

DUSHKAR KANCHAN SINGH

Appellant

5

v

THE QUEEN

Respondent

10

Hearing: 7 October 2010

Coram: Elias CJ

Blanchard J

Tipping J

McGrath J

William Young J

Appearances: B J Hart, G J King and A J Haskett for the Appellant
B J Horsley for the Respondent

CRIMINAL APPEAL

15

ELIAS CJ:

Yes, are you leading off Mr King?

20 **MR KING:**

I am Your Honours. Your Honours this case involves consideration of really quite a complex matrix of evidential matters and you have before you two case books, which essentially contain – one of them is the full diary of the complainants which was produced in its entirety and there were also a large

number of other statements, some were produced, some were not and we've prepared overnight a schedule which we hope is of assistance in identifying the various statements and giving very brief précis about what is each, whether it was produced in evidence and the importantly where it can be
5 found in the bundles. And my friends have got a copy and hopefully it's just of assistance. I'll distribute that.

That really, I suppose sets the scene for what the appellant submits was a very unsatisfactory state of affairs because by the time one gets to the trial,
10 the complainant has effectively made, in one form or another, whether to the police or by letter or by affidavit, something in the order of 18 different statements touching on the matters that are before the Courts and in some of those she supports her original complaint to the police and others she retracts those, recants them and others yet she doesn't necessarily recant or retract
15 but says she doesn't want to give evidence against her partner, and there was throughout this period of time, there was conciliation and there was reconciliation, there was breaking up. In the middle of it all there was the preliminary hearing where the complainant gave evidence, she was effectively led through the diary about the various complaints that she alleged had
20 occurred.

After the preliminary hearing the complainant took a number of steps to try and retract or withdraw, I think the word, "drop," is used in the Crown submissions and that's the obvious word. To drop the complaints against her
25 husband. The matter was raised on a pre-trial issue and where it first comes to some prominence is in regards to the affidavit that is dated the 15th of May 2007.

ELIAS CJ:

30 Do you want to take us to that?

MR KING:

Yes thank you. It's in the volume number – it's tab 12 in the case on appeal, volume 2, complainant's statements.

TIPPING J:

Could you give me the page number because I have no numbers on my tabs?

5 **ELIAS CJ:**

No, none of us have I think. You don't – so don't rely on tabs.

MR KING:

Right, regrettably I don't know what they are sequentially –

10

BLANCHARD J:

They don't necessarily have page numbers either?

MR KING:

15 No, unfortunately, I apologise for that.

ELIAS CJ:

Well how many tabs –

20 **MR KING:**

So it's third from the – third from the –

ELIAS CJ:

It's 12 tabs in is it, we can count?

25

MR KING:

Yes. It's one, two, three, four, five, six from the end. This material was filed in respect of the upcoming callover that the, at that stage, accused was facing on the 24th of May 2007. You will see it was prepared by a lawyer who was not otherwise involved in the proceedings, a Ms Cedar-Wood Brown. And it contained both a memorandum seeking to have the complainant excused from giving evidence on a just excuse basis and it contains a fairly detailed affidavit from the complainant herself running to some 32 paragraphs.

30

TIPPING J:

This was drafted without legal assistance was it?

MR KING:

5 No this was prepared by counsel, Ms Cedar-Wood Brown.

TIPPING J:

Right.

10 **MR KING:**

And the covering letter is at the front of the tab.

TIPPING J:

Well I just found paragraph 3 of the affidavit rather strange if it, but it probably
15 doesn't matter Mr King.

ANDERSON J:

Of course they weren't, it's one of things that has slightly bugged me through
the case, that she keeps on calling herself the appellant's spouse –
20

TIPPING J:

Yes.

YOUNG J:

25 – when she's not.

MR KING:

No they weren't legally married.

30 **YOUNG J:**

So it's a pretty unsatisfactory affidavit from the outset.

MR KING:

And that point I think has been noted by all and sundry throughout, really, including, I think, the Judge dealing with it. So that affidavit and application for – to – for the complainant to be excused from giving evidence was before the

5 Court and was dealt with by His Honour Judge Harvey in the callover and the ruling or minute in relation to that is contained at page 27A of volume 4 of the case. So the point to note, of course, is that this is May of 2007, so by this time the Crown and the Court had been availed of the reluctance of the complainant to give evidence and she was seeking to be excused on the

10 just excuse clause. It does not specifically raise, at that point in time, any issue of self-incrimination but is taking the alternate tack of seeking just excuse to be excused. But at paragraph 7 of the Minute of His Honour Judge Harvey of the 24th of May, and this is page 28A, His Honour noted that, “Putting that to one side does not suggest that the evidence that she gave at

15 depositions was not true, and if indeed she was to suggest that, before she even desposed to such a fact she would have to be cautioned about privilege against self-incrimination and whether or not she waived that.” But essentially His Honour considered it was premature to deal with the just excuse issue and that it was something that would need to be considered at the trial.

20 And that’s really the import of that Minute.

TIPPING J:

Was this the Judge’s raising of self-incrimination or had that been the subject of some discussion during the hearing?

25

MR KING:

It seems it was the Judge pre-empting it really – from the material that was before him, so it doesn’t seem – certainly there was no formal application at that stage of self-incrimination.

30

YOUNG J:

She’s hardly ever, she’s never really said until she gave evidence at trial, except possibly by reference to general expressions of other inaccuracies, that the evidence was wrong?

MR KING:

Well she had it, at prior to the trial in – affidavit said she wasn't going to comment because of the risk of self-incrimination.

5

YOUNG J:

Yes, I – that's not the question. In the disputed letter of 7 January, she says "not accurate"?

10 **MR KING:**

Mhm.

YOUNG J:

And then when she comes to, as it were, take the fifth in the affidavits, she refers in very general terms to inaccuracies and inconsistencies. But she's never really come up with what you might call a narrative which contradicts or is inconsistent with her diary and a depositions statement, is that right? Well if I'm wrong take me to it.

20 **MR KING:**

No, no Sir, can I – I agree with the premise Sir, but in my submission she had sufficiently identified that there was going to be an issue of self-incrimination well prior to the trial.

25 **YOUNG J:**

Well she did on the 14th of February interview.

MR KING:

Yes and, well the 18th of January affidavit which is under –

30

YOUNG J:

It didn't really, when asked to say what she was, what sort of incrimination she was worried about, she wasn't really interested in answering.

MR KING:

She did at the –

YOUNG J:

5 No, I'm in the 14th of February interview.

MR KING:

Yes that's right but if we go just back a bit to the 18th of January and this is the affidavit which is, under – it's tab 14 but, so it's two down from the one we just
10 referred to at paragraph 4, "I do not intend to give evidence against my partner as we have now reconciled our differences and I do not intend to incriminate myself on this matter before the Court. So certainly the issue of self-incrimination had been raised and it would be, I suppose, the answer to that if she had put in any letter that well, I have lied in my previous statements
15 and so on, had come outright and said that, then she would in effect by incriminating herself in that way. So –

TIPPING J:

So when she came to give evidence and she took the self-incrimination point,
20 what she seemed to be concerned about was that she was prospectively going to commit perjury –

MR KING:

Yes.

25

TIPPING J:

– which is not a very orthodox self-incrimination argument.

MR KING:

30 There are, in the appellant's case there are a whole raft of ways in which she could potentially incriminate herself from past statements –

YOUNG J:

Yes but you're taking points she didn't take. You're taking points now that she didn't take at trial.

5 **MR KING:**

Part of the difficulty that was, was that she clearly had had counsel representing her and had clearly turned up and made the application to have her excused for just excuse. By the time she gets to trial she was not represented. The matter – once she had effectively tried to invoke a privilege
10 the case was stood down for her to obtain legal advice over the luncheon adjournment. That did not occur. So when she returned before His Honour, she was effectively left to her own devices.

What she tried to do was to read out material to the Judge. On a word back
15 basis, it would seem the material she was endeavouring to read out was the 15th of May affidavit and application, the material that she had with her and His Honour refers at one point to that being the material she was endeavouring to read out. So –

20 **TIPPING J:**

Did she ever clearly say that the evidence that she was minded to give at trial would make her at risk of perjury for what she said in the depositions?

MR KING:

25 She said that it was untrue. What she'd said at the depositions was untrue.

TIPPING J:

Can you refer us to that?

30 **MR KING:**

It's in His Honour's ruling, paragraph 39, sorry, page 39A of the volume 4, case on appeal. Starts really at paragraph 4, where it has Ms G denying entries in her diary which previously at the preliminary hearings she'd agreed were hers. At paragraph 6, "What Ms G says, is that the evidence which she

gave at the preliminary hearing is false and if she repeats it here it will be untrue and that she may then incriminate herself by committing perjury.”

YOUNG J:

5 Yes, prospectively.

TIPPING J:

Mmm.

10 **MR KING:**

Yes, it's a, it is a really complex issue I submit sir, because with the changes to the Evidence Act, the previous statements are effectively able to be used as evidence, in a different way, they're able to be relied on as truth of their contents which of course is a significant change heralded under the
15 Evidence Act and has resulted in cases such as *R v O'Brien* [2001] 2 NZLR 145 with the rule about not calling the witness, you know, to be hostile, almost falling by the way –

ELIAS CJ:

20 But she wouldn't be in jeopardy because she would not have given that evidence, the Crown would have introduced it. I don't see how she would be in jeopardy.

MR KING:

25 By giving oral evidence that it was false. In my submission that would meet –

ELIAS CJ:

Well she's already admitted it was false. In a way, she's already incriminated herself, if this is accurate.

30

MR KING:

But this Ma'am was in the context of a voir dire effectively, a hearing to determine the issue of privilege against self-incrimination, so to that extent she was, by definition, she would have to lay –

ELIAS CJ:

She's really saying that –

5 **MR KING:**

– her cards on the table in that regard –

ELIAS CJ:

– she's in a catch 22, is she?

10

MR KING:

Yes, that's right.

ELIAS CJ:

15 She can't say that the evidence at the previous, at the depositions, was false
without incriminating herself?

MR KING:

Yes. That's right and it's –

20

TIPPING J:

And she can't say it's true –

ELIAS CJ:

25 But that is not –

TIPPING J:

– without perjuring herself at the trial.

30

MR KING:

That's right, so in one way or the other –

TIPPING J:

That's the dilemma.

MR KING:

5 Yes and of course, that's, and I accept Your Honour's point Sir, that it was, essentially it was related to the depositions and it didn't refer really to the, more than a dozen other statements which had variously completely and intractably contradicted each other and simply could not all be true –

10 **YOUNG J:**

Well have they really, what are the contradictions?

MR KING:

Well, on the one occasion, she's saying that she, the letters that she
15 prepared, the subject of forgery count for example, was at the appellant's insistence and suggestion and in another –

YOUNG J:

Oh yes, well she said she never prepared it in fact.

20

MR KING:

She'd never even seen him. That she prepared it of her own free will. So certainly when it comes to those documents and can I submit that –

25 **YOUNG J:**

But they're slightly peripheral. I mean, on the core allegations of violence, she never really gave a narrative, other than the one which was consistent with the diary. She tended to say, oh it was so unfair, I was pressured, the support people bullied me, no one likes my husband, I was very tense and upset –

30

MR KING:

And under pressure and –

YOUNG J:

– the police took over, I wasn't interested in the complaint but they made me do it and whatever.

5 **MR KING:**

Yes but she does of course, as I say, she is conscious of self-incrimination and in my submission she is taking appropriate steps by not coming out directly and saying well, I lied here, I lied there, I lied there.

10 **YOUNG J:**

Is there any case where a woman, who has blown hot and cold on a domestic violence case, has ever been prosecuted for perjury, or wasting police time, in this context?

15 **MR KING:**

I could only talk anecdotally Sir, I couldn't put anything before you.

YOUNG J:

Can you talk anecdotally?

20

ELIAS CJ:

Well, can we use it?

YOUNG J:

25 But I mean, has there ever been an instance where this sort of dilemma has actually crystallised into something of substance?

MR KING:

Well there have been, of course, occasions where female complainants have
30 been prosecuted for making false complaints of crimes.

YOUNG J:

Of course there have, but in terms of this case, where there's domestic violence, the case is saying that the complainant has got her arm up behind

her back and she's been bullied into withdrawing the complaint, or pressured into withdrawing the complaint. Have there ever been cases in that context that –

5 **MR KING:**

I couldn't refer –

YOUNG J:

No.

