IN THE SUPREME COURT OF NEW ZEALAND SC 66/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **ROBERT JOHN CONDON**

Appellant

AND **THE QUEEN**

Respondent

Hearing 30 May 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel NJ Sainsbury and M Snape for Appellant
B J Horsley and C Curran for Respondent

CRIMINAL APPEAL

10.05 am

Sainsbury May it please Your Honours I appear with Mr Snape for the Appellant.

Elias CJ Thank you Mr Sainsbury, Mr Snape.

Horsley May it please the Court, Counsel's name is Horsley and I appear with Mr Curran for the Respondent.

Elias CJ Thank you Mr Horsley and Mr Curran. Yes Mr Sainsbury.

Sainsbury Thank you Your Honour. Your Honours I intend to address you first in respect of the issue on appeal relating to s.30 of the Sentencing Act and the approach that I've taken in the submissions is the approach I urge

on your Honours is this start the exercise as a green field's exercise. Simply look at s.30 afresh, use the basic rules of interpretation and determine what does this mean. Having then arrived at what is the sensible consistent coherent interpretation then consider is that consistent with any previous authority and if not why not and what should prevail rather than starting that there is a pre-existing authority and using that as the touchstone and in this Court in particular my submission is the exercise starts as a fresh one in the first instance and that is why my submissions emphasises has really been on exactly that. What do these words sensibly mean? I don't propose to simply read through my submission

Elias CJ We have read them Mr Sainsbury.

Sainsbury I've taken that as read Your Honours but what I propose to do is to emphasise particular points and obviously address issues that Your Honours may have as I do that. The first point in terms of interpretation of s.30 is to consider its purpose and that's obviously important simply in terms of the Interpretation Act as well as a sensible approach to the interpretation of any section and as I noted in my submission starting at para.6 there's a point of principle involved here and that is where someone's at risk of imprisonment following conviction it is important that they at least have the opportunity of legal representation. They don't have to accept it, it remains their choice but that opportunity is a vital right in a civilised society. To that extent it's consistent with what one finds in the Bill of Rights Act and I think was even acknowledged in the Court of Appeal. There is that consistency in the interpretation that was urged by counsel there and the interpretation that I urge in terms of the way s.30 can work and the rights that the Bill of Rights Act guarantees in terms of representation or the right to choose representation.

Elias CJ Section 30 is clearly a narrower provision than the Bill of Rights Act provisions?

Sainsbury Yes it obviously has a focus within the context of the Sentencing Act but it's interesting that when you look at that combination of what s.30 provides and then of course the provisions at s.30(1) provides and then the provisions of s.30(2) which are there for two purposes, one confirms that there isn't a absolute obligation on the State to provide representation, you don't get representation whether you want it or not. It's not a paternalistic provision as so to is not the Bill of Rights, so there's that aspect but it's interesting there's that consistency, there's also the consistency that it's not a right to be abused and that protection is found in s.30(2) for the person who chooses or fails to exercise, or refuses to exercise loses this protection. So although in one sense it's narrow because it's focusing on the Sentencing Act it's interesting that there is a parallel between them. They fit very well together in my submission.

Elias CJ Well do they have to fit though because wouldn't it be possible to have a breach of the Bill of Rights Act even though s.30(2) applies, in other words a breach of the right to fair trial even though s.30(2) applies?

Sainsbury Yes, that is correct. What I'm really saying is in support of the interpretation I'm putting forward the fact that it fits within what seems to be the thrust of the Bill of Rights Act is helpful in supporting the interpretation I'm putting forward.

Tipping J Well if the point is that you're given this opportunity as you rightly put it and you exercise it then, or you want to exercise it, leaving aside all questions of failure or refusal, it would seem a bizarre situation that you could be found to have exercised it by having some relatively cursory advise before the trial and then be left to your own devices during the trial. That seems extremely odd and that was a view which impressed itself on me in **Parkhill**

Sainsbury Yes

Tipping J below even though the ultimate decision in **Parkhill** didn't adopt my general view.

Sainsbury No.

Tipping J But **Parkhill** of course was a plea of guilty case not a trial case.

Sainsbury Yes that's correct and indeed a case where the result was indeed academic because it was a sentencing matter and the sentence had been served, unlike here where there is the conviction aspect and the Court largely gave its views as a Courtesy to the arguments that had been put forward by counsel who had taken the matter on pro bono but as they noted that they didn't have the factual, full factual position for them, it was academic so even in terms of the analysis that was there with respect to the Court it was not necessarily a case where the matter had been gone into in great depth and that's perhaps unfortunate that it's taken on importance subsequently, that perhaps it need not or should not have had. But to come back to your point Sir that is one of the concerns that comes out of both **Long** previously and **Parkhill** is that almost the appearance of legal advice is enough, having had someone speaking to someone at some point, having had someone appear at some point could be enough to allow the Courts to say 'well you've had legal advice, there you go, rights are fulfilled, we don't need to trouble ourselves'. It gives no meaning to the right and what I'm urging on Your Honours is that that phrase in terms of 'the stage of proceeding at which the offender was at risk of conviction actually means something that gives weight to the right . There is a point where that bites to use the phrase from **Page** in the Court of Appeal and where that bites is when the person makes the irrevocable position of pleading guilty or when they are before the tryer of fact be it Judge or jury and that's when they need legal representation because that's

when the lawyer's mind in concentrated as well on what the client is doing and that gives real weight and gives reality to the actual right, so the interpretation I'm urging on Your Honours means that the section does something in terms of ensuring that right has meaning.

Tipping J Is it inherent in your argument that the stage of the proceedings at which the offender was at risk of conviction in a case that is defended is a reference to the period of the trial or hearing and cannot be read back to some earlier theoretical stage from the moment of charge.

Sainsbury No, that is my

Tipping J That's the essence of your argument is it?

Sainsbury That is, yes, but the concern that may arise is that well what of the person that was advised earlier competently, sensibly they took the advice, they then get rid of their counsel because of financial constraints or they are simply of a mind that they will deal with it themselves and that person then may plead guilty on the basis of very sound advise and later complains 'but I wasn't represented at the crucial time and I now thought better of it and I now want it overturned and we have the manipulation of the system using this protection and the answer is simple, s.30(2) deals with that situation, there you have the person who haven't taken legal advice chooses not to have counsel at the crucial time and it is something that is probably happening as we speak in District Courts the length of this country where a person will be standing up and the Judge will say 'do you have a lawyer' and they say 'no', 'have you spoken to a lawyer', 'yes', 'are they going to be here', 'don't want them here', do you know what you want to do', 'yes I do', 'what do you want to do', 'I want to plead guilty', 'do you know that you can have a lawyer if you want one', 'yes I do, I don't want one, I've discussed it, I want to plead guilty'. And it takes about that long, it's dealt with effectively, the person's made a decision, they are outside the protection of s.30(1) because they've chosen to put themselves outside the protection of s.30(1) and with that simple inquiry the risk of manipulation is gone. So having started with the purpose the interpretive exercise looking at the wording concentrates very much on these words 'the stage of the proceeding' and it's interesting to note that when I read through the materials provided by my learned friend and they had the Hansard reports from the 1984 debate which the Hon. Mr McLay, who was then leader of the opposition and who in fact had introduced the Bill earlier when he was Minister of Justice commented about the wording of that phrase which at that point said 'some stage of the proceeding' and how this may cause all sorts of confusion because when's that going to be. Now there seems to be nothing in the Hansard that I could see as to why that got changed. It appears to have been changed at the committee stages but it is interesting that there was that change from the somewhat broad 'some stage of the proceeding' to 'the stage of the proceeding' at which the offender was at risk of conviction and indeed it's that

definite article that takes on some importance in my submission, in this interpretation exercise.

McGrath J Have your researchers Mr Sainsbury thrown any light on exactly when the change took place?

Sainsbury I can only go on what is in the casebook of my learned friend and it seems to have gone from the reading that's reported to committee stages and back

McGrath J I've read that material. You haven't done anything further than that,

Sainsbury No, no that was all.

McGrath J No, no that's alright, that's fine thank you.

Sainsbury Mr Snape drew the short straw of going through Hansard trying to find references to the various permutations of this Bill and that has not thrown up anything further.

McGrath J Thank you.

Tipping J Is it perhaps a reasonable inference from the change that the stage at which someone is at risk tends to put a sharper focus on this concept of at risk rather than some stage when you're at risk is a rather more fluid an amorphous idea?

Sainsbury Yes it is. Yes I would agreed with that Sir.

Tipping J So it's quite important to delineate for present purposes when or at what stage of the proceedings you are to be regarded as being at risk of a conviction?

Sainsbury Yes.

Tipping J And that I've always thought was difficult in relation to guilty pleas. When are you at risk when you enter a guilty plea? You're not really at risk at all.

Sainsbury Well I

Anderson J Entry of the plea. Noting of the plea probably.

Tipping J The acceptance of the plea.

Sainsbury That is probably correct, it is the acceptance

Tipping J Well that of course puts quite a sharp difficulty into the attempted distinction that pleas of guilty are different from trials from the in-

Court, out-of Court point of view. This helps your action so don't look distressed.

Sainsbury No, yes I suppose of the way I've considered it while I accept the point and that discussion of acceptance of the plea as opposed to the entry of the plea and it's an interesting issue; it's one that comes up in the application of s.106 of the Sentencing Act for a discharge without conviction where typically a plea is put in but a conviction is not entered and then there may be a further adjournment for money to be paid or work to be done, there's that quite interesting distinction between that but for my purposes I'd somewhat read that process is really being on a continuum still within the ambit of the time of risk of conviction, it's the person being in Court making the step though no entirely revocable, they can simply draw a guilty plea but for practical purposes

Anderson J You're at risk of conviction immediately you've been charged until the point of time you are actually convicted or acquitted.

Sainsbury That is an interpretation and I accept that Sir

Anderson J And if Parliament, if the Statute had intended the meaning apparent from the previous jurisprudence one would have expected the section to read ''no Court may impose a sentence of imprisonment on an offender who has not been legally represented after being charged'.

Sainsbury Yes, because risk of conviction in that sense you would need representation throughout and of course the practical problems with that are enormous.

Anderson J Well not necessarily. If it's the case that any old bit of advice after you've been charged satisfies the section then it wouldn't have said 'at this stage of the proceedings' it would have said 'after having been charged', at some point 'after having been charged'.

Sainsbury Yes, yes.

Anderson J And it doesn't as Justice Tipping pointed out, there's the particular emphasis on 'the stage' some point

Sainsbury Yes and that is why Sir in having to try and find that point

Anderson J Well it depends on whether it's a guilty plea or a finding of guilt by the tribunal. On a guilty plea it's going to be when the plea is accepted finally as often pleas of guilty are entered but then are discharged without conviction

Sainsbury Indeed.

Anderson J Or alternatively it's throughout the whole course of the trial, whether it be summary or on indictment.

Elias CJ Well it seems to me that a formal point is being looked to which is logically the entry of the plea or when you're in charge of the jury as the tryer of fact.

Sainsbury Yes, yes but my concern with taking the acceptance of the plea, although I can see the sense in that because that is when the conviction is formally entered when we're trying to fix a point one can have a situation where the person may enter the plea unrepresented and unadvised and subsequently gets legal advice and that would seem to go against the purpose of the section which is the person needs that advice when making the decision 'do I plead guilty or not guilty'.

Tipping J Once you've entered the plea irrespective of that acceptance you must then be at risk of a conviction. It's only the risk of conviction that's focused on isn't it, not the certainty of conviction?

Sainsbury No that's correct Sir, yes, so I suppose in that sense one could have the entry of the plea puts you at risk of conviction that certainty may well come later but there's no question the entry puts you at risk of conviction.

Tipping J Yes it must do.

Sainsbury Yes.

Tipping J And you're at greater risk of conviction the moment you've entered the plea than you were the moment before you've entered the plea.

Sainsbury Indeed Sir.

Anderson J There's another uncertainty because it may appear at the time the plea is entered that it will be met with a non-custodial sentence and then events are disclosed which show that a custodial sentence may well be appropriate so then you have to respond accordingly. So it has to be made to work in some sensible way.

Elias CJ Mr Sainsbury it may be that other members of the Court want you to enlarge upon these submissions but is there very much more for you to say on this point of interpretation because there is another matter I want to raise with you.

Sainsbury Certainly. I'm very much in the Court's hands

Elias CJ It may be that other members of the Court want to raise matters or would like you to further enlarge upon your submissions however.

Sainsbury The issues are clearly there. I'm happy to leave them as they stand in the written submissions. I don't have a needle compulsion to add on it for their own sake so I'm very much in the Court's hand in that regard.

Tipping J The only, well may be you can do this in reply, the argument against you is essentially as I understand it that you're at risk from the moment you're charged or in a sense when you are sitting in your solicitor's or counsel's office discussing how you're going to plead. Now it may be that you'd prefer to leave that to a reply but that's really the counterpoint you've got to head off and if there's one sort of short or succinct part of your submission or something you can encapsulate orally to suggest why that's unsound I would be helped by that, either now or later.

Sainsbury Yes I think it's perhaps it's a point that's already been perhaps alluded to and it's that the phrasing seems to wish to pinpoint within a continuum it's the stage of the proceeding not during the proceeding I think or after arrest or after being charged, the section itself appears to want to isolate a moment in time within the period that a person finds themselves charged and before the Court.

Tipping J It's not so much a pinpoint of time, it's a circumstance isn't it, because the pinpoint of time concept wouldn't work for a trial unless you

Sainsbury No, I'd have to broaden the pinpoint I suppose Sir, yes

Tipping J Yes, yes. It's the circumstance if you like, the forensic circumstance when you are at risk

Anderson J A stage in other words.

Sainsbury Yes.

Tipping J Well my brother is very succinct.

McGrath J Mr Sainsbury going back to that passage you referred to from Mr McLay's speech which you drew from the submissions of the Crown and that I think is at a stage where we still had a point in the process where we still have the words 'some stage' and Mr McLay seems to be of the view, and as you pointed out, he was once responsible for this Bill, that a person's at risk of conviction at any time during a criminal prosecution, isn't he, I mean that's what he says?

Sainsbury Yes he is, that's right.

McGrath J Now I suspect it's after than intervention that the word 'some' is dropped and the word 'the' comes in. Is that your perspective of timing? I know that you are not able to give a precise position on timing but is

Sainsbury That was my understanding, now I can't be authoritative on that but that was certainly what I took from it.

McGrath J What I think could be the argument you'd have to answer is that the word 'the' or the words 'the stage' have been substituted for 'some stage' because the drafter took the view that there were only two stages involved during the proceeding rather than several and that he wished 'the' to identify one of those two stages. Would that be one way of looking at the introduction of the definite article?

Sainsbury Just so I'm clear Sir, the two stages being

McGrath J Well that's what you would then have to answer, but the two stages could be from the time of charge up till the point of determination of guilt in whichever precise moment that happens to be, a plea of guilty, the verdict of jury, acceptance of plea, etc, etc.

Sainsbury Yes.

McGrath J But that might be one of the stages and the other stage might be what you would call the sentencing process and any incidental matters associated with that thereafter.

Sainsbury Yes, my submission would be that it doesn't need to be restricted to those two parts of the process that

McGrath J You can still have several stages.

Sainsbury Yes and it's referring to the, well it comes back I suppose to the emphasis I put on the indefinite article it's 'the stage in trying to find as **Nicholls** refer to as a circumstance at which the offender's at risk of conviction while the whole process in one sense puts them at risk of conviction

Elias CJ But it's not proceedings of course is it, the whole process if you're talking about arrest, charge and so on? Once you're in to Court proceedings there are stages at which you're at risk. One is when you enter the plea, the other is when you're in charge of the jury.

Sainsbury That would be my, that's my position, yes.

Elias CJ Yes.

Tipping J Proceedings suggests in-Court proceedings rather than the whole shebang so to speak.

Sainsbury Yes so that again would be

Tipping J That was one of the points I made or tried to make in **Parkhill** of course but it sank rather deeply. It didn't make it as tightly as it's just been made.

McGrath J Is it not the case though, and it was McLay's views, now he's out of office may not be of particular significance but is not the case that Mr McLay's views were that you could be at risk of conviction at any time during a criminal prosecution and it indicates that he was of the view there was only one stage right through to the point at which guilt was determined

Sainsbury That seemed to be the view he

McGrath J He took.

Sainsbury He took.

McGrath J Yes.

Tipping J But you couldn't be at risk of proceedings when you're first brought before the Court and no plea is asked for. I mean that's just absurd with respect.

Sainsbury Well I'm not, I'm certainly not endorsing Mr McLay's view.

Tipping J No, no, I know you're not but I'm just rejoining to Mr McLay. If that was his view it just doesn't make forensic sense.

Blanchard J I think with respect that far too much is being read into what Mr McLay was saying. He was simply I think point out the imprecision of the words 'some stage' and it appears there was a response to that to pin it down more tightly.

Sainsbury I wouldn't disagree with that Sir and my submission is the pinning down more tightly is as per the submissions. Perhaps the only other issue if I might while we're just having dealt with this and it follows on from the interpretation, there's an argument advanced by my learned friend in his submissions which was that **Parkhill** provided an interpretation of the forerunner to the current section but effectively they're the same section. It was subsequently amended into s.30 and accordingly it follows from that that there has been a legislative consideration of the **Parkhill** interpretation and by not changing in any substantive way the section the legislature has effectively put its imprimatur upon that interpretation and accordingly it's not for this Court to change it and there was an argument which I gave some thought to because it had an attraction to start with but my submission is deeply flawed. One, it perhaps assumes a scrutiny from the legislature in re-enacting the legislation that may be more apparent than real, but also it creates an extraordinary principle when you step back and consider it and it's the principle of legislature implicit,

implied legislative fettering of this and other Courts in this country. Because what it seems to be saying is that if Parliament has re-enacted a section and the Court has previously made a decision about the Court can no longer re-consider that decision or revisit it. Now it's as if Parliament has said by legislation **Parkhill** is right and until Parliament decides otherwise **Parkhill** will remain to be right and the Courts can no longer consider that issue. Now that just cannot be correct.

