IN THE SUPREME COURT OF NEW ZEALAND SC9/2005

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **LESLEY JANE MARTIN**

Applicant

V **THE QUEEN**

Respondent

Hearing 10 June 2005

Coram Gault J
Blanchard J

Counsel DL Stevens QC for applicant
JC Pike for respondent

APPLICATION FOR LEAVE TO APPEAL

10.00am

Stevens May it please the Court I appear for the applicant.

Blanchard J Yes Mr Stevens.

Pike I appear for the respondent may it please the Court.

Gault J Yes thank you Mr Pike. Yes Mr Stevens.

Stevens Thank you Your Honour. The first issue I will achieve to appeal as sought is whether the proviso to s.385 subsection 1 of the Crimes Act can be applied where there has been a breach of a fundamental right, in this case the right to a fair trial.

Gault J Isn't that rather question begging?

Stevens Well the first question of course is has there been a fair trial and that's of course a question that will have to be determined. The applicant's

position is that there was not a fair trial in this case and there was not the fair trial because of two misdirections in the summing up concerning the issue of intention. That issue was one of the two fundamental questions or issues in the trial. The first issue was whether an injection of 60mgs of morphine had been given by the applicant to her mother at all. So that was the issue of whether the act took place with the injection being given. The second issue and the critical one for the purposes of this appeal was the issue of the applicant's intention in giving the injection if such an injection were to have been given. Now the two misdirections that the Court of Appeal found to have been given related in each instance to the question of intention. The first misdirection occurred as a result of the Judge telling the jury there was a presumption of intention as a matter of law and that term of misdirection is found at para.60 of the summing up. That misdirection cannot be characterised as a mere slip or of little or no consequence. Now it's correct of course that elsewhere in the summing up the Judge had correctly stated the Crown had to prove intent to kill, in particular in para.17 and para.52 of the summing up. But the passage which contains the misdirection can be read as qualifying what had been said earlier. The Judge says in effect that in proving intent the Crown's entitled to rely on the presumption of capacity which he then connects with a presumption of intention and he says that some three times in para.60. The jury could have interpreted that as meaning that the Crown had to prove intention but they were assisted in doing so by the presumption of intention. The misdirection went to the heart of one of the two principal issues in the case and as such the applicant contends it was a misdirection so fundamental that it deprived the applicant of a fair trial.

Gault J Well it gets to the heart of it a little doesn't it Mr Stevens. The Court of Appeal as I read their judgment concludes that in effect the misdirections were immaterial, so where is there a miscarriage of justice if the misdirections are immaterial?

Stevens Well my submission is that misdirections were not immaterial.

Gault J Well then what you're really asking is for a second appeal on a general assessment rather than on a point of law aren't you?

Stevens Well in my submission what I'm asking you to do is look at the question of whether those misdirections did or were so significant and substantial that they amounted to a miscarriage of justice and I concede that that point has to be addressed initially before one can go on to look at the legal issue that arises or the legal issue that is engaged by that issue of whether there has been a fair trial. No in my submission for the misdirection, and one doesn't have to necessarily look at the assessment of the Court of Appeal because if one looks at the misdirection itself it demonstrates manifestly in my submission that there was a serious misdirection going to a critical issue in the case while the two fundamental issues and that that must have given rise to

a miscarriage of justice or an unfair trial because how could there be a fair trial if the jury didn't even consider the issue of intention?

Blanchard J Well if it was as obvious as that surely counsel would have drawn that to the Judge's attention and sought some redirection.

Stevens Well I've got to say as I said in the Court of Appeal when this issue was raised, that it's something that I didn't or wasn't aware of at the time and I was in the rather strange position of reading the transcript of the summing up some time later and saying why did I not notice that at the time. But there are of course a multiplicity of issues in the summing up and one can't pick up on everything but this is a case where something the counsel was not aware of at the time.

Blanchard J Could that not be that because in the context of the summing up as a whole the Judge's words wouldn't have been misunderstood by the jury and weren't misunderstood by counsel.

Stevens Well that's very speculative because if I missed this issue it doesn't mean the jury missed it and when one reads it one assumes the jury were picking up everything that was being said then it makes it very clear that the Judge is saying that there is a presumption and he is qualifying his earlier comments about, his comments that were direct directions about the Crown having to prove intention by saying that the Crown assisted by the presumption. No it may be that the jury were much more alert to that point than I was and one can't say well because counsel missed it at the time that the jury would have missed it as well.