10

MR KING:

– you to any Sir but, can I say, the particular context of this case is important because of course one of the allegations that Mr Singh was facing was an allegation of perverting the course of justice, that had a very wide parameter, it was actually extended by the Judge right up to trial but the indictment referred to a period well before that but it was quite a broad period of time. Now, on one analysis at least, the complainant, if that allegation is true that he's been putting pressure on her to write false letters and so on, then there's certainly no suggestion that she has a duress-type defence to that, she simply says she was pressured and so she would be bringing herself in as effectively a party to that offending.

15
20

TIPPING J:

Let us assume Mr King, that this witness should have, the evidence should have been, she should have been excused from giving evidence.

25

MR KING:

Yes.

30 **TIPPING J:**

Let's assume that for the moment. How does the evidence that she actually gave, contrary to what should have happened, become inadmissible against your client?

MR KING:

You mean the evidence at the preliminary hearing?

TIPPING J:

5 No, I mean the evidence at trial.

YOUNG J:

This is, what, the *Kinglake* point?

10 **MR KING:**

Yes.

TIPPING J:

Well, whether *Kinglake* or not, what is the ground of inadmissibility, under the
15 Evidence Act?

MR KING:

It would have to be that the evidence, it would have to be a section 8 analysis,
that it was more prejudicial –
20

TIPPING J:

Unfairly prejudicial?

MR KING:

25 Yes and that –

YOUNG J:

But to whom?

30 **MR KING:**

To the accused and that's really at the nub of what the appellant is saying in
this case, that this trial effectively fell so much off the rails as to barely be any
trial at all. The complainant was a terrible witness, absolutely appalling and

everyone, I think, roundly makes that point. That would have been, in the context of this trial, the appellant submits, very much to his detriment.

TIPPING J:

- 5 So the legal basis for your client claiming that this evidence should not have been admitted against him, never mind what justice or injustice was done to the complainant –

MR KING:

- 10 Yes.

TIPPING J:

– is that it was unfairly –

- 15 **MR KING:**

It resulted in an unfair trial and it's for these reasons Sir, firstly –

ELIAS CJ:

- 20 But was it unfair because of the privilege point, or was it unfair because of a standalone section 8 problem? I mean, I think you're then right into *Morgan v R* [2010] NZSC 23.

MR KING:

- 25 Yes, indeed. The appellant's position is that the unfairness really stems from the privilege issue, that had the privilege issue been properly managed –

ELIAS CJ:

But it's not his privilege.

- 30

MR KING:

No, indeed, it's the witnesses but because what the appellant says was it not being properly managed, it really enabled a whole raft of problems to –

ELIAS CJ:

But the damage was –

MR KING:

5 – flow from that –

ELIAS CJ:

– the introduction of her deposition evidence.

10 **MR KING:**

And a multitude of other statements and the exclusion of –

ELIAS CJ:

But how does the privilege –

15

MR KING:

– some other ones –

ELIAS CJ:

20 – bite on that, the claim of privilege bite on that?

MR KING:

If the complainant had availed, had been able to avail herself with the privilege against self-incrimination, that would have, in the appellant's submission, extended to her not having to produce the documents.

25

TIPPING J:

But the document, the deposition could have been produced by someone else.

30

MR KING:

And if the deposition was produced by itself, then the appellant's position would be weakened –

TIPPING J:

And the diary could have been –

MR KING:

5 – but the reality was it went in –

TIPPING J:

– produced by someone who recognised her handwriting, or by someone who found it and the inference could be drawn that it was her diary?

10

ELIAS CJ:

Well, it can come in as hearsay, written hearsay under the Evidence Act –

MR KING:

15 If it meant this –

TIPPING J:

Well, I'm just thinking about provenance –

20 **MR KING:**

– the reliability –

TIPPING J:

– provenance, not accuracy –

25

MR KING:

Yes, it would have to be sufficiently reliable to meet the test.

TIPPING J:

30 But I have some difficulty, and I think it's the same point the Chief Justice is raising, why was the viceful evidence, the evidence that was harmful to the appellant, not properly admitted? You say, under a general rubric of unfairness.

MR KING:

Yes and that's why the context is so specific in my submission and where the unfairness bites in is because one, the quantity of material that was allowed to be produced, it was just beyond the pale, that we just had statement after
 5 statement being adduced. But we, in the same way, the ones that were actually of benefit to the accused were not allowed to be admitted because section 31 –

YOUNG J:

10 But this is sort of sliding all over the show because the first issue in the case on your ostensible argument is privilege was claimed and it should have been allowed and the evidence shouldn't have been admitted.

MR KING:

15 Should have been not admitted?

YOUNG J:

Yes, should not have been admitted.

20 **MR KING:**

Yes.

YOUNG J:

And you accept that that's not an argument that your client can run because
 25 it's not his privilege – in terms, well you're now saying something slightly different that it was an unfair trial?

MR KING:

30 Yes. The –

ELIAS CJ:

Well the – that's why I say surely the real complaint here is that the written material was introduced in evidence. It isn't the proper analysis that the

privilege seems to me, the claim of privilege seems to me to be irrelevant. The real issue is whether that written evidence should have been admitted and then you've got to get into the *Morgan* analysis.

5 **MR KING:**

Mhm.

ELIAS CJ:

Was she a witness? Therefore outside the hearsay rule or do you have to
10 apply the, the safeguards of the introduction of written hearsay evidence?

MR KING:

Yes. In my submission I don't want to be seen to be abandoning the –

15 **ELIAS CJ:**

No.

MR KING:

– privilege argument because it is the appellant's position that that's really
20 where all of this stems from, but the way it transpired was that the witness –

ELIAS CJ:

Privilege has been lost in respect of the –

25 **MR KING:**

Spouse privilege of the –

ELIAS CJ:

– of the written material and the – it's only a privilege, privilege has to be
30 claimed on an occasion and she claims it –

MR KING:

Yes.

ELIAS CJ:

– when she gives her evidence, but it's not her oral evidence that's the, that's the problem for your client.

5 **MR KING:**

Well if one, no – in a sense it isn't but when one goes to assessing her demeanour, His Honour tells the jury very clearly, that this case boils firmly down to what you believe, what she said in Court or previous statements. So the –

10

ELIAS CJ:

Well that's a question of reliability isn't it?

MR KING:

15 That's right. But the oral evidence is still very much, very significant and the problem that the jury must have encountered was that they had the witness seeking to invoke a privilege very early in the proceedings. That then is not returned to, to the jury. So it's left hanging. The rest of it, that issue is determined after the luncheon adjournment in the absence of the jury, rulings
20 given, a request was made to the Judge to direct the jury on the fact that he had ruled that she didn't have privilege and therefore was required to answer. But on more than a 100 occasions, throughout her oral evidence, she declined to answer questions, without any explanation to the jury as to why she was doing that apart from Mr Hart in cross-examination putting to her as
25 part of your reluctance because you don't want to incriminate yourself. And she agrees with that.

BLANCHARD J:

That must have been obvious to the jury?

30

MR KING:

Well there was no, there was no coming back to it and of course the other inference the jury could have –

ELIAS CJ:

Why did it have to be, because the effect of disallowing her claim of privilege is that she was really a hostile witness wasn't she? Which is why I'm saying that isn't she in the same position as the witness in *Morgan*?

5

MR KING:

Well her approach, her evasiveness, her refusal to answer questions was, in my submission, simply left hanging. We then have this, what I submit as a very disturbing feature of this case right at the very end of her evidence, where the Judge effectively questions her for three pages, including putting to her the suggestion that she had refused to swear on the *Ramayan*, her holy book, because of the nature of the evidence she was going to be giving at the trial. Effectively saying she had –

15 **YOUNG J:**

This is an entirely new point isn't it?

MR KING:

No this was the – this was part of it.

20

YOUNG J:

No this is you raising that. I did notice that when I read the transcript but this hasn't been featured in the argument before has it?

25 **MR KING:**

It was very much mentioned in the Court of Appeal and it's briefly referred to the Court of Appeal judgment and a couple of paragraphs at the end. But for my submission –

30 **TIPPING J:**

Am I right in thinking Mr King –

MR KING:

Sorry Sir.

TIPPING J:

– that the reality is now that a sharper focus has come on this question of privilege and the consequences and the sort of matters that have been put to
 5 *Kinglake*, and that subsection (2) in the section, it's thought appropriate and skilfully to try and shift the focus from inadmissibility to unfairness.

MR KING:

Well if the, I mean if the Court has properly identified issues about the – who
 10 can claim the privilege, the arguments that we've – there's nothing new here that hasn't been advanced in the Court of Appeal –

TIPPING J:

No, I appreciate the material's all there but it seems to me the focus is quite
 15 significantly altered. And I'm not saying that's not to be allowed but I'm just saying that –

MR KING:

Can I say it's been refined, Sir. The reason being if the Court is, the concern
 20 is that the Court will simply take the view, right this has got nothing to do with this appellant, this was the witness's issue and if there, if she should have been given a privilege and wasn't then that's not something that this appellant can complain about.

25 **TIPPING J:**

Well you were starting off to say it was unfairly prejudicial or the trial was unfair –

MR KING:

30 Yes.

TIPPING J:

– and this is now the true focus –

MR KING:

It always was in my submission.

TIPPING J:

- 5 All right, well we won't debate that. Because of the quantity – I've – I was just trying to take a note of the things that we've got to consider –

MR KING:

Sure.

10

TIPPING J:

– the quantity of material –

MR KING:

- 15 That was allowed to go in.

TIPPING J:

– the exclusion of what I've colloquially called the, "helpful stuff" –

- 20 **MR KING:**

Yes.

TIPPING J:

And was there anything else?

- 25 **MR KING:**

Yes sir, the fact that it was, that the issue of privilege was left hanging with the jury, that it wasn't explained, the witness who claimed it and it wasn't returned to in the presence of the jury to explain that. That on more than 100 occasions when the complainant was evasive or downright refused to answer questions –

30

TIPPING J:

What are you saying? Are you saying the Judge should have embarked upon some sort of an explanation to the jury?

MR KING:

Yes.

5 **BLANCHARD J:**

How would that have helped to say that they shouldn't draw an adverse inference against the appellant in that regard?

YOUNG J:

10 Because it was the truth that she wouldn't give a straight answer to straight questions and the most likely explanation for that was that what she was saying at trial was a pack of lies.

MR KING:

15 Or that she didn't want to incriminate herself –

YOUNG J:

No, I said the most likely explanation.

20 **MR KING:**

Well in my submission, not necessarily. It could also be I don't want to – I've been denied my right of self-incrimination. Remember this is a witness who's been arrested.

25 **YOUNG J:**

But she gave evidence saying that her evidence at the depositions was untrue so she wasn't worried about incriminating herself in relation to that.

MR KING:

30 Well she sought to invoke the privilege before she got to that point –

YOUNG J:

Yes I know that.

MR KING:

– and was prevented from doing it. And so –

ELIAS CJ:

5 So the evidence she gave was actually the evidence that was supportive of your client's case?

MR KING:

Well on paper yes, but in reality not. That's my point Ma'am.

10

ELIAS CJ:

It really does seem to me that – that this – I'm just looking back at the application for leave and the way it was – and there is a part in there about fair trial –

15

MR KING:

Yes.

ELIAS CJ:

20 – and the requirement of directions in relation to the written material that was put in and that seems to me to be the issue that you're now concentrating on. And I just don't see how the privilege point comes into it except as background?

25 **MR KING:**

It certainly is context. That had the witness been given an immunity, sorry had been able to invoke her privilege and not answer questions in that way, the trial, in my submission, would have been so much cleaner and that the jury wouldn't have been left speculating.

30

ELIAS CJ:

Well if she had, if she had not given evidence –

MR KING:

Yes.

ELIAS CJ:

- 5 – effectively, then what would the result have been in terms of admissibility?
There's an issue as to whether it would have been introduced under the exception because it's not – well it's not an exception, that it's not hearsay because she was a witness –

10 **MR KING:**

Yes.

ELIAS CJ:

So that's the *Morgan* point?

15

MR KING:

Yes.

ELIAS CJ:

- 20 Or it would have been introduced as hearsay and therefore the rules in the Evidence Act as to reliability would have to have been addressed by the Judge.

25

MR KING:

The argument would be in that case that this was not reliable material because it was just so inherently contradictory in many respects. That secondly it would have prejudicial tendency because it –

30

ELIAS CJ:

Well you say it would have been –

MR KING:

Yes.

ELIAS CJ:

- 5 – but was that actually put – and in fact because I was concentrating on the privilege point, I didn't read the Judge's directions with this problem, this fair trial problem in mind, did he in fact direct them on issues of reliability?

MR KING:

- 10 He did but he also said it's a question of which, you believe, what she said in Court or what she said out of Court, so there were directions in that regard.

ELIAS CJ:

Well what's wrong about that?

15

MR KING:

Well because it's a, it becomes an either/or choice as opposed to you have to be sure.

