SUPPRESSION ORDERS F AND G ARE NOW SPENT
NOTE: HIGH COURT ORDER MADE SUBSEQUENTLY SUPPRESSING THE NAMES OF WITNESSES MS A, MS B, MS C

IN THE COURT OF APPEAL OF NEW ZEALAND

CA571/2008
CA572/2008
CA672/2008
CA727/2008
CA769/2008
[2009] NZCA 1

THE QUEEN

v

DAVID CULLEN BAIN

Hearing: 17, 18 and 19 December 2008

Court: William Young P, Chambers and O'Regan JJ

Counsel: M P Reed QC, H A Cull QC and P A Morten for Mr Bain
K Raftery and C L Mander for Crown

Judgment: 30 January 2009 at 2 pm

Recall of judgment: 5 June 2009

JUDGMENT OF THE COURT (AFTER RECALL (NO 2))
UNREDACTED VERSION

A In CA571/2008, we give the Crown leave to appeal the ruling in relation to the proposed evidence of Mr Taylor but dismiss the appeal.

B In relation to CA572/2008:

(i) **We decline leave to appeal in respect of the following grounds of appeal referred to in [6](a) of the notice of application for leave to appeal: (ii) (recusal), (xi) (Mr Letts), (xiii) (Mr Galliven), (xiv) (Mr Coward), (xv) (Ms Bridgman), (xviii) and (xx) (Ms Gillan and Mr Nader-Turner), (xix) (Ms C) and (xxv) (further particulars).**

(ii) **We make no ruling on the ground of appeal referred to in (xii) (Mrs Mitchell) of [6](a) of the leave application.**

(iii) **We grant leave to appeal in relation to all other grounds of appeal referred to in [6](a) of the leave application, apart from that referred to in (v) of [6](a).**

(iv) **We dismiss the appeal in relation to the following grounds set out in [6](a) of the leave application: (i) (transcript), (vi) (ambulance officers and Constable Andrews), (vii) (Dr Pryde), (viii) (Constable van Turnhout, (x) (timing of paper run experiment), (xvi) (Mr and Mrs Marsh), (xxi) (Mr Mouat), (xxii) (Ms Hemming and Ms B), (xxiii) (Bain family members) and in relation to the ground of (xvii) to the extent it relates to Mr Christie.**

(v) **We allow the appeal in relation to the following grounds set out in [6](a) of the leave application: (iii) and (iv) (Ms McCormick) and (xxiv) (Mr Buckley). The proposed evidence of Ms McCormick and Mr Buckley is not to be led at trial.**

(vi) **We allow the appeal to the limited extent identified in [264] of the Reasons of the Court in relation to the following grounds set out in [6](a) of the leave application: (ix) (Mr Samuel) and (xvii) (to the extent it relates to Ms Dunckley).**

C **In relation to CA672/2008, we decline leave to appeal in relation to the decision of the High Court not to make an order under s 368 of the Crimes Act 1961.**

D **In relation to CA727/2008, we grant leave to appeal on all grounds and:**

(i) **allow the appeal in respect of the ground relating to the proposed evidence of Mr Buckley (see B(v) above); and**

(ii) **dismiss the appeal in respect of the grounds relating to the 111 call and the appellant's police statement.**

E **In relation to CA769/2008:**

(i) **We grant leave to appeal but dismiss the appeal in respect of the ground relating to the 111 call (see D(ii) above).**

(ii) **We grant leave to appeal and allow the appeal in respect of the ground relating to the proposed evidence of Ms McCormick (see B(v) above).**

(iii) **We decline leave to appeal in respect of the ground relating to the decision of the High Court not to make an order under s 368 of the Crimes Act.**

F **We prohibit publication of the unredacted version of the judgment and the reasons therefor in the news media or on the Internet or other publicly available database (including any law report or digest) until further order of this Court or the Supreme Court.**

G **We prohibit publication of the redacted version of the judgment and the reasons therefor in the news media or on the Internet or other publicly available database (including any law report or digest) until final disposition of the trial.**

REASONS OF THE COURT

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Introduction

[1] In this judgment, we address a number of points of appeal which have been pursued in four applications for leave to appeal on a pre-trial basis by Mr Bain (to whom we will refer throughout as the appellant) and one application for leave to appeal on the part of the Crown. This judgment should be read alongside two earlier judgments relating to the same trial, [2008] NZCA 455 and [2008] NZCA 585. The matters with which we deal in this judgment were the subject of oral argument on 17, 18 and 19 December, although the issue relating to the admissibility of Ms McCormick's evidence was foreshadowed at the hearing of 17 and 18 November 2008 and was briefly referred to in [2008] NZCA 585 at [2].

[2] In all, there have been six applications for leave to appeal on the part of the appellant (including CA652/2008, which the Court treated as an appeal rather than an application for leave) and one by the Crown. In all cases, the applications for leave and the proposed appeals have been heard simultaneously. The appellant's

appeal in CA652/2008 was dismissed in [2008] NZCA 455 and his application for leave to appeal in CA312/2008 was dismissed in [2008] NZCA 585. For ease of reference, we set out the outcome in relation to all points raised in all of the appeals or applications for leave to appeal at the end of this judgment.

Background

[3] The background to the case and its history are well known: for details see *Bain v R* (2007) 23 CRNZ 71 (PC). As in [2008] NZCA 585, we propose to assume reader familiarity with the Privy Council judgment and will proceed directly to a discussion of the issues, rather than reciting the factual background. The points are dealt with in broad groupings and roughly in the order in which they were presented at the hearing.

[4] Panckhurst J has issued four judgments dealing with matters that have been raised in the appeals to this Court. They are dated 8 September 2008, 17 October 2008, 13 November 2008 and 8 December 2008. We refer to these as the September judgment, October judgment and so on.

The evidence of the ambulance officers

[5] The appellant challenges the admissibility of aspects of the evidence given by three ambulance officers who attended 65 Every Street in response to the 111 call made by the appellant. The ambulance officers are Raymond Anderson, John Dick and Craig Wombwell. The appellant's opposition to the Crown's application under s 344A of the Crimes Act 1961 focused on particular aspects of the ambulance officers' evidence, rather than objecting to their entire briefs. It was argued that the specified parts of their evidence were inadmissible opinion evidence, and in some cases that evidence should be excluded on the basis that its prejudicial effect outweighed its probative value (s 8 of the Evidence Act 2006). In relation to Mr Wombwell, it was also argued that his evidence was unreliable and should be excluded on that ground.

Briefs

[6] In his brief of evidence, Mr Anderson records that he was a St John's ambulance officer in 1994. He had qualified as a paramedic in 1987 and by 1994 had been a full time ambulance officer for 14 years. He attended at 65 Every Street at 7.10 am on 20 June 1994. He saw the appellant in a foetal position in the house and provided treatment to him. He says that at one point the appellant appeared to convulse. Having described the convulsion, he adds "He [the appellant] didn't appear to be showing any signs of trauma". This is the first aspect of his evidence to which the appellant objects. The witness then describes the appellant calling out to his dog, which he notes is the only time the appellant spoke during the incident. He says the appellant changed position only twice, once when he had the convulsion and the second in response to his dog barking. His brief then contains this statement:

> The only movement – that I believe was feigned to a degree – was the shivering or the seizure.

[7] A little later the following statement appears:

> In the course of my duties as an ambulance officer I sometimes dealt with people who displayed a similar type of fit that the Accused seemed to be having – which has always been "put on", always been purposeful – and this was in line with a purposeful fit.

The appellant objected to the admission of these extracts as well.

[8] Mr Dick arrived at 65 Every Street sometime after Mr Anderson, at 7.54 am. He had been an ambulance officer for 15 years at the time. He also describes seeing the appellant in a foetal position on the floor. He says that at one stage the appellant said that "black hands were coming after him", and that the appellant seemed more agitated when he said this. He said that after this the appellant went to sleep. He says he remained with the appellant for about two and half hours at the scene, after which the chief ambulance officer and a police officer helped the appellant out to the ambulance. Towards the end of his brief he makes the following statement, to which objection is made:

> With regards to the Accused's comments about the black hands, contrary to what I have previously said, I think the Accused made those comments about three times before I heard what he said.
>
> I don't recall having to ask him a number of times what he said.
>
> With regards to my comments about the Accused being asleep, I now don't think he was.
>
> I can recall that if something moved, perhaps at the bedroom door or similar, his eyes would move to see what the movement was.
>
> I can recall that I was struck by how cool and calm the Accused was.

[9] The last paragraph of his brief says:

> He [the appellant] was fully conscious and fairly consistent in appearance throughout my dealings with him.

[10] The appellant objects to these extracts on the basis that they constitute inadmissible opinion evidence and that they are unreliable evidence, because they are not consistent with Mr Dick's evidence at the first trial.

[11] Mr Wombwell was the Chief Ambulance Officer for the Otago region in 1994. At that time, he was also a qualified registered nurse and had been in the paramedical field for 21 years, having been qualified as a paramedic since 1979. He says in his brief that in the course of his duties he has attended many incidents involving serious injury, including shootings and suicides, and is familiar with the term "shock" or "medical shock". He says that he has observed thousands of people over the years in medical shock and has treated them.

[12] He describes in his brief entering the house at 65 Every Street with Mr Anderson. He describes seeing the appellant lying on his side with his eyes closed, appearing to be unconscious. He expresses the view that the appellant was "light", i.e. potentially unconscious, but only just. He then gives a description of what he would have expected if the appellant had been fitting, but expresses the view, contrary to what he said to the police in 1994, that he did not see anything in the nature of a fit or convulsion while he was there. He then describes finding the bodies of the other family members in the house, before returning to a description of the appellant's condition at the time. He expresses a view that the state the appellant

was in could have been caused by a reaction to what he had found or seen, and ends his statement with the following observation:

> However, in relation to the symptoms I was observing, there is no way that I could say that the Accused was "putting it on" or was not. I could not make a definite statement either way.

High Court approach

[13] The issues relating to the evidence of the ambulance officers were dealt with by the High Court Judge in his September judgment. He records at [88] that the objection to Mr Wombwell's evidence was not pursued, but Ms Cull told us that this was an error. The defence did not pursue the objection to Mr Wombwell's observations about fitting, but did intend to pursue the objection to the last paragraph of the brief, which we have quoted above.

[14] The Judge considered that the opinions expressed by the ambulance officers were admissible in terms of s 24 of the Evidence Act, which allows a witness to state an opinion if the opinion "is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived."

[15] In relation to the argument that evidence which differed from that given at the first trial was unreliable, the Judge expressed the view at [94] that the change in evidence may well be relevant to weight, but not to admissibility.

[16] In relation to the argument that the evidence was more prejudicial than probative, the Judge said at [95]:

> With reference to the probative value of the evidence, the circumstances in which the observations were made are obviously all important. The essential issue in this case is whether David Bain killed five members of his family. All three witnesses had contact with the accused soon after the relevant events. His behaviour, and demeanour, at that time will be relevant to the jury's assessment of the accused and whether it is proved he was responsible for the deaths. Although this evidence may be described as contextual, it is still of sufficient importance to be placed before the jury. In my view its exclusion would be artificial and wrong in principle, albeit such evidence relates to a single circumstantial aspect of the case.

Opinion evidence

[17] Ms Cull's principal point in relation to the Judge's finding on opinion evidence was that the Judge was wrong to admit the evidence under s 24. She said that the ambulance officers did not need to resort to statements of opinion in order to communicate what they had observed. We agree with Ms Cull in that regard. It may be that the Judge had in mind other aspects of the evidence of the ambulance officers when he made that observation, but we are satisfied that the expressions of opinion to which objection was taken by the defence fell to be considered under s 25 of the Evidence Act, rather than s 24. Under s 25(1) an opinion by an expert is admissible:

> if the fact-finder is likely to have obtained substantial help from the opinion in understanding the other evidence in the proceeding or in ascertaining any fact that is of consequence to the termination of the proceeding.

[18] Mr Raftery accepted that s 25 applied and that, in order for the ambulance officers to give the evidence to which objection is taken, they would need to qualify themselves as having the necessary expertise at trial. We have already outlined the professional background and qualification of the ambulance officers: all have significant paramedic experience. As Mr Raftery pointed out, all will have had extensive experience of arriving at the scenes of accidents, crimes and other causes of trauma. Mr Raftery accepted that it will be necessary at trial to establish the degree of experience each officer has in that regard, the nature of the training they have had and the like.

[19] We do not see any basis for excluding the ambulance officers' evidence at this stage; rather, we simply note the need for them to qualify any claimed expertise.

Unduly prejudicial

[20] This aspect of the objection focused particularly on Mr Anderson's observation that the appellant did not appear to be showing signs of trauma, that the shivering or seizure was "feigned to a degree", and that the fitting was "put on" or "purposeful". Ms Cull argued the probative value of this evidence was outweighed

by its prejudicial effect, and it should therefore be ruled inadmissible under s 8 of the Evidence Act.

[21] We are satisfied that the evidence is probative. It hardly needs to be said that the observations made of the accused in the immediate aftermath of the killings are relevant to the key issue at the trial, namely whether the appellant murdered his family or was a witness to the immediate aftermath of the killing by another. The way the appellant appeared and acted during that period, particularly where the observations are made by ambulance officers used to dealing with situations of trauma, is in our view important evidence. The Judge described it as "contextual", which Ms Cull criticised, apparently on the basis that the Judge had created a new classification of evidence and a new basis for admissibility. We do not read the Judge's comment in this way; he was simply making an observation along the same lines as that we have made above.