Tipping J Well they could do it expressly.

Sainsbury Exactly, they could do it expressly but to say that somehow implicitly that once legislation's re-enacted in some form the pre-existing decisions and interpretative decisions are now cast in stone with some Parliamentary seal just simply is wrong in my submission.

Elias CJ Well it depends on context doesn't it, it depends on what scrutiny there was of the existing laws that was understood to be and so on but this was I suppose in part, was it in part consolidating statute or was it

Sainsbury It was, it was an interesting exercise. In terms of sentencing it was a codification and consolidation dragging matters out of the Criminal Justice Act, I think even the Crimes Act to some extent. The parole aspect which was in together with it to begin with was quite a more radical change and eventually got split so we have the Parole Act and the Sentencing Act. The Parole Act was the more innovative shall we say there's aspects of it, the Sentencing Act innovative insofar as it codified but largely was codifying principles that had been used for some time and obviously just brought in to play this section which has a bearing on sentencing. The argument in terms of parliamentary intervention over a Court decision works more clearly in the other direction and perhaps the most obvious one that springs to mind in terms of the area I would work is that the recasting of the law relating to belief and consent in terms of rape and sexual violation where the **Queen and Morgan** decision from United Kingdom holding that honest consent was enough but it did not need to be reasonable and Parliament specifically overturned that authority which had been adopted in this country by requiring that belief and consent must be on reasonable grounds and now here is an instance of Parliament stepping in expressly changing the law for perfectly valid policy reasons, but it cannot work in some implicit way that simply by consolidating, codifying or re-enacting that we have now cast in stone the decisions before hand. I just raise that now as a specific matter that relates to the s30 Interpretation.

Elias CJ The question that I would like you to address is if we are not persuaded after hearing the Crown against your interpretation, what then because you slide over that a little in para.29 but I think that there's a rather more formidable point that you need to address there. It's not clear to me that the Crown's point that this is moot, the sentence having been served is not worthy of being addressed.

Sainsbury Yes. There's supposed to

Elias CJ Bearing in mind that there is the independent obligation to ensure fair trial and representation and so on under the Bill of Rights Act.

Sainsbury Indeed. I suppose it can be addressed in two ways – sentence and conviction.

Elias CJ But why does conviction enter into this except as one of the options that the Court must consider. This is not a section directed at wrongful conviction. For that you have remedies under the Bill of Rights Act and under the general Appeal provisions.

Sainsbury It's interesting that that section in terms of conviction appears to be a response to the comments from the minority in **Long** where His Honour President Richmond made the comment that there was a difficulty that the person who should have been sent to prison will escape when they shouldn't

Elias CJ Yes, but isn't that exactly what it's directed at? It's not directed at unsafe conviction, it's directed at failing to comply with this provision. In some circumstances where there is a sentence still to be served, the Court can remedy it by substituting a non-custodial sentence because then the policy of the section is not engaged. In other circumstances where it would be wrong to do that because the offence clearly calls for a sentence of imprisonment the Court can remedy it by setting aside the conviction and directing retrial and giving any other directions, but that remedial provision doesn't necessarily mean that this is a provision itself designed to overcome wrongful conviction.

Sainsbury Yes, my answer to that is that while it is understood that the comments of **Long** gave rise to this, Parliament hasn't restricted the discretion it's given to the Court in the way that was given by President Richmond. It has cast that power widely, either quash the conviction or direct a new hearing or trial or make such other orders as justice requires. It was not, it could have a set criteria making it clear that this was to be exercised only where the person is wrongfully escaping the punishment that is due to them. It could have been for instance I suppose a remedy granted to the Crown as who would be I imagine if that was the case would be the only one who would want that remedy and it would be hard to imagine a sentenced person seeking that knowing if that is what is coming, so my answer is Parliament didn't phrase it that way, they left it open.

Elias CJ Left what open, because my point is directed at the policy of this section?

Sainsbury Yes, and the policy is to ensure at that crucial time the person is represented.

Elias CJ For the purposes of imposing a sentence of imprisonment? The policy of the section is directed at imposition of sentences of imprisonment.

Sainsbury Yes, but my submission is that notwithstanding that it still contemplates a situation where the person whether they've pleaded or whether they've been found guilty, without that representation it leaves open the mischief that that plea should not have been entered or that verdict not reached and I know that the thrust of it is to prevent someone from imprisonment who isn't necessarily represented but this scenario necessarily, this lack of representation moves over into that area that we see more obviously in unfairness of trials and this is in the second part of the submission, so my submission is it leaves scope for a Court when considering a situation such as this to actually step back and say 'in fact things went so wrong through lack of representation the only proper way of undoing this is to go back before conviction and start again, not just because the person might deserve imprisonment but because they actually deserve the opportunity to have their case heard properly and receive advice'. So it dovetails over

Elias CJ So it's a prohibition, so your submission is that it's a prohibition against convicting someone without representation and therefore a ground of appeal against conviction.

Sainsbury It can be in some circumstances; it does not automatically follow.

Tipping J But if you're not sentenced to imprisonment rather this section doesn't affect you in the slightest.

Sainsbury No, and then you must look elsewhere for your remedy.

Elias CJ Well that seems a very odd result which is why it seems to me that it's a pretty formidable argument that the policy of this provision is only sentences of imprisonment. You get the remedy if you clearly should have been sent to imprisonment for this offence, you can go back and start over but that's not the trigger that you weren't represented at conviction, that's the occasion but it's all directed at sentences and imprisonment.

Sainsbury Yes it is but what follows from that is that it's directed at either serious crime or crime in serious circumstances because that's what merits prison and the lack of representation at the crucial stage in my submissions leaves open the remedy of the Court saying this can only be resolved by unravelling what happened and giving the person the opportunity now to get advice if they choose to and either go through to trial or enter their plea. I don't see that it need be restricted. That's not to say it's a blanket if you've not been represented therefore you're going to get your conviction quashed, that doesn't immediately follow and that would seem to make sense given the options that we there and what the Court can do

Tipping J Well the Court could say well you shouldn't have been sentenced to imprisonment, it's not quite bad enough to insist to going back to the beginning so we'll give you 10 months period detention or something, probably not 10 months, but whatever.

Sainsbury Whatever, yes.

Tipping J Because on a pragmatic basic rather than sort of going right back to the, but on this question of mootness if I may, as I read ss.3 if you carry us ultimately to the view that the sentence of imprisonment was imposed in contravention of ss.1 the Court must adopt one or other of those options whether we think it's offensible or not, we must and which one and what sub-sentence might be substituted if we decide to take that option is moderately tricky but we can't simply say we'll he's served it therefore we are not going to quash the sentence. Either of those options implies the quashing of the sentence.

Blanchard J And it would also leave in place an unlawful sentence.

Sainsbury Yes, yes.

Tipping J So whatever the policy of the section may be in an ultimate sense it doesn't seem to me at least at first blush that it trenches on what the Court has to do which at the very least is quashing the sentence if it finds that there's been a breach of ss.1.

Sainsbury Well I suppose those two alternatives and I suppose there is in a sense the third will make such other order that justice requires, we saw that in the **Page** case

Tipping J Well quash the conviction and make such other order, sorry, or make.

Sainsbury Oh sorry, quash the conviction and make such other order.

Tipping J Well it inevitably involves the quashing of the conviction.

Sainsbury Yes it does.

Anderson J What if the appellate Court says well yes it was imposed contrary to the section but not all the evidence before us, that was a disgracefully lenient sentence in any event and we are going to double it. The Court could do that couldn't it?

Sainsbury I suppose that's always your risk on a sentence appeal.

Tipping J You couldn't double an unlawful sentence of imprisonment.

Anderson J But you impose a new sentence.

Blanchard J Don't you then have a further breach of ss.1?

Elias CJ Well not if you ensure representation into your re-sentencing.

Anderson J That's the problem I suppose it's not directed to the point of sentencing but to the point of conviction.

Sainsbury I've read ss.3 as in a sense being an endorsement of the importance of the right we are dealing with here.

Elias CJ It's probably also a pointer to this not being self-executing the remedy. I mean this obligation to either quash the sentence or quash the conviction only arises on an appeal against sentence. On your argument it would be available to effect an appeal against conviction so I mean that's one worry I have about it but on this question of mootness an appeal against sentence, I may not have this entirely right, but I would have thought that there was an ability to refuse to entertain an appeal against sentence out of time or when the sentence was served. Am I right in that?

Sainsbury It is often described as being academic. It's a view I take issue with

Elias CJ I don't use that because Sir Kenneth Keith resented it like mad if anyone ever says things so that's why I've used mootness.

Sainsbury Yes Ma'am I'll stick to mootness as well then in deference to my old constitutional lecturer. I take issue with this matter of being moot because even when the sentence has been served it lives on, it lives on in the person's criminal record and this may sound an odd submission but it's an important one when you're actually representing criminal clients. What sits on their record has a bearing on their futures, often a very significant one, because the sad factor of it is many are recidivists and on their return to the Court to have sitting there a substantial or any sentence of imprisonment has a very real bearing about what happens to them in the future and if that sentence shouldn't have been there

Tipping J Well it shouldn't have been there under that process.

Sainsbury No, no, but it shouldn't be in that case a process then should, whether it's through quashing the conviction going back or quashing the sentence and re-imposing whatever, the appropriate sentence should be there.

Anderson J What if it's the same I mean is one required to read ss.3(a) as any other lawful sentence that the Court thinks ought to have been imposed provided it's non-custodial. It doesn't say that does it. What it envisages is that the appellate process can result in an appropriate outcome which may mean another custodial sentence but one assumes that at the appellate stage at least there will be counsel representing.

Sainsbury Yes.

Anderson J And with the opportunity if necessary to file an application, file an appeal against conviction for example.

Blanchard J Well I must say with respect I've got a problem with that because you would still have a situation after the appellate Court imposed the new sentence of a breach of s.30(1) which cannot be satisfied because the offender was not legally represented at this stage of a risk of conviction.

Anderson J May be the answer is that an appellate stage you can be because a different Court with the ability to review it all having the power to impose any other lawful sentence.

Blanchard J But you've already been convicted. The only way of curing it is to set aside the conviction and effectively have another trial.

Anderson J I think it's a difficult

Blanchard J Yes.

Tipping J And it does say ought to have been imposed, deeming you to be sitting in the position of the sentencing Judge.

Sainsbury And of course His Honour Justice Blanchard mentioned s.30(1) means you cannot impose a sentence of imprisonment so whether one reads that as putting a gloss on ss.3, a lawful sentence is a sentence that complies with s.30(1).

Elias CJ That's a non-custodial sentence.

Sainsbury Indeed.

Elias CJ And that I think is the proper sense of these provisions that you can substitute a non-custodial sentence or you send back for retrial, but that's not directed at the point that I've raised which is this is on appeal against sentence and even accepting what you say about sentences living on, what is the law on that, I can't remember.

Tipping J There's something in the Solicitor-General's appeal situation which reflects on the fact that you can't increase a sentence after it's been fully served.

Anderson Section 383, ss.2 of the Crimes Act says that an appeal by the Solicitor-General against sentence if not determined before the sentence has been served is deemed to have been abandoned.

Tipping J My brother is more precise than I but I knew there was something there.

Anderson J I have a copy of the section here.

Tipping J But it doesn't work, as far as I'm aware you're not deemed to have abandoned your appeal against sentence simply because you have happened to have finished serving it before the Court could get around to hearing your appeal.

Elias CJ No but do you have to bring your appeal before you've served your sentence?

McGrath J Yes, the Crimes Act applies

Elias CJ Yes, yes, that's what I was wondering.

Tipping J Well that means it's not a

McGrath J Appeal against sentence only

Elias CJ Yes.

McGrath If its appeal against conviction its otherwise.

Tipping J But the would mean that if you report to appeal against sentence after you've fully served your sentence it's not a competent appeal.

Elias CJ Yes.

Tipping J In which case we're sitting here on a point that we can't determine and so was the Court of Appeal.

Elias CJ Well is that the case?

Tipping J Well I'm not sure.

Elias CJ I would in fact like some assistance on this point and it may be that you can come back to it in reply.

Sainsbury That might be

Elias CJ And may be Mr Horsley can address it when he speaks to us.

Sainsbury Yes, yes.

Elias CJ Unless there are future questions on s.30 you've still till deal with the miscarriage of justice point.

Tipping J Well there's also the point about, unless you want to leave it to reply, that you haven't failed or refused within the meaning of the section so as to bring yourself, the Crown says your not entitled to ss.1 because

your exempted from it by ss.2. Now I would like to hear a little bit about that because your client doesn't seem to be a man who plays with a wholly straight bat Mr Sainsbury, but I am not out of sympathy with on this but it's not a wholly straightforward set of facts for your client.

Sainsbury I suppose from a defence counsel's point of view I'm in the unusual but happy situation of relying on the findings of the Court below whereas one's normally on the wrong side of those findings and are somewhat thrashed with the fact that the other Court had the opportunity to here make a determination and one's rather caught with it.

Tipping J But the Court below seems to have been of the view that provided it wasn't a dismissal within para.(d) your client was okay.

Sainsbury Yes.

Tipping J But could there not even if it's not a dismissal, could they not be a failure after the non-dismiss, the withdrawal of counsel by your client to engage representation. I'm not expressing a view one way or the other but it's not open and shut just simply because there's no dismissal.

Sainsbury The timing becomes important in that regard because the position that Mr Condon found himself in was that once the withdrawal of counsel had been finally determined he was in the week set down for trial and the argument that my learned friend advanced as well, the trial had been set down before and there had obviously been discussions so surely he would be ready to proceed and with respect and this is the functions of the respective parties here. The fact that one's counsel may have been ready to proceed doesn't mean that the lay litigant is ready to step into counsel's shoes.

Tipping J No, no, you're sliding with respect. That may have a bearing on the miscarriage of justice. As I see it the simple issue here, and it may be more than this, is was there a failure by your client to engage counsel after Radford withdrew. Because the Crown says there was.

Horsley Yes Sir, it is.

Tipping J No the timeframe's all very tight and so on but there are authorities to which the Crown has drawn attention which would suggest that may be your client should have got legal advice or legal representation if he wanted it and there's an inference that he didn't want it.

Sainsbury Yes, it's perhaps useful to look again at that process because there is a comment that he made along the lines of 'we might as well'

Elias CJ Get it over with.

Sainsbury Get it over with and taken in isolation that can be read as saying 'alright we'll I accept I'll deal with it myself and I'm not going to bother to get anyone else'. And I think that comment if I recall correctly and I shall get Mr Snape to find it, the passage where I just generally discuss it. That comes in the afternoon. There had been earlier discussion in the morning between Mr Condon and the trial Judge regarding this issue of counsel withdrawing and whether he wanted to have counsel and my submission is at that point he was very much wanting to have counsel. By the afternoon my submission he is effectively worn down by the situation he's in. It's not a 'alright I've made an informed sensible decision, I can deal with this myself, it's what else can I do, I'll make the best of it'.

Elias CJ It's pages 36 and 37 I think where he indicates absence of counsel would disadvantage my position and then he says on 37 'I'm quite happy to proceed and get it out of the way on Thursday'.

Sainsbury My submission is a resignation of someone who just finds themselves in an impossible position.

Anderson J He's not told is he that he re-apply to the Legal Services Agency for a new counsel?

Sainsbury I don't believe so Sir.

Anderson J This might bear on the question of opportunity in section 13.

Tipping J Where is it on page 36, I'm sorry I haven't it.

Elias CJ Oh sorry, no that's about the witness, sorry.

Tipping J I didn't understand him to have said in the morning that he was wanting new counsel but by the afternoon he does a complete volte-face I understood him to be ambivalent in the morning and resigned if you like in the afternoon to going on alone.

Elias CJ At page 31 'to be able to represent myself I would have to have time to call witnesses'. 'Well you've known since 25 June'. And there's the earlier indication at page 30 that the Crown would oppose any adjournment of the matter and also page 29 – no that's counsel.

Sainsbury The bottom of page 29.

Elias CJ Oh yes, page 29, yes that's the one. 'I'm not sure it's in my best interest to have this matter dealt with now I'm left to defend myself and the complications I have, I'll ask for one further adjournment'. Yes. And the Judge perhaps rather briskly, page 37 expresses the view there's no real reason why this trial cannot proceed now. Not a reminder there of the desirability of having counsel or anything like that.

Sainsbury Indeed. So that one comment needs to be read in its context and with respect to all concerned it is an awful position for an accused to bind himself in.

Tipping J If it appeared to be a completely free and happy and relaxed observation by Mr Condon the Judges' rejoined to that a number of lines saying how difficult it would all be if that, the adjournment seems a little odd.

Sainsbury Yes

Tipping J He was sort of as it were rubbing it in and saying well that's just as well because you know you aren't going to get the adjournment anyway. Well perhaps that's a little unfair but

Elias CJ No because then it does go on to say will you assist me through the trial and 'oh well I can't be your advocate', there's no reminder of the advantages or the disadvantages of being unrepresented.

Tipping J He's really putting a degree of pressure on him as it were to reinforce the decision that apparently has been made by Condon that the line above, he's saying that's just as well because.

Sainsbury It's interesting at page 40 when Mr Condon says 'will Mr Radford be entitled to consider what I understand to be a McKenzie's friend position Sir, so he was even hoping that he might have him back to help him if he could.

Elias CJ And then at the bottom 'so I am afraid Mr Condon I see no basis for a further adjournment. This matter will proceed'.

Sainsbury And I know there's reference to the **Jays** case, a Mr Rowan Charles **Jays** who was no stranger to the Courts over the years, where the comment was made that he'd been told on the Friday there'd be an adjournment because there was the difficulty with um, to be fair **Mr Jays'** not contacting his lawyer. So his lawyer just heard the trial's next week and discovers there's a bit of work to be done on it and **Mr Jays** has been somewhat difficult to contact. They discuss the matter with the Judge who indicates there will be an adjournment but on Monday find themselves in the position where the trial Judge says no, this matter will go ahead and allows a further day and that was overturned. There was a comment made in that decision that if there had been no assurance on the Friday that the trial wouldn't go ahead, there would have been sufficient opportunity over the weekend for **Mr Jays** to prepare and instruct his counsel – this is on page 5 at tab 13, but in fact that weekend was lost through reliance on the assurance that they understood had been given.