Gault J You are hardly assisted by an assumption when it is said to have been a presumption of law. That was in effect to take away an assessment of intention from the jury and realistically you couldn't say that at the end of that summing up the jury didn't believe they had to consider whether intention was proved.

Stevens In my submission you could say that when the jury were told well the Crown have to prove intention but they are assisted by a presumption.

Gault J It's not an assisted by a presumption it is dealt with by a presumption. It's dispensed with by a presumption if it's a presumption of law isn't it?

Stevens Well however one wants to put it.

Gault J Well I just don't believe that the jury would have taken that meaning.

Stevens Well one can't say that Sir with confidence.

Gault J I just did.

Stevens What I should have said was one shouldn't say that with confidence. It's not something that one can say and be confident that that was the position.

Gault J Yes.

Stevens So one can't be confident there was a fair trial. Now the second misdirection on the question of intention denied the applicant the opportunity to have the jury consider whether stress and exhaustion had impacted on whether she had formed the intention to kill. The Judge correctly directed the jury there was no defence of stress and exhaustion as such, but he also said there was no defence of stress and exhaustion negating criminal intent and the Court of Appeal held that it would have been better for the Judge to have indicated to the jury that stress and exhaustion may be relevant to whether there had been an intent to kill. In the case there was an abundance of evidence from several witnesses of the extent to which the applicant was stressed and exhausted and there was evidence as to the effects of sustained severe stress and that also went to the heart of the intention issue. The applicant was entitled to have the jury to consider whether stress and exhaustion had impacted on her capacity or on her formation of an intent. So that, those two misdirections which go to the heart of the intention issue engage the first issue of whether the proviso should be applied where there has been a breach of a fundamental right, even if the Court considers that the jury would inevitably have convicted and the applicant wishes to argue that the two-step approach to the proviso adopted by the High Court of Australia in the case of **Wild** should be adopted in New Zealand. That is that a breach of the right to a fair trial will ipsofacto give rise to a substantial miscarriage of justice. **Wild** of course established a two-step approach to the proviso. First, and I'm referring to para.18 of my written submissions, certain rights are so fundamental that if breached there has ipsofacto been a substantial miscarriage of justice regardless of the strength of the evidence. In that situation the proviso cannot be applied and the appeal must be allowed. It's only where the regularity is not a fundamental one that the focus will be on the issue of whether the jury would inevitably have convicted. The issue in my submission which is an issue of public importance is whether the **Wild** two-step approach to the proviso should be adopted in New Zealand and whether such an approach is necessary to reconcile the proviso of the rights guaranteed by the Bill of Rights Act.

Blanchard J So your first question really is whether the Court of Appeal erred in the test it applied to the use of the proviso?

Stevens Yes, yes.

Blanchard J Thank you.

Stevens Now the approach that would have to be followed here is exactly the same approach that was adopted in **Wild** where the High Court of Australia explored the issue first of whether there had been a fair trial, and then having arrived at a conclusion on that issue went on to look at the approach that should be taken in applying the proviso in that case.

Blanchard J Because we're in the unusual situation at the moment that we're waiting for a decision from the Privy Council on this exact point.

Stevens Yes, yes.

Blanchard J Which is presumably going to mean that the Supreme Court may not have to look at the test if it's appropriate simply to apply what the Privy Council suggests.

Stevens Yes indeed. Now the second issue that the applicant wishes to argue on appeal concerns the manner in which the proviso was applied. The applicant contends that the reasoning of the Court of Appeal was flawed and that as a result there has been a misapplication of the proviso. The reasoning was flawed because it assumed that if the jury had rejected cognisance of dissonance is calling into question the reliability of the applicant's admissions of what she had done, that is administer the injection, it would also have rejected cognitive dissonance as calling into question the reliability of the admissions concerning intention.

Blanchard J Was that a distinction which was directly put to the jury by the defence in closing, or was it ever suggested to the jury by the defence that even if Mrs Martin's admission about the quantity of drug might be reliable, there was still a reasonable doubt or would still be a reasonable doubt about whether her admission about her intention or motive in administering the drug was reliable?