[22] We do not see this evidence as being unfairly prejudicial if Mr Anderson is qualified to express the views he does. He will need to establish that his experience and training in dealing with episodes of fitting. If he cannot do so, his evidence will need to be restricted to the symptoms he observed. It would still be open to the Crown, if it wished, to adduce evidence from a duly qualified expert as to the nature of the symptoms which could be expected if a genuine fit or convulsion was occurring. In summary, we see this issue turning on the qualification of the witness to give the opinion, rather than unfair prejudice. If the opinion is properly based it is not unfair. If it is not properly based it is not admissible as opinion evidence.

[23] Our overall assessment is that the probative value of the evidence outweighs any illegitimate prejudice.

[24] We do, however, emphasise that the witnesses should tell the jury what they observed in purely factual terms as far as is possible before giving their views on the genuineness or otherwise of the appellant's conduct. In other words, they should provide a factual underpinning for any opinions they express.

Unreliable

[25] The appellant also objected to elements of the evidence of all three of the ambulance officers on the basis that the evidence they foreshadow in their briefs differs from the evidence they gave at the first trial in some respects. When asked to highlight the strongest example of this aspect of the argument, Ms Cull pointed to the statement in the brief of Mr Dick that, contrary to what he had previously said, the appellant had not made comments about black hands three times before Mr Dick heard him, and similarly that he did not now think the appellant was asleep, though he had previously said he was. In relation to Mr Wombwell the example which was given was his observations about the appellant not being tense, and not showing the signs of having been convulsing or fitting, and that contrary to his earlier statement that he did not see anything in the nature of a fit or convulsion. Mr Wombwell's comment that he could not say whether the appellant was putting it on or not was also given as an example of this, because the comparable statement made at trial was "no there is no way that I could say he was putting it on or could not. Couldn't make a definite statement either way". With respect to Ms Cull the differences between the brief and the evidence of the first trial in relation to this last comment are so minor as to be almost unrecognisable.

[26] The argument that a difference between what is stated in the briefs prepared for the second trial and the evidence given at the first trial indicates a degree of unreliability justifying exclusion of the evidence is made in relation to a number of witnesses. We will deal with the point in general terms now, on the basis that the comments we make here apply equally to those other witnesses.

[27] Obviously, a witness should give evidence only if he or she believes it to be true. It is not uncommon that a witness recalls at trial something which was not mentioned in his or her brief of evidence, deposition statement or police statement. The conventional view is that the failure to mention something earlier or the making of a prior inconsistent statement may affect the weight which the jury gives to the evidence and the jury's view on its reliability. But it is for the jury as the fact-finder to make that assessment. In this case, the changes highlighted in the extensive schedules provided by Ms Cull are, in many respects, minor and inconsequential. In some cases, however, the witness contradicts the evidence given in the first trial or deals with an aspect not earlier mentioned. But in all cases, the relevance of the

evidence remains unchanged and, to the extent that any of the differences between the evidence given at the first trial and that mentioned in the briefs is material (assuming that the evidence actually given at the second trial deals with the relevant matter), that can be the subject of cross-examination and submission on reliability and weight.

[28] In summary, we reject the contention that the mere fact that a witness's brief includes material that differs from his or her evidence at the first trial makes the evidence so unreliable that the Court should prevent the witness from giving the evidence at the subsequent trial.

Conclusion

[29] We uphold the High Court decision, though for slightly different reasons.

Constable Andrew

[30] The objection to the evidence of Constable Andrew has many similarities to the objections to the evidence of the ambulance officers.

Brief

[31] Constable Andrew arrived at 65 Every Street at the same time as the ambulance officers. He also makes observations about the state in which he found the appellant on entering the house. In particular, he describes the accused as follows:

> At about this point the Accused started to shake. His whole body was shaking as though he was having a fit. The shaking lasted between 10 and 15 seconds.
>
> He fell backwards between the bed and the wall.
>
> One thing that stuck in my mind during this was that I clearly remember that the Accused's eyes stayed the same – they were normal – there was no change in them. They didn't change or roll back as I have seen occur in other people having fits.

[32] Constable Andrew said that when he saw the appellant start fitting, he rushed into the room and dragged the appellant back from where he was, putting him in the recovery position. He then called for the ambulance officers and attended to the appellant. He said that when he dragged the appellant back from where he was, he had stopped shaking and "he did not appear distressed". He added that the appellant was limp, not tense. These observations were not included in the evidence which Constable Andrew gave at the first trial.

Objection

[33] The defence objected to the observations comparing the state of the appellant with others who are having fits and also his expression of view that the appellant did not appear distressed. It was said that both of these involved opinion evidence which the constable was not qualified to give. Objection was also taken on the grounds of unreliability because of the observations which did feature in the constable's evidence at the first trial.

High Court approach

[34] Panckhurst J did not determine that Constable Andrew had qualified himself to make observations of this nature. Rather, he concluded at [93] of his September judgment that the constable would need to qualify himself in terms of experience before it may be appropriate for him to compare his observations of the accused by reference to other persons he has seen fitting.

Unreliability

[35] We reject the challenge on the basis of unreliability for the same reason as given in relation to the briefs of the ambulance officers. The fact that the constable makes observations about the state the appellant was in when he went to his assistance, not having made any such observations at the first trial, can be the subject of cross-examination and submission at trial, if that is thought to be appropriate. There is no proper basis for exclusion.

Opinion evidence

[36] As to the argument that the evidence is improper opinion evidence, the Judge's ruling leaves that issue for determination at trial. Mr Raftery accepted that he would need to establish that the constable had sufficient experience and qualification to express a view comparing the symptoms he observed in relation to the appellant against those which he has observed in relation to others who have been fitting. Mr Raftery indicated that further details as to the constable's expertise in this regard would be forthcoming at trial. The determination of whether the evidence is admissible in terms of s 25 will need to await that.

[37] As to the observation that the appellant was not distressed, we consider that for that evidence to be admissible in terms of s 24, the constable should describe his observations factually and, if the opinion is needed to communicate these, given that opinion only when the factual basis for it is clear. For example, the constable could note the absence of particular signs of distress – crying, shaking, and the like. The other observations (that he had stopped shaking, that he was not tense, and that he was limp) are all observations rather than expressions of opinion and there is no reason for concern about them.

[38] In summary, we see no reason to take an approach to this aspect of the case which differs from that taken by the High Court Judge. The issue of expertise will need to be resolved at trial.

Constable van Turnhout

Brief and objections

[39] Constable van Turnhout arrived at Every Street at 8.03 am on 20 June and was instructed to locate and stay with the appellant. In his brief he described speaking with Constable Andrew for a short time before taking up this role. He then describes how he found the appellant and gives a detailed description of the room. At one point he describes the appellant attempting to get up, but described this

attempt as "only half-hearted". He remained with the appellant until the appellant was taken away from the address at about 10.20 am. He describes his interaction with the appellant during that period. He then went to the police station with the appellant and Detective Sergeant Dunne. In describing the discussion with the appellant in the interview room at the police station, the constable says:

> His manner was quite open and not distressed.

[40] The defence objected to the admission of that statement on the basis it was inadmissible opinion evidence. Later, Constable van Turnhout described being present when Dr Pryde questioned the appellant about a small graze on the inside of his right knee. The constable adds:

> I could see the graze and it appeared recent.
>
> At the time, the accused indicated several other cuts and grazes on his legs. To me those did not appear as fresh.

[41] The defence also objected to this aspect of the constable's evidence on the basis that it was inadmissible opinion evidence.

[42] In addition, although no objection appeared to have been taken to the reference to the "half-hearted" attempt to get up in the High Court, Ms Cull criticised that aspect of Constable van Turnhout's evidence in her argument in this Court.

High Court approach

[43] The High Court Judge found at [102] of his September judgment that the evidence of Constable van Turnhout was admissible under s 24 of the Evidence Act. However, he noted that evidence of the constable's experience would be needed.

Our evaluation

[44] We do not see any basis for objection to the observation about the half-hearted attempt to get up. We see that as falling very clearly within the category of

evidence permitted by s 24, where the observation enables the witness to communicate what he saw.

[45] In relation to the observation about the appellant appearing quite open and not distressed when at the police station, we see this as in the same category as the evidence of Constable Andrew that the appellant "did not appear distressed", and find that it should be addressed in the same way.

[46] The evidence in relation to the grazes is different. We agree with the observation of the High Court Judge that Constable van Turnhout will need to establish his expertise to give that opinion. Mr Raftery accepted that it would be necessary for the constable to describe what he saw in relation to the grazes rather than simply making the assessment of one as recent and the others as less so. We do not see this as an area requiring particular medical expertise: if the constable describes what he saw in relation to the grazes and the basis for his assessments as to some being more recent than others, the jury will be able to assess that evidence from their own experience of life.

[47] We see no error in the High Court Judge's approach.

Marjory McCormick

[48] Ms McCormick was a Victim Support officer who dealt with the appellant and other members of the extended family in the immediate aftermath of the killings. The Crown wished to call her to give evidence about the demeanour of the appellant during that period. Her evidence is broadly consistent with that of the members of the Bain/Cullen family. Mr Raftery said that the Crown wished to call Ms McCormick because of her independence from the family, which lends weight to her observations.

[49] The defence objected to this evidence on two bases:

(a) It was inadmissible opinion evidence, which Ms McCormick was not qualified to give;

(b) There was an obligation of confidence which arose from the relationship of the appellant, who was then being treated as a victim, and Ms McCormick, as a Victim Support officer.

High Court approach

[50] The Judge dealt with this in both his September and December judgments. We reproduce the relevant part of the September judgment because it sets out a very useful summary of the background to this aspect of the appeal. The Judge said:

> [46] In June 1994 this witness was a victim support person for an agency, Victim Support. Between 20 and 24 June she provided support to the accused, and to other members of the Bain-Cullen family, in the aftermath of the homicides. Ms McCormick spent a considerable amount of time at the home of the accused's aunt and uncle, providing support to David Bain in particular.
>
> [47] At the first trial objection was taken to this evidence. Separate counsel appeared for the victim support officer and argued that the evidence should not be admitted because the public interest in the preservation of confidence between a victim support officer and a client outweighed the public interest in disclosure of the relevant evidence. This issue fell to be determined under s 35 of the Evidence Amendment Act (No. 2) 1980. Williamson J in Trial Ruling (No. 5), 22 May 1995, found that it was appropriate to excuse the witness from giving evidence.
>
> [48] The Judge accepted that victim support officers received information in a situation of confidence. This was confirmed by the terms of a declaration taken by officers on joining Victim Support. The declaration included the words "I will divulge such information only with the consent of the client …". Although the accused was by then alleged to be the perpetrator of the relevant crimes, the Judge accepted that his status at the time of the relationship was that of a victim.
>
> [49] As to the merits he said this:
>
> > In this case I am influenced by the nature of the evidence which it is desired to lead. It has only limited significance, in my view, to the essential task of resolving the issue to be decided at this trial. … It substantially deals with a variety of statements allegedly made by the accused while in the home of relations about matters principally concerning the funerals but also concerning some of the events which had taken place. There is no suggestion in any of the evidence of any form of admission or words amounting to admission or indicating admission of guilt of the serious crimes that the accused is charged with. Many of the matters raised are ones which could be said to be equivocal so far as the issue in this trial is concerned and in respect of which different arguments could no doubt be put for each point of view. (p 4 of the Ruling).

In directing that the witness was excused from giving evidence, Williamson J noted that a list of clothing to be worn by the deceased at the funeral, which the witness had prepared on the accused's instructions, was still to be produced as an exhibit. Apparently, there had been reference to this topic in the evidence of two aunts of the accused.

[50] Section 52 of the Act enables a Judge to order that evidence not be given where it is privileged, confidential or material to matters of State. Section 69 of the Act defines the scope of the discretion as to confidential information. In particular, subs (2) provides:

> A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in –
>
> (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
>
> (b) preventing harm to –
>
> (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
>
> (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
>
> (c) maintaining activities that contribute to or rely on the free flow of information.

[51] Mr Raftery in arguing against non-disclosure raised three matters:

> (a) that the witness is retired and no longer asserts that the relevant communications were confidential (although the agency by which she was employed at the relevant time may claim confidentiality);
>
> (b) that the relevant communications did not occur in a situation of close confidence between the witness and the accused, in that the witness was providing support to the extended family and members of the family were privy to at least some of the discussions; and
>
> (c) other witnesses are to give evidence in a similar vein, so that the so-called confidential information is not sensitive both on account of the time that has elapsed and the extent to which it has already been disclosed to other persons: s 69(3)(f).

[52] Ms Cull responded by pointing out that s 52(2) envisages that non-disclosure may be ordered "on the application of an interested person". Here

> the confidence is that of the accused. Nor did it matter that the witness, in whom confidence had been reposed, was no longer concerned to preserve that confidence. The new Act identifies the fact of confidentiality as the core prerequisite, rather than the existence of a special relationship as was previously the case. Objection was also taken to the witness's evidence on the ground that it contained expressions of opinion concerning the accused's demeanour, which in general terms was described as detached, inappropriate and unemotional for someone who had just suffered the loss of their immediate family.
>
> [53] I essentially agree with Williamson J's assessment of the witness's evidence. I do not regard it as of significant importance, or probative value, in relation to the main issue in the case. In addition, it does seem that other means exist by which evidence of a similar kind will be available to the Crown from other family members. Ms McCormick, however, was in a different situation in that she was independent and had the benefit of experience as a trained nurse and as a counsellor (including grief counselling). She had also received some training in how to deal with victims of homicides. This indicates that, if called, she is qualified to give opinion evidence of the kind contained in her brief. Another issue is the extent to which the confidential information is already in the public domain as a result of evidence given by others and to be given by them again at the retrial.
>
> [54] Unfortunately, I do not think it is appropriate to finally rule on Ms McCormick's evidence at this stage. Two considerations influence me. First, it is not apparent whether the agency which employed the witness will assert the need for confidentiality in order to prevent harm to victim/support person relationships generally or in order to maintain a free flow of information: s 69(2)(b)(i) and (c). Secondly, I anticipate that family witnesses will be called before evidence is to be given by the present witness. As noted, these family witnesses cover similar ground and their evidence will also bear upon how sensitive (and confidential) Ms McCormick's evidence actually is. I therefore reserve a final ruling until trial.