Tipping J When he says get it out of the way on Thursday, we're talking on Tuesday are we? So is there only one clear day in between?

Sainsbury Yes, yes indeed and I think the Crown put forward a proposition on the basis of **Jays** that two days is adequate time to prepare a criminal trial. **Jays** has to be read in its context. The lawyer had indeed dealt with **Mr Jays** but **Mr Jays** went AWOL on him. One, it may well be that if it was a trial where there are no witnesses to be called, that the accused is the key player as it were, that one could perhaps prepare adequately in limited time, perhaps. But to use **Jays** as a proposition that the two clear days will do you fine for a criminal trial is extraordinary. There would be quite rightly questions asked I put in my submission of counsel who adopted that as the touchstone for preparation on matters that affect the liberty of clients so **Jays** has to be looked at in its own particular context and that of course **Jays** was contemplating that counsel would continue to act and would get together with **Mr Jays** and work the hours God gives them over the weekend and perhaps an extra day or two into the next week. Here we have Mr Condon left to his own devices. Now even if Mr Radford adequately prepared, Mr Condon hasn't prepared the cross-examination, the opening statement, closing submissions, considered any evidential matters and how he will deal with them.

Tipping J Neither of the previous two adjournments have been brought about by any default on Mr Condon's part have they?

Sainsbury Indeed, indeed, the worst that could be said was that at 1 when the Officer in Charge, or one of the Police Officers wasn't present, the Crown may have proceeded without that witness must Mr Condon's counsel wanted to have that person present for cross-examination. I don't think that fault could be held against him insofar as he

Tipping J And the other time it just wasn't reached.

Sainsbury That's correct Sir.

Elias CJ Is there anything further you want to develop in that answer?

Sainsbury No Your Honour.

Elias CJ Then miscarriage of justice which does of course raise some of the same points.

Sainsbury It does and in some of the very issues we've just discussed simply move over into the area of miscarriage of justice. Perhaps an issue I'd like to emphasise under this heading. It's an issue my learned friend has addressed which is whether a breach of the right to representation and with that the right to prepare, means that there's been a miscarriage of justice

Elias CJ Do you mean the s.30 breach or the Bill of Rights Act breach.

Sainsbury The Bill of Rights Act, although as I've argued that there is some cross-over between them which is why I was reluctant to and don't see it as appropriate to concede the issue that was raised whether s.30 restricted solely to sentence and in my submission it can have a bearing on conviction appeals. The concern I have is this that my learned friend's correct that the right to representation is not a blanket one as I said earlier in my submissions, it does not mean that you must have representational to State in a paternalistic way will insist that you have representation. It means if you choose representation it should be available and if you cannot afford it there is a scheme in place which is designed to ensure that there will be representation. So my argument is predicated that the right to people representation is where it has not been waived by the individual. Where that is breached so that a person wrongly is left to fend for themselves in a criminal trial to then look through the trial transcript in an exercise of saying well is this fair or not, my submission creates more problems than it solves for this reason. We create categories of the aggrieved. There is the person who has wrongly been left un-represented who doesn't cope at all and receives a new trial. There is the person who equally has been left un-represented by dint of the innate abilities they have; they make at least something of a fist of it. Not adequate, not what you'd expect if counsel had been representing them necessarily but the Crown response would say 'well it doesn't fall below the threshold of making it an unfair trial so that one can stand and my submission is there is something inherently wrong in dividing appellants into those categories. That where something is fundamental as this, the person who chooses to have representation and has been deprived of it and left to fend for themselves in a process as complicated as a criminal trial, that of itself means that there is the miscarriage of justice that required the conviction to be overturned.

Tipping J You capsulate that proposition by saying 'if you are wrongly left un-represented' are you going to go on and deal with what you mean by 'wrongly'?

Sainsbury Yes, in this context of this particular case it does go back to the arguments in the submissions that have been dealt with and will be under the heading of s.30 and starting with the finding of the Court of Appeal that Mr Radford withdrew or was granted leave to withdraw when he hadn't in fact been dismissed by Mr Condon.

Elias CJ And it was quite clear he was going to withdraw? I mean he had decided to withdraw, yes?

Sainsbury Indeed, yes, so here is the person who wants representation who hasn't sacked his counsel and of course the factors that the Court will often look at in deciding wrongly are very similar to the s.30(2) factors, the

person who bails or refuses to engage counsel, the person who as a ploy sacks counsel at the door of the Court.

Tipping J Did Mr Radford, I haven't read it as thoroughly as I should have, did he ever assert to the Court that he had been dismissed.

Elias CJ No, he wanted to withdraw because he felt that his position was untenable.

Sainsbury And evidence was called before the Court of Appeal in that reasonably rare situation from both Mr Radford and Mr Condon at that hearing, so they both filed affidavits, both gave oral evidence subject to cross-examination.

Tipping J And if Mr, perhaps it doesn't matter, we've got the finding that he wasn't dismissed.

Sainsbury Yes and that is why in my submission that is an important finding and it is one I put reliance on so in terms of what is wrong about this situation there is the person who wants representation who is in a sense abandoned by his lawyer at the door of the Court.

Elias CJ I just wonder whether you're putting it too highly when you say he wants representation unless you can point me to something then my impression was that at the highest your case is that he's not shown not to have wanted representation.

Sainsbury Well in this sense his expectation at Court was that Mr Radford would represent him and as Mr Radford, who takes the step of seeking to withdraw rather than the other way round

Elias CJ Oh although the accused does say 'oh well he wouldn't have represented me properly anyway'. So I'm not sure that he did really want him.

Sainsbury Well, or is that just the bravado of 'I'm left here and he's gone, well you know'. It has that throw away line of the person who's, well he wouldn't dare, it's the classic sour grapes isn't it, it's the old Aesops Fable really, the response.

McGrath J Would it be fair to say that Mr Condon right from the time he wrote the first letter to Mr Radford was ambivalent as to whether he wanted to be represented by him?

Elias CJ He says that, he says 'I haven't decided whether I'm going to represent myself'.

Sainsbury But he was still there at Court expecting his lawyer would be there and with the expectation that the case would proceed with him representing him. It was not a situation if he arrived and said to the Judge 'I've

been thinking about this and just give me a moment and I'll see if I want this guy here or not'.

Elias CJ That's why I say that really I think the highest you can put it is that he's not shown not to have wanted legal representation.

Tipping J Would another way of putting it Mr Sainsbury saying that he has a right to counsel to be found to have waived that right, the waiver must be fully informed, clear and not pressured.

Sainsbury Yes I would accept that.

Tipping J I mean that's probably putting it too high frankly but that's the sort of concept you're trying to invoke I think.

Sainsbury Yes, yes there is that aspect of it. In any event even at the lesser level my submission would be the end result should be the same. Whatever faults he may have are not such that he's wavered his rights to counsel or sacked his counsel in an improper way or manipulated the system in all those ways that mean that your right to counsel is effectively gone.

Elias CJ Moreover there's no consideration by the Judge of the issue of disadvantage, even in circumstances where he's given some insight into what the Court of Appeal called 'his obsessive pre-occupation with aspects of the case' and the Judge's own acknowledgement 'that there are going to be some tussles over relevance.

Sainsbury Indeed. That's an interesting issue in terms of the failure to get counsel and again I'm not necessarily categorising this that the problem is this at all but there are people one represents who can be obsessed, who are difficult, who see issues where strictly speaking there not, who want matters included within the proceeding that don't do them any great assistance and it takes time to work with those people. Now mostly, I can only say in my experience, if time is spent they will listen. Some won't. There's a small minority who one will never change but that's an important issue for someone to come in and pick up a trial such as this if there is a perception that there were issues there deeply held by Mr Condon which may or may not have been directly relevant to these charges, but he deeply believed they were. To work with someone like that and get their confidence, to be able to explain to them why these matters need to be put to one side takes time. It can be done but it takes time.

Tipping J Can I be the devil's advocate a bit here Mr Sainsbury and put it to you that we've got to be practical about these things, I mean here's a busy list and here's the Judge sitting there at 4.15pm with a trial on Thursday and ultimately the man says to him I'm quite happy to proceed and get it out of the way on Thursday. I mean what's the unfortunate Judge supposed to do? Say 'oh I don't know whether you really are, oh dear oh dear'.

Sainsbury The best use of judicial time in that circumstance is to ensure that that person who was in that pressured situation of no longer having their lawyer there, who feels constrained to go ahead, isn't do simply because it's the easiest reaction and solution to the pressure when that in fact creates a miscarriage of justice and the Judge taking that time, even if it means losing a couple of days of hearing time and the long run in this case those couple of days of hearing time compared to the time we have now spent

Tipping J Yes but I am a bit anxious if we set too high a standard Judges are going to sort of have to go behind what people are effectively saying to them 'I am quite happy to proceed'.

Sainsbury It's got to be the comments that have gone on throughout and in terms of what Mr Condon's said in my submission it just smacks of 'I'm bowing to the inevitable'.

Tipping J Did he renew any application for adjournment at the start of the trial? Did he say I've been having second thoughts about this, I really don't think I'm up to it?

Sainsbury I think at that stage he simply felt he had to get on with it.

Tipping J Well never mind what you think he thought. Is there any evidence of him having made any protest to the Judge or indicating that he had ceased to be happy to proceed?

Sainsbury I don't believe so but with respect Sir I think it would be wrong to put too much weight on that because

Tipping J Well they may be so, I was just asking you whether

Sainsbury No, it would be treating

Tipping J He's not the client who simply you know at every possible opportunity asks for an adjournment.

Sainsbury Yes.

Tipping J You say he'd been sort of worn down.

Sainsbury Yes, he now realised he had to go ahead. The Judge wasn't going to grant him further time. He simply gets on with it.

Tipping J I suppose that a fair comment in view of what the Judge said immediately after he'd said he was happy to go on.

Anderson J The likelihood that he was reserving to himself when he responded to his counsel 'well, I haven't really decided but at this stage do the

preparatory work but I might just ditch him when the case is called', that sort of tone to it.

Tipping J He hasn't steered a very consistent course has he?

Elias CJ I wonder whether we could take the morning adjournment now and we will see you in 15 minutes thank you.

Court adjourned 11.30am

Court resumed 11.51am

Elias CJ Thank you.

Sainsbury Ma'am perhaps if I addressed that issue you asked that I check on during the adjournment which relates to the sentence appeal and indeed s.383(A) of the Crimes Act, which at ss.1 provides that with leave of the Supreme Court a convicted person may appeal to the Supreme Court against the decision of the Court of Appeal on appeal under s.383 which provides a right of appeal against conviction for sentence or both then s.383A ss.3 states that if an appeal under ss.1 against a sentence of detention is not heard before the date on which the convicted person has completed serving the sentence, on that date the appeal lapses and must be treated as having been dismissed by the Supreme Court for non-prosecution. So we have that provision in respect specifically of a sentence appeal in respect of curiously sentence of detention which I think I would concede covers imprisonment. Now in terms of Mr Condon there is still another issue that s.30 creates in terms of sentence

Elias CJ Do we have the dates of all of this by the way?

Sainsbury He was sentenced to imprisonment. August 2003 was when the trial took place. Now without giving you the exact date I understand it would have been September 2003 but even allowing a leeway of month or so that's not going to make an awful lot of difference, he was sentenced to 18 months imprisonment for nine months accumulative of the two counts. So on the best possible reading he has well and truly completed his 18 months by this point in time.

Elias CJ What's the upshot then for the appeal?

Tipping J We can all go home.

Sainsbury No quite because it's also an appeal against conviction so that remains the same so we're not

Elias CJ Except you run into this problem that I have been putting to you about whether s.30 is apt there for an appeal against conviction.

Sainsbury Yes well my submission is it is, it still has effect there. There's also another issue that s.30 raises. In terms of that section relating to an appeal against sentence and it's this 's.30 provides that the Court may not impose a sentence of imprisonment in certain circumstances which submit it exist here, which makes it an unlawful sentence so

Elias CJ You have to read the whole section.

Sainsbury Yes.

Elias CJ And the appeal provision and the consequences that you're urging on us arise on an appeal against sentence.

Sainsbury Yes, no I'm aware of that but the issue for example the ordinary course of events in an appeal against sentence where the sentence is claimed to be inappropriate manifestly excessive but there's no attack directed to the sentence itself whereas here what is being argued is that this is not a sentence of imprisonment, it's not one that could be lawfully imposed. Now

Blanchard J But you're challenging that by way of an appeal against sentence.

Sainsbury I'm in fact challenging it by way of both the appeal against sentence and conviction.

Blanchard J Well your miscarriage of justice argument goes to conviction directly, but you're only able by the s.30 route to seek the quashing of the conviction via an appeal against sentence.

Sainsbury One can do that and my argument would be that s.30, and this was the discussion we had earlier, can go further and so I in that sense call on it in aid of the argument against conviction.

Elias CJ Yes, you're driven to say that s.30 allows you to bring an appeal against conviction if you didn't have legal representation at the time you were at risk.

Sainsbury Indeed, indeed, so it survives to that extent.

Elias CJ Yes.

Sainsbury But I accept that in the classic sense if we were here Mr Condon was still in prison we would have a far easier or at least cleaner situation

Blanchard J Cleaner, but your miscarriage of justice point probably enables you to run all the arguments about non-compliance with s.30.

Sainsbury Indeed.

Tipping J Because it pertains to whether he was wrongly left unrepresented.

Sainsbury Yes, yes, so the fact that it is, and in fact the way the submissions were drafted is quite, and indeed the leave application, was put forward quite clearly on the basis of the focus was on the conviction and the s.30 was called in aid of that because it in a sense formed a statutory example of the importance of those rights of representation and had

Tipping J This, sorry

Sainsbury Sorry Sir and had with that remedy of conviction being overturned.

Elias CJ Well it doesn't have an automatic remedy of course if you're running the miscarriage argument and so that's something that you'll need to address also.

Sainsbury Yes.

Blanchard J If the Court concluded that there was no miscarriage of justice although there had been a breach of s.30 it may be that the Court can't in those circumstances forward any remedy because of that bar in s.383(A).

Sainsbury I suppose my first response, or my first response is in my submission that the breach of s.30 the circumstances would either of itself indicate a substantial miscarriage of justice and by analogy the arguments that support it would also support a substantial miscarriage of justice so my submission would be that that is not a finding that respectfully would be open to the Court but the two would go together.

Elias CJ I'm sorry can you just say that again I don't think I've got it.

Sainsbury If the Court found there wasn't a substantial miscarriage of justice yet there was a breach of s.30 that Mr Condon may find himself without remedy because of the difficulties of the sentence appeal being deemed to have lapsed. My response to that would be if the Court was to find there was a breach of s.30 in these circumstances then there are two things that follow from it. That of itself I would submit should support a substantial miscarriage of justice in and of itself further the very circumstances that show that s.30 has been breached would be of themselves substantial miscarriage which show a substantial miscarriage of justice so that while in theory that is a finding the Court could reach my submission would be it is not a finding the Court could sensibly reach in the circumstances of this case.

Tipping J I understand that entirely but on the hypothesis which you reject that that is the conclusion we reach do you accept the consequence that there is no relief because you have no extant appeal against sentence, you have only an appeal against conviction?

Sainsbury Yes, I have to accept that there is no appeal against sentence as such.

Tipping J So if your appeal against conviction fails because there's no miscarriage of justice, say, that's the end of it isn't it, appeal dismissed?

Sainsbury Yes, but I don't accept that

Tipping J I know you urge us not to come to that and I fully understand that but it's a hypothesis – you can't damnify the hypothesis, but I'm asking you to talk or respond on the basis of the basis of the hypothesis.

Sainsbury Yes, yes but my further response Sir is that it's also not appropriate to departmentalise s.30 away from the miscarriage of justice. It will still form part of that.

Tipping J I'm not suggesting we would, I'm just simply asking you if you've got any way out if we were to find for better or for worse that there's no miscarriage of justice then your appeal against conviction cannot succeed can it?

Sainsbury No.

Tipping J I'm sure that's right.

Sainsbury Yes.

McGrath J Mr Sainsbury you may not be able to help us with this, we appreciate that you've only come into the matter at the Supreme Court stage but I'd be interested to know when Mr Condon was released and when he ceased to be the subject to any post-sentencing restrictions. Do you have anything that can assist on that? Also post-release restrictions I should have said.

Sainsbury I do but I can't tell you at this point in time because I

Elias CJ But there won't be any post-release restrictions now because his full sentence has

McGrath J The nine months has expired.

Elias CJ The 18 months.

McGrath J The 18 months has expired.

Sainsbury Yes it has.

McGrath J I'm just really interested in trying to ascertain the situation in relation to the Court of Appeal in s.383.

Sainsbury Yes, I can find that out because I have made that inquiry with them exactly when his sentence finished.

McGrath J Well if you're able to assist us over the lunch hour I would be grateful.

Elias CJ Well all we'll need to know is the date on which sentence was imposed.

Sainsbury Yes and I can obtain that over the lunch hour Ma'am.

McGrath J Well the Crown may be able to do a concurrent check.

Sainsbury Yes, yes I have that information in my office and I will obtain it for you.

McGrath J Thank you Mr Sainsbury.

Sainsbury Now in terms of the substantial miscarriage of justice where I'd left matters prior to the adjournment was completed that before the proposition that it's unsound to distinguish between those who are as I put it wrongly, left unrepresented between those who are deemed to have made something of a competent fist of it and those who haven't and to categorise or put appellants into those two categories that the only safe way to approach these cases is that once it has been established that the person has not had their right to representation and it's through no fault of theirs as an overall finding, and I accept there may be grey areas where they're difficult appellants but when the finding is that there has been that breach and the person is left to simply cope on their own in the trial process that of itself is indicative of a substantial miscarriage of justice, and that's not the same as simply saying that anyone who ends up appearing on their own has suffered a substantial miscarriage at all. It's accepted that people still have that right to choose whether they're represented or not and some by their behaviour waive that right.