Stevens Yes, yes. So that the defence said that cognitive dissonance calls into question the reliability of the admissions or the accuracies of the admissions or the reliability in particular and that that applies to the two issues. One, was there an injection of 60mgs given and two, if there was what was the intention.

Blanchard J And did the Judge put that to the jury?

Stevens Not in that way, no.

Blanchard J Was, and I take it no objection was taken at the time to his failure to put it in that way to the jury.

Stevens Well there was an objection taken concerning the failure of the Judge to put any to make any reference to the jury to a defensive mistake and the Judge corrected that omission some four and a half hours into the

jury's deliberations and that was a point that was taken on appeal as well.

Blanchard J So they were directed to consider that she may have made a mistake.

Stevens Indeed, yes.

Blanchard J What other intention apart from to kill was live at the time?

Stevens To alleviate suffering. To alleviate pain, and there was also a suggestion that the applicant was so exhausted and effected by stress, sustained severe stress.

Blanchard J Just going back to that, isn't that just a variant on mistake.

Stevens Well it may well be, yes, yes.

Blanchard J So wouldn't a direction on mistake effectively take the jury to a consideration of that the intention may have been not to kill but to alleviate suffering.

Stevens Well it may have, but my complaint is that the jury were effectively invited to consider only the question of whether the 60mg injection had been given and that if they concluded it had been then there was this presumption of intention. So that they may well have reasoned along the lines that well did she give the injection, will we reject cognitive dissonance on the question of the liability of her submissions that she did, therefore she did give the injection and we don't have to consider intention because there is a presumption. Now the Court of Appeal is in error in my submission by saying well if, and this is the reasoning they applied on the question of the proviso, that if the jury rejected cognitive dissonance insofar as it applied to the admissions concerning the giving of the injection then they must also have rejected cognitive dissonance applying to the issue of intention, and my submission is that it doesn't follow that that would have been the case.

Gault J Strictly logically that is clearly right but it's a question of whether or not these admissions are to be so discretely divided up and directed to two quite separate matters rather than simply an admission.

Stevens My submission Sir would be that they would have to be divided up because the Crown was relying on them for both issues. Now that means in my submission that the approach of the Court of Appeal was defective and that it made a wrong approach to the problem to employ the wording of Lord Devlin in the **Lee Chun Chuen** case, and as the Court of Appeal has made a wrong approach to the problem then there has been a miscarriage of justice which this Court must concern itself with. The third issue which the applicant submits leave should be granted on is the question of whether the Court of Appeal erred in failing to seek from the parties submissions in either the application of

the proviso to the case or the particular basis on which the Court proposed to apply the proviso. And because counsel were not advised the Court was considering applying the proviso or of the basis upon which the Court was considering applying it counsel were not afforded an opportunity of addressing the issue.

Gault J There's not in any appeal against conviction, particularly one directed at the summing up, such that the application for the proviso is alive.

Stevens Well yes and one could say well counsel should address the matter as a matter of course but this case illustrates the difficulty in saying that because counsel had no idea that the Court would apply the proviso in the erroneous fashion that it did, and one really needed to be told well this is the basis on which we think the proviso can be applied, to even address one's mind to the issue and address the Court on the issue.

Blanchard J Mr Stevens what would be the relief if you won on that ground and that ground only?

Stevens Well I guess we would then have a review of the manner in which the proviso was applied.

Blanchard J But you've got that on the other two grounds. You either win on those or you don't. If you don't win on the other two grounds then winning on this one takes you nowhere.

Stevens Well I guess that's really so, because if we win on this and the Court's already determined that the second issue is not one that arises then, I take Your Honour's point on that.

Blanchard J In other words it's cured by the review on the other two grounds.

Stevens Yes, I have to take Your Honour's point on that.

Blanchard J I doubt that there's any rule of law anyway that the Court of Appeal must always draw it to counsel's attention that they're thinking about the proviso.

Stevens No I don't think there is any law that the Court of Appeal must always do it but.

Blanchard J It may be good practice.

Stevens Yes. Now I see I have exhausted my time Your Honours and that completes the submission on behalf of the applicant.

Blanchard J Thank you Mr Stevens. Yes Mr Pike.