[51] For convenience we reproduce the relevant paragraphs of the December judgment as well:

> [8] To a large extent the two issues which prompted me to reserve a final ruling have been clarified. The District Manager for the Otago/Southland Victim Support agency has supplied a brief of evidence concerning the issue of confidentiality. Mr Guy Scoon states by reference to a training package formalised in 2006:
>
> > It is expected that if anything is learnt from the client that has the potential to advance a criminal enquiry, then that needs to be shared with the appropriate agency.
> >
> > It is my understanding that this has always been the case with Victim Support.

> It is expected that this will be made clear to the clients at an early opportunity in contact.
>
> There is no distinction in this between homicide Victim Support work and general work.

[9] While this no doubt represents the current position, Mr Scoon is not correct in saying that a similar situation obtained in 1994. It is clear from Williamson J's trial ruling (No. 5) of 22 May 1995 that victim support persons did receive information in confidence and made a declaration on joining the agency that they would not divulge information save with the consent of the client. To my mind this information provided in 1995 should be seen as more reliable than Mr Scoon's understanding of the historical situation. I note that he began with the agency in 2004. It follows that the most that can be said is that in contra distinction to the approach in 1994-95, the agency's policy is now changed and the relation of support persons and their clients is no longer one of confidence. Importantly, the present practice is to inform clients of this policy at the outset.

[10] The second matter which influenced my decision to defer a final ruling concerned the content of the evidence to be given by other family members. I anticipated when giving the previous ruling that the admissibility of Mrs McCormick's evidence could be determined at trial and with the benefit of having heard the evidence from family members. However, counsel seek a ruling in advance of trial. At least I have now given a ruling concerning the permitted ambit of the family evidence, although I understand that ruling is the subject of an appeal.

[11] Two aspects require determination. First, should the evidence of Mrs McCormick be admitted at all? Second, if it is, should that part which comprises opinion be allowed?

[12] The discretion to direct non-disclosure of evidence is to be determined by evaluating whether the public interest in disclosure of the information is outweighed by the public interest in preventing harm to the person to whom the confidential information relates, or harm to the particular confidential relationship or relationships of that kind generally, or the public interest in maintaining the free flow of confidential information: s 69(2). In terms of s 69(3) regard must be had to the likely extent of harm from disclosure, the likely importance of the information in the proceeding, the nature of the proceeding, the availability of other means of obtaining the information, the ability to restrict public disclosure of the evidence at trial and the sensitivity of the evidence having regard to the relevant time lapse, the extent to which the information has already been disclosed to others and society's interest in protecting the privacy of victims.

[13] With reference to the question of harm flowing from the disclosure, I think the risk is low. The information was not supplied in a situation of high confidence. In the main others were present at the relevant times. And, importantly, Victim Support holds no concerns about disclosure and has now adopted a non-confidential approach to the provision of its services. I do not regard the evidence as of significant importance, in part because similar evidence is available from family members. That said, this witness has the advantages of independence and some expertise in relation to grief counselling, which the other witnesses do not possess. The importance of

> the proceeding – a trial of multiple counts of murder – is not to be underestimated. If the evidence is given at trial, unrestricted public disclosure would result, but I do not think the evidence is sensitive given the delay which has occurred and the extent to which its content is already in the public domain.
>
> [14] On balance I am not persuaded that the overriding discretion to direct non-disclosure of the evidence should be exercised. I consider the public interest in disclosure outweighs the other public interest factors identified in s 69.
>
> [15] Mrs McCormick's witness statement includes expressions of opinion concerning the accused's demeanour on each of the occasions she saw him, being each of the four days from 20-24 June. I think this is overkill. While I am satisfied that this witness is competent to express an opinion concerning how she found the accused in her dealings with him, a single assessment of the pattern throughout the period will be quite sufficient.

Confidentiality

[52] Ms Cull argued that the Judge ought to have made an order under s 69 of the Evidence Act. She pointed out that, although Ms McCormick no longer asserts the confidentiality of the communication, s 52(2) of the Evidence Act empowers the Judge to make a direction under s 69 on the Judge's own initiative or on the application of an interested person, which in the present context would include the appellant. The appellant's objection to the evidence is, in effect, such an application.

[53] Section 69(2) relevantly provides:

> A Judge may give a direction [that a confidential communication or confidential information not be disclosed in a proceeding] if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in –
>
> (a) Preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated;
>
> …

[54] Ms Cull said that the Judge ought to have applied s 69 in the same way that Williamson J applied s 35 of the Evidence Amendment Act (No 2) 1980. She said that the fact that Victim Support no longer saw confidentiality as crucial did not change the underlying reality that the communications between the appellant and Ms McCormick were made in circumstances where Ms McCormick believed she

was under a duty of confidentiality, having signed a declaration to that effect, and had communicated to the appellant and other members of the Bain/Cullen family that their communications with her would be kept within the extended family. Ms Cull provided us with a copy of a police jobsheet recording the initial contact with her by the police. It records that she stressed that she should not be required to give evidence, otherwise "it would destroy [the] credibility in the role of victim support".

[55] Section 69(3) sets out seven factors to which a judge must have regard in determining whether to make a direction under s 69. These include the nature of the communication or information and its likely importance in the proceeding (s 69(3)(b)), the nature of the proceeding (s 69(3)(c)) and society's interest in protecting the privacy of victims of offences (s 69(3)(g)). As is apparent from the quotation reproduced above, the Judge was aware of the requirements of s 69(3), and expressly recited them. However Ms Cull said he had failed to give weight to the privacy of the appellant (who was being treated as a victim at the relevant time). She argued that the Judge was wrong to give weight to the fact that similar evidence was being given by members of the Bain/Cullen family. However, we have difficulty understanding that submission given the requirement of s 69(3)(d) that the Judge must consider the availability or the possible availability of other means of obtaining evidence of the communication or information. Much of the interaction between the appellant and Ms McCormick occurred in the presence of other family members.

[56] We have some concern about the standard being applied to the confidentiality of the interaction between the appellant and Ms McCormick being judged by today's standards rather than those of the time. We give considerable weight to the assessment made by Williamson J at the time of the first trial, in light of the position then taken by Victim Support. As Panckhurst J correctly noted, the District Manager of Victim Support was wrong to hold the view that Victim Support had always had a policy that anything said by a client that has the potential to advance a criminal inquiry needs to be shared with the appropriate agency, because Williamson J accepted that information obtained by Victim Support would be divulged only with the consent of the victim.

[57] In our view, the declaration signed by Ms McCormick at the time and her clear assurances to the appellant about the confidentiality of matters arising from her interaction with him during the time he was being treated as a victim are telling. In terms of the criteria under s 69(3), we note that the evidence which the Crown seeks to adduce from Ms McCormick is available from other witnesses (albeit witnesses who do not have the same degree of independence) and is not, as both Williamson J and Panckhurst J found, crucial in the context of the trial. In those circumstances we take the view that the confidentiality upheld by Williamson J at the first trial should be maintained at the second trial. In those circumstances we conclude that an order under s 69 preserving the confidentiality of the communications between the appellant and Ms McCormick should have been made.

[58] Although not cited to us by counsel, this Court's decision in *R v Gulliver* CA51/05 9 June 2005 has some similarities and we have considered it in coming to our decision. In that case, this Court upheld a decision not to excuse a counsellor in the STOP programme (a sex offender treatment programme) from giving in evidence details disclosed to him by Mr Gulliver, which was essentially the only evidence of the commission of sexual offending against a child. The case was decided under s 35 of the 1980 Act. The Court found the public interest in apprehending the offender outweighed the confidentiality considerations inherent in the relationship between the counsellor and Mr Gulliver. In that case the evidence was crucial, so the public interest in disclosure was much more compelling than it is in this case, where similar evidence is available from others. On the other hand, the need to preserve confidentiality was stronger too. We see that case as involving stronger competing interests on both sides of the ledger. It does not dissuade us from the balance we have struck in this case.

Opinion evidence

[59] In light of our finding on the s 69 issue, it is not necessary for us to consider the second argument made on behalf of the appellant, namely that Ms McCormick was expressing opinion evidence which she was not qualified to give. We record, however, that our views on that aspect of the case coincide with those of

Panckhurst J. It is also unnecessary for us to engage with the arguments which Ms Cull made by reference to s 15 of the Victim Rights Act 2002, s 25(e) of the New Zealand Bill of Rights Act 1990 ("NZBORA") and ss 6(b) and 8(2) of the Evidence Act.

Jurisdiction

[60] This issue was dealt with in the High Court in the context of a s 344A application, i.e. as an issue of admissibility. Arguably, it should have been dealt with as an application under s 69, and if it had been there may have been an issue about the availability of a pre-trial appeal. There was no argument on this and we have dealt with the matter in a similar way to the way the High Court dealt with it, i.e. as an appeal from a s 344A ruling. But that should not be seen as authority that there is a pre-trial appeal (with leave) from a s 69 ruling. We leave that for decision on another day.

[61] We conclude that the evidence of Ms McCormick should not be led at trial.

Dr Pryde

[62] Dr Pryde was a police doctor in 1994. He was called to 65 Every Street on the morning of 20 June 1994 and checked each of the deceased family members for signs of life. At around 11 am he examined the appellant at the Dunedin Police Station. Dr Pryde has died since the first trial, and it is proposed that his brief of evidence will be read at the second trial.

Objections

[63] The objections of the defence relate to the following aspects of his brief:

(a) When describing his examination of the appellant, Dr Pryde says:

> I noticed recent bruising to his right temple which measured about three square centimetres in area.

> I also noticed recent bruising above his right eye which measured approximately one centimetre by half a centimetre.

(b) Dr Pryde noted another bruise on the appellant's right cheek, and also a skinned abrasion area on the appellant's right knee. At the end of his brief he makes this observation:

> During the course of the examination I asked David Bain if he could tell me how the various injuries had occurred.
>
> He was unable to explain the injuries and he said that he did not know.

High Court approach

[64] Panckhurst J dealt with these objections in his September judgment. He found that Dr Pryde, as an experienced medical practitioner, was competent to describe bruises as "recent". In relation to the unanswered question, he found as follows:

> [101] In relation to the question asked of the accused concerning his facial injuries, I am satisfied this was a natural question in the circumstances and that there was nothing improper about it. David Bain was more a victim than a suspect at that point in time. To the extent that the accused's non response is described in a manner which has a pejorative ring about it, the statement may be edited (to read "he did not respond", for example).

Age of bruising

[65] The appellant argues that the doctor is not qualified to make an assessment of the age of the bruising, and that this is exacerbated by the fact that his evidence will now be read and there will be no cross-examination.

[66] We can see no error with the Judge's approach. While it is well known that estimating the age of bruising is problematic, we see no reason why the estimate made by a medical practitioner who has considerable experience of acting as police doctor should not be admitted as opinion evidence.

[67] We discussed with counsel during the hearing whether the cross-examination of Dr Pryde from the first trial should also be admitted. Mr Raftery indicated no objection to that course. Ms Cull said it was not particularly effective cross-examination because it was done "on the hoof" and, from the defence point of view, cross-examination of the doctor afresh would have been preferable. We leave it to defence counsel to determine whether the cross-examination from the first trial should be placed before the jury.

Unanswered question

[68] The objection to the doctor's observation that the appellant did not respond when asked how the various injuries had occurred was based on the decision of this Court in *R v Halligan* [1973] 2 NZLR 158. That case involved an appeal against convictions for the indecent assault of two girls aged eight and six years respectively by their de facto stepfather. The six year old girl had not come up to brief in giving evidence. The police officer who interviewed the appellant in that case gave evidence of the interview he had with the appellant. The appellant had asked him what the girls were supposed to have said about him. The police officer set out in detail what the girls had told the police and the appellant responded:

> I could not have done what they say. I love those girls and I just could not do it to them.

[69] The case for the appellant was that the police officer's evidence had effectively put before the jury evidence from the young girl about what the appellant was said to have done to her, which she had not given herself at the trial. In giving the judgment of the court, Turner P said (at 162):

> But when an account of such a conversation is being given to the jury, its only relevance is as a background for any damaging admission which the appellant may have made in response to the account read out to him by the police officer. What was read to him is not independently evidence against him. Had the appellant replied, for instance, in this case, to Detective Ell, "[The older girl's] account of the matter is true", then the whole conversation would at once have become in the highest degree relevant. But in this case the appellant said nothing to incriminate himself in reply to what was said to him. This Court has said before, and it now repeats it, that police officers cannot be allowed to introduce evidence for the Crown by making accusations to a suspect, and, when they receive no damaging admission in

> reply, retailing to the jury what they said as if it were relevant evidence. Where this is the effect of what was done, and it is the effect of what was done here, this Court will not allow a conviction obtained upon such evidence to stand, unless it is clearly demonstrable that without that evidence the jury must have convicted.

[70] *Halligan* is, therefore, authority for the following proposition, which is set out in the headnote of the report:

> Where a suspect is being interviewed by a police officer and is told what some witness has said about him and asked to comment, if the suspect makes no damaging admission in reply, what was said by the police officer to the suspect is irrelevant and inadmissible as evidence.