20 **ELIAS CJ:**

Well isn't that what the reliability came down to in context?

MR KING:

- It did. I was really addressing, Your Honour, that the scenario whereby if the
25 privilege had been upheld –

ELIAS CJ:

Yes.

30 **MR KING:**

– that she was not required to give evidence, then in that situation would the prosecuting authority still be able to admit the various statements as hearsay.

YOUNG J:

Why not?

MR KING:

5 Yes, and in my submission the argument in that regard, that's what I was endeavouring to address, would be that firstly they were too unreliable to meet the statutory test for hearsay. That secondly to adduce them without the ability of the defence to challenge them, would effectively compromise the fair trial considerations, the effect – it's the old –

10

YOUNG J:

You don't see a fair trial consideration going the other way? That the Crown really is entitled to have a clean run at this without having its witness got at by anyone?

15

MR KING:

Well that's, that was the case.

YOUNG J:

20 Because I mean on basically this sort of idea of, I will scuttle the trial by saying I don't want to co-operate and if that doesn't work I'll put in a few statements, volunteer a few affidavits and then I'll say I've got myself in such a frightful pickle I can't give evidence and I'm so unreliable my evidence shouldn't be accepted anyway?

25

MR KING:

Well that's to take a rather jaundiced view of it in my submission.

30 The alternative could be that what she was saying in her retractions was the truth and what she was saying in her allegations was not.

ELIAS CJ:

Well how did the Judge deal with it? Would you mind taking us – sorry, I'd find it very helpful to see what directions did the Judge give on how –

5 **MR KING:**

Directions to the jury?

ELIAS CJ:

Yes on how they could use this material. I think that would –

10

TIPPING J:

I just want to — after that I'd like to come back to this question of the Judge failing to help the jury on this “left hanging” business.

15 **MR KING:**

Yes.

ELIAS CJ:

That may be covered by –

20

TIPPING J:

That may be, but I – just so we don't lose sight of that because it's –

ELIAS CJ:

25 Where do we find this?

MR KING:

It's at page 517 of volume 5 of the case on appeal. The first passage –

30 **ELIAS CJ:**

Sorry, just before you start that. So analytically, just trying to sort of work out what ballpark we're in here –

MR KING:

Yes.

ELIAS CJ:

5 – either she was a witness, in which case you're cast on to, is what happened compliant with section 8, or she wasn't effectively a witness and she has to – the material comes in if the standard prescribed for hearsay documentary evidence is fulfilled?

10 **MR KING:**

Yes.

ELIAS CJ:

Yes, which is a reliable –

15

MR KING:

But in both scenarios of course it's subject to section 8 as well, of course.

ELIAS CJ:

20 Yes, yes, yes, I accept that.

MR KING:

The first paragraph I would seek to draw to the Court's attention is at page 518, paragraph 9 where there is reference to demeanour, demeanour in
25 the appearance of the manner. And it's my submission that this was a witness who presented such an appalling demeanour, that that must have reflected very poorly upon the appellant and had of course the privilege been able to be invoked then –

30 **ELIAS CJ:**

Well isn't it more accurate to say that it must have impacted upon the evidence she gave –

MR KING:

Orally.

ELIAS CJ:

5 Orally, which was that the earlier statements were false?

MR KING:

That's right. And tended to therefore suggest that the earlier statements must have been the truth because her attempt to rescind them –

10

YOUNG J:

Because she couldn't give a straight answer to explain it away.

ELIAS CJ:

15 How can the jury be precluded from considering that. Isn't that exactly what –

MR KING:

Yes, no, this is – that's right. The jury does have to –

20 **ELIAS CJ:**

Yes.

MR KING:

– and consider demeanour, but the point is that this witness was, because her
25 privilege was not apparent, it had presented so badly, including as I say more than 100 times being extremely evasive and refusing to answer, and His Honour does comment on that.

TIPPING J:

30 And do you say in effect, that the Judge should have said to the jury, well she claimed privilege but I ruled against her and you may think that she's so hacked off by that, that she's behaving in this manner?

MR KING:

Or, alternatively Sir, to add on to that, to say: you may think that, or it's open to you, but one possibility is that the evasiveness in her questions was because she was seeking to avoid incriminating herself, despite the fact I had ruled that she had to answer.

TIPPING J:

Yes well that's what I thought you were saying.

10 **MR KING:**

Yes in my submission –

YOUNG J:

But it doesn't make much sense though, does it, because she unhesitatingly incriminated herself when she said that the evidence she gave at the preliminary hearing was untrue. What she wouldn't do is answer questions which pointed to that evidence being true.

MR KING:

20 Mmm.

YOUNG J:

So it's not actually – it's just a sort of an idea that's floating around, it's not attached to anything of substance in the case is it? But if she's really worried about committing perjury or being – incriminating herself, she would have said to Mr Hart, I'm not going to answer that because if I answer that I might be prosecuted for perjury, she just went fair and square into it, happy as Larry, yes I didn't do this, therefore all the evidence I've given in the past is perjury.

30 **MR KING:**

Well she did that Sir and I, that's I suppose available but what would be urged upon the Court, that she was just inherently and intractably unreliable as a witness.

ELIAS CJ:

So what else was said about unreliability?

MR KING:

5 Paragraph 46 is where His Honour says, "What this case boils firmly down to is this. Do you believe the evidence of the complainant and accused given in this Court, that these things did not occur, or do you believe what the complainant said in her deposition at the preliminary hearing and what she said in the statements earlier to and following the hearing," and so on.

10

TIPPING J:

Curiously he didn't put the boot in by referring to the diary.

MR KING:

15 Oh he does –

TIPPING J:

Does he, later?

20 **MR KING:**

– paragraph 47.

TIPPING J:

Because that really, if that was a false narrative made up at that
25 contemporaneous and sequential stage, that's almost defying belief.

MR KING:

Well it's, if one looks at the diary and it's important to see that. I mean the diary consists primarily of blank pages, it's not a comprehensive day-to-day
30 document so there are only, I don't know, less than 100 lines in the whole thing so that would take some –

TIPPING J:

Well no one said or there was no suggestion that it wasn't a contemporaneous record of what occurred, no one suggested that it was a fabrication –

5 **YOUNG J:**

The appellant did, the appellant did. He said that she wrote it up the night before the police saw it.

MR KING:

10 And he wrote it in his notebook.

TIPPING J:

And he recorded this in his notebook.

15 **MR KING:**

Because he was concerned about it yes.

TIPPING J:

Well he would but I mean, there was no other evidence.

20

MR KING:

Well the complainant seemed to suggest that someone else had come and signed it, but that just demonstrates just how bad it was. But you can see – it goes on to paragraph 48 is when he's talking, and at paragraph 49 and
25 paragraph 50 are really the key ones where he comments specifically on the unusual features.

TIPPING J:

Well the Judge says she would have presented as an unreliable witness.

30

MR KING:

Exactly.

TIPPING J:

Yes, but he also goes on rightly to say that it doesn't mean to say you can't – you've got to sort of throw your hands in the air and say we can't accept anything.

5

MR KING:

Yes. So this is all the point that the appellant's trying to make is when the jury has said you make a choice on which you believe, what was said in Court or was said in the out-of-Court statements, including of course their position, then the witness had presented so appallingly badly in her evidence that really it was no contest at all, a jury was always going to –

10

YOUNG J:

But perhaps the case wasn't the contest.

15

MR KING:

Well –

YOUNG J:

When the case against the defendant on a common sense view, leaving aside hearsay rules and the traditional morality of the criminal trial process, it was overwhelming.

20

MR KING:

Well he was acquitted on 14 counts.

25

YOUNG J:

I know but it was – in the broad scheme of things, they acquitted him on everything that wasn't corroborated.

30

MR KING:

Well the perverting the course of justice I would submit was an exception to that.

YOUNG J:

Well that was corroborated in part by the solicitors there, the evidence from the solicitors' receptionist.

5 **MR KING:**

Yes.

ELIAS CJ:

What's wrong with the direction though? I mean, you're not challenging the Judge's admission of the documentary evidence in application of the provisions of the Evidence Act, and once you get to that stage, hasn't he
10 warned them that this is an unreliable witness, that they are going to have to consider her evidence very carefully? What more should the Judge have said?

MR KING:

15 Well, the Judge should have explained that part of her evasiveness could be due to her concerns about self-incrimination.

ELIAS CJ:

Well she said that. They knew that.

MR KING:

20 Well she'd sought to invoke that very early but there was no returning to it, and that's the point that's made in that regard but, when assessing her demeanour, we have –

ELIAS CJ:

Well he says in explanation, "You don't need to worry about admissibility
25 because I've ruled on that," and you're not challenging his ruling on that, so and that's right. The questions of admissibility are for the Judge. So then all the Judge needs to do, surely, is what this Judge has done, said, "You've got an obviously unreliable witness here so you're going to have to be very careful what you accept."

MR KING:

It's really the fact, Ma'am, that the –

ELIAS CJ:

You really either had to challenge the admission of that evidence or you have
5 to point to something in this direction that is really deficient.

MR KING:

Well the point that is being sought to be advanced is really that this presented
an unwinnable proposition to the defendant. There was just no way he could
meaningfully challenge this. When he's cross-examining –

10 **ELIAS CJ:**

But that's an admission point. You're really saying that in the circumstances
the defendant – that the admission of the evidence was unfair because
the defendant couldn't challenge it.

TIPPING J:

15 Look at paragraph 50 of the summing up.

ELIAS CJ:

I haven't looked. Oh, yes that's what I've underlined, sorry, that's what I was
referring to, yes.

TIPPING J:

20 Oh sorry, you're ahead of the play, yes.

BLANCHARD J:

Well there's two bits in there, "You need to consider whether the clearly
demonstrated unreliability of the complainant means that you have doubts
about the entirety of her evidence and statements and whether you can rely
25 on any part of it." And then a few lines further on, "You need to exercise
considerable care in considering the evidence and the statements and the
overall evidence of the complainant in this matter."

TIPPING J:

That's exemplary.

BLANCHARD J:

He's warned them.

5 **MR KING:**

That's right.

TIPPING J:

Once this stuff's in with that warning, unless it's wrongly in, I would have thought that it was game, set and match.

10 **MR KING:**

Well it's the – the defence has challenged the quantity of the evidence of the material that went in.

ELIAS CJ:

Well again, it's an admissibility point

15 **MR KING:**

Indeed, indeed, but it created an overwhelming climate because, and this really comes in very clearly in my submission, perhaps in the third basis in which leave by this honourable Court was granted to consider whether the additional statements should have been in.

20 **TIPPING J:**

Well, that I think is really your only runner frankly. If that should have come in and it might have made a difference –

MR KING:

Yes.

25 **ELIAS CJ:**

Sorry, which ground is this?

TIPPING J:

That's the –

MR KING:

Third ground.

5 **TIPPING J:**

– exclusion of the –

MR KING:

“If not, was the Judge's decision to refuse to admit other statements of the complainant to the police in error.”

10 **ELIAS CJ:**

Oh, our grounds, sorry.

TIPPING J:

Grounds.

MR KING:

15 Yes.

ELIAS CJ:

Sorry I was looking at your application for –

TIPPING J:

20 Our grounds, and that's where we'll need to look at those documents and see what they said, why they weren't in and what difference it might have made.

MR KING:

Yes, indeed.

TIPPING J:

I would think you'd agree with that scenario Mr King?

MR KING:

Absolutely, yes. I just don't know – I just don't want to be seen to abandon the whole provision.

TIPPING J:

- 5 No, of course you're not abandoning anything. You're just being told, by at least some members of the bench, that it's not looking too flash.

YOUNG J:

Perhaps we'll move on to the next point.

MR KING:

- 10 By everyone I think.

BLANCHARD J:

Mr King, it might help if you identified from your schedule which are the, I'll call them consistent statements.

MR KING:

- 15 Yes.

BLANCHARD J:

Which you say should have been admitted and would have made a difference.

MR KING:

Thank you, 14, 16, 17 –

- 20 **BLANCHARD J:**

Hang on, 14, 15, 16, 17, yes.

MR KING:

Yes, and 18 and 19, and you'll see that they've got the disallowed.

BLANCHARD J:

- 25 Right.

YOUNG J:

What are we looking at? Are we looking at that?

MR KING:

The schedule, Sir.

5 **TIPPING J:**

It was handed in this morning.

YOUNG J:

Am I missing – oh sorry, a page has fallen off it.

MR KING:

10 Page 4.

YOUNG J:

Yes.

TIPPING J:

So it's all those marked disallowed.

15 **MR KING:**

Correct.