Tipping J Is that equivalent to a submission that if there's no sufficient waiver of the right that will automatically and inevitably lead to a substantial miscarriage of justice.

Sainsbury In my submission, yes.

Tipping J That's the proposition for which you're contending?

Sainsbury Yes.

Tipping J Sufficient waiver whether ordinary or statutory in terms of s.30.

Sainsbury Yes.

Tipping J Yes.

Elias CJ Well always.

Sainsbury Yes, because otherwise we have to try and find some way of categorising different appellants who are found in that position and say well this person in I guess the **Ru** case was truly pathetic and in fact they were in a situation where they actually in an informed way chose to act on their own but was so appalling but notwithstanding that the Court said well this is just simply an unfair trial. This can't stand. So that's perhaps right at one end of the continuum where the person actually put themselves beyond, chose not to exercise their rights and

McGrath J You're now moving, you started your proposition with the qualification that if the defendant was wrongly left unrepresented but are you now suggesting the test is really looking at how it all panned out?

Elias CJ No, the opposite.

Sainsbury No what I'm saying is the importance of this right is perhaps illustrated by analogy with that particular case where even the person who hadn't been wrongfully deprived of their rights may still find themselves with a basis of appeal because of the general unfairness of what occurs and simply an illustration of how important this right is and how it needs to be looked at meaningfully. Coming back to the specific group that we are dealing with, those who have been wrongfully deprived of their right to representation

McGrath J What about the right to represent yourself in criminal proceedings?

Sainsbury That's different again because the person who chooses that, they have chosen to be there, to represent themselves, they have the right but they have chosen not to exercise it.

Tipping J Well that's a sufficient waiver.

Sainsbury Indeed, indeed, but interesting in the **Ru** case even there the Court in the extreme case may say that what happened here was simply an unfair trial, but that's a different category, but they need not concern us in my submission Sir, whether under s.30(2) when we did that analysis, they're excluded under the ordinary principles where they have made a sufficient waiver, they are excluded as is their right.

Tipping J And really no sufficient waiver is the opposite side of the wrong, it's the same concept as wrongly it's just another way of putting it.

Sainsbury Yes, yes it is Sir.

Tipping J Perhaps as more accurate way of putting it with respect.

Elias CJ I'm sorry say that again.

Tipping J I'm saying that the idea of there being no sufficient waiver is really synonymous for present purposes with wrongly not representing, because if you have given a sufficient waiver that cannot be wrong.

Sainsbury No.

McGrath J What about the person Mr Sainsbury who loses confidence in his counsel during the trial, let's say towards the end of the trial which certain events have taken place and the defendant dispenses with counsel and asks for an adjournment for say a week or two weeks so that new counsel can get up to speed with what's happened at the trial.

Sainsbury Yes, a difficult situation and one where the experience and wisdom of the trial Judge or the Judge conducting the hearing must play a considerable role because they're in the position of having to determine is this a ploy by the person who seeks to manipulate the system or is it an indication of a trial that is going wrong. It may well be circumstances that for whatever reason counsel has simply failed to adhere to instructions and the accused or defendant is quite right to raise objection to that and raise objection to their representation. But I think those would be rare circumstances but they would need to be dealt with on a case by case basis. First instance by the trial Judge or the finder of fact dealing with the matter before him or her and if necessary before the appellate Courts in the usual way. And it is an inquiry appellate Courts look into and often put under that pigeon-hole of competence of counsel, whether that's rightly or wrongly but it's a factor that the Courts grapple with and I don't think there is any cure for that particularly and I don't see that that circumstance need influence the principle

McGrath J It's not your situation

Sainsbury No it's not Sir.

McGrath J I think is perhaps the best answer you can give to this.

Sainsbury Yes it is.

Tipping J If the test was sufficient waiver or the lack of it the trial Judge would simply have to ask himself or herself in these circumstances has there been a sufficient general waiver of legal representation. If there has box on if there hasn't big problems, we'll just have to work out where we go from there.

Sainsbury Exactly Sir.

Elias CJ So you're not, just taking it back to s.385, you're not arguing are you that trial's a nulity, you're arguing that there's a miscarriage of justice through the accused not having representation in circumstances where he's not waived that right?

Sainsbury I'm just trying to recall what the Privy Counsel have to say in the case of **Queen and House** and I may be wrong in this and stand to be corrected in terms of

Elias CJ Well there were errors of law identified there

Sainsbury But it is whether unfairness of the trial can reach such a level that the whole trial process itself is rendered a nullity.

Elias CJ Well then you really would have to look at the effect wouldn't you? You'd need to go through and, it's just that if you, I'm not sure that you can be, well may be you can be categorical, may be you can say that on the, particularly with the Bill of Rights Act, that there's a miscarriage of justice if you haven't been given an opportunity to be represented by a lawyer, then the Court would have to consider the proviso, whether there's been a substantial miscarriage which does require you to look at the effect.

Sainsbury Yes.

Tipping J Yes I'm just a little troubled at the absoluteness of this proposition Mr Sainsbury. I can understand a presumptive approach but your proposition gives no room for the thought that the effect of this has been nothing. Say, and I take your point about different levels of inadequacy of self-representation, that's a good point, but say the Court was satisfied on looking at this particular case that this accused did as well as anyone could have done with the onus if you like being on the Crown to demonstrate that there has simply not been any significant detriment as a result of this. It's just to say automatically that wrongful absence of counsel will lead to a new trial is because that effectively is what it will amount to, I'm sympathetic conceptually but I'm just wondering if it's just too absolute and something slightly less absolute would be a better formula.

Sainsbury My proposition is in some sense a pragmatic one but also a principled one. The situation Your Honours we put forward and I accept that it may well happen.

Tipping J It happens, it does. Sometimes you think they did it better than some counsel might have done.

Sainsbury Yes, but not that often. That is still a comparatively rare circumstance and if the price is that in that rare circumstance the person who may well have done as good a job as competent counsel would have done nevertheless gets a further trial, that price is worth paying for the

simplicity of process but more important the statement of principle that this is important, that this right to representation is so important, because otherwise what appellate Courts must do is back distilling through between the self-representative who's made a decent fist of it and the one's that haven't.

Anderson J What about the person who has insufficient means to pay counsel but the Legal Service Agency decides that the case is not worth defending and won't grant aid?

Sainsbury Yes, that's a troubling situation Sir. The present legal position although unfortunately this varies from region to region in this country which is not entirely satisfactory, but certainly matters that would go to trial, the Legal Service Agency very much weigh in the balance the right to be represented at trial and the importance of that.

Anderson J Perhaps a harder one then is a person who thinks that they do not have sufficient means to pay for counsel themselves but the Legal Service Agency thinks that they have.

Sainsbury Yes.

Elias CJ Well they can be tested of course.

Sainsbury Yes there's review procedures and what's referred to as LARP if the Legal Aid request a review. Not entirely satisfactory

Anderson J It just test the absolute to make sure it's the rule that you're positing.

Sainsbury Yes and it is a very difficult area. In my submission there may be an advantage if I can put it in this way Sir, if anything will clearly demonstrate to the powers that be that run the Legal Services in this country that adequate provision of legal services is required it would be the person who could rightly say I'm in serious difficulty, I want representation, my means are limited and yet I find myself without representation. If the consequence seem to be that that person the prosecution may well collapse whether on appeal or earlier would be a useful wake-up call to the provision of ensuring the provision of Legal Services in this country.

Anderson J It doesn't address the question though of an actual waiver or not. The person who says I can't get legal aid and I can't afford to pay and I want a lawyer. On your basis they can't be tried because they can't have a fair trial.

Sainsbury If assuming Sir they want that lawyer, they are genuine about wanting the lawyer, they're not simply saying again this is a device to be used, then that may mean they cannot be tried and what needs to be addressed is the provision of adequate assistance to ensure representation.

Anderson J But they may be honest but wrong in their assessment of their availability to pay.

Sainsbury In that case it may well be the hard decision is when it is properly reviewed and the person is told you have the ability to pay if you choose not to that becomes your look-out, it's another form of waiver.

Elias CJ It's another point that could be raised relying on s.24(F) on an appeal but that's not this case. Here we are only looking at whether the appellant was given the right to consult and instruct a lawyer and really you don't need to go much further than I wouldn't have thought, than to establish that he wasn't given an effective opportunity to exercise that right and he wasn't reminded of that right and that I'll be interested to hear what the Crown has to say in response, doesn't strike me as an impossible burden for this Court to require of the system and I can't see that at the moment on the material we have that that was communicated and that opportunity was provided so on that basis it may be that you're right, that there's a prima facie, we don't like to use that do we, but a prima facie breach which amounts to a miscarriage and then the question is whether the proviso applies.

Sainsbury I'm not going to disagree in terms of the specifics of this case, I'm certainly not going to disagree with you Ma'am but I had argued it as a broader point of principle into which in my submission this falls.

Tipping J In actual fact this impasse that's been discussed between you and my brother Anderson a few moments ago, potential impasse, would I think be covered by ss.4 of s.30 at least for those purposes. No if that is the policy for those purposes it would be quite a bold step to say never mind that we're going to hold it to be an absolute mandatory requirement apropos of conviction as opposed to sentence.

Sainsbury Yes, well I've put forward a proposition that s.30 in a sense mirrors

Tipping J Yes, well you've got to take the bad out of s.30 along with the good haven't you if you're going to carry it across?

Sainsbury Indeed. I just want to come back to Your Honour Chief Justice's point that regarding the broad points of principles in my submission Mr Condon on his own facts is squarely within miscarriage of justice.

Tipping J Yes understood but the principle we lay down to get him there is almost more important than getting him there if you know what I mean?

Sainsbury I do, I do and that is why as a matter of principle while I've taken a broader view than perhaps necessary for Mr Condon's particular position, in my submission that is in terms of the principled and

workable approach err on the side of simplicity that guarantees the right to representation.

Elias CJ Well you would perhaps have to say that 'the right under s.24 of the Bill of Rights to consult and instruct a lawyer incorporates the right to be represented by a lawyer at trial'.

Sainsbury Yes, yes I would.

Anderson J Well that's captured by s.24(f) of the Bill of Rights Act should have the right to receive legal assistance without costs if the interest in justice so require and the person does not have sufficient means to provide for that'.

Sainsbury Yes.

Anderson J Is your argument then as the proposition of such a general nature that you propounded the BORA-based right or is it an independent assumption?

Sainsbury It's both. BORA has encapsulated in my submission what had been a long held view that there is a right to representation. It's not mandatory but it has always been that right to representation before the Courts and BORA encapsulated that and my submission if we did not have BORA it would still be appropriate for this Court to uphold that right to representation.

Anderson J If you didn't have BORA what would the entitlement stem from?

Tipping J Provision in the Crimes Act which says unless its gone since when I was there that says 'like to present your full defence in person or by counsel.

McGrath J That that is the source of the right not to have a lawyer.

Tipping J Well exactly, it's the source of both. It's a source of the ability to waive but it's generally regarded the primary right is to have counsel and the secondary right is the ability to waive it. I don't know what the section number but it's

Horsley 354 Your Honour.

Elias CJ What is it?

Horsley 354.

Elias CJ Thank you.

Tipping J Because I once had it drawn to my attention by a litigant in person when I said 'wouldn't you be wise to have counsel'. They said "oh yes

may be so Your Honour but I have a right to represent myself' and it's stayed with me.

Elias CJ It's a shame somebody didn't ask Mr Condon this question.

Tipping J Well they did didn't they, they tried but not on the crucial moment.

Sainsbury Perhaps if we turned it the other way around. If Your Honours would consider the circumstance in a Court in this country if a person turned up with counsel and the presiding Judge said to counsel 'you will not be appearing, please leave the Court, I will deal with this person as a litigant in person' and let's assume BORA doesn't exist. In my submission I'd find it difficult to believe that this Court would not find something remiss even without that section

Tipping J However great the temptation might be Mr Sainsbury on occasions one has to obey the law.

Anderson J That's of course s.354 doesn't say 'or by counsel provided at public expense'. It's the rights of BORA.

Sainsbury Yes.

Elias CJ It's not the issue here though.

Anderson J No.

Elias CJ Is there anything further you want to enlarge upon Mr Sainsbury?

Sainsbury No not unless there are other issues that Your Honours wish me to deal with.

Elias CJ No, thank you Mr Sainsbury.

Horsley Thank you Your Honours.

Elias CJ Yes Mr Horsley.

Horsley I think it's probably easiest to address you in the very similar order to which my learned friend has and the first issue that we are dealing with is the interpretation of s.30 and my learned friend has endeavoured to convince this Court that the approach that should be adopted in this Court perhaps as opposed to other Courts is a Greenfields basic rules of interpretation type approach. My learned friend endorses an approach whereby you simply look at s.30 afresh, see what you make of it now and then turn to its historical significance and the case law that surrounds s.30 to see whether there is a reason why your Greenfields approach differs from the case law. And the reason why my learned friend has endorsed that approach is because in my submission he has failed to address the primary argument made by the Crown on the

interpretation of s.30 that the existing Court of Appeal authority on it is well considered, takes into account the historical significance of the section and is in fact correct.

Tipping J This is **Parkhill** you are referring to is it?

Horsley Yes Sir and **Long** and then moving on into **Parkhill** Sir and of course Condon itself.

Elias CJ Well what's the reasoning in the Court of Appeal decision in the present case that you particularly rely on?

Horsley In particular Your Honour it's the fact that the Court has endorsed the approach in **Parkhill**

Tipping J I thought it was actually a bit anxious about **Parkhill** but felt it had to follow it. That's how read the judgment.

Horsley Well it's interesting Sir, the analysis of the Court of Appeal decision is something that I would take issue with and the Court in my submission did not need to delve into this issue of whether they considered the interpretation to be consistent with the Bill of Rights Act. In a sense the Court failed to actually consider that s.30 was trying to achieve something quite different to what s.24© and 24(F) and perhaps 24(D) and even s.25(A) the right to fair trial they were trying to achieve. In my submission s.30 is effectively an information section. What it requires to be satisfied is that the persons facing the potential for a sentence of imprisonment are told of their right to legal assistance through the legal aid provisions, whichever Legal Aid Act might have been enforced at the particular time and the need for that advice to have then either been adopted, people apply for legal aid or they obtain separate legal representation or for there to be a waiver of those rights. Now the section itself just simply requires that they be informed of those various potentials. It doesn't require someone to actually be represented in Court for the section to be satisfied. That will satisfy it but it doesn't require it.

Tipping J Which section are we talking about?

Horsley Section 30 Sir. So s.30, ss.1 will give a Court the jurisdiction to impose a sentence of imprisonment if they are legally represented, and I'll come back to what that exactly means, but ss.2 also enables a Court to impose a sentence of imprisonment in the various cases where an accused person is not in fact represented.

Tipping J You are inverting the conceptual basis of ss.1. It's couched as a prohibition, not as a permission. It's couched as a prohibition on sentencing to imprisonment if the person hasn't been legally represented.

Horsley Yes Sir.

Tipping J It doesn't say you may sentence to imprisonment if they have been legally represented. Now I'm not trying to be pedantic Mr Horsley but I think isn't that of some significance?

Horsley I don't think so Sir is the simple answer to that. The section is designed around a jurisdictional qualification for imposing a sentence of imprisonment and I think simply Sir the way you phrased it is merely the flipside of perhaps what I said and I should have stuck to the words of the section but I don't see that makes a serious distinction Sir.

Tipping J No. The simple fact is surely that unless you can get out through ss.2 you can't sentence to imprisonment if the person hasn't be legally represented at the relevant stage, whatever that is.

Horsley Yes Sir, that is correct. Now what I am saying is my first point is that is not a BORA right, that is not a right to fair trial. Section 30 is expressed as a sentence appeal right effectively, the only remedy is by way of an appeal against sentence and so the section itself is targeted at a jurisdiction to impose a sentence of imprisonment. It has no target on the right to fair trial and that's why I say that what its subjective is is to inform people of rights to counsel, rights to legal aid so that they can then if they choose to exercise their various BORA rights.

Blanchard J But isn't it concerned with risk of conviction and isn't that the direct connection with fair trial?

Horsley No Sir it's not concerned with risk of conviction because if you consider the remedies. If we were concerned with this being an unfair conviction thereby an unfair trial how could you ever have a remedy which is simply to impose a non-custodial sentence on somebody who has had an unfair trial or where their conviction is unsound. Essentially Sir if it was concerned with conviction then the remedy would never be a sentencing option, it would be a quashing of the conviction option.

Elias CJ But that option is available.

Horsley Yes Your Honour but as discussed with the Court that option really only became available because of course previously it wasn't available, that option really only became available because of a very well detailed concern expressed by the President at the time to say what happens if someone slips through the net and they manifestly deserve a term of imprisonment, we need an option of not just simply imposing a non-custodial sentence, we need to be able to send that person back and impose a proper sentence.

Tipping J So you're saying that quashing of the conviction option is really incidental and is a necessary machinery step if you think ultimately the person should be sentenced to imprisonment and no lesser sentence will suffice.

Horsley Yes Sir, I say that is why that section came under s.10 of the Criminal Justice Act as opposed to it being in existence at s.13(A) of the Criminal Justice Act.

Elias CJ And so you rely on the legislative history in part in that argument?

Horsley Yes I do and of course the comments of President Richmond in the **Long** decision. And essentially Your Honours that's why I say that the analysis that the Court of Appeal went into in terms of 'is this consistent with the BORA right or not' was in fact an analysis that they should not have delved into and was quite unnecessary in their interpretation. Regrettably what it does is colour the purpose of s.30. By equating it to a fair trial right we get concerned about how it is that s.30 should be satisfied and we have interpolated into it now a need for legal representation in Court and perhaps that brings me to the second aspect of s.30 which the interpretation of the phrase at some stage of the proceedings at which the offender is at risk of conviction.

Elias CJ I wouldn't want you to think that I am convinced yet that representation doesn't mean 'in Court representation'.

Horsley No Your Honour.