[71] Ms Cull said this applied to the present case because Doctor Pryde had observed the appellant's reaction and repeated a conversation when no damaging admission had been made, thus rendering that aspect of his evidence inadmissible. She said the doctor's observation was "an implied opinion of guilt".

[72] Ms Cull pointed to the decision of this Court in *R v Nahandi* [2007] NZCA 130 at [15] for the proposition that it is neither normal nor appropriate for a prosecution witness to express belief in the defendant's guilt. We do not see that case having any relevance to the present situation. In *Nahandi* the detective concerned had stated clearly that he believed the accused person was guilty. In the present case the doctor is simply recording an exchange between him and the appellant. As noted above, the High Court Judge suggested some editing to the statement to address the concern expressed by the appellant that the exchange could be interpreted as pejorative. The brief of the doctor has now been amended so that the last line simply states that the appellant said that he did not know, when asked how the injuries had occurred. That removes any possible basis for concern that the doctor was expressing a belief in the appellant's guilt.

[73] The present case does not come close to engaging the principle for which *Halligan* stands. Apart from the fact that Doctor Pryde is not a police officer, his exchange with the appellant does not introduce new evidence which is not otherwise before the jury, as happened in *Halligan*. Rather, the evidence of the injuries is the subject of the doctor's direct evidence earlier in this brief.

[74] Ms Cull said the principle in *Halligan* had been extended by the decision of this Court in *R v Hunt* CA178/00 26 September 2000. In that case allegations and opinions of a police officer that were expressed during an evidential video but were not assented to by the accused were placed in evidence before the jury. The Court said at [16] that the impact of this occurring was no different from the situation described in *Halligan*, where factual assertions of others in the form of questions on which the accused had been asked to comment and on which no damaging admission was made were placed before the jury. We do not see this extension of the *Halligan* principle as having any impact on the present situation.

[75] We see no error with the approach of the Judge and we do not accept that the *Halligan* principle is engaged in relation to this point of appeal.

[76] We uphold the decision of the Judge on this aspect of the case.

Thomas Samuel

Brief

[77] Mr Samuel was the prison officer who attended on the appellant when he first arrived at the prison following his arrest. He was not a witness at the first trial. In his brief he says that he has been a prison officer for 20 years and spent about 15 of those years at the Dunedin Prison. He said that at the relevant time he was looking after the remand prisoners and the "at risk" prisoners. He was asked to go to the receiving office to pick up the appellant and take him to a cell, strip search him, and place him on 15 minute observations. The appellant had gone directly to the prison after appearing in court. Mr Samuel describes undertaking a strip search and noticing marks on the appellant's body. His witness statement says:

> The marks I saw were on the right hand shoulder area.
>
> The marks were above the nipples.
>
> There were two types of marks.
>
> One was like scratch marks.

> They weren't deep scratches and were starting to heal a little.
>
> It looked as though someone had raked his body with their fingers.
>
> The gouges or scratches ran downwards and were spaced apart consistent with the space between somebody's fingers.
>
> There were two distinct different patterns of scratches.
>
> It looked like he was scratched once and then scratched again.
>
> These marks did stick out as I could not see any other scratches about his body and I did a full strip search.
>
> There was also pre bruises around the scratched area.
>
> It was like a yellowing of the skin and slight darkness in the middle of these yellow areas.
>
> I have seen similar types of bruising effects on many prisoners and I have also received injuries myself.
>
> These bruises I would have thought were about two to three days old.
>
> I asked David about the scratches and bruises.
>
> He looked blankly at me and said nothing.
>
> He said nothing.
>
> The bruising looked like it had been caused by someone giving him a hard push with their fingers spaced.

High Court approach

[78] Panckhurst J dealt with this challenge in his September judgment. He ruled out the observation that the bruises were two to three days old (he said the witness should simply say the bruises were recent or old) but otherwise upheld the admissibility of the proposed evidence of Mr Samuel. He held that s 24 of the Evidence Act applied and the observations could be expressed in the way they were because of the difficulty in detailing the observations in purely factual terms: at [103].

Objection

[79] In this Court, Ms Cull submitted that the Judge ought to have ruled out the following aspects of Mr Samuel's evidence:

(a) The following statement about the appellant's demeanour:

> David seemed nervous by the environment, you could tell it was his first time in prison.
>
> He was looking around a lot trying to view his environment, and he did ask where he was going.
>
> It was clear to me that David Bain was not at ease in the prison setting.

(b) His statement about the marks he saw on the appellant's body (reproduced above);

(c) The statement that the appellant did not respond when asked about the scratches and bruises (also reproduced above).

[80] We will deal with each of these in turn.

Nervousness

[81] The objection to this statement is based on its lack of relevance, rather than on any concern as to Mr Samuel's expertise to express the view. Panckhurst J did not deal with this aspect of the objection in his judgment. That is perhaps not surprising because it is not mentioned in the schedule setting out the appellant's objections to the Crown's s 344A application that had been provided to the Judge by counsel for the appellant. The observation itself appears to us to be anodyne because it could be expected that any first time prisoner would be nervous on arrival at the prison, and we doubt that there is any prejudice to the accused in evidence to that effect being adduced. Having said that, we can see nothing probative in the description of the appellant as nervous, and on balance we conclude that it should be omitted from the brief.

Marks on body

[82] Ms Cull objects to the description of the marks on the appellant's body on the basis that the description is inadmissible opinion evidence and unreliable. We agree with Ms Cull that evidence about the age of bruises should not be admitted, even in the generalised way suggested by Panckhurst J. Aging of bruising is problematic and in the absence of any medical expertise on Mr Samuel's part, it is better that his evidence be confined to his description of the bruises he observed. In other respects, we see no difficulty with the evidence relating to the marks that Mr Samuels observed on the appellant's body. The evidence in the main is pure observation. Such opinion, as is expressed, (other than in relation to the age of the bruising) is within the ambit of s 24.

[83] With respect to the second challenge, the argument put forward by Ms Cull was that the observations are inherently unreliable because they relate to an event that occurred 14 years ago, and they were not recorded at the time. That is a matter of the weight to be attributed to the evidence by the jury, not an inadmissibility issue. Section 122 of the Evidence Act provides that a judge may warn a jury of the need for caution in deciding whether to accept evidence or the weight to be given to evidence if the Judge considers that the evidence, though admissible, may be unreliable. The Judge is required to consider giving such a warning where the evidence is about conduct of the defendant that is alleged to have occurred more than ten years previously: s 122(2)(e). We think it is at least implicit in that provision that evidence which is more than ten years old will not be inadmissible for that reason alone: it may be considered to be potentially unreliable, thus meriting the warning mandated by s 122(1), but that will not render it inadmissible.

[84] In the present case the Judge will no doubt consider whether a warning is required, though, as Ms Cull pointed out, all of the evidence in this case will be in relation to conduct that occurred more than 14 years ago.

[85] Ms Cull also argued that this evidence was highly prejudicial and should be ruled out under s 8 of the Evidence Act. We disagree: it is descriptive of the appellant's state only a few days after the killings and potentially has significant probative value. That is not unfairly prejudicial. We uphold the Judge's finding that this evidence is admissible.

[86] We record that we discussed in the course of argument the desirability of the witness providing a more detailed physical description of what he saw so that the basis of his opinion was more clearly stated. Mr Raftery indicated no objection to that suggestion.

Unanswered questions

[87] In our view the evidence relating to the unanswered questions is also admissible. We do not see the principle enunciated in *Halligan* as being infringed in this case, because the question which was asked but unanswered does not introduce any new evidence which is not otherwise available to the jury – rather it refers back to evidence which will already have been given by the witness. We suggest that the same approach be taken to this evidence as was taken in relation to the evidence of Doctor Pryde: any pejorative aspects to the description of the failure to answer should be removed, and the witness should simply say that the appellant did not answer when asked about the bruises and scratches.

[88] We uphold the Judge's finding in relation to the evidence relating to marks on the body and the unanswered questions, but rule that the evidence about nervousness and the age of the bruising should not be led.

William Christie

High Court approach

[89] The Judge outlined the issue and dealt with this aspect of the case in his September judgment as follows:

> [139] Objection is taken to the evidence of William Christie…. [He] is a registered nurse with extensive experience in caring for the elderly. He was the supervisor and manager of a Dunedin rest-home and hospital where a percentage of the residents invariably suffered from depression and related disorders. Mr Christie knew Robin Bain for about four years as a fellow member of a male choir. As of two weeks before his death he considered Robin Bain to be in good spirits and not suffering from depression.

…

> [141] Mr Christie's evidence is objected to on the basis that he is not competent to express an opinion and that it is speculative, non-probative and unhelpful. …
>
> [142] Robin Bain's state of mind in June 1994 will be a relevant issue at the retrial. I do not accept that Mr Christie is not competent to express an opinion of the kind he provides. He is qualified by both training and experience to do so. The weight to be accorded his evidence is a jury question.
>
> [143] Nor do I accept the point that it is inappropriate for the Crown to anticipate a defence theme and call evidence in attempted rebuttal of it. This theme has been well sign-posted, and were the Crown not to respond to it in the course of its own case, it would be unlikely to be permitted to call evidence in rebuttal. Section 98(3)(b) provides the test for leave, being if "the relevance [of the further evidence] … could not reasonably have been foreseen". I am satisfied foreseeability requires that the evidence be led as part of the Crown case.

Objection

[90] The appeal was advanced in this Court on the basis that Mr Christie was not qualified to give evidence on depression and on the basis that "the Crown was adducing evidence on an 'either/or' basis resulting in a proliferation of non-probative, irrelevant and speculative evidence". We will deal with these grounds in turn.

Opinion evidence

[91] In common with the Judge, we are satisfied that the witness appears to hold the necessary qualifications to give evidence about Robin Bain's psychological state. In the absence of a hearing at which full details of the experience and qualifications of the witness are elicited and subject to challenge, we can take the matter no further than the Judge did. Mr Raftery accepted that he would need to lead evidence from Mr Christie as to his experience and training as a nurse and his contact with people with depression.

Either/or

[92] The second aspect of the objection was on the basis that the evidence of Mr Christie was improper because it focuses on the position of Robin Bain, who is the only other possible perpetrator of the murders (and, in his own case, suicide). Ms Cull said that the "either/or" position of the Crown was untenable in the context of a criminal murder trial, pointing to the principle that where it can be proved that an offence was committed by one of two people, but not which of those two, then both must be acquitted. We fail to see the relevance of that principle in the present case. What the Crown has to do at trial is to prove beyond reasonable doubt that the appellant was the killer. In order to do so, it needs to eliminate the reasonable possibility that it was Robin Bain, not the appellant, who killed his fellow family members. It is obvious that Robin Bain's state of mind in the period immediately before the killings will be an important aspect of the defence case, and the Crown will need to adduce whatever evidence it can in support of its theory of the case.

[93] Ms Cull said that the Crown should be obliged to wait until after the defence has led its evidence about Robin Bain before adducing evidence which, in effect, is designed to counteract that defence evidence.

[94] Mr Raftery argued that it was legitimate for the Crown to adduce evidence about the psychological state of Robin Bain as part of the Crown case. He said that if the Crown were to ask the Judge for permission to adduce rebuttal evidence under s 98(3) of the Evidence Act, it could be argued by the defence that this should not be permitted because, in terms of s 98(3)(b), it could not be said that:

> the further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen.

[95] We accept the Crown submission. It will be incumbent on the Crown, in the conduct of the Crown case, to put forward its case in relation to the possibility that Robin Bain was the killer. It is clearly on notice that Robin Bain's mental state in the period before the killings will be in issue.

[96] We agree with Panckhurst J on this issue.

Ingrid Dunckley

Brief and objection

[97] The nature of Ms Dunckley's brief, and the defence objections to it, are well summarised by the Judge in his September judgment:

> [140] Ingrid Dunckley is a registered psychologist with the Special Education Service. In 1994 she was the psychologist responsible to provide services to the Taieri Beach School of which Robin Bain was the principal. On Friday, 17 June she spoke to Robin Bain and the two made an appointment to meet the following Monday. The appointment related to assistance required for some students. Her evidence also includes reference to Mr Cyril Wilden, a psychologist colleague in 1994, who, under Ms Dunckley's supervision, provided traumatic incident support at Taieri Beach School. Her evidence contains observations about Mr Wilden's performance of that role and concerning the extent to which special education psychologists are placed to assess the mental health of principals, as opposed to students. It is apparent that this latter aspect of the witness' evidence has been briefed in anticipation of the possibility that Mr Wilden may be a defence witness.

High Court approach

[98] The High Court Judge's approach to this aspect of the case was as follows:

> [144] Ms Dunckley's evidence directed to Mr Wilden's situation in 1994 is, in my view, relevant and admissible. I do not read her evidence as a direct challenge to any opinion which Mr Wilden may proffer. Rather it is in the nature of contextual evidence which seeks to emphasise the role of a special education psychologist and the extent to which school psychologists are placed to assess adults as opposed to children. Viewed in this light I consider the evidence is admissible.

Objection

[99] The appellant objects to Ms Dunckley's evidence on two bases. The first is that she is not qualified to give the opinion she does. The second is that her evidence about Mr Wilden should not be permitted as part of the Crown case, but should be adduced as rebuttal evidence if, in fact, Mr Wilden gives evidence for the defence. We will deal with each of these in turn.

Opinion evidence

[100] We agree with the High Court Judge's assessment on this aspect. Ms Dunckley is clearly able to record her observations as to the Robin Bain's apparent demeanour during her telephone conversation with him, and as to the fact that they resolved to meet on Monday 20 June 1994. She is also qualified to express a view about the ability of an educational psychologist to express a view about adult depression.