YOUNG J:

The letter, is that just the letter from Dr Wong? Was there a letter from the complainant as well?

20

MR KING:

There's a handwritten part to that as well.

YOUNG J:

I couldn't find that.

MR KING:

Sorry which number is that sir?

YOUNG J:

Nineteen.

5 **MR KING:**

Nineteen, yes there's the – sorry not the handwritten, the typed letter from D G, registered nurse, Fiji Islands, not dated.

YOUNG J:

Where's that?

10 **MR KING:**

It's at the – just behind the letter from Dr Wong.

YOUNG J:

Oh, I see, sorry.

MR KING:

15 So it's the – it's tab 19.

ELIAS CJ:

Is this submission really that –

MR KING:

If it's all –

20

ELIAS CJ:

– a partial –

MR KING:

Yes.

ELIAS CJ:

– admission of the out-of-Court statements was unfair, that everything had to come in.

MR KING:

- 5 It's not that simple because it's very context specific. The application to adduce this material was not made until very near the end of the trial.

YOUNG J:

It was made when Mr Singh was giving evidence, Sergeant Singh was giving evidence and when he was being re-examined.

- 10 **MR KING:**

Correct, and the reason for that is significant. So there's the material – this material had not been specifically referred to, to the complainant herself, but the appellant's position is that by the time we get to the re-examination of the accused, the parameters for admissibility had been set and –

- 15 **YOUNG J:**

Was it responsive to anything in cross-examination?

MR KING:

It was responsive to a number of things. Can I – I'll identify them.

TIPPING J:

- 20 I think we've got to go through this fairly precisely Mr King.

MR KING:

That's right. I agree. So the complainant had given evidence that multiple affidavits had been prepared –

- 25 **ELIAS CJ:**

Where are you taking us to?

MR KING:

This is paragraph – notes of evidence, page 96, line 21.

TIPPING J:

And what volume's that in?

5 **MR KING:**

That's in volume 4.

ELIAS CJ:

Ninety six?

MR KING:

10 Yes, page 96, lines 21 to the next page, line 6.

ELIAS CJ:

I don't have page numbers – I mean line numbers.

MR KING:

No.

15 **ELIAS CJ:**

So what are you directing our attention to?

MR KING:

So there had been reference there to affidavits being made to Mr Koya and to Ms Cedar-Wood.

20 **ELIAS CJ:**

Yes. Was that the same lawyer who –

TIPPING J:

Yes it's C-E-D-A-R actually rather than S-I-D-A.

MR KING:

Yes, it's cedar as in the tree. It's just the transcript.

ELIAS CJ:

But, so that was the lawyer that she swore the affidavit in front of?

5 **MR KING:**

Correct, and that's the under tab –

ELIAS CJ:

That's the appellant's lawyer?

MR KING:

10 – the 15th of May affidavit, yes.

ELIAS CJ:

Yes.

YOUNG J:

So this is when she's being cross-examined by Mr Hart?

15 **MR KING:**

Yes.

ELIAS CJ:

Or is this the complainant?

MR KING:

20 Yes.

ELIAS CJ:

I'm sorry, yes.

MR KING:

Yes. So that's the first reference, but in re-examination of the officer in charge of the case –

YOUNG J:

- 5 Just go over the page, and without going into all the details, do they provide various documents and affidavits to come forward, effectively, tracking what had been said earlier?

MR KING:

Yes.

10 **YOUNG J:**

Oh, yes.

MR KING:

- Now remember that this is not just simply a context of an assaults allegation in and a general retraction, but this defendant is facing an allegation of
15 perverting the course of justice by trying to influence this witness to retract. So the fact of the various types of retractions, and the context in which she made them, that she'd gone to a lawyer and sworn them, was in my submission, highly relevant, at least to that allegation, if not to the overall question of reliability that can be attached to the witness's evidence
20 generally. But it's very contextually specific on the perverting the course of justice ground. Then, in the – in re-examination of the officer in charge, the witness was asked when it was that the complainant retracted her depositions evidence or indicated that she did not wish to give evidence.

YOUNG J:

- 25 So what page is this?

MR KING:

This is at page 317, line 16, to 318, line 3, which is in volume 5.

ELIAS CJ:

Sorry, what lines? Can you read again?

MR KING:

It goes to, right up to 318, line 3.

5 **ELIAS CJ:**

Right.

MR KING:

And this is really the nub of it, is at page 318. "And just so we are clear, you had the statement that you took on the 28th of March 2007. Did you receive
10 any document from the complainant, Ms G, between 28 March 2007 and this first affidavit on the 31st of December 2007 which said she didn't want to carry on with the case and give evidence?" Answer, "No, not that I'm aware of."

TIPPING J:

But this is all before the accused gives evidence at all.

15 **MR KING:**

Correct.

TIPPING J:

Why didn't he put it in, in chief? Why was it left to re-examination to put these documents there?

20 **MR KING:**

Can I come back to that Sir?

TIPPING J:

Yes.

MR KING:

25 Because there is an answer but it involves going through the sequence.

TIPPING J:

All right, all right. Well it's an immediately obvious question.

MR KING:

Indeed. So, and it's obviously, in my submission, a very relevant point, that
5 we have the officer in charge, who has expressly disavowed –

TIPPING J:

Yes.

MR KING:

– knowledge of the 15th of May affidavit and so on.

10 **TIPPING J:**

Yes but you'd expect that to be put in in chief, not in re-examination.

MR KING:

Well, and the same would apply, with respect to the officer in charge.

YOUNG J:

15 Did he necessarily know of the May 9 2007 affidavit?

MR KING:

The May 15.

YOUNG J:

Sorry, the May affidavit?

20 **MR KING:**

Yes – well –

YOUNG J:

There's no immediate –

MR KING:

Well he's the officer in charge of the case. This had been the subject of pre-trial rulings and so on.

YOUNG J:

5 Yes, I mean he may have but he may not have.

MR KING:

Oh, I'm not suggesting – it's putting it too high to say he's lied and, clearly, it's, if it is, it's oversight, but the reality was the jury's left with the impression that there's been nothing between these periods of time and, in fact, there had
10 been.

ELIAS CJ:

I'm sorry, I'm just trying to again, trying to grasp for the analysis here. You're complaining that the jury was given an incomplete picture and it required this other material to come in to give it the full picture.

15 **MR KING:**

Yes.

ELIAS CJ:

Why was that not an issue in the admission of the inculpatory, or not the inculpatory, but the damaging statements?

20 **MR KING:**

Yes. Not all of the statements that the complainant had made were produced. So –

ELIAS CJ:

Yes, but –

25 **MR KING:**

– the original statements –

ELIAS CJ:

– but if your problem with all of this is lack of balance, you’re not seeking to have more consistent statements, consistent damaging statements before the jury but you’d still have the same problem that there are inconsistent
5 statements that you say should have been before the jury to give the full picture.

MR KING:

Yes.

ELIAS CJ:

10 Why is that not an issue on the admission of the out-of-Court statements?

MR KING:

Well –

ELIAS CJ:

The damaging ones?

15 **MR KING:**

– well, the complainant had given evidence and had made reference to these other documents that she had done. That might have been deemed sufficient to cover the point at that point.

ELIAS CJ:

20 When did the diary come in? It came in –

MR KING:

Very early.

ELIAS CJ:

What, through her evidence?

25 **MR KING:**

Correct, yes.

ELIAS CJ:

Why was not objection taken that if that material was to go in, the jury required to have also the other statements retracting those and explaining them?

MR KING:

5 There were some documents retracting at that point in time.

YOUNG J:

There's quite a few. The two letters or –

MR KING:

20th of December and 1st of December.

10 **YOUNG J:**

The 1st of December, 21st of December 2006.

MR KING:

Yes.

YOUNG J:

15 That the rather doubtful letter of 7 January 2007.

MR KING:

Yes, those are all in.

YOUNG J:

20 There's also the interview in March where she says that the letters were written off her own bat.

MR KING:

Correct.

YOUNG J:

The 13th of March.

MR KING:

So that was all there.

YOUNG J:

So that there was quite a lot of stuff in there.

5 **ELIAS CJ:**

Well what does this add?

MR KING:

Yes.

ELIAS CJ:

10 So what does this add, the stuff that you say should have been admitted?

MR KING:

Because we have the complainant testifying without being referred to the documents but, at least the submission could have been made, "Well, we know she went to lawyers, Mr Koya, Ms Cedar-Wood, in that affidavits were
15 filed," but that is undone when the officer in charge effectively disavows any knowledge of the, certainly the 15th of May affidavit. And in the context where the other letters of course that are, or statements where the witness is disavowing of her evidence, or recanting or whatever, those are essentially being adduced by the Crown in support of the, either the forgery count or
20 they're perverting the course of justice. It was – so they were saying that these were evidence of him putting pressure on her to do these things.

YOUNG J:

But in truth, if these other documents had come in when she was giving evidence, she would have cross-examined about them in very much the same
25 way. For instance, there's the draft affidavit, the handwritten affidavit that she gave to the police in March, which is one of the documents. There's evidence that, on the Crown case, suggested that the appellant had arranged for her to see a solicitor, and had turned up with her when she went to see the solicitor,

and then for some reason that went off. There's then, when she's interviewed under caution in February 2008, basically over affidavits and also not turning up for trial –

MR KING:

5 Yes.

YOUNG J:

– that the police officer asked some reasonably obvious questions about this, to which she basically give evasive responses, for instance, “Who paid?” “I paid.” “Well how did you pay? Have you got a job?” “Yes I have.
10 Of course I've got a job but I won't tell you where.” Now, all of this stuff, if put forward at the appropriate time, would have been able to be responded to the Crown, who would have simply said, “It's more of the same because it's already there anyway,” but it's also more of the same because it's basically more evidence of her being induced by Sergeant Singh to scuttle
15 the prosecution.

MR KING:

Or it's more evidence that she's doing this off her own bat.

YOUNG J:

Yes, sure.

20 **MR KING:**

Which is what the appellant submits its relevance was.

YOUNG J:

Yes, but the jury have got both ends of a bit of string. They've got her at the beginning in, well, right from the very get-go in September. She's pretty
25 ambivalent about prosecution.

MR KING:

Yes.

YOUNG J:

They know that. They know that in December she's writing a letter saying she doesn't want the prosecution to go on. They've got a document that she acknowledges writing, although they obviously don't believe her, of 7 January.

- 5 They know that by the – they know that in general terms, between depositions and trial, she's been basically blowing cold on the prosecution. They know that she didn't front up for the first trial –

MR KING:

Yes.

- 10 **YOUNG J:**

– in February, and they know that at trial she's, you know, all on the side of Sergeant Singh.

MR KING:

Yes.

- 15 **YOUNG J:**

So, there's a little bit in the middle that they haven't got.

MR KING:

No.

YOUNG J:

- 20 But they have got the guts of it, haven't they?

MR KING:

- Well, that's – certainly that will undoubtedly be the Crown position but the appellant's one is that this material tended to contradict the suggestion, or the inference, that this was a person who was just constantly being put under
25 huge pressure, because if the jury were to have that material before them, they could see that these are actually very detailed documents that are prepared by lawyers.

But the reason that they become significant is, as I say, it starts really at the point in time where the officer in charge doesn't know about them. So a jury could well be thinking: more lies from the complainant when she's talked
 5 about these other affidavits. It's just more of her lies because the police don't know about them?

TIPPING J:

What was the basis for the Judge disallowing them?

MR KING:

10 It's – the ruling is essentially that it was –

ELIAS CJ:

Where is it sorry?

MR KING:

That they were self – that they were section 35, consistent –

15 **TIPPING J:**

Self-consistent.

MR KING:

– consistent statements effectively.

BLANCHARD J:

20 At what point was that ruling made?

MR KING:

They – it's in – it's at page 61A, effectively is where we get to. The ruling is dated –

ELIAS CJ:

Where do we find that, what volume?

MR KING:

It's in, sorry, it's in volume number, volume 4, 59A, and it's on the
5 26th of November 2008.

BLANCHARD J:

And is that before or after the evidence given at page 318?

YOUNG J:

Some days later.

10 **MR KING:**

Yes, it's in the course of re-examination of the accused's own evidence.

YOUNG J:

Right.

MR KING:

15 So, whereas 318 is the officer in charge's re-examination. It really starts at
paragraph 5 on 60A.

ELIAS CJ:

Sorry, which page?

MR KING:

20 On 60A.

ELIAS CJ:

Thank you.

MR KING:

Paragraph 5.

TIPPING J:

Some of the documentation and information is already in. So there's –

MR KING:

5 Yes, no but it refers to these specific ones.

TIPPING J:

Oh, I see. So the Judge is saying material of this character is already in.