Elias CJ But you're going to come on to develop that.

Horsley Well perhaps I should deal with that first.

Elias CJ It may be part of this next argument.

Horsley It really is Your Honour and it does tie in with that.

Elias CJ Yes, alright, deal with it then, yes.

Horsley But perhaps to start with that first you will recall that s.13(A) of the Criminal Justice Act which I've set out at tab 1 of the first bundle of authorities contained a separate definition of the words for legal representation and they were defined as meaning in relation to any person 'the assistance in Court of a counsel or solicitor to represent that person in the proceedings before the Court at some time before the person has pleaded guilty or has been found guilty' and to be legally represented has a corresponding meaning. Now interestingly enough if this section was designed to be a fair trial right or a right which could only be exercised by representation at that critical time, ie, when you're in the midst of a defended hearing, s.13(A) of course did not do that.

Section 13(A) was simply satisfied by representation in Court at any time prior to the hearing.

Tipping J It meant, didn't it, and this was one of its problems, that if someone had appeared for you on an adjournment application pro forma the section was satisfied. It was a nonsense.

Horsley Exactly Sir. Now the reason why that was a nonsense is because the section is aimed in my submission at giving you advice which is meaningful to the charge, not to something that is incidental to the charge such as a bail application. So we then move to s.10 and that's at tab 2 and the critical thing about s.10 is that there has been a complete move away from the use of the words 'in Court'. 'Legally represented' is still used but it's not qualified by the words 'in Court'. Now in **Parkhill** that was seen as a significant distinction because clearly people are legally represented at various times in the proceedings. In **Parkhill** you will recall Your Honours that the legal representation took the form of correspondence that was written by the lawyer that had been engaged with the prosecuting authority and I think during the course of that correspondence pleas were even intimated but effectively there was meaningful legal representation on the charge. That representation did not take place in Court. **Parkhill** I think lacked the means to continue to pay for his lawyer and elected to simply enter the plea of guilty himself, so the Court was satisfied in **Parkhill** that there was some meaning and significance obviously to the deletion of the words 'in Court' and to the change from having 'legally represented' separately defined.

Tipping J One of the differences between 13(A) and 10 was the substitution for the words 'in Court' with the concept of at the stage of the proceedings. In 13(A) the definition of legal representation was to represent that person in the proceedings before the Court.

Horsley Yes Sir.

Tipping J Yes, now is it part of your argument that the concept of the proceedings has shifted from 13(A) to 10?

Horsley The concept of the proceedings may have shifted in the sense that previously as we've just discussed s.13(A) could have been satisfied by an appearance in the proceedings that was as remote as a bail application. Section 10 focuses on the critical fact which is the part of the proceedings where you're actually at risk of conviction, that's why I term it in my submission Sir as meaningful representation relating to the charge.

Tipping J But the concept of proceedings surely implies that you're in the Court. Now I know that this was the view that was rejected in **Parkhill** because it was the one that I proffered at first instance

Horsley Yes Sir, and I'm well aware of that Sir.

Tipping J Yes I'm sure you are, and I'm not wedded to it, I'm absolutely trying to be open-minded about it but the idea of proceedings has suddenly taken a large leap from 13(A) to affairs in Court to a much more amorphous difficult concept of anything that happens in relation to the charge.

Horsley First I think you're right Sir that it did use some unfortunate language and became a much more amorphous term but proceedings hasn't really changed, the proceedings and for the purposes of s.13(A) was not limited to 'in Court'

Tipping J Yes it was.

Horsley That was a qualifier that was put on the proceedings

Tipping J It said proceedings before the Court.

Horsley Yes Sir so proceedings could have been the entire criminal proceedings but it narrowed the focus to having to be the 'in Court' part of it and in my submission Sir the proceedings commenced at the time that the charges are laid from that time you have criminal proceedings in process and so when we are talking about at the stage at which you are at risk of conviction is the distinction between the stage where you might be for instance under arrest or under investigation

Blanchard J There's no proceedings then.

Horsley No there aren't Sir, so now we have at any stage of the proceedings or at the stage of the proceedings at which you are at risk of conviction, ie, from the time you are charged. Now I think it was Justice Anderson who was saying 'why did it not say from the time you were charged' and the answer to that in my submission is that for certain persons you are not at risk of conviction in actual fact from the time you are charged there are distinctions. If the charge is laid indictably an unrepresented person pursuant to s.153(A) of the Summary Proceedings Act cannot in fact plead guilty until he has gone through a deposition hearing, so until that person is committed for trial they are not at risk of conviction. So there are distinct stages. My learned friend even acknowledges that there are distinct stages because he advocates for a distinct position in time which is the point at which you are at risk of conviction yet even he acknowledges that in the context of a defended hearing that has to be on a continuum. It must be from the time for instance he would say that you are put in charge of the jury, perhaps when you're arraigned, right up to the time that the jury return their verdict or even till the conviction itself is entered by the Judge, so there's a continuum there. And the Crown says that if you take into account the purpose that **Parkhill** discussed then legal representation which is meaningful to the charge that effectively

conveys the s.30 various concerns, ie, that people are aware of their right to legal aid, are aware of their right to representation, that simply needs to happen at the stage of the proceedings at which you're at risk of conviction and that does not have to be in Court. We've specifically moved away from it by deleting all of those references to 'in Court' from s.13(A) moving to s.10.

Elias CJ Well it's equally possible to see this as an expansive definition which nevertheless necessarily includes 'in Court' representation, also picks up anything that might take place outside the Court which could put you at risk, but it must include surely representation in Court.

Horsley The Crown's position is that it can be satisfied obviously by representation in Court and that's the easiest and most obvious way because of course at that time the Judge can record the fact that standing before him this person has representation, or not for that matter, but the Crown says that is not the only time that is met.

Tipping J Are you saying that this means you're at risk of conviction when you're in counsel's chambers discussing strategy?

Horsley I'm simply saying Sir that you remain at risk of conviction from the moment that a charge is laid against you until that charge is finally disposed of. That is hanging over your head, the Sword of Damocles is there and this is why the words 'at risk of conviction' are there.

Tipping J But that means you are at risk throughout the proceedings.

Horsley Yes you are Sir.

Tipping J Well why the reference to the stage of the proceedings. Because your argument represents it seems to me Mr Horsley, that you're at risk from beginning to end. The idea of stages has got no relevance at all on that premise.

Horsley Well there are other stages and in fact

Elias CJ Post-conviction

Horsley There's post-conviction obviously.

Tipping J Well you're not at risk of post-conviction.

Horsley And there's pre-trial of course as well but the point I made about that was in fact an answer to Justice Anderson's earlier question or statement 'why was it not worded from date of charge' and as I've mentioned in s.153 of the Summary Proceedings Act, perhaps provides an answer to that.

Tipping J Well you couldn't be, I mean that gives you independent protection. You don't need to rely on this because you can't if you're unrepresented, you can't be allowed to plead guilty as you rightly say.

Horsley No and it just makes clear doesn't it that a person in that indictable jurisdiction who has been represented perhaps up to depositions has had advice but that representation ceases, has not in fact had legal representation for the purposes of s.30 because they did not receive legal representation at a time at which they were at risk of conviction.

Anderson J Take a person who is charged indictably and whom you say is not at risk until the completion of the depositions.

Horsley Sir.

Anderson J As soon as all the evidence has been heard at depositions and a case to answer has been found and then with the next breath the accused person is asked if they plead so there's a really narrow window of time to satisfy the section.

Horsley It does although

Anderson J Seconds.

Horsley They're not convicted though in that situation Sir. From memory if a conviction isn't entered the matter is adjourned to either the High Court for entry of conviction and sentence or further out for sentence.

Tipping J Bear in mind the expansive definition if convicted on indictment in the Crimes Act. I just think we need to watch that.

Horsley I don't think that person is convicted on indictment at that stage Sir.

Tipping J You don't think so?

Horsley No.

Tipping J Alright.

Anderson J I think you might be right. They're remitted to the appropriate Court.

Horsley Yes Sir I think that is the normal procedure.

McGrath J Mr Horsley you mention pre-trial procedures a moment ago

Horsley Yes Sir.

McGrath J But they would fit within

Horsley Pre-charge sorry I should have said pre-charge, yes.

McGrath J Pre-charge is it, yes, but if we're talking about the stage of proceedings there is an implied contrast with another stage of the proceedings in which a person is not at risk, isn't that more like at risk of conviction, isn't that more likely to be a subsequent period than an earlier period.

Horsley Yes it is Sir and once you're convicted of course you aren't at risk of conviction, it's happened and perhaps that can be likened to the situation in England where the equivalent to s.30, in fact doesn't arise until sentencing. Their very same version of s.30 arises at sentencing and there is a requirement that a person be represented at sentencing. There is no statutory requirement that person to be advised as we have with s.30 at an earlier time.

McGrath J On your argument that's not good enough, that wasn't good enough

Horsley For the purposes of our s.30 that's not good enough Sir. You can't turn up with legal representation at sentencing if you have already been convicted and satisfy s.30, that's correct Sir. The point I do wish to make is that without wishing to be belligerent particularly the interpretation that is suggested by my learned friend is one that has some merit. There's no doubt about that and the Crown is not suggesting that that interpretation as fanciful or strange the meanings of the word, it is simply to say that that interpretation has previously been rejected by the Court of Appeal, it doesn't follow what the Crown says is the legislative purpose of s.10 and despite my learned friend's criticism of the change between s.10 and then the advent of s.30 of the Sentencing Act, it has to be remembered that **Parkhill** was the extant leading Court of Appeal authority on this issue for some ten years before the advent of the Sentencing Act. If that interpretation had been critically and fundamentally wrong then the Crown has always submitted that one would have expected to have seen a change to the Sentencing Act to word it in a way which made it perfectly clear that the representation had to occur in Court at one of those relevant times.

Tipping J In **Parkhill** at first instance I proffered the view that it can hardly have been Parliament's intention in a case of a trial leading to finding of guilty that out of Court advice or assistance before the trial should be regarded as a sufficient safeguard as opposed to representation in Court at the trial. Is it inherent in your argument that out of Court advice or assistance as I put it there is a sufficient or is viewed by Parliament as a sufficient safeguard for the purposes of that section?

Horsley Yes Sir, yes Sir as opposed to for the purposes of ensuring a fair trial, yes I would agree with that Sir, and this is where it's critical to draw the distinction between as Your Honour just has, between the fair trial process and what s.30 is trying to achieve.

Tipping J Like my brother Blanchard I'm troubled that the focal point being 'risk of conviction'. It seems that Parliament was anxious that you should

have legal assistance, representation when, never mind exactly when, you were at risk of conviction. Now surely the policy of that is to make sure as much as possible that people are not wrongly convicted and sentenced to imprisonment. The fact that they can be sentenced to preventive detention jurisdictionally is a curiosity but I have difficulty in seeing that Parliament wasn't looking at least to some extent at the safety of the conviction.

Horsley I'm sure that down the track Sir that is correct. What the section is trying to achieve is effectively as I say an information section which says that for people who are facing serious offences, looking at terms of imprisonment, they need to be informed of their right to legal aid and their right to counsel.

Tipping J But this idea that it's primary purpose is information with great respect Mr Horsley seems to me to be a bit fanciful. It's there to protect people against sentences of imprisonment, if they haven't been legally represented. It's not there like a billboard is it. It's a protective mechanism, a safeguard as I

Horsley It has that remedial effect now certainly.

Elias CJ One of our number needs to adjourn promptly and I wonder whether we can resume this after the lunch break thank you at 2.15pm.

Court adjourned 12.58pm

Court resumed 2.18pm

Elias CJ Yes, thank you.

Horsley Thank you Your Honour. Yes Your Honour I think when we left I had pretty much reached the end of the interpretation issue on s.30. The final point that I wish to make on that issue was simply the one noted by the Court of Appeal in Condon and that was Parliament's intention having some purpose to be established through the fact that **Parkhill** had been a decision of the Court of Appeal and a guideline on the application of s.30 since 1992. The Sentencing Act was a complete re-write of both the Criminal Justice Act and previously when it first came into being as a Bill it was an incorporation of both the Sentencing Act and the Parole Act, a significant piece of legislation that no comment appears to have been made on the adoption of s.10 into the form of s.30 of the Sentencing Act and the Crown says that that is not to be taken as implying some sort of presumption that when Acts are re-enacted in a different form or even if it's in the same form that that's necessarily binding on Courts but that in this situation when we've already seen some legislative analysis of s.13(A) then changing into s.10, that one might have assumed that the **Parkhill** analysis was also

very much in the forefront of Parliament's mind and that they had seen fit to continue on with the existing situation. And that's perhaps as high as I'd elevate that.

McGrath J Now you're about to leave s.30's interpretation then are you Mr Horsley?

Horsley Yes I am Sir.

McGrath J Can I just ask you can you help us any more than you were able to in the written submissions on the circumstances in which 'the' came to be the governing craze.

Horsley That is an issue I was going to address Your Honour actually Sir.

McGrath J At a later stage or now?

Horsley No, sorry Sir and I'm pleased that you've reminded me. The phrase itself I think in our submissions I've said that it happened at Select Committee stage but in fact it was drawn to my attention that that was actually incorrect. The Bill went through the Select Committee stage and it was actually amended after coming back from Select Committee in the same form that that in fact it is as I've attached to the casebook so with the word 'some' rather than 'the' and I can't assist you with how that change was made Sir but it appears that at some stage after the Select Committee consideration.

McGrath J So it's after the Select Committee's reported back.

Horsley Yes Sir.

McGrath J And it's amended in the House during the course of the reading is it or is there a supplementary order paper introduced? What do we know about that?

Horsley I don't have that supplementary order paper. Our research has not sufficiently identified exactly when that change occurred Sir. Certainly we can't find any comment on it. It just appears in the final version of the Bill as reported to the House.

Elias CJ It must be in Hansard, mustn't it if it's

Horsley There's no discussion of it Your Honour, the amendment at all.

McGrath J But it must have been introduced in some way. I mean normally you'd expect it to perhaps come in a supplementary order paper or perhaps sometimes even in the third reading of a Bill something can pop up but that's usually explained so if you'd just like to be confident your researchers have gone into all of that, that if there is a supplementary order paper you've seen it.

Horsley No I haven't is the answer.

McGrath J Is it possible this one?

Horsley It is Sir although our researchers were unable to find a supplementary order paper that reflected directly on this so

McGrath J Okay, thank you.

Horsley My answer is that the research may be lacking Sir but I haven't seen it.

McGrath J You can't take it any further?

Horsley No, sorry Sir. The next point I wish to address Your Honours is the issue of the application of s.30 ss.2, so this is the question of whether there's been a failure by the appellant to exercise his rights and as you will recall the Court of Appeal had already found of course that the appellant was legally represented for the purposes of s.30 and strictly speaking did not have to look at ss.2 of s.30. They did however start by saying at para.66 of the decision that the appellant could only be regarded as within s.30 ss.2 on the basis that he had dismissed Mr Radford. He certainly did not do so in an explicit and formal way but it is at least open to argument that he did dismiss Mr Radford constructively and later at para.71 the Court concludes that they are not prepared to conclude that there was a constructive dismissal and the matter is left there. The issue as the Crown has already submitted

Elias CJ Where does this concept of constructive dismissal arise from?

Horsley I think in the case Your Honour that

Elias CJ Is that an implied dismissal?

Horsley Yes it is because the words of the subsection say "has dismissed counsel" and in this case it was clear that no express words of dismissal were used by Mr Condon and so the Court considered that 'well we're going to look at this as whether there was a constructive dismissal by Mr Condon'. Effectively they are the same concept as I understand the Court

Elias CJ Well no they're not really because

Horsley No sorry Your Honour

Elias CJ The Court may be referring to Mr Radford's suggestion that it was intolerable for him to continue and that was the constructive dismissal, so it may be a different concept than an implied dismissal, an implicit dismissal, because it still required Mr Radford to do something about it.

Horsley They do talk about saying it's at least open to argument that he did dismiss Mr Radford constructively so I took it from that Your Honour that they were talking about whether the acts of the appellant himself had led directly to Mr Radford being forced into a position where he had to withdraw, thereby being constructively dismissed.

Elias CJ Yes, yes.

Horsley And the critical part of that is that

Elias CJ Radford went to Court without instructions, without conferring with his client to withdraw.

Horsley That's something I need to take the Court through I suspect Your Honour.

Elias CJ Yes.

Horsley But we're not seeking to re-visit this constructive dismissal type issue.

Elias CJ No.

Horsley What we are arguing though is that there was a failure which is an issue that the Court didn't address of Mr Condon to exercise his rights and that is quite different from actually dismissing his counsel.

Tipping J Is this post-Radford's withdrawal, that was his failure?

Horsley Well in fact Your Honour that failure commences the Crown would say from the time that he receives the letter from Mr Radford dated I think 8 August

Elias CJ 9 August.

Horsley And his reply of 9 August I think is the critical one, and perhaps it's easiest to deal with that now. In this case we had a situation where, and you will see that there's a chronology attached to the Crown's submissions Your Honours. That chronology reveals that for a significant proportion of the year Mr Condon had in fact been acting in person and had exhibited and stated an intention to actually defend these charges himself. He was on a number of occasions, in fact just about every occasion he appeared before the Court, told to apply to Legal Aid or to apply for Legal Aid or obtain legal representation and he did not do so. You will see there in the chronology on the 7 April for instance, the information records that 'does not wish to have legal representation or to apply for Legal Aid' and Judge Keane noted the strong suggestion that he take legal advice.

Elias CJ Can you just answer me why you're taking us to this given the findings that the Court of Appeal made? Are you inviting us to come to a different conclusion than the Court of Appeal?

Horsley I'm asking you to come to a different conclusion on whether s.30, ss.2 applies in that the Crown says that 'this man actually failed to exercise his rights, and issue that the Court did not directly address in fact.

Elias CJ Yes I see so it's directed at that rather than whether there was a dismissal?

Horsley Yes, yes it is Your Honour, yes, definitely.

Elias CJ Yes, thank you.