Rebuttal evidence

[101] We see some force in the defence argument that evidence anticipating Mr Wilden's evidence, and effectively seeking to discredit the evidence before it is given, is problematic. However, there is much strength in Mr Raftery's argument that the Crown is on notice that Mr Wilden is likely to give evidence: indeed the defence has served a hearsay notice under s 22 of the Evidence Act foreshadowing Mr Wilden's evidence. Mr Raftery expressed concern that the Crown may not be permitted to recall rebuttal evidence because, in terms of s 98(3)(b), it should have reasonably foreseen that Mr Wilden would give evidence.

[102] We raised with counsel during the course of the argument the possibility that there be an agreement that Ms Dunckley's evidence during the Crown case would not include her evidence relating to Mr Wilden. But if Mr Wilden gave evidence there would be no defence objection to the Crown recalling Ms Dunckley to give her evidence relating to Mr Wilden. We can see no reason why, in those circumstances, rebuttal evidence would not be permitted, on the basis that s 98(3)(d) would apply: the interests of justice would require the rebuttal evidence to be admitted. Both Mr Raftery and Ms Cull agreed to this course of action. On that basis, we make a finding that Ms Dunckley's evidence in relation to Mr Wilden should be deferred and led as rebuttal evidence if, in fact, Mr Wilden gives evidence for the defence.

[103] We differ from the High court Judge on this issue only to the extent outlined in the previous paragraph.

John Mouat

[104] John Mouat gives evidence concerning a choral workshop at the university a few weeks before 20 June 1994. The appellant was seated directly in front of Mr Mouat. Mr Mouat saw him become agitated. The appellant then suddenly stood up on his chair, turned around and stepped over Mr Mouat in order to go to the back of the room. In doing so, his trailing foot accidentally kicked Mr Mouat in the shoulder, but he simply continued on and sat by himself at the rear of the room. Mr Mouat says that the appellant "rocked back and forth and appeared almost in a trance".

[105] Subsequent to the killings, the appellant told the police that in the months prior to 20 June he had experienced occasions when he was in a trance-like state. That explanation was relevant to the time lapse between the appellant's return to Every Street on 20 June and his making the 111 call some 25 minutes later.

[106] Panckhurst J ruled this evidence admissible: September judgment at [165]. Ms Cull submitted that decision was wrong. We disagree. We think Panckhurst J was correct.

[107] Ms Cull submitted the evidence was irrelevant. We disagree. The appellant's state of mind as revealed by his actions and words in the weeks before the killings is obviously relevant. So too is it relevant to know that he did have a trance-like episode a couple of weeks prior to the killings, given that a similar trance may be an explanation for the appellant's delay in making the 111 call.

[108] Ms Cull further submitted that Mr Mouat's evidence is unacceptable opinion evidence. But it is not. He is merely describing what he saw.

[109] Finally, Ms Cull submitted this was propensity evidence which does not meet the statutory test for such evidence. But in our view it is not propensity evidence as defined in s 40(1) of the Evidence Act. The Crown is not relying on the evidence that the appellant accidentally kicked Mr Mouat in the shoulder as evidence of a violent nature. Rather, the relevance of the incident lies in it shedding some light on the appellant's state of mind a couple of weeks before the killings.

Ms A

[110] Ms A was a university friend of the appellant's. They met in February 1994 when they were in the Shakespeare play, "The Tempest", together. Thereafter the two had regular social contact.

[111] Part of Ms A's evidence includes an account of an intense conversation with the appellant on 14 June. He spoke about his family, his perception of himself, the plan for the family to build a new house, Laniet's ability to see black auras, a trance which he had experienced at a concert, feelings of deja vu and a premonition that something horrible was going to happen. Ms A suggested a need for counselling.

[112] On 22 June, two days after the killings, the appellant phoned Ms A. He asked to see her and another friend, Ms B. Ms A and Ms B went to see the appellant and then went for a walk along the beach. As they were walking, Ms A asked the appellant whether the tragedy was "the something horrible" he had foreseen and told her about the previous week. He said, "yes". He then fell to his knees in apparent anguish.

[113] Some time later in the walk, Ms A asked whether it was his father who had killed the family members. The appellant replied that he was really angry that they had all gone and said he couldn't believe it was his father (who had killed the others), but if it was, "he was going to be really angry with him". The appellant denied doing it himself.

[114] Ms A also gives evidence that that night the appellant showed them some scratches across the left side of his chest. The scratches "looked like a graze" and went diagonally from the top left of the chest down to the middle of the chest.

[115] The following day Ms A visited the appellant again. He told her about his plans for the funeral. She asked the appellant why Laniet had been in the house the night of the killings, as Ms A knew Laniet had had her own flat. The appellant replied that Laniet had been going to work the next day and had asked if she could come and stay the night at Every Street. The appellant also told Ms A about the fact

there was a period of about 20 minutes or so that he could not remember on the morning of 20 June.

[116] Finally, at one of the meetings that week, the appellant told Ms A about his intention to have a party after the funeral to celebrate what would have been Arawa's 20th birthday.

[117] Panckhurst J essentially ruled all this evidence admissible. The only qualification to that was in his September judgment:

> [175] In two respects I accept that the witness' [sic] evidence may be objectionable. Both witness statements contain odd expressions of opinion or "impression". These should be avoided. And, in some respects the descriptions of social contacts between the witnesses and the accused contain a level of detail which is of questionable utility. But, I regard these concerns as a responsibility of counsel in leading the evidence in the first instance, and as an aspect of my trial responsibility in the final analysis.

[118] Ms Cull challenged that finding. She submitted the whole of Ms A's evidence was inadmissible on one ground or another. We disagree. We think Panckhurst J was correct in finding the evidence relevant and admissible. We also agree with the qualifications he expressed at [175]. Mr Raftery had no difficulty with either point expressed in that paragraph.

[119] Ms Cull challenged all the evidence on the unreliability ground on the basis that there is a difference between the brief prepared for the second trial and the evidence given at the first trial. We need say no more about that: see the discussion at [26] - [28] above.

[120] She also challenged the pre-killing evidence on the basis that it was simply "demeanour" or "background" evidence. We do not agree. In our view, this evidence is in the same category as Mr Mouat's. The 14 June discussion reveals much about the appellant's state of mind just a week before the killings. The fact he had a premonition of "something horrible" may reveal something about the state of the family relationships.

[121] Ms Cull also suggested this was really inappropriate "rebuttal" evidence being given in advance. We disagree. As already noted, the central issue in this case will be whether the killer was Robin Bain or the appellant. The defence have clearly foreshadowed that they will be calling evidence as to Robin's state of mind and actions prior to the killings. Clearly such evidence will be relevant, and, for the same reason, evidence about the appellant's state of mind and actions prior to the killings will be relevant. There is no basis for the Crown to hold off calling this evidence until after the defence has closed. We have no doubt that, were the Crown to adopt that course, the defence would object strenuously to rebuttal evidence – and rightly so.

Ms B

[122] Ms B's evidence covers similar ground to Ms A's. She recounts a number of conversations with the appellant in which he outlined matters concerning the family relationships and issues. In early June, she and the appellant attended a ball at Larnach Castle. The appellant wore white dress gloves to the ball. About a week before the killings, the appellant and Ms B attended a concert, during which the appellant experienced a trance.

[123] She also gives evidence of discussions with the appellant in the period 21-23 June, including an account of the walk on the beach.

[124] Panckhurst J treated Ms B's evidence in the same way that he had treated Ms A's evidence.

[125] Ms Cull challenged the admissibility of Ms B's evidence on a number of grounds. If successful, nothing would have been left! First, she challenged all the pre-killing evidence on the basis it was irrelevant. We disagree. It is relevant for the same reasons Mr Mouat's and Ms A's evidence is relevant: Ms B's conversations with the appellant reveal much about family relationships and the appellant's state of mind leading up to 20 June. We agree with Panckhurst J that the descriptions "contain a level of detail which is of questionable utility", but that will be a matter for the trial Judge.

[126] Ms Cull also challenged the relevance of the conversations Ms B had had with the accused in the week after the killings on the ground of irrelevance. Clearly, what he said to friends in that period about what had happened is highly relevant.

[127] Ms Cull again objected to much of the evidence on the unreliability ground. We need say no more about that: see the discussion at [26] - [28] above.

[128] She also challenged some of the post-killing statements made by the appellant on the *Halligan* ground. Again, we need say no more about that: see the discussion at [68] - [74] above.

[129] Finally, she submitted that some evidence concerning a tattoo should be ruled inadmissible on the ground that it was inappropriate propensity evidence. According to Ms B, on 23 June, the appellant told Ms B he had lied to her about something and that was whether he had a tattoo. She had apparently asked him the previous month whether he had any tattoos and he had said he had not. In fact, he did have a tattoo. The appellant told Ms B he had had it done a year and a half ago after Sasha, his pet, had died. He said he had been walking past a tattoo shop in South Dunedin while he was feeling depressed after his pet's death and had gone in and had it done. Ms Cull complained that this evidence was being called to show the appellant had a propensity to lie. Mr Raftery submitted that that was not the point of the evidence at all. Rather, the point of the evidence lay in the appellant's assertion that he had been feeling depressed a year and a half before. On this basis, the evidence is admissible, though probably it does not take the Crown case very far. As Mr Raftery rightly submits, however, that is the nature of a case built on circumstantial evidence: each piece on its own may be of minor significance, but the case takes shape from the pattern built up by the pieces of circumstantial evidence considered together.

[130] It may be that the Crown can think of a way of getting in the evidence about the tattoo and the reasons the appellant gave for getting it without referring to the fact the appellant had lied originally about whether he had any tattoos. Whether that is possible is not something we really discussed with counsel. We invite counsel to confer on that to see whether there is a way in which the crucial evidence can be led

without needing to refer to the lie. Of course, it goes without saying that Ms B must not be asked to give untruthful evidence so as to avoid a reference to the lie.

[131] Subject to the possible tweaking we have just outlined, we agree with Panckhurst J's ruling and with his approach to this evidence.

Bain/Cullen family members

[132] The Crown proposes to call five family members. They are Robin Bain's brother, Michael Bain, Margaret (Cullen) Bain's sisters, Janis Clark and Valerie Boyd, and their husbands, Robert Clark and John Boyd.

[133] Panckhurst J recorded that Ms Cull had challenged these witnesses' evidence on a number of grounds, "being that the evidence was variously irrelevant, non-probative, inadmissible opinion, unreliable and in the nature of inadmissible propensity evidence": September judgment at [177]. He also recorded that Ms Cull had challenged some of the post-killing statements made by the appellant on the *Halligan* ground.

[134] On the whole, the Judge ruled the evidence admissible. He did, however, order that the Crown should provide revised witness statements. So far as Michael Bain's statement was concerned, he considered its description of Robin Bain's character "unnecessarily fulsome": at [181]. So far as the Clarks' evidence and the Boyds' evidence were concerned, the Judge noted Mr Raftery's concession that some parts of their evidence should not be adduced in chief and other parts needed "truncation": at [182].

[135] The Judge was also concerned about "some question and answer evidence" with the appellant in Paparua Prison: at [183]. He ruled this evidence inadmissible on the grounds that it infringed the *Halligan* principle: at [181] and [183]. There is some confusion in the judgment as to which visits the judge was referring to and whose evidence: Michael Bain's or Mr Boyd's? We think it clear what the Judge had in mind even if not accurately expressed. He had in mind the conversations Michael Bain and Mr Boyd had with the appellant on a visit they both made to

Paparua Prison in January 1996. He was also concerned about the admissibility of a conversation Michael Bain had had with the appellant on a later visit in March 1997. We think it clear, in context, that the Judge intended to rule inadmissible any evidence relating to either of those conversations. Although the Crown has not cross-appealed those rulings, we confirm them. For the sake of removing any ambiguity, we restate the ruling: evidence relating to conversations between Michael Bain, Mr Boyd, and the appellant in Paparua Prison in January 1996 and evidence relating to conversations between Michael Bain and the appellant in Paparua Prison in March 1997 is inadmissible. Both of the new witness statements for Michael Bain and Mr Boyd still contain references to these inadmissible conversations; they need amendment.

[136] Ms Cull before us continued to challenge the family members' evidence on the grounds advanced before Panckhurst J. We need say nothing further about the unreliability ground. Nor do we consider the evidence to be propensity evidence under s 40(1) of the Evidence Act. As well, what we have previously said about the relevance of evidence regarding the family relationships and the apparent states of mind of Robin Bain and the appellant in the period prior to the killings applies here and need not be repeated.

[137] There is really only one concern Ms Cull mentioned which requires specific comment. She described "the most objectionable element in these briefs of witnesses" as being "the inadmissible, irrelevant opinions of the way David Bain should have been reacting or was reacting" in the immediate aftermath of the killings. There is a difference between an opinion as to the way the appellant should have been reacting and an opinion as to how he was reacting. As to the former, we agree it would be irrelevant for family members to express opinions as to how the appellant "should have been reacting". So far as we can see, however, there are no opinions of that sort in the revised witness statements. How he was reacting is relevant, however.

[138] The witness statements, perhaps inevitably, continue to express opinions of the kind described in s 24 of the Evidence Act. That section reads as follows:

> A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

[139] Let us give an example of that. Michael Bain meets the appellant for the first time after the killings, on 23 June, at the Clarks' home. He says of the appellant:

> He seemed collected and relaxed, and seemed to be enjoying the hospitality of the Clark family as though he was there on a routine visit and that nothing untoward had happened.