MR KING:

That's right.

10 **TIPPING J:**

But here's some more.

MR KING:

That's right, yes.

TIPPING J:

15 But why did the – why did it get – why did the earlier stuff get in, if it was – did the Judge say that there was no need for this to go in?

YOUNG J:

It's a part of the Crown case. The letters.

TIPPING J:

20 Oh, part of the Crown case, I see.

YOUNG J:

Yes, because -

MR KING:

It was perverting the course of justice and forgery.

ELIAS CJ:

About the pressure.

5 **YOUNG J:**

Because the Crown case was that the letters in December –

TIPPING J:

Yes, that's all right, I've got –

10

YOUNG J:

– and also the, rather I think, a misconceived forgery charge was not based on the January letter.

15 **MR KING:**

Yes.

TIPPING J:

The primary, well a reason, is in paragraph 7, that the documents weren't put to their author.

20

MR KING:

Well there was the concurrent application by the defence to recall her –

25 **TIPPING J:**

Oh, I see.

MR KING:

– to put them to her, if that was the impediment.

30

TIPPING J:

He will call the complainant back?

MR KING:

Yes.

TIPPING J:

5 What, to call her again as part of the defence case presumably?

MR KING:

Well, or sometimes the Crown –

10 **TIPPING J:**

Or he could have done –

MR KING:

– will agree to a re-call –

15

TIPPING J:

– that, he didn't need leave to re-call her, he could have called her again –

MR KING:

20 Well, it was declined, Sir, the application was made and it was declined by His Honour.

YOUNG J:

Well he said he wouldn't grant an adjournment, didn't he, to that end –

25

TIPPING J:

So he –

MR KING:

30 Yes, yes.

YOUNG J:

– he was extremely true on it.

TIPPING J:

Yes, he didn't facilitate it, shall we say.

MR KING:

5 Yes but one –

ELIAS CJ:

So the Judge's ruling is that it's unnecessary and they appear to offend against section 35?

10

MR KING:

Yes, well I don't know if it was unnecessary –

ELIAS CJ:

15 Well –

MR KING:

– I suppose that's inherent –

20 **ELIAS CJ:**

Yes, I think so because he's saying that we've all this material, or we've got sufficient material on these points.

MR KING:

25 The reason seems to be –

ELIAS CJ:

On which the complainant wasn't cross-examined.

30 **TIPPING J:**

Yes, that seems to be quite a – he mentions that more than once.

ELIAS CJ:

Yes.

MR KING:

Yes but see, the reason – and that's why I take the Court to page 318 because it's really at that point, after the complainant is gone, after the officer in charge has given evidence-in-chief and been cross-examined, is
 5 being re-examined, that the real significance of these documents, in my submission, emerges.

ELIAS CJ:

Well, just the fact that he says that he doesn't recall them, but that doesn't
 10 affect what's the substance of the documents, should they have been admitted? I mean, the fact that the officer didn't recall them isn't significant in itself, is it?

MR KING:

15 Well, he says no, not that I'm aware of, so –

TIPPING J:

I find it very odd that this was attempted to be in re-examination of the accused when giving evidence.
 20

MR KING:

Well there's, I know Sir and that's why –

TIPPING J:

25 I'm sorry, I just keep coming –

McGRATH J:

The Judge thought that was prejudicial, I think Mr King –

30 **YOUNG J:**

It was around 468 –

McGRATH J:

– didn't he?

MR KING:

Yes, yes. Sorry Sir?

5 **YOUNG J:**

It's around 468. Where does it actually happen in re-examination, I couldn't identify it?

TIPPING J:

10 You normally couldn't put a document in at re-examination, unless to do so is necessary, fairly, to answer cross-examination?

MR KING:

15 That's right and that's what I'm trying to get to, Sir, because, in my submission, that situation arose.

ELIAS CJ:

Yes, you say that it was because the officer said, "I don't recall."

20 **MR KING:**

No, not just that –

TIPPING J:

No, no –

25

YOUNG J:

No but that's not –

ELIAS CJ:

30 Oh, it's not?

YOUNG J:

No, no, this is days later, this is the next week.

ELIAS CJ:

Oh, I see.

TIPPING J:

5 This is the accused giving evidence.

MR KING:

But I do say that Your Honour, I just haven't said it yet –

10 **ELIAS CJ:**

You mean, the penny didn't drop?

MR KING:

In my submission, well, where it becomes, it becomes important, I submit,
15 at 318 when the officer in charge is being re-examined. The defence has no –

TIPPING J:

Yes but the accused hasn't even started to give his evidence at that point.

20 **MR KING:**

Correct, then the accused gives evidence and then in cross-examination it
was put to him that every single statement given to the police had been
referred to in Court –

25 **TIPPING J:**

Ah, well that –

MR KING:

– and that is at –

30

TIPPING J:

– might make a difference.

MR KING:

Yes, in my submission, it does –

ELIAS CJ:

5 So where are we now?

MR KING:

It's 388, line 12. Question, "You have been in Court, haven't you, where every single statement she has given to the police has been referred to in this Court.

10 She has acknowledged –

YOUNG J:

Sorry, what line, I'm sorry.

15 **MR KING:**

It's line 12.

YOUNG J:

Yes, right.

20

TIPPING J:

Well, I think that might let it in.

MR KING:

25 Well, that's in my submission, that's –

YOUNG J:

Oh yes, yes, wait a minute, wait a minute. If you just read the whole thing though.

30

MR KING:

It says, "Statement –

YOUNG J:

“Where every single statement she has given to the police has been referred to in this Court. She has acknowledged writing this statement as true and correct.” So, these are the –

5

TIPPING J:

Ah, it’s only to the police.

YOUNG J:

10 – witness statements, as it were.

MR KING:

Well, these were statements that had been handed to the police as it were. So it’s an indirect thing. I know the point, Sir.

15

YOUNG J:

But this is actually quite an important point because –

TIPPING J:

20 Yes, it’s vital.

ELIAS CJ:

Yes.

25 **YOUNG J:**

– time and time again, there’s evidence, there’s reference and evidence on both sides to the standard notation at the end, I’ve read this statement as true and correct.

30 **MR KING:**

Yes.

YOUNG J:

And –

TIPPING J:

This is clearly statements taken by the police.

5 **MR KING:**

Yes, well that – but would it have been heard by the jury in that way, that's my submission?

TIPPING J:

10 No, oh no, I thought I was with you up to a point but now I think it's not a fair point.

MR KING:

Well, my –

15

TIPPING J:

This doesn't let in Uncle Tom Cobley and all. This lets in, if there was a statement made to the police – this is a semantic twist.

20 **MR KING:**

Well, in my submission, this is the reason why the application was made when it was.

ELIAS CJ:

25 And it's in response to a question put about if the complainant would have been interviewed properly and asked to tell the truth, she would have co-operated. So, it's really –

TIPPING J:

30 The context shows quite clearly –

ELIAS CJ:

Yes.

TIPPING J:

– what this is all about. It's nothing to do with this exhaustive list of all possible statements she's made of any kind whatsoever.

5 **ELIAS CJ:**

Yes, it's in response to a criticism of the police investigation and the question is then asked, every single statement she's given to the police and they all say that they're true and correct.

10 **MR KING:**

Yes, that's true but what I'm trying to explain in this point is why the application was not made previously.

TIPPING J:

15 I can understand why it was made but it was made outside the compass of the cross-examination.

MR KING:

20 Well outside of the compass of the cross-examination in strict terms, but the concern of the appellants was that the jury would think that they had seen everything, when they hadn't.

YOUNG J:

25 No but they haven't seen everything because they know that quite a lot of the statements she was cross-examined on weren't produced.

TIPPING J:

30 I think it's perfectly plain on revisiting this, that the context of this and the language, is what you might call traditional police statements.

MR KING:

Yes, well I think that and that's –

TIPPING J:

And that lets in another traditional police statement that hasn't yet been referred to but nothing more.

5 **MR KING:**

The concern is, as I say –

TIPPING J:

I know what the concern is Mr King but, with respect, unless there's
10 something else in the cross-examination that gives a foundation –

ELIAS CJ:

Presumably some of the other material was separately addressed in the cross-examination, was it? I mean, for example the diary, is he separately
15 cross-examined on that?

MR KING:

Yes, he is, yes and that's where he makes the point that he'd seen her writing, days that didn't key up and had made the notation in his police notebook
20 which –

TIPPING J:

I think if I'd been the trial Judge I'd have simply ruled "not fairly arising out of cross-examination", end of story.
25

MR KING:

The other aspect of cross-examination that I would seek to draw the Court's attention to, is that the appellant was cross-examined about whether he had told the complainant to go and see a lawyer and that's at page 388.
30

TIPPING J:

Is that the only passage you rely on –

MR KING:

No Sir –

TIPPING J:

5 – of the kind that suggests that all relevant documents are in?

MR KING:

No, there's also, in your cross-examination but there are also in
re-examination when he is asked about that suggestion of taking it to the
10 lawyer, the appellant refers to the statement dated the 14th of February 2008
and the various affidavits. So he refers to those in re-examination without –

ELIAS CJ:

But how do they arise –

15

MR KING:

– any objection being made.

ELIAS CJ:

20 How does it arise out of cross – you'll take us to the cross-examination?

MR KING:

Yes, indeed and that's the passage where it is, where he's cross-examined on
whether he had told the complainant to go and see a lawyer and that's at 448,
25 line 18.

YOUNG J:

Sorry, 448?

30 **MR KING:**

Yes Sir, line 18. "Did you tell her in any of these phone calls to go and see a
lawyer with this phone, yeah?" No I've never told her to go and see a lawyer."
"Never?" "Never." "Even though you say that you know that these allegations
are false and the police are putting pressure on her and everything else,

you've never told her to go and see a lawyer and sort it out?" "No."
"Why not?" And it goes on. So that is –

ELIAS CJ:

5 So what does this lead to?

MR KING:

Well this is cross-examination that clearly, in my submission, raises the issue
about the complainant's attendance at the lawyers and on a –

10

ELIAS CJ:

But no, this is about whether he told her to go to a lawyer?

MR KING:

15 Correct. But a jury on assessing that evidence and seeing whether or not he
had been instrumental in that would have been assisted, in my submission, by
having access to the actual affidavits –

YOUNG J:

20 But this is about –

ELIAS CJ:

Why?

25 **YOUNG J:**

– it's also focused on December 2006 isn't it – focuses on?

MR KING:

Well his answer is no, I've never told her to go and see a lawyer so whether
30 the question is thought to be tightly confined, the answer is certainly broad,
saying I've never done it.

ELIAS CJ:

But that's the issue that this cross-examination is being directed to –

MR KING:

5 Indeed.

ELIAS CJ:

– so how does what she might have said to a lawyer –

MR KING:

10 Because it will help the jury assess, in my submission, whether –

ELIAS CJ:

Whether he told her to go to a lawyer or didn't?

MR KING:

15 No whether she was willingly there or not, and when one looks at the raft of information she's providing to the lawyer, when it's not suggested he was present in the room when that was done, then it would be probative of whether she was there of her own free will or whether she was –

20 **TIPPING J:**

Well when you haven't put it to the complainant and it's as oblique as that. I would have thought it was clearly –

MR KING:

25 No it has been put to the complainant in those terms that: you've been to see Mr Isaac Koya, you've been to see Ms Cedar-Wood and you've made – so.

TIPPING J:

Oh yes, yes.

30 **ELIAS CJ:**

So why didn't you put it in if you thought it was going to be helpful?

MR KING:

Well I wasn't there so –

5 **ELIAS CJ:**

No I know. I was meaning, your side.

MR KING:

And this is a problem which frequently arises of course in any appellate
10 context with a retrospective analysis –

ELIAS CJ:

Yes.

MR KING:

15 – this was a trial which really, with the greatest of respect to any trial lawyer,
you'd just be floundering because it was just – had taken on such a life of its
own and it was, it couldn't be prepared and predicted, in my submission, and
whilst with hindsight one may have done things differently –

ELIAS CJ:

20 Well then, but with hindsight, which is a good thing –

MR KING:

Yes.

25 **ELIAS CJ:**

– with hindsight we have to be persuaded that there's significant error which is
– has led to the trial being unfair.

MR KING:

30 Yes well ultimately –

TIPPING J:

Or there's a miscarriage has arisen on this account.