Pike Yes may it please the Court there are a number of in theory in theoretical terms important issues of law in the case but what the Court

of Appeal decided in the end was that they do not practically arise on the evidence and the starting point really for the Court of Appeal's decision which finally determined the case was the evidence of Professor Owens was barely admissible in the Court of Appeal came within a whisker of saying that it ought not to have been admitted at all but the Court certainly went so far as to indicate that it was unfortunate that it had been because it did not accept contrary to the trial Judge's view of matters that the evidence was such that it dealt with matters not ordinarily within the realm of jurors. Ordinary people understand stress and the effect of stress and difficult times of their lives as a matter of community experience, and so it was critical on the value of the evidence and it was right to give it little weight itself. Now the difficulty with respect with the whole intent issue is that two streams opened up as my learned friend has indicated, one that the applicant couldn't be thought to remember anything or recall correctly because of cognitive dissonance and then the idea took route that the same syndrome might affect her ability to intend to do what she did, but the difficulty that bedevilled the case and which got the learned trial Judge, with respect, into a spot of bother, was that as is recorded on and I just make this reference for the Court because I think it's important, in the Court of Appeal's case the case on appeal from the Court of Appeal on page roman 20 there's a para.17 and it's one of the trial rulings and the trial ruling notes that in opening the defence case Dr Stevens outlined as a defence stress. The accused was not capable of forming a conscious intent to kill because of the extreme stress she was under. Now immediately the thought was that automatism in some form was going to be run and indeed that seemed to be the case for some time until it finally was disavowed, but that issue while the label 'automatism' fell away from the defence case, it remained in the defence's posture and it never changed and I notice that Dr Stevens has used the same terms here this morning. The accused was not capable he said was his case of forming an intent, which is a classic description of automatism, and that is why with respect the Judge was said to have gone wrong in the famous para.60 of his summing up, where he notes of course that there's a capacity, sorry, that there is a presumption of law that the accused person is presumed to have sufficient mental activity to form an intent and then as the paragraph continues His Honour slips and I do stress the Court of Appeal was right to see it as a slip. He said there was a consequential inference of capacity and intention. Now it's at that point about four or five lines at the bottom of the paragraph where unfortunately His Honour makes just what is a slip, but the whole and context it submitted is plain the heading in the summing up is accused not in a fit state to form any sort of criminal intent. Now with respect the Judge didn't simply make that up. That was still the defence posture that stress had basically turned the person, the applicant into something of an automaton because of the circumstances, the distressing circumstances she found herself. That prevailed. Now that's the difficulty and so the Court of Appeal's now criticised the trial Judge for not leaving that concept as negating intent when the real point in the trial was never to negate intent as such but to

negate capacity to intent, and that's where it was left and that's why His Honour Justice Wild rightly summed up on this basis but wrongly unfortunately slipped by putting in those words right at the end of it, as to a capacity of intention and then goes on and the slip becomes um I'm not trying to minimise it because the concluding words of para.60 are "of course unfortunately quite incorrect that there is once the act is proved the criminal intent to commit it is presumed". Now of course we just know everyone knows that's wrong and it is submitted that the jury probably too knew that it wrong because not only had they been told correctly in many places, two or three places, my friend's rightly pointed to them that the Crown had the onus of proof and must prove intent but the very final words to the jury from the trial Judge came back to intent and this is on another I would submit important part of the case at 310 I think the reference is, questions from the jury, when the jury returned with a number of questions and this is the issue of mistake which my friend raised and was critical of the Judge for not immediately directing on. The last paragraph on page 310 begins "the third point relates to the elements of count 1, the intent or intention to kill that the Crown must prove. I listed a number of points that Dr Stevens had put to you to negate intent the defence does not accept and so on… and it goes through the whole passage 'the defence does not accept that there was a single dose administered overlook mentioning to you I summed up it closed the possibility, if you did find a large dose you might have done so by mistake, got the dosage wrong, stressed and exhausted. So the possibility of error or mistake is raised, and so on, and that is a fact for supporting submission to you that the Crown has not proved beyond reasonable doubt that the accused intended by that dose to kill her mother. Now that with respect cannot believe any doubt that the very last words the Judge ever said to the jury in the trial, this is the issue, there's a hard fought fight on, intent has now arisen and the defence is advancing the stake and I didn't direct earlier, I direct now. I do point out that it was never put to anyone and there doesn't seem to be a particularly strong foundation but I leave it to you. And so with respect that must take the sting out of a submission that the jury would likely have seen the final slipping words of para.60 as completely washing away the clear statement of what the issue was through the number of paragraphs, four in all I think that the Judge put and put it very plainly and we do rely on the submission that nobody in the trial saw this as.