[140] It is very difficult for the average witness to put into words what it was that led him to conclude that another person was "collected and relaxed". Obviously, if the witness can recollect things that were said or things he observed which led to his drawing the inference that the other was "collected and relaxed", so much the better. But it may well be, especially after this time, that it is unrealistic to expect any witness to have that level of detailed recall. At the same time, the witness may be quite firm in his recollection that his overall impression was that the other was "collected and relaxed". This is the sort of situation s 24 is intended to cope with. We have much greater reservations, however, about the latter part of the statement set out in the previous paragraph. We do not consider Michael Bain should express a view that the appellant "seemed to be enjoying the hospitality of the Clark family as though he was there on a routine visit"; if that sort of statement is to be made, it must be based on what the appellant did or said which caused him to think that. And, of course, if Michael Bain can recall what led him to draw that inference, then the observed facts and conversations can stand on their own, for the jury to make of them what they will.

[141] All of this is fairly elementary. We do not propose to go through the witness statements, line by line, indicating what is and is not appropriate s 24 opinion evidence. This will be a matter for management at the trial. It is a mistake to treat these witness statements as if they are the evidence, word for word, as it will be given. To an extent, experienced counsel must be trusted, and in any event, the trial Judge is there to ensure that lines are not crossed.

Billie and Wayne Marsh

[142] Billie and Wayne Marsh were the Bains' neighbours from the time the family returned from Papua New Guinea. They had occasional contact with Margaret and Robin Bain. They had some contact with the appellant, largely when he was working outside in the garden. Arawa babysat the Marsh children occasionally. The Marshs had less contact with Laniet and Stephen.

[143] The Marshs did not give evidence at the first trial. At the new trial, they propose to give evidence of their impressions of the Bain family. In addition, they will give evidence about a specific "incident" on 18 June, less than 48 hours before the killings. On that occasion, the Marshs saw Robin Bain, the appellant, and Stephen fixing the spouting on the Bains' house. From what they saw, the Marshs drew an inference that there was tension among the three male members of the household.

[144] Panckhurst J described the Marshs' witness statements as "over-briefed": September judgment at [135]. He noted that Mr Raftery had made "significant deletions to them". He thought "the metes and bounds of the evidence" would need to be policed at trial: at [135]. Apart from that, however, he considered the evidence to be relevant and admissible.

[145] Mr Raftery has now produced the new witness statements. They have been slimmed down. But Ms Cull contends they still contain irrelevant evidence, inadmissible opinion evidence, and inadmissible propensity evidence.

[146] We do not need to discuss this in any detail, as the thrust of Ms Cull's submission is the same as that she advanced with respect to the other "family relationship" evidence we have already discussed. In general, we, like Panckhurst J, consider such evidence to be relevant. Clearly the Marshs, like other witnesses, should, where possible, restrict their evidence to what they have seen or heard; only where the criteria of s 24 are satisfied should they use "opinion" language.

[147] Ms Cull's primary concern was evidence of "tension between the male members of the family" on 18 June. She submitted this was inadmissible opinion evidence. She further submitted it was evidence of propensity, "in that it is

purporting to show the appellant and other male members of the family, acting in a particular way and with a particular state of mind towards each other". Yet, she said, it did not comply with the test for propensity evidence.

[148] There is something in Ms Cull's complaint. We note, however, that the new witness statements are much improved. Evidence as to the spouting incident is relevant, but the Marshs should restrict themselves to what they observed and heard. They should not refer to detecting "tension". Rather, they should describe in words simply what they observed. There is a real risk in this particular case, we think, that the Marshs may have drawn a wrong inference about the family dynamics from their observations.

[149] We should make clear, however, that we do not accept this is propensity evidence under s 40(1). Rather, it is simply evidence describing the general family relationships as observed by the family's neighbours. That is relevant evidence under s 7. It is not propensity evidence and does not have to meet the criteria for such evidence set out in ss 41-43.

[150] We have real doubt as to whether Mrs Marsh's evidence adds anything, and indeed Mr Raftery indicated she may end up not being called. If the Crown does decide to call her, the trial Judge will need to consider whether the evidence should be excluded under s 8 on the basis that its admission will needlessly prolong the trial. Such an assessment is best made in the context of the trial itself.

Ms C

[151] Ms C was a friend of Laniet and Arawa Bain. Through Laniet, she also met the appellant and other members of the Bain family. She describes the very close relationship between Laniet and the appellant.

[152] During 1993, she noticed a change in Laniet's relationship with her. The change was so marked that Ms C asked Laniet if she was in some sort of trouble. Laniet replied that "she did have some things going on" but she would not say what.

Laniet also told Ms C that "all her relationships were flawed" and that the appellant "broke all her relationships up".

[153] Panckhurst J held this evidence admissible. He said in the September judgment:

> [157] …The accused and Laniet's relationship is a material issue in this case, as is the relationship of Laniet and her father. I am about to consider evidence of Laniet saying that David had called a family meeting at Every Street on the evening of 19 June. Ms [C]'s more general evidence supplies context and forms part of the necessary background against which to consider the more specific and proximate evidence concerning the 19 June meeting.

[154] Ms Cull challenges the Judge's ruling. First, she submitted the evidence was unreliable on the ground that Ms C had not given evidence at the first trial. Clearly the evidence cannot be ruled inadmissible on that ground: we say no more about it.

[155] Secondly, she complained that Ms C's evidence "that the appellant broke all of Laniet's relationships up and that Laniet was in some sort of trouble" is speculative and contains implied assertions of the appellant's guilt. We disagree. Ms C is simply reporting what she said to Laniet and what Laniet replied. What Laniet said is relevant evidence as to the relationship between the appellant and her. It provides important background context for any evaluation as to the likelihood of the appellant having killed Laniet.

[156] Finally, Ms Cull submits this evidence tends to imply there was an inappropriate sexual relationship between Laniet and the appellant. Mr Raftery has confirmed that this is not part of the Crown's case. The relationship between the appellant and Laniet was clearly, based on Ms C's evidence, somewhat unusual: Laniet obviously felt very close to the appellant, but also in some way annoyed with him for ruining relationships she formed. It will be for the jury to make of this evidence what they will. It is clearly relevant. We dispute that this evidence "contains implied assertions of the appellant's guilt". Ms C herself says nothing to indicate her opinion on the topic of the appellant's guilt; she merely describes what the appellant's relationship was with Laniet, as she perceived it, based on what Laniet told her.

[157] We agree with Panckhurst J's conclusion on this evidence.

The appellant's police statement of 24 June 1994

[158] On 24 June 1994, the appellant gave his fourth statement to the police. He had given three statements previously – one on 20 June and a further two on 21 June. Ms Cull submits the statement should be ruled inadmissible on a number of grounds. Panckhurst J disagreed with a similar submission put to him, although he did rule inadmissible one question and answer and also ruled inadmissible five further questions which Detective Sergeant Croudis wanted the appellant to answer at the end of the interview, but which he declined to answer: the November judgment at [91] – [95]. The Crown has not cross-appealed against this ruling; we therefore do not concern ourselves with what has been ruled inadmissible.

[159] Two issues arise under this head. The first is whether the Judge was right to rule that the appellant, at the time of making the 24 June statement, was not detained for the purpose of s 23 of the NZBORA. Ms Cull submitted the appellant was detained, which meant, she said, he should have been given his s 23 rights but was not. For reasons we shall give, we think that the appellant was not detained and the s 23 rights were not breached.

[160] The second issue is whether the Judge was right not to find a breach of the Judges' Rules. Ms Cull originally pitched her submission on the basis that the *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, promulgated in 2007, applied. But that Practice Note is clear on its face that it applies only to police questioning taking place on or after 1 August 2007: see *R v Tye* [2008] 1 NZLR 214 at [19]. Questioning prior to that date is to be assessed according to the Judges' Rules which the Practice Note replaced. Ms Cull, on *Tye* being pointed out to her, accepted that and submitted the questioning was nonetheless improper, rules 7 and 9 of the Judges' Rules having been breached. Panckhurst J had considered the questioning fair, save in the respect set out at [158] above.

[161] We shall consider these issues in turn.

Was there a breach of s 23 of the NZBORA prior to or during the 24 June interview?

[162] The background to the 24 June interview and the events of 24 June itself are clearly set out in Panckhurst J's November judgment:

> [62] On 20 June, and subsequently, Detective Sergeant Dunne interviewed the accused concerning the death of his family. On Friday, 24 June the detective sergeant, on account of personal reasons, could not conduct a further interview.
>
> [63] On the afternoon of 20 June a detailed written statement was obtained by him. It covered the family background, movements of family members on the Sunday night and the accused's account of what occurred the next morning. Detective Lowden was present at the interview.
>
> [64] On the afternoon of 21 June Detective Sergeant Dunne obtained a further statement which covered similar ground, but also included questions obviously prompted by information conveyed to the officer by those who were conducting a detailed scene examination.
>
> [65] That same evening Detective Sergeant Dunne returned to the home of Bob and Jan Clark and spoke again to the accused. He found the accused to be in a distressed state. This was in contrast to his manner at their previous discussions. The conversation included reference to three possibilities, namely that the deaths were caused by a third party, Robin Bain or the accused. The detective sergeant recorded aspects of the discussion in his notebook.
>
> [66] On Friday, 24 June Detective Lowden phoned Bob Clark and asked whether he could bring his nephew into the police station. This was agreed to and they arrived there at about 10.31 am. Mr Clark went with Detective Senior Sergeant James Doyle to an office. They had coffee and in the course of conversation Mr Clark was told that the accused would be arrested for the murders. At the same time Detective Lowden and Detective Sergeant Croudis were speaking to the accused in an interview room.
>
> [67] The interview and events which followed can be conveniently summarised as follows:
>
> 10.38 am - Detective Sergeant Croudis gave the accused a short caution and advice of his right to consult and instruct a lawyer without delay. Five questions were then asked, which were recorded by Detective Lowden, including whether the accused would prefer a video-taped interview.
>
> 10.43 am - The short caution and right to consult a solicitor were repeated. A written statement was commenced, with Detective Sergeant Croudis and Detective Lowden recording the questions and answers (Exhibit 586)[.]
>
> At an unrecorded time – Final 10 questions asked by Detective Lowden and recorded by Detective Sergeant Croudis[.]

11.20 am - The accused requested to have a solicitor present and the interview ceased. Detective Lowden left the interview room to speak to Mr Clark.

11.30 am - Mr Clark entered the interview room and confirmed that the accused wanted him to contact a lawyer.

11.31 am - Mr Clark left the room to contact Mr Guest.

11.33 am - Mr Clark returned to the interview room accompanied by Detective Senior Sergeant Doyle who informed the accused that Mr Guest was at court but that he would go and speak to him. The interviewing detectives, Mr Clark and the accused remained in the interview room, during which time Detective Sergeant Croudis said that David Bain's position had changed somewhat.

11.43 am - The detectives left the interview room leaving the accused and Mr Clark alone.

11.45 am - Detective Senior Sergeant Doyle brought Mr Guest to the interview room where, in the presence of the interviewing detectives, introductions were made and the officers left the room leaving Messrs Guest, Bain and Clark in private.

12.21 pm - Mr Guest requested copies of the previous statements made by the accused.

12.35 pm - Mr Guest advised the interviewing detectives that no further questions were to be asked. Detective Sergeant Croudis responded that he had some further questions and that he intended to ask them. Mr Guest said he wished to speak to a more senior police officer and that if further questions were put he and his client would leave the police station. Detective Sergeant Croudis indicated there were only a few matters to be covered and Mr Guest suggested the questions be reduced to writing for his consideration.

12.41 pm - A handwritten list of five intended questions was provided to Mr Guest.

12.47 pm - After consulting with the accused Mr Guest advised the interviewing detectives that the further questions would not be answered. At this point he was supplied with copies of the previous written statements.

12.49 pm - The handwritten record of the Friday interview was read back to the accused.

1.06 pm - The accused signed the statement subject to an endorsement "It is a fair record of the conversation but some questions had more of a preamble. But the answers are fairly recorded".

1.35 pm - The accused was requested to submit to a medical examination, but he declined to do so.

1.40 pm - The accused was told he was under arrest.

1.46 pm - The accused was taken to the watchhouse and formally charged and cautioned.

[163] In order to determine whether, on the basis of those facts, the appellant was detained at 1.40 pm (as the Crown contends) or not later than 10.38 am (as Ms Cull contends) one needs to consider the controlling law, namely s 23 of the NZBORA:

> (1) Everyone who is arrested or who is detained under any enactment—
>
> (a) Shall be informed at the time of the arrest or detention of the reason for it; and
>
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
>
> (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
>
> (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
>
> …
>
> (4) Everyone who is—
>
> (a) Arrested; or
>
> (b) Detained under any enactment—
>
> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

[164] "Detention" under that section has been the subject of appellate amplification. It has been described as an objective/subjective test, see *R v BGN* CA271/04 4 August 2004:

> [19] Whether there is a detention in the context of police interviews of suspects is to be determined on the objective/subjective test proposed by Blanchard J in *R v M* [1995] 1 NZLR 242 at 245 and adopted by this Court in *Everett v Attorney-General* [2002] 1 NZLR 82 at para [7] and in *R v Koops* (2002) 19 CRNZ 309 at para [14]. On this basis, the appellant was arbitrarily detained if he believed reasonably, as a result of police action, that he was not free to leave.

[165] Like Panckhurst J, we do not think the police had detained the appellant prior to the interview. They had not arrested him. They had not gone out to where he was living and insisted he come to the station: on the contrary, they had merely invited him to come in, to which he had agreed. He was not eventually arrested until some two hours after he had asked to speak to Mr Guest.

[166] We do not overlook other evidence to which Panckhurst J referred:

> [69] The cross-examination of Detective Sergeant Croudis revealed that on Thursday, 23 June the two senior officers involved in the investigation, Detective Chief Inspector Robinson and Detective Senior Sergeant Doyle, had considered and resolved that there was a prima facie case against the accused. At another point (p 18 of the transcript) he did not demur in relation to the proposition that the interview was conducted "in anticipation of charging him that day". There is also further evidence of the police mindset in that Detective Senior Sergeant Doyle spoke of an arrest when talking to Mr Clark while the interview was underway.