MR KING:

5 Yes that's the submission Sir, that had the jury had this material as well as all the other material, then it would, in my submission, have gone firstly to the general issue – and ongoing issues of reliability of the witness generally - but secondly it would have had a direct nexus with the allegation of perverting the course of justice. Because if we've got the complainant going along to the
10 lawyer and in the lawyer's room preparing very detailed and certainly in respect of the 15th, maybe others maybe not so detailed, but detailed statements to the lawyers without him present, they're proper fully-fledged lawyers and presumably they've taken their obligations seriously in taking the oath and so on, and have advised her accordingly, then that could well have
15 shifted the balance of them saying: well this was not a person that he was attempting to dissuade, this was a person who was just wanting to retract or recant for her own reason, not because of any pressure he was putting her under.

ELIAS CJ:

20 But it wasn't the case that was put at trial and it's pretty speculative.

MR KING:

Well in my submission it was. The case was that he was not putting her under any pressure at all to do any of these things, that it was all of her own free will,
25 that was the case –

TIPPING J:

In fact it was the case.

ELIAS CJ:

30 No, no, if the content, if that's what you're talking about –

MR KING:

Yes.

ELIAS CJ:

– if the content of the statement she'd made to the lawyers threw some light
5 on whether she had been coerced into going to the lawyer to retract, first one
would have thought that it would have come in as part of the defence case
and on appeal you'll have to show us that the content really was critical in that
respect, won't you?

10 **TIPPING J:**

And you'd have thought also that it would have been put to the complainant.
Does this not –

ELIAS CJ:

15 It's really –

MR KING:

It was, it was and the answers obtained were sufficient without having to have
the materials put to her that she'd gone and done it.

20

ELIAS CJ:

Well why isn't that the answer to the miscarriage point?

MR KING:

25 Because that's then undermined by the police officer –

ELIAS CJ:

Saying I don't know about them?

30 **MR KING:**

I'm not aware of it.

ELIAS CJ:

Well –

YOUNG J:

- 5 Just – could we have a look at some of these? I mean the first of the documents you complain about is the May 5 2007 affidavit?

MR KING:

Yes.

10

ELIAS CJ:

Where do we find that?

YOUNG J:

- 15 It's towards the end of volume 2

MR KING:

It's tab 12.

- 20 **ELIAS CJ:**

Oh that's the one we've already looked at yes.

YOUNG J:

Just looking at it, para 3 there's a lie –

25

BLANCHARD J:

Sorry, I haven't found it, where is it?

ELIAS CJ:

- 30 We were taken to it in volume 2.

YOUNG J:

Tab 12. Volume 2, it's – they're in chronological sequence.

ELIAS CJ:

So you can count or you can date.

MR KING:

5 Well the spouse –

YOUNG J:

Well she wasn't a spouse and she knew it.

10 **MR KING:**

Well there's been recent High Court authority that spouse can include a de facto couple.

ELIAS CJ:

15 It's a courteous –

YOUNG J:

For the purposes of the Adoption Act.

20 **ELIAS CJ:**

– it's a courteous way to refer to her anyway.

YOUNG J:

25 But it's not a, it doesn't mean de facto couple, it didn't mean de facto couple in the context of spousal immunity which is what she's talking about.

ELIAS CJ:

No, but that's long gone.

30 **YOUNG J:**

No it hadn't gone then.

MR KING:

At this stage they could, but of course there was the so-called, the ad hoc privilege, in any event.

5 **TIPPING J:**

The archers of Agincourt would have been proud of that submission Mr –

ELIAS CJ:

Long bow.

10

YOUNG J:

Over the page at pages 20, 21 she – her evidence is to the depositions –

ELIAS CJ:

15 Twenty, 21?

MR KING:

Paragraphs.

20 **ELIAS CJ:**

Oh sorry.

YOUNG J:

18 Eighteen through to 21. She wasn't – the presiding Justice had obviously
25 thought that she was the appellant's wife because he said she didn't have to
give evidence –

MR KING:

Mhm.

30

YOUNG J:

– and she did give evidence?

MR KING:

Yes, which of course the jury heard.

YOUNG J:

- 5 So this isn't a particularly great set of paragraphs. But apart from that is there anything in here that wasn't in the, of substance that wasn't in either the December letters or the suspect January letter?

MR KING:

- 10 What's in there is my submission, the ring of truth.

YOUNG J:

Well –

- 15 **MR KING:**

Because this is not, if the suggestion is that she's there under effectively duress or whatever or compulsion by the appellant, then this does not have the hallmarks of that in my submission.

- 20 **YOUNG J:**

Is there anything factual in there that's not in substance already before the jury?

MR KING:

- 25 Well that fact is Sir.

YOUNG J:

Ring of truth?

- 30 **MR KING:**

The demeanour factor yes. Because in my submission someone reading this, a jury seeing this, having it with them, can take a look at and say well it just does not have the appearance to me of someone who is there unwillingly

under pressure. We have someone who is clearly volunteering an awful lot of information, there's no suggestion that he is present.

YOUNG J:

5 Is any of this inconsistent with the Crown case?

MR KING:

Well it's inconsistent in that regard, in my submission because –

10 **YOUNG J:**

Well what's inconsistent – she doesn't say, my statement to the police, my depositions evidence were all a pack of lies, she doesn't disavow what she said?

15 **MR KING:**

Well on the perverting, this is particularly pertinent to the perverting the course of justice whether –

YOUNG J:

20 But where does she address the perverting the course of justice claim?

MR KING:

She – no, no, no –

25 **YOUNG J:**

Para 16?

MR KING:

30 No, Sir, I hadn't made myself clear. The appellant is facing a count of perverting the course of justice –

YOUNG J:

Yes I know that.

MR KING:

– part of that allegation and a significant part of it is that he has put pressure on her to go to lawyers to retract her allegations. In assessing whether or not that allegation is proven beyond reasonable doubt, the jury could only have
5 been assisted by actually seeing what it was she actually said to the lawyers. What it was she took on oath, put her name to in that way.

YOUNG J:

They did have the draft affidavit that's in her handwriting?
10

MR KING:

Yes.

YOUNG J:

15 Which is something I'd forgotten briefly.

MR KING:

They did have that, yes.

20 **YOUNG J:**

But wouldn't that even be better in her handwriting than something that a lawyer's typed up?

MR KING:

25 Well I don't know, it sort of, it has the – it's more solemn occasion, Sir.

YOUNG J:

Because don't forget the Crown case was that they had tried, the defendant had tried to jack up the appointment with the lawyer to get this document –
30

MR KING:

Yes.

YOUNG J:

– put into type form.

BLANCHARD J:

- 5 What's the jury going to make at paragraph 25 in the statement, "I was robbed of my rights on 5th March 2007"?

MR KING:

- Well that pertains back obviously to paragraph 18 and so on when she says
10 that she was under –

BLANCHARD J:

At the depositions hearing?

- 15 **MR KING:**

Yes.

BLANCHARD J:

- Where her rights were explained to her.
20

TIPPING J:

The Court didn't explain the rights, that's their allegation in 18.

BLANCHARD J:

- 25 Then it's not true as I understand it, that the Judge in fact told her that she didn't have to give evidence, is that correct?

YOUNG J:

- Yes at the start says, "Witness wishes to give evidence after Mr Greenbank
30 explained to her that she only has to give evidence if she wishes to and that she doesn't have to". Recorded in deposition form and she signed.

BLANCHARD J:

This looks to me like something that could boomerang on the accused if it goes in.

5 **MR KING:**

Well the, my response to that, Sir, would be it couldn't boomerang on any more than things already were when the jury's told –

ELIAS CJ:

10 I don't know where that submission goes though.

MR KING:

Well when the jury's told, you choose between what she said in Court and what she said in statements, where you can't assess her demeanour, but we
15 know that her demeanour in Court was appalling, which is a set, effectively what it really boiled down to. The Judge said look, there were problems, it was all identified, it must have been patently obviously to the jury in any event. That's where, in my submission, the real difficulties that the appellant faced landed because he was effectively left with no contest because she made
20 such an appalling spectacle of herself, she was –

YOUNG J:

But she couldn't, when she – in a way, she couldn't give a credible explanation as to why he was innocent but here are all these diary entries and
25 all these statements she'd made, there wasn't a credible explanation.

MR KING:

The admissibility of the diary issues is problematic and one needs to actually, in my submission, look at the document to see that we're not talking about
30 something which could not have been fabricated or untrue, it really is just a few brief entries amongst many, many blank pages.

ELIAS CJ:

Well, what was the ruling on that? Was it objected to?

TIPPING J:

Presumably used to refresh memory.

5 **MR KING:**

At the depositions it was –

ELIAS CJ:

Well, you just said, in your submission, you referred to it as the admission of
10 the diary which is why I –

MR KING:

Yes, no, what I mean was that the diary should not been seen as a smoking –
as an incontrovertible piece of evidence in this case because it was, as I say,
15 it was actually a fairly vague document.

TIPPING J:

Was it admitted on the basis of refreshing memory, or –

20 **MR KING:**

It's, it's, there's not specific ruling on the point. It came in effectively as part of
the – to make sense of the depositions really.

YOUNG J:

25 It's also a statement she's made –

ELIAS CJ:

It's a previous statement that's admissible –

30 **YOUNG J:**

– it's a previous statement.

McGRATH J:

In the depositions –

ELIAS CJ:

– and it wasn't objected to.

5 **MR KING:**

Providing it meets those requirements of course, yes.

TIPPING J:

Well, it was consist –

10

ELIAS CJ:

No, it was not consist – well –

TIPPING J:

15 Well, that's one of the conundrums of course, in this.

MR KING:

And of course –

20 **YOUNG J:**

It was inconsistent with the evidence she gave at trial.

TIPPING J:

Yes, yes, so it could be put to her.

25

MR KING:

Yes but by putting it in and it being part of the evidence, then the section 35 objection to these statements which are contrary to it, to say that they are consistent with her testimony –

30

TIPPING J:

How did she purport to explain the diary entries, in the light of her saying at trial that nothing had happened?

MR KING:

She –

YOUNG J:

5 Said some other wretched –

MR KING:

– suggested someone else –

10 **YOUNG J:**

– person must have written them.

MR KING:

– had come in and done it.

15

TIPPING J:

So some evil-minded person had created this diary, purporting that it be her diary?

20 **MR KING:**

Which on previous occasions she had given evidence on oath that it was hers, including at the preliminary hearing where she was taken through it –

TIPPING J:

25 So it was all –

McGRATH J:

I thought she confirmed at the preliminary hearing –

30 **MR KING:**

That it was hers –

McGRATH J:

– that the diary entries were correct?

MR KING:

Correct, she did Sir, she absolutely did. So she, there's – and she, effectively it was a very significant part of her evidence at the deposition hearing.

5 She was taken to each page of it and used it extensively to refresh her memory but at –

TIPPING J:

Well that's where I got the refreshing of memory from, yes and the –

10

MR KING:

Correct, yes, there was an objection –

TIPPING J:

15 – depositions, of course, yes.

MR KING:

– to it at depositions to have been used in that way.

20 **TIPPING J:**

But it was clearly admissible in the light of her giving evidence at trial as an inconsistent statement?

MR KING:

25 Subject to the overriding section 8 consideration and that's where –

TIPPING J:

Of course.

30 **ELIAS CJ:**

How was it introduced, was it introduced as part of the, was it introduced through her?

MR KING:

Yes, it was.

ELIAS CJ:

5 Yes, yes and there was no objection taken?

MR KING:

I think it was done, it was done in re-examination I believe. Can I just –

10 **YOUNG J:**

Isn't it done at the end of cross-examination?

MR KING:

Yes –

15

YOUNG J:

Sorry, end of the Crown's examination of her, Mr Jones' examination of her.

TIPPING J:

20 Examination-in-chief.

YOUNG J:

Yes, yes which was cross-examination.

25 **TIPPING J:**

Yes, quite.

ELIAS CJ:

Yes.

30

MR KING:

There is a –

YOUNG J:

But there's all sorts of stuff in there that has nothing to do with her complaints about the appellant. I mean, there's a whole lot of stuff about medical expenses, for immigration, details –

5

MR KING:

Yes, when she arrived in New Zealand and so on.

YOUNG J:

10 – and sort of consistently with her position, she was with some other fellow, or other person must have written that.

MR KING:

Well –

15

YOUNG J:

I mean, it was –

ELIAS CJ:

20 And all of this is subject to the direction given by the Judge that look, you're going to have to look very carefully at this and work out what you believe.

MR KING:

Mmm.

25

TIPPING J:

I would have thought that the fact that the inherent likelihood of that diary being accurate would have been what took the jury's mind over the line, but we're not really trying the case again here but –

30

MR KING:

No and that's of course the difficulty that was faced, was when we've got this crazy suggestion that someone else has come in and written it but the –

TIPPING J:

It's just unbelievable.

MR KING:

5 – point of the appellant is that that of course reflected appallingly on him.

TIPPING J:

Well, it's bad luck for him.