Horsley And the next stage in this anyway is that, and this is quite critical, is that Mr Condon appears at depositions himself. He files extensive, and it's described as affidavit evidence in the deposition hearing. He also makes a no case to answer submission but is eventually committed for trial on the 10 April 2003. Sometime later and that appears in the chronology at 23 April 2003 Mr Radford is assigned by Legal Services and meets with the appellant to discuss the case. Now you will see that there's reference there to a memorandum that is prepared in conjunction with Mr Condon and Mr Radford and that memorandum is in the case on appeal, it's actually attached to both the affidavits of Mr Condon and Mr Radford in the case on appeal and that memorandum is very much worth reading in terms of Mr Condon's awareness of the defence and the structure with which Mr Radford as counsel and Mr Condon had agreed the defence would be run. I think I've cross-referenced that to

Tipping J What page are we being referred to Mr Horsley please?

Horsley Page 144 of the case on appeal Your Honour.

Elias CJ And what are you referring to the chronology just at the moment?

Horsley Sorry Your Honour.

Elias CJ I thought you were taking us through the chronology.

Horsley I was, I was.

Elias CJ So where does this appear in the chronology?

Horsley This is in the chronology Your Honour at page 2 of the chronology in late April to May 2003. I was just simply taking Your Honours to the fact that by May 2003 we have this memorandum which appears at page 144 of the case on appeal which is a very detailed memorandum in preparedness for a potential trial to go ahead in late May.

Tipping J But what was the purpose of this memorandum? This is just a note prepared by Mr Radford for his own benefit but also for reference to Mr Condon what is?

Horsley It was prepared in conjunction with Mr Condon and Mr Radford. It set out the defence and copies of it were made available to Mr Condon at that stage Sir in May of 2003.

Tipping J Yes.

Horsley The next stage is that of course the fixture in May did not occur and again the main reason for that appeared to be that Mr Condon wished to cross-examine the Officer in Charge at that stage. That was seen to be on a peripheral issue by Mr Radford but nonetheless the fixture was vacated. The 25 June 2003 again counsel and client were ready to proceed to trial. That did not get reached in that trial week and a new fixture was allocated for the week commencing 18 August and from here Your Honour the critical feature is that we see Mr Condon now giving cause for concern to his counsel that in fact he does not want counsel to represent him, rather he may be intending to represent himself and in August 2003

Tipping J You say may be intending but the note here says 'is intending'. Which is it, is it definite or just possible?

Elias CJ No he'd heard hadn't he through the grapevine on the streets I think he says that Condon was intending to represent himself and he confronted Condon with it.

Tipping J Radford with his ear to the ground.

Elias J Yes.

Anderson J No he heard it from Court staff.

Horsley It's a little more reliable than perhaps on the streets but in fact it was one of the Registrars who had spoken to Mr Condon, had asked effectively how his counsel was going and there was an indication that in fact he was thinking about appearing himself.

Tipping J Thinking about it?

Horsley I think it can't be put at much higher a level than that Sir, but anyway this was sufficient to give Mr Radford concern that he in fact had a client who was intending to represent himself and he needed to clarify the position.

Anderson J Wasn't he really asking for confirmation. I mean he was engaged, he says this rumour in effect and I want a straight answer because I don't

want to do the preparatory work and find that I'm ditched at the last moment. That's the tenor of it.

Horsley Yes Sir that is the tenor.

Anderson J And Mr Condon's response is 'well I haven't made up my mind finally yet'.

Horsley That's correct Sir.

Anderson J Well wasn't it Mr Radford's responsibility then to say 'well until I'm dismissed by you I carry on'.

Horsley I don't disagree necessarily with that but the critical factor about this is that there is a responsibility that lies upon an appellant, an accused person, to exercise their right to legal assistance, legal representation in Court and that obligation needs to be exercised by that person exercising and ensuring that in fact their representation is going to appear for them, is available. As early as 8 August Mr Condon put on notice that his counsel is not sure whether in fact he is going to be required at trial. Rather than confirming that 'yes, I want you and I need you at trial' he sends back what is described as a delphic reply which does no more than confuse counsel. Counsel then takes a step

Elias CJ It makes him mad.

Anderson J I would have thought a delphic reply was a prophetic one rather than a dissembling one?

Horsley It's interesting and it should perhaps be described as an obtuse delphic reply because trying to work out exactly what it meant was the difficulty but in fact it left counsel in a state of confusion as to his status. He at that stage determined that it was not appropriate for him to continue with his representation and you will recall that on the 14 August, which is the Friday, Mr Radford actually appeared in the absence of the accused and sought leave to withdraw. Now I don't endorse that approach whatsoever, I'm just saying that that is what occurred. The Court did not endorse that approach either. They suggested that he needed to have his client with him and needed to discuss that further. Then either on the Sunday if you believe Mr Condon's affidavit or on the Monday or Tuesday immediately before making the application to withdraw Mr Radford actually meets in person with Mr Condon and his evidence is that he asked him directly 'do you want me to represent you'? Mr Condon refused to give a straight answer to that. At that stage Mr Radford said 'in that case I'm going to renew my application to withdraw'. That happens. He is given leave to withdraw on the Tuesday and immediately after that Mr Condon applies to adjourn the fixture on the basis that he needs to get some witnesses for the trial, not I might add on the basis that he needs further legal assistance at that time. Those failures by Mr Condon to

actually give explicit instruction to his lawyer that he wished him to continue to represent him the Crown says amount to a failure for him to exercise his rights pursuant to s.30 ss.2. They also amount to a failure to exercise his rights pursuant to s.24© of the Bill of Rights Act to have legal representation. Now that's the first failure and the Crown says right from there there is an application of s.32, and in fact that's borne out by Judge Holderness's minute or memo to the Court at page 220 of the case on appeal that the understanding he had at that stage from the appellant was that the appellant ultimately elected to represent himself having earlier indicated to his Legal Aid counsel Mr Radford that he had no confidence that counsel would advance his defence in the manner which he the appellant desired and critically in para.4 'in view of the appellant's indication given in the knowledge that Mr Radford had been granted leave to withdraw that he was quite happy for the trial to proceed on Thursday 21 August, I subsequently proceeded at sentencing on the basis that s.30 ss.2 of the Sentencing Act applied' and the Crown says that is a direct consideration by the District Court Judge of the implications of s.30 of the Sentencing Act and him proceeding on the basis that he did not wish to exercise his rights to legal counsel further.

Tipping J Was Mr Condon, who gave evidence in the Court of Appeal as I understand it, asked to explain what his game was?

Horsley He was, and I commend the Court of Appeal's transcript to you Your Honour. He obfuscates in the Crown submission throughout his affidavit and throughout the course of the Court of Appeal hearing. He claims that he never wished to actually dismiss his counsel yet he seems to acknowledge that he had some difficulties, or claims that he had some difficulties with how his counsel wanted to run the trial. At one stage in his affidavit he said that he had instructed his counsel to call witnesses for him, he then acknowledges in fact that when he gives evidence that no he had not done that and he had not pursued the issue of witnesses himself. It was very difficult to get a straight answer from Mr Condon about what his thoughts were at that particular time. But with respect Your Honours at that stage the Crown says the District Court Judge was fully entitled to consider s.30 had been satisfied but there's also a follow-on from this of course and that is that the District Court Judge even at that time commended to Mr Condon a course of action whereby he should try to make amends with Mr Radford and engage him as counsel. He did not do that. He took no steps to engage Mr Radford again, he took no steps to engage any other counsel, nor did he ask for an adjournment on the day of the trial on the basis that he did not have legal representation.

Tipping J If the Judge has accepted Mr Radford's assurance as counsel that his position had become untenable as I understand was the foundation for the application for leave to withdraw, am I right so far?

Horsley It's not that his position is untenable because he has a direct conflict in terms of what he is allowed to run at trial for instance, it's untenable because Mr Radford claims he can't get instructions from his client to say that he wishes him to be engaged.

Tipping J Was that further detail put before the Judge. I understood the Judge had asked counsel or somehow other the question had arisen between Judge and counsel as to whether counsel's position had become untenable, just untenable full-stop.

Horsley No counsel always maintained that it was simply a failure to get instructions.

Tipping J Right.

Horsley Mr Condon himself expressed some dismay, disappointment or difficulties with his counsel in that he did not think that he was going to put forward the best defence for him so Mr Radford always maintained he would run the defence he was instructed to, Mr Condon said he didn't believe that effectively. That was an additional circumstance that I think allowed the District Court Judge to make the comments that he did at page 220 of the case.

Anderson J Mr Horsley at page 155

Horsley Yes Sir.

Anderson J Clause F, the last three sentences or two, there's reference to a subsequent discussion between Mr Condon and his counsel. Is there any other evidence as to the nature of that discussion?

Horsley Sorry Sir which page?

Anderson J 155 of the case, clause F, last two sentences 'I subsequently spoke directly to Mr Condon on the point'.

Horsley Yes there's some evidence on that. It's picked up again in the affidavit Sir at 157(E).

Anderson J Is there any evidence of more or less the viva voce discussion or is that

Horsley Yes and again Sir there is some evidence of that and that appears in the transcript of the Court of Appeal hearing, now that commences at page 188 and at page 191 the counsel is giving evidence as to the application to withdraw at about line 22. He talks about the application to withdraw being deferred until he thinks the 19 August and he says that he saw Mr Condon that morning when he was bailed to come to the Court and I was in the same position that he wouldn't confirm my continued instructions. Later on he's asked by the Court on the 19th,

this is at line 34 sorry, "yes the day before we appeared in Court before Judge Holderness I think it was I said 'well I'm going to seek leave to withdraw' but he didn't tell me 'look I want you to carry on with it or anything" and over the page at page 192 'did you say to the appellant "look you must either dismiss me or tell me that you're electing to defend yourself". I think I said to him 'Bob do you want me to carry on with the case', I mean I know him on first name terms and his response was evasive. He just 'um, I'm making up my mind' but that's the way Bob talks, Mr Condon talks that way.

Elias CJ He had already given an indication though that he was going to withdraw in front of Judge Abbot, hadn't he, Mr Radford, he had gone along in the absence of his client, asked for the matter to be pulled and indicated that he was going to withdraw.

Horsley Yes he had and on being told that he wasn't going to have that application granted he did in fact and quite properly in fact returned to his client and said to get the instructions before he renewed that application. I don't endorse the fact that he made that application on the 14th but I don't see that it has any effect Your Honour.

McGrath J Can I just take you back to another point at page 36 where we've got the transcript of the second hearing before Judge Holderness on the 19 August.

Horsley Yes Sir.

McGrath J Five lines up from the bottom the Judge says to Mr Condon that this was to proceed to trial on 29 May and you were representing yourself at that stage. That date's not correct is it?

Horsley No Sir at that stage as I understand it, in fact Mr Radford had been engaged and if that trial had proceeded on the 29 May he would have had counsel.

McGrath J I just picked that up from your chronology really, the cross-reference, are you able to help us with when the date would have been? It was when he appeared before Judge Kerr it seems.

Horsley I think the Judge is referring to the comment that I have made

McGrath J It might be the 7 April in which case it would be Judge Keane not Judge Kerr?

Horsley It could be Sir, it could be, because of course by May any record would have been on an indictment not on an information anyway. It may even relate Sir to the fact that there is some confusion because even after the engaging of Mr Radford Mr Condon in fact appeared for himself during the course of a bail application so it may have just been unclear to the Judge as to whether in fact he did have counsel.

McGrath J Oh I see, I see, thank you.

Horsley And in fact Mr Radford I don't think actually appeared in Court until possibly when the May fixture was even vacated. He may not have even appeared then.

McGrath J Thank you.

Horsley The point being Your Honours that two-fold. This man was well aware of his right to Legal Aid and his right to legal counsel. He'd been advised by Judges on numerous occasions of that right and of his ability to apply. He had in fact exercised that right and had engaged legal counsel but by his own actions on the 8 August or thereabouts he had put his continued representation in jeopardy. He was put on notice of that when counsel wrote to him and he took no steps to ensure that in fact he would be represented at trial, instead he continued to obfuscate and not commit himself to instructing his counsel. Critically on the 19 August he is told directly 'I'm going to apply to withdraw unless you can tell me that you want me to act' and he couldn't even give a straight answer which simply required a 'yes I do'. The application to withdraw is heard. On the afternoon there is an application to adjourn the trial and the Judge is satisfied that this is a case where s.30 does not apply.

Elias CJ Well he said that afterwards didn't he? There's nothing in the decision on the adjournment to indicate that he had s.30 in his mind.

Horsley There is in fact Your Honour in that the Crown submissions on the adjournment themselves referred to s.30.

Elias CJ Oh did they?

McGrath Mr Grierson referred to it. It was at the second hearing.

Horsley Yes, so that the one in the afternoon so there's no doubt that at least those counsel that were present

Elias CJ I see that s.30

McGrath J In a fairly passing way.

Horsley It may have been Your Honour but at least it wasn't one of those times where it's simply been overlooked. So the next stage is that even then he is invited to either try to repair his relationship with Mr Radford, or in fact that is the invitation. He does nothing. He doesn't inform the Court that he wishes other legal assistance and on the morning of the trial he never raises again the issue of legal assistance, something that he should have done and had an obligation to do if he wished to exercise that right. Now for those reasons the Crown submits that by

the Tuesday there has been a failure to exercise the right and s.30 at that stage has been satisfied and certainly by the morning of the trial there is no issue about continued representation and he no longer is exercising a 24© right. Now it's not a case of waiver of the right because waiver is definitely one way of excluding yourself from the application of s.24©, this is a right which imposes an obligation upon an accused person to exercise and he has simply failed to exercise that right.

Tipping J Are you putting it as high as this that if one is considering the events following Radford's withdrawal then hypothetically nothing before that is relevant to this failure issue? Are you saying that he has still failed by not availing himself of a day's opportunity to get substitute representation?

Horsley Yes I am Sir and perhaps I need to address you on that because I did notice Your Honour's concern obviously that one day might not be enough.

Tipping J Well the section talks about an opportunity doesn't it?

Horsley Yes Sir and again all of these cases, and it's clear from the case law from every jurisdiction that when we are talking about whether someone received a fair trial or whether someone has properly exercised their rights to counsel leading on to whether there's been a fair trial it has to be assessed on a case-by-case basis. Mr Condon is someone, and this is why I took you through the chronology, is someone who competently went through the depositions preparing his own case, filing extensive written material and also applying to have the case dismissed as a 'no case to answer'. He was actively engaged in the presentation of his defence, he was also a person uniquely able to run that defence. Now this is a very simple case. He claims he just did not say those words. The threat to kill was never made by him, there's been a misunderstanding or

Tipping J Are you saying that this was all so simple that he should have got someone within the day? I'm just trying to cut to the chase Mr Horsley.

Horsley Yes sorry Sir and perhaps cut to the chase. The first thing is yes, I think that any competent trial counsel could have, with the assistance of that memorandum and a discussion with Mr Condon, have easily assisted him in his defence. He was already briefed up to give evidence. He knew right from May that he was going to give evidence. He was in a position where he could easily

Tipping J I just wanted to identify, I didn't need you to develop it

Horsley I'm sorry Sir.

Tipping J I'm sorry it was my fault Mr Horsley. If necessary it's your argument that one day was enough in all the circumstances?

Horsley Yes Sir and

Tipping J I just wanted to make sure that we have to deal with that if it comes to it.

Horsley Yes Sir, one day is enough to engage counsel but equally he was a person who was in a position where he did not actually need counsel

Tipping J That's a separate point.

Horsley Yes it is, and I think my learned friend has suggested that he was unable to conduct his defence and the Crown simply brings out those facts, the background facts to this to say in fact 'no' he was in a very good position to, with a day's preparation, easily conduct his own defence.

Elias CJ Well is that the point though? The point is whether he had the opportunity to have legal representation not whether he was well-placed to conduct his own representation. You say we should look at it from the Sunday night, isn't it?

Horsley No, from as early as the 8 August in terms of him being on notice about whether he was going to have Mr Radford as his trial counsel.

Elias CJ Whether Mr Radford was going to withdraw?

Horsley Yes, or whether in fact he was going to confirm his constructions. From that moment he had an obligation to ensure his continued representation if he wanted it. I also say that

Tipping J But he had it.

Horsley Sorry Sir.

Tipping J He had representation at that stage unless he either constructively or if there is such a concept, or actively dismissed Mr Radford. He had representation. I know he was messing around like an absolute lunatic as one way of putting it but had representation.

Horsley But he'd put it in jeopardy Sir and he had to ensure that it continued.

Elias CJ But that's about fault, that's a different sort of thing isn't it.

Horsley Sorry Your Honour, its

Elias CJ Well you're talking about fault, whether it was his fault. So what if it was his fault that Mr Radford wasn't prepared to represent him.

Horsley No it wasn't that Mr Radford wasn't prepared to represent him, it was that Mr Radford did not know whether Mr Condon wished for him to represent him.

Elias CJ And therefore wasn't prepared to continue to represent him because he didn't want to be messed around any longer.

Tipping J He wrote a pretty telling letter that Mr Radford saying he was concerned at the personal inconvenience and discomfort of not knowing for sure and so on.

Horsley Absolutely Sir and at that stage that's where the Crown says Mr Condon steps in to the fray and won't say 'look don't worry, I don't want you'.

Tipping J But he wasn't releasing him. I know it's all thoroughly unsatisfactory on the facts but there's no way Condon was releasing Radford from his responsibilities.

Horsley No, but he's been put on, not at that stage perhaps Sir, and that's right,

Elias CJ Well then what stage, at what stage?

Horsley By the time that he will not confirm his instructions on the morning when he's been told on the 19 August, by the time he is then saying 'no I won't confirm your instructions to appear' he's failing to engage counsel.

Tipping J Well isn't that the wrong way of looking at it with respect. He has counsel. The problem is that he's dithering about whether he actually wants counsel's continued assistance but he hasn't actually released counsel. It's mightily inconvenient for Mr Radford and one can sympathise but frankly I'm not sure that one can countenance the idea that for personal inconvenience reasons one's allowed to withdraw in these circumstances. He'd accepted the brief and until such time as he was released or it became forensically untenable because he was privy to certain information and so on, surely he had an obligation to continue.