[167] Taking all this evidence together, we consider the position best summed up as follows. The police regarded the appellant, prior to the interview, as the prime suspect against whom they had a prima facie case. It was likely that a decision would be made to arrest him on 24 June. But there remained the possibility that the appellant might persuade them he was not involved or, alternatively, that further investigation was required before an arrest could be effected.

[168] There is no evidence to support the view that the appellant remained at the station answering questions because he believed he was not free to leave. Although it is difficult to assess the appellant's subjective view, given that he chose not to give evidence on this application, we note that at the first trial he had said his purpose in going to the 24 June interview was an attempt "to answer the police's questions to get things cleaned up". He accepted then that he knew he did not have to answer questions. Once he detected the tone of the interview changing, he decided to exercise his right to a lawyer and thereafter not to answer further questions. Indeed, his lawyer stated that they would both leave the police station if any further questions were asked. All of this tends to indicate that he realised his participation was voluntary and that he thought he was free to leave.

[169] Our conclusion, like Panckhurst J's, is, therefore, that prior to his arrest at 1.40 pm the appellant did not have a reasonably held belief, induced by police conduct, that he was not free to leave. It follows his s 23 rights were not triggered at the start of the interview or at any time until he was arrested.

[170] We may add that, even if we had not come to that view, the practical outcome would have been no different. That is because the appellant was in any event effectively given his s 23 rights at the start of the interview when he was advised of his right to consult a lawyer without delay. Ms Cull identified two respects in which she submitted he had not been given his rights:

(a) he was not told of his right to consult a lawyer in private; and

(b) he was not told at the time of his detention of the reason for it.

[171] As to (a), it is to be noted that s 23(1)(b) does not in terms require the detaining officer to inform the detainee of a right to consult in private, even though the detained person does have a right to private consultation and instruction. Further, as the case law stood in 1994, it was not necessary (although often desirable) to inform the detained person of the right to consult in private: see *R v Mallinson* [1993] 1 NZLR 528 (CA), *Keni v Police* (1993) 10 CRNZ 623 (CA), *Police v Kohler* [1993] 3 NZLR 129 (CA), and *R v Piper* [1995] 3 NZLR 540 (CA).

[172] In any event, the appellant has not said that he was labouring under a misapprehension that, if he consulted with a lawyer, it would be in the presence of the police. Indeed, when later he did request a lawyer, he enjoyed access to that legal advice in private.

[173] As to (b), although the appellant was not told of the reason for his detention (for the reason that the police officers concerned, Detective Sergeant Croudis and Detective Lowder, did not consider they were detaining him), he can have been under no misapprehension concerning it. He was the sole survivor of his family who had been killed earlier in the week. He had been found at the scene, along with the murder weapon. He had been subjected to detailed questioning over the past three

days. On 22 June, he and Detective Dunne had discussed the possibilities of who had killed the family. Three possibilities were canvassed. They discounted someone from outside, leaving the remaining two options as Robin Bain or the appellant himself. The appellant was well aware of his jeopardy and the extent and nature of it. Again, it is noteworthy there is no evidence from the appellant to the contrary. In these circumstances, any failure to advise expressly of the reason for the detention (if there was one) would have been inconsequential and would not have led to the evidence being excluded: see *R v Robinson* CA 16/97 12 May 1997.

[174] Ms Cull also submitted that s 23(2) of the NZBORA was breached, as there was a three hour delay from when the police began interviewing the appellant until when he was charged. Section 23(2) provides the right to an arrested person to be charged or released without delay. However, the right does not extend to those who are detained, unlike the other subsections in s 23. For this reason, s 23(2) was not breached: the appellant was arrested at 1.40 pm, and he was then charged at 1.46 pm.

Did the police officers breach the Judges' Rules?

[175] Ms Cull's next argument was that the interviewing officers had breached rules 7 and 9 of the Judges' Rules. (These rules correspond to the clauses of the 2007 Practice Note on which her written submissions were based. It should be noted that not all the 2007 Practice Note requirements are in identical form to the earlier guidelines.) These breaches meant, she submitted, that the resultant statement should be excluded under one or more of ss 28-30 of the Evidence Act.

Rule 7

[176] Rule 7 read as follows:

> A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

[177] Panckhurst J (in his November judgment) said with reference to the submission that this rule had been breached:

> [85] Exhibit 586 indicates that about 35 questions were asked before the interview was suspended when the accused requested the presence of a solicitor. In my view none of the questions involved cross-examination of the accused. Perhaps the question which comes closest to cross-examination is one asked by Detective Sergeant Croudis which began "If your previous statements to DS Dunne are truthful, then there should be no reason for that blood to be on your shirt …". Perhaps this bordered on cross-examination, but, if so, there was in my view nothing oppressive, overbearing or unfair about it: *R v Rogers* [1979] 1 NZLR 307 (CA) and *R v Dally* [1990] 2 NZLR 184 (HC).

[178] In that latter case, Eichelbaum CJ had said (at 188):

> In considering whether particular passages of questioning amount to cross-examination I bear in mind that this can be a matter of degree, and that the Court has to keep in mind the desirability of not handicapping the police unreasonably in their inquiries, to the extent that this is consistent with proper regard for the liberty of the subject. For purposes of the Judges' Rules, a definition of cross-examination often quoted is that of McGregor J in *R v Weaver and Hammon* [1956] NZLR 590, 591: the concept "that certain facts are not accepted and an attempt is being made either to whittle down or to differentiate the answers already given". Certainly in recent years the view has been taken that questions to a suspect in custody which in a sense may be called cross-examination, may not be objectionable. The important proviso is that they must not be oppressive, overbearing or unfair: see *R v Wilson* [1981] 1 NZLR 316, 324 and *R v Schindler* (CA 96/78, 8 March 1979). Undoubtedly, at various stages the detectives cross-examined the accused in the *R v Weaver and Hammon* sense; they accepted that when it was put to them.

[179] Despite Ms Cull's submissions, we are satisfied the Judge was right in the conclusion he reached. The questions did not amount to "cross-examination" as that term is understood in the context of rule 7. The interview as a whole was not "oppressive, overbearing or unfair".

Rule 9

[180] Rule 9 read as follows:

> Any statement made in accordance with the above rules should, wherever possible, be taken down in writing and signed by the person making it after it has been read to him or her and he or she has been invited to make any corrections he or she may wish.

[181] Ms Cull submitted that this rule had been breached because the written, signed, transcript was "an incomplete record". This submission was based on two

pieces of evidence. The first was contained in Detective Sergeant Croudis' fifth question, which began: "When we discussed that question earlier, you stated you could not account for between 15-20 minutes…". This, Ms Cull submitted, showed there had been discussion prior to the recording which had not been recorded. The second was the appellant's comment recorded at the end of the written statement:

> It is a fair record of the conversation *but some questions had more of a preamble*. But the answers are fairly recorded. [Emphasis added.]

[182] Of this complaint, Panckhurst J recorded:

> [84] The fifth question asked by Detective Sergeant Croudis began "When we discussed that question earlier you stated you could not account for between 15-20 minutes …". And, when the accused signed the statement he added the caveat "Some questions had more of a preamble". Although the theme that the written statement was an incomplete record which did not capture the full extent of the interview was broached in cross-examination with the interviewing detectives, the matter was not developed to any degree. Nor of course is it apparent to me what the accused meant by the observation that some questions had more of a preamble. While I shall bear this criticism in mind, I do not consider it has been developed in such a way as to demonstrate unfairness or the like.

[183] We have read the cross-examination of the interviewing officers. We consider the Judge's description of it to be entirely accurate. In the absence of any explanation from the appellant, we conclude that all the salient parts of the interview have been recorded and, as the appellant himself certified at the time, the answers have been fairly recorded.

[184] In these circumstances, we consider the appellant has not established any breach of rule 9.

Non-corresponding rules

[185] One of the clauses in the 2007 Practice Note that Ms Cull erroneously relied on was cl 4. This provides:

> Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.

[186] There is no equivalent rule to this clause in the Judges' Rules. However it is possible that this clause would have been encapsulated by the common law discretion to exclude evidence on the ground of unfairness: see *R v Tihi* [1990] 1 NZLR 540 and *R v Beazley* [1987] 2 NZLR 760 (CA). Even accepting the applicability of this ground, we do not consider that the police questioning was unfair.

[187] Ms Cull's submission on this ground this was that two propositions deriving from forensic evidence were put to the appellant without being fairly explained. The first proposition put to the appellant during questioning was that the appellant's fingerprints were found in blood on a firearm. Ms Cull objected to this on the basis that the appellant was not told that there was no evidence to prove whether the blood was from a human; whether the blood was from the murders; or where the fingerprints were found on the firearm. She also suggested that there had been no proper forensic testing of the blood. The second contested proposition put to the appellant was that a blood-stained fingerprint was found on the washing machine. It is submitted that this was unfair because what was found was in fact a palm print and it could not be proved to be blood.

[188] These propositions were a fair representation of the information the police had at the time. The police had performed rudimentary forensic tests on the substances, from which it could reasonably be inferred that the substance found was blood. That was the extent of the propositions put to the appellant, and therefore they could not be considered unfair. The exact location of the fingerprint on the firearm and the fact that the print on the washing machine was a palm print rather than a fingerprint are immaterial compared to the substance of the propositions. Importantly, the appellant's responses to these propositions, that he did not touch the firearm or have blood on his hands, are not incriminating. The appellant has not suggested that he would have answered differently if the propositions had been more fully qualified or that the answers provided were wrong.

[189] For these reasons, we do not believe the propositions expressed to the appellant in questioning were unfair.

Conclusion

[190] Like Panckhurst J, we consider no breach of proper police questioning practice has been established. We also do not consider any other ground of unfairness or oppressiveness has been made out. In these circumstances, the Judge was correct in his ruling that the appellant's police statement was essentially admissible. We also note, for what it is worth, that this evidence was tendered at the first trial without challenge.

The "false alibi" evidence

Overview

[191] In issue is the evidence of three witnesses who attended high school with the appellant: Mark Buckley, Gareth Taylor and Greer Taylor. (Gareth and Greer Taylor are now married.) As well, there is a new brief of evidence of Kathleen Mitchell, a witness who saw the appellant on his paper round on the morning of the murders. The primary questions relate to the evidence of Mr Buckley (held by the Judge to be admissible) and Mr Taylor (held by the Judge to be inadmissible). The appellant seeks leave to appeal in relation to Mr Buckley and the Crown seeks leave to appeal in relation to Mr Taylor.

[192] The Crown wishes to lead evidence to the effect that in 1989 or more probably in 1990, the appellant (while still at school) told Mark Buckley, his then school friend, of his sexual interest in a young female jogger and how he could commit a sexual offence (presumably rape) against her and use his paper round to get away with it. Mr Buckley's evidence is that the appellant proposed to free up time for this offending by arriving at the usual times at houses where he would normally see the residents (thus suggesting a normal delivery round) but delivering papers at other houses much earlier than usual. According to Mr Buckley, the appellant had a notebook which seemed to contain details of how he could use the paper round in this way, although Mr Buckley did not actually see what was in the

notebook. Mr Buckley says that this discussion started on their way home from school and carried on in the appellant's bedroom.

[193] Mr Buckley's proposed evidence thus suggests that the appellant, while at school, had sexual offending against a female jogger on his mind. In this respect it is supported by the proposed evidence of Mr Taylor and more remotely by that of Mrs Taylor. Mr Taylor's evidence is of a similar discussion in which the appellant mentioned the possibility of sexually offending against a female jogger. A number of years later, but before the murders, Mr Taylor, by way of a warning, told his wife about this conversation, as she was at the time studying music with the appellant at university. Mrs Taylor's evidence primarily relates to that conversation with her husband. We should make it clear that Messrs Buckley and Taylor did not attribute to the appellant the word "rape" and Mr Buckley did not attribute to the appellant the word "alibi". We, however, use both words for ease of reference because they seem to capture the essence of what was proposed (at least on the challenged evidence).

[194] At the time of the first trial, the police knew from Mr and Mrs Taylor that the appellant had apparently considered the rape of a young woman in or around 1990. But Mr and Mrs Taylor had not known of the proposed use of the paper round as an alibi and had accordingly not told the police of this. The police did not interview Mr Buckley until after the Privy Council judgment.

[195] According to the Crown, the evidence of Mr Buckley ties in with evidence of the appellant's behaviour during his paper round on the morning of 20 June 1994. Mrs Mitchell's new brief of evidence is to the effect that the appellant took unusual measures to ensure that she noticed him on the paper round. This evidence goes further than her evidence at the first trial which, on the whole, suggested that the appellant's conduct on that morning was not particularly remarkable. In his first detailed account of events to the police (on 20 June 1994) the appellant mentioned Mrs Mitchell and an associated dog barking incident and in that sense alerted the police to her existence. Mrs Mitchell died in August last year and the Crown will wish to rely at trial on her revised brief of evidence. As well, there is evidence from two other witnesses of getting the paper earlier than usual (by around 10 minutes in each case) that morning.

Propensity evidence?

[196] It is open to question whether the proposed evidence of Mr Buckley is properly to be regarded as propensity evidence for the purposes of s 40 of the Evidence Act. Panckhurst J thought not, but we are not so sure. Nothing, however, turns on this point in the present case because of the outcome of our analysis of the balancing of the probative value and prejudicial impact of the evidence.