10 **ELIAS CJ:**

It reflected appallingly on her evidence at trial and if that was damaging for him, well that's the way evidence, that's what the Crown evidence is meant to be directed at.

15 **MR KING:**

Which I suppose takes it back to that point where, had she been availed of her privilege, none of this would have been before the jury. I mean, if the diary would have been, her appalling demeanour in evidence, in oral evidence wouldn't have been.

20

BLANCHARD J:

Mr King, what other things in these statements that weren't admitted do you say would have helped bolster her credibility?

25 **MR KING:**

No, not necessarily bolster her credibility but would have been demonstrative of her free will, Sir, that it was – because we have –

BLANCHARD J:

30 Well, she presumably gave evidence that she was going to make the affidavits, et cetera, of her own free will.

MR KING:

Yes but seeing them and actually seeing what it was that she had sworn to –

BLANCHARD J:

All right. Well we've looked at the first one. What is there in the other ones?

5 **MR KING:**

Can I just, on the spousal issue, I had a note from my friend that the complainant would refer to herself as a spouse because apparently there had been a traditional custom, customary marriage of sorts in the Fiji Islands and although that wasn't legally recognised, that was how she was accustomed to referring to herself –

BLANCHARD J:

Well, for myself, I wouldn't hold it against her that she described herself as a spouse.

15 **TIPPING J:**

No.

ELIAS CJ:

20 No.

TIPPING J:

Not at all, that's not the problem.

25 **MR KING:**

No.

TIPPING J:

The fact is, she wasn't entitled to spousal privilege.

30 **MR KING:**

Well, in those days of course, there was the ad hoc privilege which had on many occasions been extended to cover de facto couples.

BLANCHARD J:

Yes but once again, I wouldn't hold it against her that she claimed that privilege but the point, as I understand it, is that her ability on that basis to decline to give evidence at depositions was explained to her and she elected
5 to give evidence.

MR KING:

Yes.

10 **BLANCHARD J:**

So later on, when she says she was robbed of her rights, she's not telling the truth.

MR KING:

15 No but that would hardly necessarily come as a surprise to the jury that she was a person who didn't always tell the truth. What was significant was, it does have the appearance of being someone who is there of her own free will, rather than simply parroting something that she's been pressured –

20 **YOUNG J:**

But if she'd said that, the Crown would have been in a position to challenge whether, if it had come in at an appropriate stage in the trial, the proposition that she was at these lawyers of her own free will could have been challenged.

25

MR KING:

Well, effectively it was challenged and it was answered by the officers in charge, who said that she was, when she made the statements to them, she was happy and under no pressure and so on, so that's –

30

YOUNG J:

Well no but it wasn't completely answered –

MR KING:

– the other side of the coin –

YOUNG J:

5 – it wasn't completely answered. I mean, there was the evidence that at the end of March the defendant had, it was suggested that the defendant had been significantly involved in arranging for her to see lawyers –

MR KING:

10 Yes.

YOUNG J:

– and there is the oddity that there were three different lawyers involved. There's a statement she's made saying the first two lawyers she went to
15 weren't prepared to deal with it, they didn't think it was proper. They were the appellant's friends, I think.

MR KING:

Mmm.

20

YOUNG J:

So, I mean, there was a fair bit of, you know, there was a bit of traction there that was available to the prosecutor if this had been put in at an appropriate time in the trial. Do you accept that, or not?

25

MR KING:

Yes, I think I would have to, Sir, but what I would say in response is that on the, the perverting the course of justice ground, if it was shown that the complainant was willingly engaging in active deceit then that would make her,
30 at the very least, a party to the process, could call in further grounds for caution as to the, what was to be given to her evidence but the reality was that a jury just did not have this material before them, like they had the bad stuff, as it were. The balance was certainly with the material that they had, was the bad stuff. Where it could be seen as being favourably to the accused, well

that was part of the allegation that he was putting pressure on her and that was the evidence of that. So this material would have gone some way – it wouldn't have been an absolute answer but it could have been sufficient to change the jury's view, especially on that perverting the course issue.

5

The submission is often made and it's a truthful one, with respect, that cases are often decided in inches and not miles, and a jury sitting there deliberating, having available all this other material but not having this, regardless of really the reasons whether it should have been put in at one stage or another, the reasons why it was sought to be put in at that stage are before the Court to make what they, what you will of, but ultimately, on that miscarriage of justice issue, it's submitted that a jury having available to them that detailed, that material, could well have reached a different verdict, at least on the perverting the course of justice count.

10

Remembering that this was a case where the complainant obviously was well aware of what the allegation was against the appellant, that this was not simply confined to acts of physical violence but this went further to allegations that he was putting pressure on her. Secondly, that she –

15

YOUNG J:

Can you just explain, sorry, can you just explain, there wasn't a separate preliminary hearing on the perjury and, sorry, the attempt to pervert the course of justice and forgery charges, were they just added to the indictment by leave of the Judge?

20

MR KING:

They were just added to the indictment very late in the piece, I think, weren't they, yes. Yes, there wasn't a separate committal –

25

YOUNG J:

Because they came up after committal, yes.

30

MR KING:

It actually covered the period, basically from the depositions hearing, I think, I'll just –

5 **YOUNG J:**

Goes up to the 16th of April which I assume might be the date the charge was laid, was it?

MR KING:

10 That's right, yes because remember the trial had been set down for February.

YOUNG J:

2008.

15 **MR KING:**

That's right. It had to be adjourned until – because the complainant hadn't turned up. The complainant of course had – the warrant was issued before she went. She'd given the police an affidavit, saying that her residential status in New Zealand was up on the 31st of January and therefore she would be an overstayer if she stayed longer than that. So the trial was down for February. So on the basis of that, the Crown obtained a warrant to arrest her.

YOUNG J:

25 Didn't she, wasn't the lawyer – just more informal than that, there was a lawyer, her lawyer told the prosecutor that she was going to leave the country?

MR KING:

30 I think, well that's, that seems to be referred to but if one looks at the affidavit of the 18th of January, whether that's just being extrapolated from that, I'm not sure. This is under tab 14 but I know they're not numbered, so that's not very helpful. It's the 18th of January affidavit, 2008. Paragraph 3, "I am legally entitled to remain in this country until the 31st of January 2008, as my work permit is only extended by three months to the above date by the

New Zealand Immigration Service.” Then down, “I further request the Court to prevent the police from making any contact with me, either here or in Fiji, to persuade me to give evidence against my partner in relation to this matter.”

- 5 So, in my submission, you wouldn’t have to be Sherlock Holmes to extrapolate from that that the complainant may be intending to leave the country before the trial but whether there was something –

YOUNG J:

- 10 Right. As it turned out, she didn’t.

MR KING:

Correct.

- 15 **YOUNG J:**

She just went to ground.

MR KING:

- I think, did she, yes, yes but the warrant was actually issued prior to her failing
20 to turn up at Court but not executed until afterwards. So this is all the context in my submission, she knows she can be arrested, she’s been cautioned in the course of, at least her latter statement to the police, it’s under Bill of Rights caution. She’s aware that there’s an allegation of perverting the course of justice that relates to things that she has done about going to lawyers and
25 writing letters and so on, she’s aware that there’s an allegation of forgery.

All of this turns back to her own perception about whether she was at risk of a prosecution if she gave evidence. I know I’m turning the clock right back but I’m just about finished –

30

ELIAS CJ:

Well, I was going to ask where you’re heading because we will take the adjournment shortly but it seemed to me that you probably were drawing to a close, yes.

MR KING:

Yes. No, unless the Court –

5 **ELIAS CJ:**

Carry on.

MR KING:

10 That's when it comes down to the suggestion about whether or not she was a person who could reasonably add to the likelihood of her being prosecuted by giving this evidence and she clearly could. The definition of incriminating evidence under the Evidence Act is a very broad one. It's not that I'm going to be committing an offence, it's that I'm going to be adding to the likelihood of being prosecuted for an offence.

15

So for example, and the example that I would give, is that if it's, for example, a bank robbery case and a person gives a statement to the police saying well yes, I was actually there, I didn't commit the offence but I was actually there, then that's a scenario where they're not admitting to an offence but they're actually increasing the likelihood of them being prosecuted because they've put themselves at the scene.

20

ELIAS CJ:

But it wasn't the evidence she gave that convicted the appellant, it was the evidence and statements she had earlier made.

25

MR KING:

But if she – but that evidence that she had earlier made had to be assessed by the jury in the context of her oral evidence, as the Judge put it to them, you choose, one or the other.

30

TIPPING J:

But if she hadn't given oral evidence there would have been no context in which the other statements would have been admitted, would have been –

MR KING:

Well the jury wouldn't have been – well, there was no context and that's the point of the appellant's case –

5

ELIAS CJ:

The appellant –

MR KING:

10 – is that she made such an appalling job of it –

ELIAS CJ:

But that was the best argument you had in getting, in suggesting to the jury that they had to be very suspicious about any statement she'd made.

15

MR KING:

Well no, in my submission, that could have been apparent on the statements had they all been before the jury because they were so all over the place. Had she not given evidence, then a jury would not be left to choose between her appalling performance in Court –

20

TIPPING J:

Normally an appellant is delighted when a complainant makes a hash of their evidence. This is –

25

MR KING:

Absolutely.

TIPPING J:

30 – counter-intuitive.

MR KING:

It's completely on its ear and that's why if there's things that the Court thinks could have been done at a different stage of the trial, the reality was it's asking an awful lot of counsel thrust into this, runaway train –

5

TIPPING J:

There's no criticism –

MR KING:

10 – to try and –

TIPPING J:

– of counsel, this is just –

15 **MR KING:**

No.

TIPPING J:

– how the case evolved.

20

MR KING:

Yes, mmm.

ELIAS CJ:

25 Well, Mr King does that –

MR KING:

Can I just confer with my friends?

30 **ELIAS CJ:**

Yes, yes.

MR KING:

No, thank you Your Honours. Unless there's any questions, I don't know if I can advance matters.

5 **ELIAS CJ:**

No. Thank you Mr King. We'll take the morning adjournment now.

COURT ADJOURNS: 11.36 AM

COURT RESUMES: 11.52 AM

10 **ELIAS CJ:**

Mr Horsley, you've heard the exchanges and you may feel that you can confine yourself to matters of emphasis or response.

MR HORSLEY:

15 Yes, thank you, Your Honour. And I have listened, with interest obviously, to the exchanges. I suspect I won't be long.

There was one point that I did wish to make though, which was the, what appeared to be almost a new ground of appeal, or at least a re-opening of the Court of Appeal's decision, particularly in relation to the statements that

20 the – or the Judge's directions in summing up that he did make to the jury with respect to the means or the way that the jury could deal with the evidence of the complainant, and it's really just to remind the Court that the Court of Appeal, and that's at volume 1, and it's the very final tab in that volume, is the Court of Appeal's decision. And if I could just point out to

25 the Court, paragraph 62 of the judgment, and grappling with the directions, the Court did refer to the very passages that this Court has been discussing today, and in particular, paragraphs 49, 50 and 51, which in the Crown's submission make it very clear that the reliability of the witness was squarely put to the jury and the Court of Appeal was satisfied that that was, in fact, the

30 case.

And again, perhaps just for convenience to this Court, at paragraph 37 of the decision, and 38 and 39, the Court also grappled with the issue of the claim of privilege and how the jury should deal with that, and the Court of Appeal noted that there was a very clear direction that the question of admissibility, and the reasons why evidence was being given to the Court, were very much issues for the Judge, and the Judge clearly directed the jury to not be concerned about that. And in the Crown's submission again, that takes away the concerns that my learned friend has over those directions.

10

The final point that I'd like to address is the issue of the value that can be gained from production of the statements, and this is possibly where the Court was most troubled, well this Court anyway in their discussions earlier with my learned friend, and it has to be remembered that there is a distinction between the production of those statements and the reference to them in evidence anyway. The statements that my learned friend complains of that were disallowed were, in fact, referenced on a number of occasions, including with the officer in charge of the case, who acknowledged that there were three affidavits that had been prepared. There was no further cross-examination about whether they were going to be produced or anything like that, and the only statement that he failed to recollect was the one of 15 May 2007, but the Court of Appeal felt that that made no difference either, by the way.

15

20

ELIAS CJ:

25 Where do they refer to that in the judgment?

MR HORSLEY:

It's fairly dismissive, Your Honour. It's at paragraph 61, and it was in the context of the Court dealing that those statements as being prior consistent statements, and you'll see there that the Court –

30 **YOUNG J:**

Well it's certainly succinct.