Gault J So you're going to take the position that the Court of Appeal's assessment was right, that this error was immaterial?

Pike Yes Sir I do with respect and I rely on those passages to augment that argument. As to the cognitive dissonance on memory I do also believe with respect it was the Crown's submissions repeated here that that evidence ought not to have been admitted in the case if one is complaining a fair trial right to submit that the applicant got a very fair trial because she got the advantage at least of a good deal of evidence from an expert who was able to testify as to her mental state, as to the

likelihood of mistake, as to possible automatism as to a whole range of issues, that was all left to the jury and with respect it ought not to have been but the trial Judge was not prepared to rule it as inadmissible and he had little time to make up his mind and no criticism can be possibly advanced, but it was something that was fairly before the jury which perhaps ought not to have been. With respect to the proviso arguments however the Crown does rely on the Court of Appeal's very common-sense approach to it all that given that Professor Allen's evidence was in the realms of the barely admissible that it could not have made any difference on the issue if there had been a more full exposition of his evidence on the issue of intent. The Crown of course had gone further. The Crown had submitted with respect that the Court of Appeal was wrong in law to suggest that stress per se should be left as drunkenness is left as effecting the question of whether a person had intent. There is no basis in law for that holding but one could not quibble with it if the Court of Appeal had said it goes to mistake though if you're stressed and you say out of stress you made a mistake as to something you were doing, bit would be churlish and idle to suppose that a jury shouldn't be able to listen to that to take that on board. But here with respect the Court of Appeal perhaps went further than **Kamapeli** would allow it in saying it's just like drunkenness, it's just another factor possibly going to the question of whether intent was formed. The difficulty always was with respect Your Honours and I do urge this upon the Court is that the trial Judge was caught up in what seemed a very clear automatism defence and which was not left as automatism but the language of automatism got into the case and it's hardly surprising that the Judge summed up as he did. I respectively submit the Court of Appeal misunderstood that point being somewhat slightly critical of the trial Judge in respect of para.60. The trial Judge there was dealing with what was left by the defence, it's still a live issue, no longer called automatism but very plainly as His Honour noted from the opening defence opening went to capacity to form an intent.

Gault J Well just coming back to why we're here today, it is whether there are points such that leave should be granted but I gather from what you say that your position is that the assessment by the Court of Appeal's correct and that the issues of the application proviso just don't arise.

Pike They don't arise with respect Your Honour, and as to the proviso itself the Court of Appeal of course is bound in a sense by **McI.**

Gault J So it might be but that's not a reason not to give leave if it's something that should be looked at.

Pike Oh indeed Sir, the question is to whether in fact the application that comes back to Dr Stevens' point because where the application was in itself flawed in any event but if it was simply a question that the proviso was applied properly in terms of **McI** it is with respect almost moot to suggest that there should be an advisory almost a prospective judgment that **McI** ought not to have been followed.

Gault J I'm having a bit of difficulty with the reasoning of the Court of Appeal if they assess this and say that yes there were misdirections or one misdirection and one perhaps could have been better but they were immaterial and the result would have been the same. Why do they get to the proviso?

Pike Well I don't, I must say that there was a submission that I don't quite follow either. They're saying that it was inconsequential and the proviso may not have been necessarily invoked.

Gault J The proviso arises if there's been a miscarriage of justice. They found there was no miscarriage of justice because the misdirection was immaterial.