Horsley He was faced Sir with a client who was saying 'I might do the trial or you might' and he's saying to him 'well I need to know either way'.

Tipping J I can sympathise with that but surely technically

Horsley Faced with that he is saying Sir though I am going to seek leave to withdraw, ie, you will be left without my representation unless you can confirm with me that you wish me to represent you, and he would not do that.

Tipping J Yes I understand the point Mr Horsley.

Elias CJ I still think you're addressing whether he's to blame for what happened and I don't know that that's the correct inquiry, unless you get to the point of an implied dismissal or an election not to be represented by counsel and I can quite accept that that could be expressed or it could be implied from conduct but I think you're looking at the period immediately at the beginning of the trial and the problem is at that stage nobody confronts him and says well do you want to have other counsel, do you want an opportunity to have other counsel? He's never really put to say 'no I'll go on my own'. I mean he says 'Oh well I might as well get it over with' when it's quite clear he's not going to get an adjournment. But is that adequate?

Horsley Well I would say it's adequate in these circumstances because of course for a start he's well aware of his right to alternative legal counsel and in the Crown's respectful submission there is no obligation for the Court, knowing full well the history of this man, to reiterate by the way you could apply to have other counsel appear for you. The Judge does say 'look fix up your relationship with Mr Radford, tell him that you want him to act if you want that to happen' and that I think was sufficient by the Judge to remind this person and a reminder that quite frankly the Crown says is unnecessary that he can still engage legal representation and perhaps the situation would have been different if on the first day of the trial Mr Condon had come in and said 'I do want Mr Radford now, I'm prepared to resile from my earlier position where I wouldn't give instructions and I want him to appear'. He doesn't. On the issue Your Honours of obligations to properly exercise the right that he undoubtedly had I would simply refer Your Honours to our brief submissions at para.55 and 56 of the respondent's submissions and at those paragraphs we have submitted that the right to legal representation is a negative one. 'Clearly the State must not interfere with an accused exercise of that right, however the State is neither required to ensure that an accused is represented at trial nor obliged to inform an accused of his right to be so represented' and I've compared that right under s.24© of course with the right and s.23(1)(B) which contains the right to, I'll read that out. Everyone who is arrested or who is detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right' and of course that was a deliberate legislative requirement on the exercise of that right, ie, it has to be brought home to an accused person. That can be compared with the right under 24(C) which we've described as a negative right, ie, it's available but the Crown does not have to inform people of that right. Interesting enough though, s.30 provides that information but that's not a BORA requirement. The due diligence issue is referred to in para.56 of our submissions and the submission there is certainly that 'an accused person must take reasonable steps to exercise this right before he can complain of the breach' and the decision in **Jones** which is an interesting one. **Jones** was a House of Lords decision which involved a situation with an

accused person not appearing for his trial and on a charge of I think aggravated robbery to which he was eventually sentenced to 13 years imprisonment. A trial was conducted in his absence and without any legal representation whatsoever. In that case the House of Lords determined that he had failed to exercise his right to legal counsel by not turning up and that he had to exercise due diligence in appearing for his trial and ensuring that he had legal representation, he could have expected that it would go on without him by absconding and the Court also

Elias CJ That's very different circumstances.

Horsley It's very different but a number of the comments that are made in that decision Your Honour I simply commend to you.

Elias CJ Perhaps you'd better take us to those then.

Tipping J Tab 31, is that the case, **Jones**?

Horsley Yes there are a number of passages throughout this decision that are worthy of this Court's attention. Well probably start with Lord Bingham of Cornwell actually. At para.8 on page 118 His Lordship summarises the European Court of Human Rights relevant right to appear and notes there that a person should as a general principle be entitled to be present at his trial and they've said that the Court of Human Rights has repeatedly made clear that it regards the appearance of a criminal defendant at his trial as a matter of capital importance. His Honour then goes on to detail the fact that those principles may be accepted but ultimately that the issue becomes one of whether a fair trial ensued and towards the end of para.11 'if he voluntarily chooses not to exercise his right to appear he cannot impugn the fairness of the trial on the ground that it followed a course from that which it would have followed had he been present and represented and

Elias CJ Well I don't think Lord Bingham has any general statements which support the wider propositions Mr Horsley.

Horsley The wider propositions Your Honour that

Elias CJ Well moving any statements of principle which apply beyond the circumstances of **Jones** where somebody has chosen not to be present at trial and has therefore taken to have waived his right to participate by himself and counsel.

Horsley The principles in **Jones** show that despite those constituent rights under article 6 being related to fair trial that those rights can be waived without actually necessarily affecting the fair trial aspect. That the inquiries are dispirit for want of a better description. In this case the law Lords held that there had been a waiver of the right, they then went on to consider whether there was in fact a fair trial in **Jones** and I

suppose I've perhaps conflated at a later discussion that any potential breach of 24© should be treated in the same way that the Court did treat the failure to appear at your own trial and **Jones** and that is that whilst it is seen as a very important right that a person be at trial and be represented

Elias CJ A person can waive it by conduct

Horsley A person can waive it and it will not inherently lead to a breach of a fair trial.

Blanchard J There is a sentence just a little up the page from the passage you read from **Jones** which

Horsley Sorry Sir

Blanchard J It's in para.11 of Lord Bingham where about two thirds of the way through para.11 he says 'if a defendant rejects an offer of legal aid and insists on defending himself he cannot impugn the fairness of his trial on the ground that he was defended with less skill than a professional lawyer would have shown'.

Horsley Yes Sir. Thank you Sir.

McGrath J Mr Horsley I was going to ask that as the Chief Justice points out to you this was an extreme case, absconding and not coming to the trial at all, but if we look at whether the Fair Trial Right under the Bill of Rights Act, if we consider as to assessing where that right was vindicated in the circumstances the ambivalent conduct of the accused and whether his contribution if you like to his ending up not represented, if we take that into account as one of the factors overall in assessing whether his trial was fair, along with everything else, isn't that a better way to approach the Fair Trial Right in any event and whether there was a miscarriage of justice.

Horsley Yes Sir, I think that's a fair comment. I suppose the difference with the approach is that the Crown have, and the appellant in this case, is that the appellant is basically suggesting that there are a category of people who have wrongfully, he described it I think, been put in a position where they were not able to exercise their right to legal counsel. If that has happened the appellant submits that automatically there will be a miscarriage of justice or a breach of the Fair Trial Right and a substantial miscarriage of justice and the Crown simply submits that the exercise needs to be split. First you look at whether there has been a breach of s.24©. In this case we say that there hasn't been because this man has effectively waived or failed to exercise his right to counsel. Even if that is not the case the inquiry does not end there because the critical factor, and it's mandated by our appeal provisions that we must show a miscarriage of justice. There has to be something more than simply a failure to be represented at trial before you can

determine that there's been a miscarriage of justice and that requires looking at what actually happened at trial. Was there a breach of s.25(A) effectively or you could call it a breach of 25(A) or a substantial miscarriage of justice that's occurred and I've perhaps conflated those ideas a little too much in my submissions but it is part of the reason why I have talked about this man's preparedness to go to trial. The fact that it's a simple trial and the fact that his defence was apparently put to the jury and the assessment by the Court of Appeal that irrespective of how it was that he was not represented by counsel h did in fact receive a fair trial and ultimately the Crown says that's the critical inquiry. It's also how the Court of Appeal

Elias CJ Well the Court of Appeal says he received a fair trial because the points he wished to make were before the jury, but I don't read the reasons as being more extensive than that.

Horsley I think the other reasons behind him getting a fair trial were that it was a simple case, there were no complex legal issues requiring submission and the one aspect that the appellant raised in support of his application that it wasn't a fair trial was that he was unable to call witnesses yet that became a dead duck for want of a better description in the Court of Appeal because he never led any evidence of that, he did not provide any 'would-say' briefs from those witnesses and there was no suggestion that in fact they could have added anything whatsoever to the trial, so

Elias CJ They weren't witnesses of the events, no.

Horsley No they weren't.

McGrath J You also rounded off really I think as I understand you by saying that he was represented and while in some circumstances that can immediately lead to a conclusion that a person didn't have a fair trial, in this particular case he has to take enough of the responsibility for that for it to be a neutral factor. Would that be one way of putting your position?

Horsley Yes Sir it is

McGrath J I may be understating it.

Horsley No, no it's not understating it Sir, the reason why you're not represented does form part of that entire analysis but ultimately I'm not advocating a position whereby if people are not represented through their own foolishness or because there's some culpability on them that means that we don't go into the fair trial analysis. I'm still saying that even those people who have mucked the system around, who have refused to confirm their instructions with their representatives, they can't rely upon the fact that there's also been a breach of their right to legal representation; they are simply saying as a result of me not being

legally represented I just did not get a fair trial. We still go back to that overall assessment of was there a fair trial and it might be than in some cases where they waived their rights then the Court will have to do everything they can to ensure that there's been a fair trial. If they have then that is the end of the inquiry. And it's not a case of them saying I could have done better if I had counsel.

Tipping J Does your argument amount to this that there can be a breach of s.30 in the trial sense without there being an unfair trial.

Horsley Absolutely Sir.

Tipping J It's a matter of assessment in the end if there's no absoluteness as Mr Sainsbury was inclined to submit but it maybe likely if you like that there'd be an unfair trial but no inevitably so. The whole circumstances must be borne in mind.

Horsley Yes Sir without wishing to be difficult I wouldn't even say maybe likely

Tipping J I didn't think that would appeal to you Mr Horsley.

Horsley No it doesn't Sir. No but that's a fair summary

Elias CJ But you're not saying that it's a question of weighing the substance of trial in all cases to decide whether the appellant was rightly convicted, you're saying that if one of the grounds put forward is that he wasn't legally represented in circumstances where it's not clear that he didn't want to be legally represented, that the fact that he might have been partially responsible for that comes into your assessment of whether the trial has been fair?

Horsley Yes because fair trial is an elevated state. If someone does not get a fair trial, effectively I think it was Lord Steyne, effectively the administration of justice is appeared to have broken down completely so a fair trial is a high standard. If someone has not had a fair trial we're effectively saying that they scarcely got a trial at all so we're not talking about someone simply being able to come to the Court and say I was un-represented, if I had been represented I think a better job would have been done. It needs to be considered in the context of how in **Brown and Stott** they looked at the application of what is a fair trial and in **Howse** even how they looked at this issue as well.

Elias CJ But there were errors there. In here you do start with the fact of no representation in a system which is an adversarial which is geared to representation through specialist assistance.

Horsley Yes.

Elias CJ So I would myself have thought that in the absence of legal representation of somebody who wants to be legal represented there will usually be an unfair trial. You might then be looking at application of the proviso but while else do we have this fundamental right to legal representation?

Horsley What you will have in that situation Your Honour is a breach of s.24© but not necessarily a breach of the Fair Trial Right. Just because you wanted to be represented does not automatically mean that you did not receive a fair trial.

Elias CJ So it's always a question of assessing whether the trial on paper looks alright?

Horsley Yes.

Elias CJ Yes, I understand that.

Horsley Thank you Your Honour. Those are my submissions Your Honours. If there is anything further I can assist the Court with?

Elias CJ I think I have one question. I just keep harping back to s.30. It occurred to me, this is about the obligation to ensure that the offender was informed and so on. That surely must be assessed at the stage of the proceedings at which the offender is at risk of conviction and lacks representation and this was in part prompted by something you said when you were dealing with fair trading, if only, fair trial that there's no obligation to advise people of their rights to representation. I would have thought this comes pretty close to it. In a case where somebody has been represented, where someone has been represented up to a particular point and is not represented, I wouldn't have thought it placed a very onerous burden on the system for it to be good practice for the Judge to warn at that stage in terms of s.30.

Horsley I think the answer to that Your Honour is that as a matter of good practice a Judge should enquire as to whether the person has received legal representation and is aware of their rights, that's right, because they need to be satisfied that s.30 has been met anyway and so they should enquire as to whether there is an obligation on them to inform those people of their rights, I would submit that there is not simply through the structure of the Bill of Rights Act.

Elias CJ That's taking a very literal view of it.

Horsley Yes, yes Your Honour.

Elias CJ Yes, because after all the whole reason to inform people arose through common law development. I mean we've really picked up the case law in the United States in our Act but whether

Horsley Yes and it's interesting that that's why I go back to the structure of the Act which actually places specific obligations of information at other stages but not for this particular right and I am reluctant to suggest that Courts will effectively be held responsible for a breach of somebody's rights where they have not taken the steps to in all cases where someone appears before them without legal representation, to inform them of that right.

Elias CJ But it must be part of the mix

Horsley I agree with you it's a good practice

Elias CJ Yes but it must be part of the mix as to whether the trial's being fair.

Horsley Yes Your Honour it will probably come into that and it may be that in cases where, the difficulty is that we're obviously talking about serious crime where people need to be informed of these rights, particularly of their rights to Legal Aid for instance, because in many other cases they don't have a right to Legal Aid, if it's non-imprisonment or it's not likely to result in imprisonment it may be that people do not have Legal Aid yet that will not effect we say the fairness of the trial per se, so in casting an obligation on the Court to every time inform people of their right under 24© has been I think necessarily limited to the information dispensing provision that is under s.30 of the Sentencing Act and need go no further than that. Beyond that it becomes an independent inquiry as to whether in all the circumstances the person received a fair trial. That of course may be relevant to the inquiry as to whether they ever knew of their right but the obligation's a different issue.

Elias CJ Yes thank you.

Tipping J There's just one tiny point Mr Horsley. If out of Court if I can speak in summary form, out of Court representation suffices, what is the Judge going to do for sentencing purposes when the plea is entered in the trial? Is he going to have to examine the accused so as to note the information or indictment for later sentencing purposes? Is he going to have to sort of cross-examine the accused as to what actually took place and whether he actually got advice or was simply having morning tea with his counsel? That was one of the issues that bothered me in **Parkhill** and no-one's actually yet spoken about it.

Horsley No, interestingly enough in **Parkhill** I think they, may be **Long**, that they talk about the fact that there won't be an inquiry into the extend of the advice and again Your Honour

Tipping J Or the extent of the representation.

Horsley Yes and

Tipping J See this is part of the difficulty

Horsley And the extent of the advice too because I think, and it must have been in **Long**, because it was a Duty Solicitor appearing, if he had said that I am representing you, they were not going to inquire beyond that as to whether he

Tipping J But is the Judge going to say to the accused standing there about to plead guilty without counsel or in a trial without counsel knowing that this is a probable imprisonable thing, is he going to say 'well have you been represented in the course of these proceedings'?

Horsley I think he inevitably is. If he's going to wish himself to be satisfied at s.30 he will do as, in fact I think Mr Sainsbury ran through the general banter that goes on between

Tipping J But what does the accused understand by represented? I mean

Horsley Have you received any legal advice about this charge.

Elias CJ But he has to do a lot more than that under s.30(2). He has to be satisfied so there's, he's got to turn his mind to this and be satisfied and it's not just that the accused has been informed in the past and understood, if he had engaged counsel have subsequently dismissed them.

Horsley But that's ss.2 Your Honour and if we're looking at whether ss.1 is satisfied then he simply the Judge simply needs to know that he has received some legal representation.

Tipping J But there's a spin off. There's a potential spin off into ss.2 because if the fellow says something which puts the Judge in doubt as to whether ss.1 is satisfied then he's got to clear the decks at ss.2 so that everyone knows for the future and for sentencing what the jurisdiction is.

Horsley I think that's right but I don't see any difficulty with putting an obligation on the Court to actually make inquiry to be sure that s.30 has been satisfied. The Crown's argument is simply that it can be satisfied by legal representation occurring prior to the actual appearance in Court to enter a guilty plea or to appear at the defended hearing.

Elias CJ I wonder in fact whether ss.2 doesn't really destroy your argument about the meaning of s.31 because what is the point of finding out whether counsel has been dismissed if all you're interested in doing is finding out that at some stage of the proceedings the offender has been represented. Subsequent dismissal doesn't matter at all.

Tipping J Dismissal implies that there has been a previous engagement which will satisfy 30(1) so you're not looking at dismissal. I'm sorry to sort of re-phrase it.

Horsley I understand the point Your Honour but quite frankly a number of parts of this section inelegantly re-drafted but I don't know whether that could simply refer to the fact that you've engaged counsel but never done any more than that, said that you want counsel, I don't know why, but certainly I can understand the argument. It may be did you simply canvas one of a number of other situations where people end up without representation when in fact it may appear that they did have representation, possibly even in Court, and information may reveal that somebody has actually appeared but they then appear without counsel, so looking at that information you can say that they've had counsel. I don't know, I don't see that as being in conflict to a degree that it renders the interpretation that we've put on it incorrect.

Tipping J Sorry to be persistent but I really do regard this as both important and a very difficult conundrum that's been set for us

Horsley It is difficult Your Honour and

Tipping J Does legally represented fit in with your thesis have to mean 'given some advice about the substance of the charge' or something like that?

Horsley Legally represented is inextricably linked with at the stage of the proceedings at which the offender was at risk of conviction. For that reason I have said in my submissions that it is meaningful representation, ie, that it is on the issue of the charge. Now that's as far as it has to go. It doesn't

Tipping J The Judge has got to satisfy him or herself therefore that the accused has had meaningful representation.

Horsley Or just legal representation on the charge and that's what I call meaningful, it's not representation about his bail appearance or something like that, that's the link up to the stage of the proceedings at which the offender was at risk of conviction. So he simply needs to be satisfied 'have you seen a lawyer about this charge'.

Anderson J That doesn't involve representation at all, that's simply a matter of getting advice in which case it would have said 'has not been legally advised at this stage of the proceedings etc'.

Horsley That brings in a different argument again Sir that I don't know whether my learned friends raised but I'm delighted that you have Sir and that is the issue of what is legal representation and given that s.13(A) previously said that legal representation, it especially defined it as being 'in Court' one can assume that s.13(A) itself assumed that legal representation could also occur out of Court.

Anderson J Unless it's economic drafting.

