That's why the change from two tablets to potentially 10 tablets became so significant. That is all I have.

Elias CJ Yes, thank you, Mr Lawson. We will take a short adjournment and consider how we will approach this. Thank you.

**Court adjourned at 11.12 a.m.**