Pike Indeed, yes I accept the point unreservedly Your Honour. I cannot explain quite how we got there because certainly the para.60 was immaterial and there was a strong basis for leaving that judgment intact. The only other point then comes is the issue that they should have left that it should have been left to the jury that cognitive dissonance in some way stress negates intent but then the Court of Appeal itself had already said that they were really really straining to receive Professor Owens evidence as even admissible, in that they had mistaken the case for one of intent when it was actually automatism so in those circumstances it was just borderline that you might say that the proviso arose there, but it would only arise in that respect not in respect of para.60 but in respect of that finding that there should have been a direction that stress can be a factor in negating intent. The Crown's position with a respect is that was a very generous observation by the Court of Appeal and it is not securely founded by **Kamapeli** or any other authority that can be brought to mind. If it was advanced automatism that's where it should lie, that's where it's been dealt with in cases such as **R v Stone** in the Supreme Court of Canada which was the automatism stress cases **Rabbi** and **Stone**, I think one's 1998 and the other's 2000 or thereabout. But stress is seen critically as negating intent not as going to the question of whether there was in fact an intent formed and that's done for good policy reasons. So the Crown's answer to the Court of Appeal invoking the proviso was that it was to respectfully submit it was wrong in law in any event to see stress is relevant the way it saw it as relevant and that certainly wasn't how it was run at the trial, I have to say that with respect to my learned friend. As the only other point with respect the application of **Wild** as this Court has noted the Privy Council is still deciding what it's going to do with **Howse** and it had looked at **Wild** although they may well say that a comment from the Board there was that **Wild** didn't seem to be on a quick read to be anything much different from **McI** because in **Wild** the first stage did look at the strength of the Crown case which left Their Lordships a little confused as to whether it was such a significant authority to be raised at a high appellate level.

Blanchard J Have we got any indication of when they might be delivering judgment?

Pike No, we haven't Sir, and on the other point that is the fair trial right, there was no assertion of a breach of a fair trial right by dint Justice Wild's alleged mistakes in the trial the Court of Appeal was not engaged on that issue and so far as a fair trial right is concerned I do submit as in the outline of submissions that **Brown** and **Stott** Lord Steyne's test judgment there that the test is really a grave one, that the findings a grave one and that the real issue is whether the administration of justice has wholly failed in a particular case. So in those circumstances if that's the test it would be hard to apply the proviso and I would accept that, but if the test is a lesser one of course the proviso can always weigh as a matter of remedy whether it should be applied irrespective of a fair trial right. So if **Brown** and **Stott** is the authority Crown could not say oh well that's trumped by the proviso, because if the administration of justice has wholly failed it's very difficult now to stand up in a Court and say well nevertheless he's plainly guilty and the Crown doesn't.

Gault J There's a lot of semantics in this area isn't there. There's no magic about fair trial right if there's fundamental errors in the trial process whether you approach it by reference to the right to a fair trial or simply that the process miscarried, you end up in the same point. Retrial, and just putting it in different language doesn't take you anywhere.

Pike Exactly. No except it takes an awful lot of time Your Honour. But I have nothing further to add that's the written submission stands and unless of course there is any other matter those are the three issues the Crown sees as important.

Gault J Yes, thank you Mr Pike. Anything from that Mr Stevens?

Stevens Two matters Sir. My submission is that one should not minimise the impact of the misdirection at para.102 of the Court of Appeal judgment the Court states squarely the impugned directions on intent were erroneous, it therefore becomes necessary to determine whether no substantial miscarriage of justice was occasioned by them. Now one is entitled in my submission to infer from that that the Court of Appeal had concluded that they had given rise to a miscarriage of justice and the question was whether it was substantial. The only other matter I want to advert to and reply is the submission made by my learned friend that the evidence of Professor Owens was barely admissible and he went further I think and said the evidence of cognitive dissonance ought not to have been admitted. If that were to be so it would be because it was not an issue that required expert evidence and in that event the defence could have relied on the jury's knowledge of these matters again from their everyday experience, that is how one tends to recreate memories and how fallible memory is and things like that, and

if that were to be the case then of course the defence would have been equally entitled to have addressed the jury on that issue so that whether Professor Owens' evidence should have been admitted is irrelevant because whether it was admitted or whether it wasn't the point would have been the same and the defence submission to the jury would have been the same, so in my submission there is no benefit to be derived from looking at that question in the context of the present application.

Gault J Thank you. We'll just retire and consider this matter. Counsel just remain nearby.

Court adjourned 10.50

Court resumes 10.54

Gault J Yes thank you, as the trial file has not been available to us we wish to obtain that and read it before determining the matter of leave and accordingly we will reserve our decision on the application.