Horsley Unless we're back to **Parkhill** the original Sir, yes.

Anderson J Well it might be implicit of it, I mean when you go to the state of the proceedings in which the offender was at risk of conviction you then locate it at a relevant locus as it were and a relevant locus is in a court when the risk arises and then you are represented because counsel's representing you in Court but merely getting legal advice from a lawyer can't be said to be legal representation. It's a matter of getting legal advice.

Horsley It wasn't **Parkhill** Sir because

Anderson J **Parkhill** doesn't bind us.

Horsley No, no and I certainly accept that and I'm simply saying that it wasn't **Parkhill** because the representation actually there I think it consisted of writing letters on the person's behalf and that was deemed to be legal representation.

Anderson J Well it was because they're acting as a conduit but if it's simply a discussion in a solicitor's office and left at that how can that be termed representation?

Horsley My only submission on that Sir would be that legal representation can amount to somebody engaging counsel and seeking advice on a charge with an intention that they appear on that charge but then as in **Parkhill** not having the ability to pay for them at the conclusion of that process so they have received full legal advice, all of those concerns that we are worried about in terms of them being advised of their ability to engage counsel are satisfied and they've simply made a step to proceed to that final course without their counsel being in Court, but I would submit that that does amount to legal representation for purposes of the section.

Blanchard J So there has to be a manifestation of representation by word spoken to someone other than the client ringing up the Police for example to have a discussion with them, perhaps negotiate something, or writing letters or appearing in Court but mere advice couldn't be representation, it doesn't have that quality. No one is being represented when the lawyer is simply advising the client.

Horsley It's an argument Sir that I can accept. It hasn't been fleshed out unfortunately in terms of the definition of legal representation, it hasn't unfortunately been the focus of this

Blanchard J But the word 'representation' itself has a

Horsley A connotation certainly of some external conveyance of the fact that you do act for this person and

Tipping J It's got a familiar ring this has for me Mr Horsley.

Horsley It may well be then that I've always submitted that **Parkhill** is correct. In **Parkhill** there was representation. There were letters that were written and it may well be that it does require at least to that degree a manifestation of representation. From point of view I don't resile from the position that that could be at a stage which is earlier than simply representation in Court at the day that somebody is convicted.

Blanchard J So therefore the section is about more than simply informing someone of their rights to legal representation. It's about seeing that they have had a representation by a lawyer and if not the Court has to be satisfied in a respect set out in ss.2.

Horsley Yes that's correct, that would be correct.

Elias CJ Did you have anything else to add on whether the appeal can be entertained.

Horsley I think Mr Sainsbury was going to address you on that.

Sainsbury Thank you Your Honour.

Tipping J I thought we'd reached the point that the appeal against sentence can't be entertained for the appeal against

Sainsbury I'm sorry Sir I'm about to recant.

Tipping J Oh you're about to recant. Does Mr Horsley agree with the recantation or does he not know about it?

Horsley I'm not sure yet.

Sainsbury He may not. There are four issues I would like to deal with and that's one of them so I deal with that first. The first part is just in terms of the timing of events in terms of the Court of Appeal. I think Your Honour Justice McGrath asked about that.

McGrath J Yes, thank you.

Sainsbury The sentence date was the 10 September 2003, the sentence was 18 months – two sentences of nine months accumulative – the hearing in the Court of Appeal was on the 24 and 27 May 2004, with a decision delivered on the 21 July 2004. So in terms of the Court of Appeal decision, the sentence was still in existence at the time the Court of Appeal heard and delivered the decision. So no difficulties with that. In terms of the position with s.383(A) and whether that has effectively dismissed the sentence appeal. Having had a chance to reflect on that over the luncheon adjournment and the concessions I may have brashly made, if one turns first to s.383, which is the right of appeal against conviction or sentence, and s.383, ss.1 reads "any person convicted on indictment may appeal to the Court of Appeal or with the leave of the

Supreme Court to the Supreme Court against (a) the conviction, or (b) the sentence passed on the conviction, unless the sentence is one fixed by law, or (c) both. So at that point the appellant sentence as in the accused appellant appeals we have three varieties of appeal – the conviction only, the sentence only and the conjoint appeal of conviction and sentence. Subsection 2 gives this list a general with leave the right to appeal against the sentence passed and that's ss.2. Turning now to s.383(A)3 which refers to appeal under ss.1 or ss.2 against a sentence of detention, provided that's not heard before the date in which the convicted person has completed serving the sentence the appeal lapses. My submission is this that before the Court reads down its jurisdiction it is appropriate to look very carefully at those two provisions and while that lapsing provision would apply to an appeal under 383(1)(B) and 383(2) which are the pure sentence appeals, it should not apply to the conjoint appeal which is the sentence and conviction appeal, that's (C) and this case is perhaps a very good illustration of why because the arguments relating to sentence and conviction in some instances very much interrelate as they do here. Interestingly as they did in the **Queen and Page** in the Court of Appeal which was an appeal against sentence and conviction but the sentence appeal was not actively pursued. There the Court found that the then s.10, the equivalent of s.30, had been breached and then rather than quashing the sentence or quashing the conviction made a declaration that there had been a breach of the rights. I'll come to that in a moment because that was an issue that we touched on earlier in terms of what is the remedy and that did not appear to be consistent with the view that was at least not tentatively expressed from the Bench here.

Tipping J When you read 383 and 383(A) together Mr Sainsbury, isn't it apparent that 383 in its reference to the Supreme Court is referring to a leapfrog appeal, because 383(A) talks about an appeal from the Court of Appeal to the Supreme Court. 383 without the letter (A) gives the right to appeal either to the Court of Appeal from the conviction or straight to the Supreme Court from the conviction. When the Court of Appeal has been availed of first the only right to come on to the Supreme Court is under 383(A) and therefore 383(A)3 surely bites if the appeal involves a sentence of detention. It's an interesting way you're sorting it out of the difficulty but I think the premise on which you're starting may not be sound.

Sainsbury I understand the point Sir but what by reference to an appeal under s.383 and s.383(A)1 it drags with it in my submission those three categories we see back in s.383, so I understand exactly the point in terms of the leapfrog appeal but if one goes to s.383(A) which is the sort of appeal we are dealing with here, against the decision of the Court of Appeal on appeal under s.383 we go back to s.383 to look at what is the category of appeal that was there because that's what's being appealed against so we had a sentence and conviction appeal there the conjoint both

Elias CJ But the conjoining doesn't create a third animal does it? It's run together, you have both and the sentence part on the wording of s.383(A)3 seems to have gone, lapsed.

Sainsbury In my submission it does create a third animal otherwise they could simply have left it as a 'you can appeal against conviction and you can appeal against sentence, you choose, or both'

Blanchard J Or both.

Sainsbury Or both, but both as it's own thing.

Tipping J Oh come on.

Anderson J The nature of the appeal that we are seized of, that is an appeal against a decision of the Court of Appeal and if that's right then your appeal sentence and conviction both lapse.

Elias CJ No, no it's only the sentence

Tipping J Only the sentence lapses.

Blanchard J The conjoint appeal is simply appealing against conviction plus an appeal against sentence and it frequently happens that somebody succeeds in part but they lose the conviction appeal but they win the sentence appeal.

Sainsbury Oh indeed. But for whatever reason Parliament in its wisdom has seen to create my submission this third category. Why they should have done that one may speculate on, but they have.

Tipping J Even if there are three different beasts rather than a camel and a horse tethered together.

Elias CJ A mule might be better.

Tipping J A mule, thank you Chief Justice, isn't the plain and simple fact that if you've been through the Court of Appeal we can't entertain any challenge to the sentence if it's been completed. I mean nothing could be plainer.

Blanchard J It would also be an extraordinary situation if there was an appeal both against conviction and sentence and when it was sought to bring them on here leave had to be granted. If the Court said well we don't think there's anything in the conviction appeal, no miscarriage of justice etc, we're not granting leave on that, the sentence appeal would disappear with it.

Sainsbury I'm sorry I don't follow that that would need be the case Sir.

Blanchard J I'm just demonstrating that you can't sort of link the two things together like that. They are separate animals.

Sainsbury I think confronted with that position one would then need to seek leave to amend the appeal to being one of sentence only.

Blanchard J But you couldn't

Tipping J Well that wouldn't help you.

Blanchard J But you couldn't do that.

Elias CJ Because in fact when this, it's alright because you've still got your second leave.

Blanchard J I think we were speaking in the abstract.

Elias CJ Oh sorry.

Tipping J Unless you can persuade us to the contrary it couldn't be right that you couldn't come on and get a determination of the Supreme Court if the sentence had been put in issue, only the sentence, but you can some how other do it because it happens to have been also an appeal against conviction, I mean that just with respect completely defeats the statutory purpose that once the sentence is served it's cemented in.

Sainsbury Well this is a very good example of where that does work, where one has what on the face of it is the sentence appeal yet it has a consequence of the potential for there to be a quashing of a conviction.

Tipping J Well so be it. If there is a quashing of the conviction that will be splendid from your client's point of view. The simple fact is we can't deal with the sentence alone, we can only deal with the sentence as the consequence of quashing the conviction.

Sainsbury The other aspect in my submission that can become very much an important issue and this is an example of it as well. In terms of the District Court in particular which is completely a creature of statute 'imposing a sentence such as this where there has been a breach of s.30 makes it effectively an illegal sentence'. So while on one hand it is an appeal against sentence but in fact it also has an aspect of lack of jurisdiction to impose that sentence and it would seem odd that that situation cannot be considered by this Court through the operation of s.383(A) so there is a situation

Elias CJ Well you could always bring judicial review proceedings I suppose.

Anderson J Conventionally an appeal Court dealing with an appeal against conviction and sentence deals with them as separate appeals. There are

countless appellate judgments that say the appeal against conviction is dismissed we turn now to the appeal against sentence.

Sainsbury Well I put that before you Your Honours. I'm not going to

Elias CJ Are there other points you wanted to make in reply?

Sainsbury Very briefly the matter Justice Anderson raised in terms of the meaning of conviction in s.3, I note that s.3 of the Crimes Act 'for the purposes of this Act a person shall be deemed to be convicted on indictment if ' and at © he's committed to the High Court for sentence under s.168 of the Summary Proceedings Act.

Anderson J What section of the Crimes Act is that?

Sainsbury Section 3. That is indeed at least for committal to the High Court the various situation raised, this deems the conviction to occur on that committal.

Anderson J There'll be something in the District Court's Act that applies it in the same way.

Sainsbury Yes, yes, so there one has exactly the situation that Your Honour mooted as a potential absurdity that the need for representation would have to be indeed quick. Another matter which I wish to address and it was just in response to my learned friend in terms of the background matters for Mr Condon for what his sins may or may not have been. I think in fairness to Mr Condon there does need to be some response as to how he went about obtaining his legal advice and the circumstances and I just want to draw Your Honours' attention to certain passages that arise out of the evidence from the Court of Appeal and starting first with the chronology that was to my learned friend's submissions. The first offence occurred on the 7 February and he was charged. That was the threatening to kill. It was on the 7 April that the charge of attempting to pervert the course of justice was laid. Now at that point he was still acting for himself but within three weeks he must have applied for Legal Aid because on the 23 April Mr Radford is assigned. So in terms of him sitting on his rights, initially yes he did seem keen to act for himself, but in my submission comparatively from being charged with what may on the fact of it be the more serious charge and that was attempting to pervert the course of justice he got a Legal Aid application completed, got it processed and a lawyer was assigned so he's not quite as tardy as he may appear. In terms of the dealings with Mr Radford it is perhaps interesting to note the cross-examination of Mr Radford, page 189 of the casebook, line 29

Tipping J 18

Elias CJ 189.

Sainsbury Sorry 189, line 29 and if you read through the passage 'On the 19 August the appellant told the presiding Judge that he'd no further contact from you between 25 June when the case was due for call and the receipt of your letter of 8 August, do you agree with that'. 'I can't recall, I've got not notes but my practice would certainly have been to make calls from time to time just so everybody was aware, but I didn't certainly have any consultation about the defence was going to go, no'. 'Well could you refute what he told the Judge on the 19th could you'? 'No'. Well your letter of 8 August prompted a reply from the appellant dated 9 August? 'Yes', which you received on the 12th, is that the position? 'I think so' and then goes on 'yes 12 August, I've got the original of the letter here'. So there is no effective contact between Mr Radford and the appellant up to the point of this correspondence going backwards and forwards but more significantly page 191, line 4, 'can I confirm with you that prior to your appearance on the 14 August' and I'll just interpolate here, that was when he first tried to with draw when the matter was called this correspondence that we've been discussing was the only advice that passed between you both ways, between you and the appellant. There had been no discussion or telephone communication between you meantime. 'I can't produce any document to any other effect and I've made no file note. My recollection is that when I appeared from memory on the 14th I still had not received advice from Mr Condon that he wished me to continue to represent him. I can't put it further than that'. 'Well I'm suggesting to you that his letter dated 9 August was the only advice you received prior to your appearance on the 14th, that's correct isn't it'. 'I think there was a brief telephone discussion but I've got no evidence of that. This is the only letter that I have' and down at the very bottom of the page 'but you did not tell them did you on the 14th you intended to apply for leave to withdraw'. 'No I didn't tell them on the 14th, I didn't see him on the 14th'. So there seems to have been little if any contact up until the exchange of the two letters. Little if any contact and no meaningful discussion as at the 14th when Mr Radford had already decided he was going to withdraw and further on page 192, line 12, 'would you agree that at no stage prior to the 19th did he say that he wished to dismiss you and act for himself'. 'He didn't say that directly to me, no'.

Tipping J It's a fact that perhaps should be borne in mind, although to what effect, I don't know but obviously these people knew each other on first name terms.

Sainsbury Yes, yes, they'd had dealings in the past, yes.

Elias CJ Some people are always obvious.

Sainsbury The other passage I'll just refer Your Honours too is page 213, this is Mr Condon giving evidence, line 6. 'The discussion I had with Mr Radford that morning confirmed just that, he had no intention, he made that prior to the Court on the 14th as it turned, Mr Radford himself had

made up his mind he was not going to defend me. No me making up my mind, I did not want him to defend me'. And the last passage I refer Your Honours to, page 217, line 25 when Mr Condon confirms that he brought the matter of defence witnesses to Mr Radford's attention. 'You were asked about your attention to call defence witnesses and you said that you'd brought that to Mr Radford's attention. You said you brought it to his attention, that you believed you couldn't run the trial without proof of the fact regarding witnesses and regarding my defence. When did you do that? On almost all occasions regarding my defence that I had with Mr Radford. I always brought it up in my belief that witnesses or evidence should be given rather than relying on my hearsay or recollection. Mr Radford was never confident in doing so'. And that was in fact questioning from the Bench in the Court of Appeal. So as I say for what sins Mr Condon may or may not have had I think in fairness to him the position's not entirely satisfactory in terms of both sides of the equation. And the last matter I simply wanted to deal with is the issue of **Page** because reference has been made to the existing authority of **Parkhill** and **Page** which is in the bundle of the casebook at tab 18 is a Court of Appeal decision concerning the interpretation of s.10 as it then was which found there to be a breach of s.10 and the appropriate paragraph to consider is 39 and specifically in terms of the unrepresented accused at trial where His Honour Justice Doogue had this to say 'it's essential that trial Judges ensure compliance with that section, that's s.10 whenever an accused is unrepresented at trial and that a record of such compliance be kept that is the time when the section bites as that is the time when the offender is at risk of conviction and we return to the consequences of this error and other possible trial errors later' and so there the Court of Appeal saw very specifically this stage as in terms of trial being at trial.

Tipping J They didn't have **Parkhill** referred to them did they. It's one of those

Sainsbury As I understand it they did. It was in the casebook that went before the Court of Appeal but it's not referred to in the judgment.

Tipping J Because **Parkhill** was a plea of guilty so they may have thought that it wasn't necessary to refer to it but

Sainsbury And the final matter on that in terms of the way **Page** was determined and that was not to quash sentence, not to quash conviction but to make a declaration that there had been a breach of the rights and that's possibly curious in terms of

Elias CJ We haven't been addressed on this have we? Replying to a point here.

Sainsbury Well it was a point that in fact that was raised earlier in submissions in terms of what does section 3(B) mean and it was only while reflecting on that there seemed to be two ways in which one can read it. In one sense I'm not greatly concerned either way although I have what I

think is the most logical meaning because **Page** has taken that approach I think it is useful for Your Honours to be aware of that.

Tipping J I don't see how **Page** can be reconciled with the mandatory notes for ss.3.

Sainsbury No with respect I don't either Sir.

Tipping J You've either got to quash the sentence or you've got to quash the conviction.

Sainsbury I think what it does if you read down to B and you read along till it gets to 'or trial,' they've then put a new paragraph in and called it C which is make any other order that justice requires so they will effectively read that as being a third LIM. The alternative which in my submission is the correct one and that's what was indicated earlier during discussion is you read B 'quash the conviction; and subpara.i direct a new hearing or trial for subpar.ii make any other order that justice requires'. Now that

Tipping J Well the provenance of that ie, Justice Richardson's comments in **Long** would support that because you need to quash the conviction in order to go back to the beginning in order to get a proper conviction where you can properly sentence them from prison.

Sainsbury Yes, but it goes further and it comes back to a point Your Honour Chief Justice made earlier in terms of whether it's limited to that and my submission is that allowing that option of quashed conviction (a) order retrial or (b) such other order that justice requires in fact adds a further string to the Court's bow beyond simply sending the person back so that they get the appropriate sentence.

Tipping J What other order might justice require after quashing the conviction an order that there would be no retrial?

Blanchard J I think the fact that the introductory word to both a and b is either. It makes it pretty clear that there is no third choice.

Sainsbury I would agree Sir but because of the way **Page** was dealt with I bring that to your attention but I think it does assist the argument earlier that Your Honour considered as to whether does this go beyond sentence and in my submission that supports that it does. That's my final point.

Elias CJ Thank you very much. Thank you counsel for your submissions. It's been an interesting. We'll take time to consider our decision.

Court adjourned 4.12pm