MR HORSLEY:

It certainly is sir, and with the greatest of respect, accurate as well. And that perhaps takes me to the –

ELIAS CJ:

5 Well I wonder about that. This puts it all on section 35.

MR HORSLEY:

Yes it does, Your Honour.

ELIAS CJ:

10 But I thought your submission was that the actual admission of the statements were neither here nor there. They wouldn't have –

YOUNG J:

It could be – that could be part wrapped up in 35 that they were not necessary to respond to a challenge –

ELIAS CJ:

15 Ah, yes.

MR HORSLEY:

Yes, Your Honour.

ELIAS CJ:

I see, yes it is succinct.

20 **MR HORSLEY:**

And that's certainly how the Crown's submissions have dealt with the point in greater detail –

ELIAS CJ:

Yes.

MR HORSLEY:

– on section 35, and that perhaps ties into just one comment that I would make on that. In cross-examination of the complainant, it was put to her that she had made numerous statements and comments, both to the police, and

5 provided affidavits in which she had retracted her earlier evidence, and the word “retraction” was used in cross-examination. That was really a highlight, in the Crown’s submission, of the defence case, because in actual fact, a close analysis of those statements shows that there is no retraction. Some of them express a desire to not give evidence because of reconciliation with

10 her spouse, and others simply say that she wants to invoke her privilege against self-incrimination. It’s unclear what she really means by that but, certainly, the term “retraction” is perhaps stating at a very high level what those previous consistent statements really amount to. And on that basis, the putting in of the statements could only have seen some derogation from that

15 high level point that they had got to in extracting the concession from the complainant that yes, she had tried to retract. And again, on that basis, section 35 very much comes into play because the statements themselves, production of the statements, were not necessary to respond to the allegations or the challenge to the veracity of the complainant.

20 TIPPING J:

I suppose it would have laid a foundation for an appropriate submission from the Crown, that the jury now, having the statements before them, they would need to consider whether they – what the real effect was as opposed to what had been put to, and accepted by, the complainant about them.

25 MR HORSLEY:

Yes Sir, and I think that’s right. And again, I think in our submissions we make the point that, if anything, the statements were of assistance to the Crown in that they showed, over and above the allegation of an attempt to pervert the course of justice between the periods named in the indictment,

30 actually what appears to be a continuing course of conduct where, in essence, the attempt to dissuade the complainant from giving evidence culminates in her providing those affidavits to the Court and, in fact, in giving what was

really quite incredible testimony at trial. And that's perhaps the final aspect of my point, and that is that the previous statements weren't even particularly consistent with that final testimony in any event. They may have talked about not wanting to give evidence, but the only time that there was an elaborate story, and I use that word advisedly, about what had occurred was when the complainant gave oral testimony. And her evidence, at that time, was the first time that she raised issues, such as the falling over and the reasons why the diary entries appeared as they did, that somebody had sneakily broken into the house and written those diary entries on her behalf, those sorts of claims were only raised in her oral testimony, and one would have thought that if they were true, they would have appeared in those affidavits that had been prepared with the assistance of lawyers. They weren't, and thus those affidavits weren't even particularly useful for showing a consistency of story. At most, they could show that she tried on previous occasions to do something to stop this Court case and, as said, to call them retractions was probably a highlight, which would have been exposed by the production of those documents.

Unless there are any specific aspects of the submissions Your Honours would like me to address, I think that is the Crown's response.

ELIAS CJ:

Is there anything you want to say to us on the privilege point, the Kerslake? Kerslake is it?

TIPPING J:

Kinglake.

ELIAS CJ:

Kinglake.

MR HORSLEY:

Only to the extent, Your Honours, that it would appear that the 1870 authority is consistent with what the Crown has said without authority and, certainly, the

position taken by *Wigmore*, the Crown would very much endorse, and that is, obviously, that the privilege is that of the witness and that no miscarriage arises, obviously, when the witness incorrectly even, they're not allowed to invoke that privilege.

5

Still, the question comes back to, as Your Honour perhaps mentioned right at the start, the reliability of that evidence and its test in terms of admissibility under both sections 7 and 8 of the Evidence Act.

TIPPING J:

10 And I suppose that you could say that the subsection (2), is it, of section 60 –

MR HORSLEY:

Yes sir.

TIPPING J:

– is, at least, consistent with that aspect of the common law, the fact that only
15 the witness, or counsel for the witness –

MR HORSLEY:

Yes.

TIPPING J:

– can take the claim.

20 **MR HORSLEY:**

Yes sir, that's –

TIPPING J:

It doesn't directly – it varies the point but it's certainly significantly consistent with the common law position.

25 **MR HORSLEY:**

Yes it is and, of course, section 63 I think it is, or 62, almost reiterates that in the sense that the only other person who is meant to have been involved in

that process is the Judge. If he anticipates that the witness is going down that track and, effectively, involve –

TIPPING J:

Yes.

5 **MR HORSLEY:**

– himself, or herself, in the process.

TIPPING J:

But the accused can't hop up and say, "Hang on a moment. I think this witness could claim privilege."

10 **MR HORSLEY:**

No sir, exactly, which is what has been attempted here.

TIPPING J:

Retrospectively if you like, well, yes.

MR HORSLEY:

15 And I suspect at trial too, Sir, yes.

TIPPING J:

Well if you had a legitimate interest as an accused in sustaining the privilege, you'd have thought you would be amongst those who could trigger it, because it would seem odd that you would have a legitimate interest in sustaining it,
20 but not being able to claim it.

MR HORSLEY:

Yes.

TIPPING J:

And that's really what I'm saying about the consistency with subsection (2).

MR HORSLEY:

Yes, exactly, exactly, and there is no such power.

ELIAS CJ:

Where there's a remedy there's a right.

5 **BLANCHARD J:**

Well it's a privilege for the protection of the witness. It's not there to protect the defendant.

MR HORSLEY:

10 Well exactly, exactly Sir, and, of course, again the Crown's submission is that given the Crown's case was that this witness had been suborned to an extent, she was not at risk of jeopardy herself but –

TIPPING J:

Well we don't get there, do we, if the first point is valid, we don't get there that the accused simply can't be heard to challenge the ruling?

15 **MR HORSLEY:**

You certainly don't get there in terms of the accused being able to invoke the privilege. There still remains the question, I suppose, of whether the privilege against self-incrimination was correctly, well not allowed by the Judge correctly in the first instance.

20 **TIPPING J:**

Well I don't see how that matters.

MR HORSLEY:

25 It doesn't sir, and that is again the Crown's submission. I suppose, if the point had been to address it in terms of a legal consequence or an examination of section 60, then the Crown's submissions have addressed in the sense that they've looked at whether, in fact, the privilege could have been invoked, even by the witness herself.

TIPPING J:

But there's no suggestion, for example, nor do I suggest that there could have been that, for example, this evidence had then become say, subject to section 30. Is it about improperly obtained evidence?

5 **MR HORSLEY:**

No and, in fact, the only application of section 30 would be downstream if a prosecution –

YOUNG J:

If she were prosecuted.

10 **TIPPING J:**

Yes.

MR HORSLEY:

– for perjury was to take place.

YOUNG J:

15 But she would be entitled, certainly at common law and, I suspect that's still the case that, if she'd been required to give evidence after a claim of privilege had been wrongly refused, that evidence would be inadmissible.

MR HORSLEY:

Yes.

20 **YOUNG J:**

At trial.

MR HORSLEY:

And that's –

YOUNG J:

25 At that trial.

MR HORSLEY:

– that’s the point.

TIPPING J:

Because it’s her interest that’s being protected.

5 **MR HORSLEY:**

And, exactly, and that just reiterates that whole point.

TIPPING J:

I think everything – I tried to look at this sort of roundly, because it’s a significant point in a way, that everything that you look at seems to point in the
10 same direction, along the lines you’ve said.

MR HORSLEY:

Yes Sir, agreed, agreed, and so it all comes down to, really, irrespective of the privilege, whether there has been, as my learned friend tried to make out, an unfair trial, and really there’s just, in the Crown’s submission, that’s just not
15 a sustainable submission here.

ELIAS CJ:

Yes, thank you.

MR HORSLEY:

As Your Honours please.
20

MR KING:

Just very quickly, Your Honour. One point, Your Honours. What was put to the complainant, under cross-examination, was, and this is at page 97 of the evidence, which is in volume 4. Without going into all the details, did they
25 provide various documents and affidavits to come forward, effectively retracting what had been said earlier? So it wasn’t put as boldly as, “They were all retractions.” It was that they effectively retract, and it’s my

submission that if one looks at the actual documents in question, which is numbers –

YOUNG J:

I think what you mean by retract –

5 **MR KING:**

Indeed.

YOUNG J:

If it means contradicting in a detailed way then, plainly, it wasn't. If it means attempted to withdraw, then it's probably fair enough.

10 **MR KING:**

Yes, and – but one does, when one looks at them, they are certainly moving away from previous evidence. In one of them she describes, "We only had minor problems." In three of the documents she refers – that were disallowed – the –

15 **YOUNG J:**

But she also said that in the documents that were allowed, "Minor problems."

MR KING:

Yes, yes, but to say that these don't properly encompass a concept of retraction is the point I'm addressing.

20 **YOUNG J:**

Right.

TIPPING J:

Well, I don't think there's any criticism of counsel and use of the word. It's just, simply, Mr Horsley is drawing attention to the fact that the force of

25 the cross-examination –

MR KING:

Could have been undermined.

TIPPING J:

– could have been undermined by the presence of the documents.

5 **MR KING:**

Yes, but it's my submission that, in fact, that wouldn't be the case. That's really what I'm attempting to address. So, by reference to those actual documents, we can see that in three of the four, there's an attempt to invoke the privilege against self-incrimination, and that is an explanation as to why
10 she doesn't go on to a full-blown, what I said there was "lies" because that, of course, would defeat the claim of privilege, because she's given evidence that could be incriminating against her.

And just finally, the final document that was sought to be put in, which was
15 the medical certificate and the complainant's own letter, could have gone some way, in the jury's mind, to explain the appalling presentation that the witness made in giving her evidence, the fact that she was all over the show. It could have been helpful for them, in assessing that ultimate question, about whether she was being untruthful to try and protect the appellant or, whether
20 there was some other reason for it.

And the final point I'd seek to make is that, in my submission, the issue about privilege is a complex one. We do have a new Evidence Act and it could be an opportunity to extend the concept so that an appellant can claim, and I
25 know there's the wording of the section, but I'm really talking about in the appellate context –

TIPPING J:

It's a bit funny to have this in reply Mr King.

MR KING:

30 Well, the –

TIPPING J:

I thought you, in effect, gave the point away.

MR KING:

No, no, what I'm getting to Sir – I'm not trying to re-open anything, and I'm not
 5 expressing myself very clearly on it, is that what is demonstrably appealable,
 I would submit, are the knock-on consequences of a privilege not being
 invoked which should have been, in the appellant's case it should have been.
 Whilst it's not for the appellant to come here and say that that in itself creates
 a ground of appeal for him, what is submitted is that the Court can properly,
 10 and should properly, look at those knock-on effects, and the knock-on effect in
 this case is that he was left with a witness ostensibly trying to support him that
 really could not have done a worse job, and it was that demeanour –

BLANCHARD J:

What you're essentially saying is that the knock-on effect, as you've put it,
 15 was an unfair trial.

MR KING:

Indeed.

BLANCHARD J:

Yes.

20 **MR KING:**

Yes, and that's where, in my submission, -

BLANCHARD J:

And that's certainly an appeal point arising.

MR KING:

25 – that's appealable. So, unless the Court has any –

TIPPING J:

So it's not a per se point, but if it has certain –

MR KING:

Consequences.

TIPPING J:

– consequences, yes.

5 **MR KING:**

Indeed, yes.

ELIAS CJ:

But you couldn't be extending it in a more abstract sense, because otherwise that would run straight in to things like claims, or other bases, for exclusion.

10 **MR KING:**

Yes.

ELIAS CJ:

Like claims of reasonable expectation of privacy and search and seizure, which there's plenty of authority, can't be claimed –

15 **MR KING:**

Can't do it, yes.

ELIAS CJ:

– by someone else.

MR KING:

20 And the point of bringing it back again to have – complicating the issue even further by having a section 30 analysis at the end of the day, and balancing and so on, it really does seem –

TIPPING J:

Really, the answer is, when you talk of knock-on, it's got to be a pretty
25 loud knock.

MR KING:

Yes, and a long one.

TIPPING J:

And a narrow – and a very close one.

5 **BLANCHARD J:**

Knock for knock.

MR KING:

Indeed, so unless I can be of assistance?

ELIAS CJ:

10 Thank you counsel. We'll take time to consider our decision in this matter.

COURT ADJOURNS: 12:13 PM