The approach of the Judge

[197] In his September judgment, Panckhurst J provisionally ruled in favour of the admissibility of Mark Buckley's evidence:

> [192] Subject to what I am about to say, the evidence has considerable probative value. The accused's version of the events of 20 June does raise the paper round as an alibi of sorts. In effect he told the police "while I was absent from the house five members of my family were killed". In addition, the evidence of Kathleen Mitchell … is relevant to this issue. If her account is accepted that the accused on 20 June acted so as to ensure that he was noticed, it would invite attention to Mark Buckley's evidence of the school boy conversation.
>
> [193] The evidence from the two sources, in combination, is of high probative value. Particularly if the sexual dimension of the conversation was downplayed, I am satisfied that the probative value of the evidence would outweigh any unfairly prejudicial effect.

[198] The Judge returned to the issue in his November judgment after having heard Mr Buckley at a voir dire. Having analysed his evidence in some detail, he concluded:

> [10] Obviously, it is not the Crown case that the killings occurred during the time taken to complete the paper round. Instead that was the effect of the accused's explanation to the police. His account conveyed that nothing untoward had occurred in the house prior to his leaving to complete the paper round. Upon his returning to Every Street he eventually turned on the light in his bedroom, noticed items out of place in his bedroom, made an inspection and found that members of his family were dead. Accordingly, the accused contended that the killings must have occurred while he was absent from the house delivering newspapers.
>
> [11] The relevance of Mr Buckley's evidence is that it indicates that about four or five years earlier the accused had it in mind to use his paper round as the means for "getting away with" other criminal behaviour. So

> viewed, the evidence is logically relevant. I do not accept Mr Reed's argument to the contrary.
>
> …
>
> [13] Having now heard Mr Buckley give evidence, I am satisfied that his account of the bedroom conversation is properly admissible. To my mind evidence of the accused's involvement in this conversation (if accepted by the jury) is quite striking, when viewed in the context of the events on 20 June 1994. I referred to this aspect at para [192] of my previous judgment. Kathleen Mitchell, and a number of other Crown witnesses, are to give evidence of sightings of the accused in the course of his paper round. This closely mirrors the thought process which the accused outlined to Mr Buckley in the school boy conversation. In all the circumstances I am satisfied that the evidence is both relevant and of considerable probative value. I am also more assured that the prejudicial effect of the evidence will be able to be managed at trial.

[199] In his September judgment the Judge excluded Mr Taylor's evidence for the following reasons:

> [190] I do not consider that the evidence of Gareth Taylor is admissible. Its probative value is slight. It does not directly support the thesis that the accused had in mind using his paper round as an alibi, if ever required. On the other hand, the evidence could have an unfairly prejudicial effect at trial.

If Mr Taylor's evidence is inadmissible, so too, necessarily, is that of Mrs Taylor. The Crown seeks leave to appeal on this admissibility of Mr Taylor's evidence.

[200] When the Judge gave his ruling, he was not aware that Mrs Mitchell had died in August 2008.

The probative value of the evidence

[201] On the appellant's account of events, Robin Bain must have murdered the other members of his family before the appellant returned from his paper round. Further, it is difficult to see how Robin Bain could have killed the appellant's mother and siblings and committed suicide prior to the appellant leaving without the appellant being aware that something untoward had happened. So the appellant is broadly claiming to be elsewhere when the murders occurred and, at least in that literal and etymological sense, is putting forward his paper round as an alibi. On the Crown view, the jury is entitled to scrutinise the validity of the paper round alibi

with the knowledge that some years before the appellant had proposed using his then paper round as a false alibi.

[202] In assessing the probative value of this line of argument, it is important to recognise that the paper round is not an entirely orthodox alibi. It is common ground that the appellant did do his paper round on the morning of 20 June 1994. It seems reasonably clear (based on the evidence of the paper round manager) that the appellant could not have started the round (in the sense of picking up the papers) much before 5.40 am and he was back at the house at around 6.45 am (give or take 5 minutes). The timing problem in all of this is not so much with the alibi but rather with when the murders (or murders and suicide) occurred. And on the timings, the appellant had ample opportunity to commit the alleged murders either before or after the paper round.

[203] On the Crown reconstruction of events which was primarily relied on at the first trial, the appellant planned the murders to make it look as though Robin Bain killed the appellant's mother and siblings and then committed suicide. This involved the appellant murdering his mother and siblings before the paper round and his father when he got back. It seems likely, however, that at the retrial, the Crown, while not abandoning this as a possible scenario, will be less specific as to the order of events. The Crown case may extend to the theory that all murders may have been committed on the appellant's return from the paper round. On any possible Crown theory of the case (ie assuming that the appellant was the murderer), the appellant must have engaged in some element of planning, as exemplified by the computer message and positioning of the gun near Robin Bain's body. But beyond that, there is not a great deal of hard evidence of the implementation of a plan to use the paper round as an alibi and, in contradistinction, there are a number of indications of disorganised behaviour.

[204] Most relevantly, in his dealings with the police, the appellant was not able to account for what he did between arriving home at around 6.45 am and the 111 phone call at around 7.10 am, given that what he described doing in the period of time can only have taken a few minutes. This narrative gap – which on the Crown case is damaging to the appellant – is not obviously consistent with the implementation of a

preconceived plan to use the paper round as an alibi. Also material to this is his evidence (and statements to the police) as to when he returned home. It will be remembered that Mrs Laney, a witness who worked in a rest home on Every Street, timed his return at 6.45 am: *Bain v R* (2007) 23 CRNZ 71 at [70] (PC). Before trial, that evidence gave the appellant something of an alibi (in the orthodox sense) in relation to when the computer was believed to have been turned on. But interestingly, in his evidence at trial, the appellant did not seek to exploit that alibi and instead adopted (in perhaps a slightly guarded way) what he had told the police, which suggested a time of return of around 6.42 – 6.43 am. We accept that the appellant in this respect was to some extent constrained by his statements to the police. But given that in other respects the appellant in his evidence departed from what he told the police, the fact that he did not try to do so in this respect is, we think, of at least some significance in the present context.

[205] The critical points to come out of all of this are that:

(a) The paper round alibi in relation to what happened at Every Street (assuming that the appellant is the murderer) is not particularly similar to what was allegedly proposed by the appellant in his discussion with Mr Buckley; and

(b) It is not an essential part of the Crown case that the appellant had and implemented a preconceived plan to use the paper round as an alibi.

[206] Against that background, we see the probative value of the evidence as limited and not entirely easy to explain to a jury.

The unfairly prejudicial effect of the evidence

[207] If the jury learn that the appellant, while at school, was apparently planning the rape of a female jogger, there is a risk that the jury will place more weight on the proposed offending than the proposed use of the alibi. Perhaps the prejudicial impact might be lessened by requiring the evidence to be given in terms of a proposed but unspecified crime for which the appellant intended to use his paper

round as an alibi. But if this happens, the jury will be left to speculate as to what the crime was. Further, if Mr Buckley's evidence is reinforced by Mr Taylor's account of what the appellant told him (which is what the Crown seeks), it will be necessary to allow both men to give specific evidence of what the appellant intended (because otherwise the jury will not be able to be sure that the offending the appellant proposed to Mr Buckley was the same as he discussed with Mr Taylor).

[208] The reality is that at whatever level of generality the evidence of Mr Buckley is pitched, it will carry the risk of illegitimately prejudicing the appellant.

Evaluation

[209] We think that it is open to the Crown to call evidence in relation to how the appellant behaved while on the paper run, given its proximity in time to the deaths in Every Street. We are, however, unable to deal with the revised brief of evidence of the late Mrs Mitchell, as the application of the hearsay rules in relation to her has not yet been addressed by the Judge.

[210] On the primary question of the admissibility of the discussions with Mr Buckley and Mr Taylor, we recognise that the proposed evidence has some probative value. This is limited, however, by the differences between the paper round alibi which the appellant allegedly discussed with Mr Buckley and that actually invoked by the appellant in relation to the alleged murders and the reality that the implementation of a plan to use the paper round as a false alibi is not a fundamental element of the Crown case.

[211] On other hand, what will be very obvious to the jury (if it accepts the evidence of Mr Buckley) is that the appellant had contemplated and planned for the rape of a female jogger. The associated potential for illegitimate prejudicial impact is very concrete.

[212] In those circumstances we see the evidence of both of Messrs Buckley and Taylor as inadmissible.

Timing of paper run evidence

[213] The Crown wishes to call evidence from police officers which indicates (at least broadly) the outside parameters of the time it would have taken the appellant to have completed his paper round on the morning of 20 June 1994. On the disputed police evidence, it would take just over an hour to complete the paper round at walking pace and about 39 minutes to do so running. These were the times taken by one police officer to walk the appellant's paper run and by another to complete it at a fast jog. Apart from each officer pausing momentarily at addresses where deliveries were made, neither simulation duplicates precisely what the appellant actually did that morning. On the other hand, the evidence is perfectly consistent with other evidence (already referred to) as to how long the appellant spent on his paper round that morning.

[214] The time the appellant started the paper round is of at least contextual importance. The time he arrived back at the house is more significant, given the evidence as to when computer was turned on. As well, the earlier the appellant arrived, the longer the largely unexplained delay between him finding the bodies and the making of the 111 call.

[215] The time and distance evidence which the Crown wishes to call is of a very standard nature and it will provide some general background information about which the jury might reasonably wish to be informed.

[216] The Judge dealt with this issue in his September judgment:

> [108] Objection is taken to the evidence on the basis it is inadmissible opinion evidence of non experts, irrelevant, unreliable and that its probative value is slight, by comparison to its unfairly prejudicial effect and tendency to needlessly prolong the hearing. In developing these contentions Ms Cull pointed out that two witnesses give evidence concerning the accused's presence in Every Street at or towards the end of his paper round and, absent a witness who saw him start the paper round, "evidence about the time it takes to complete the paper round is not relevant".
>
> [109] I disagree. The time taken by the accused to perform his paper round on 20 June 1994 is an important issue in this case. While the time that he arrived back at Every Street is of particular importance, the period over which he was absent from the house is equally important. It would be remiss

> of the Crown to not provide evidence of timings, against which to assess the accused's evidence at interview concerning this aspect.
>
> [110] The evidence was also criticised as being in the nature of an impermissible reconstruction. I do not accept this contention, nor that the timings are in the nature of opinion evidence. In my experience it is commonplace for evidence of this kind to be given. In *R v Collins* (2001) 160 CCC (3d) 85 (ON CA) at para 20 Charron JA said this:
>
> > A pre-trial experiment can be as simple as driving from one location to another to determine the time it takes to cover the distance in order to substantiate or disprove an alibi, or driving along a particular stretch of road to determine at what point a stop sign becomes visible. The evidence in such cases, provided that it is relevant to an issue in the case, will usually be admitted without argument. It is entirely factual, and its admissibility is only subject to the general principles of relevance, materiality and discretion … In other cases, the pre-trial experiment may be more complex, requiring particular technical or scientific knowledge to perform, and it may also form the basis of expert opinion evidence in the interpretation of the results. In such cases, the experiment evidence, in so far as the observed facts are concerned, will be subject to the usual principles of relevance, materiality and discretion but, in addition, to the extent that it includes inferences from observed facts, the opinion rule will come into play.
>
> [111] This extract has been cited with approval in this country (*R v Jefferies* [1994] 1 NZLR 290 at 304). I also adopt it. To my mind it captures the essence of the issue and the present evidence, in my view, is essentially in the first category. I have already dealt with the relevance and worth of the evidence.

[217] Something seems to have gone wrong with the first sentence of [111]. *Collins* was decided seven years after *Jefferies*, a case which anyway concerned search and seizure – and not time and distance – evidence. Nor can we find any other New Zealand case in which *Collins* has been cited and relied on. Nonetheless we consider that New Zealand practice is in accordance with what was said in *Collins* and that the time and distance evidence which the Crown wishes to call is admissible.

The 111 tape

Overview

[218] The appellant made a 111 call shortly before 7.10 am on 20 June 1994. He was put through to Charles Dempsey, an ambulance officer. The resulting

conversation was recorded and from this recording an audio cassette was taken. This was produced at the trial as "exhibit 1", and we will refer to it as such. The tape was played to the jury. It provided the appellant's first brief account concerning what had occurred on the morning of 20 June 1994. It was also original evidence of the way he was then behaving. In the ordinary course of events, there could be no question that it was admissible.

[219] In August 2003 exhibit 1 was sent to the Police Electronic Crime Laboratory in Wellington. An analyst recorded the conversation from the cassette tape to a computer hard-drive and onto three audio compact discs ("the 2003 compact discs").

[220] After the Privy Council decision, Detective Donald Ward took one of the 2003 compact discs to a Dunedin company, Strawberry Sound, and listened to the recording. In the course of this exercise he and one or more of the Strawberry Sound staff heard what we will refer to as "the disputed sounds". These disputed sounds can be construed (or heard) as a sentence that inculpates the appellant; this is the way that Detective Ward and the staff at Strawberry Sound heard them. But there is a major dispute as to whether they should be so construed. Indeed on one view the disputed sounds may in fact be nothing more than an audible out-breath that has been modified by random movements of the lips and tongue in such a way that it can be heard as deliberate speech. This has resulted in the tape being listened to and examined by a number of experts: Professor Peter French, Mr Philip Harrison, Dr Paul Foulkes and Dr Bronwen Innes.

[221] We, like the Judge, have listened to a recording of the conversation on a compact disc (albeit that we are not sure when this particular copy was created, see below at [238] – [239]). In doing so, we had the advantage (or disadvantage) of knowing that the disputed sounds are there to be heard. With that prior knowledge, the disputed sounds can undoubtedly be heard as an inculpatory sentence. But what is very interesting is that, with the exception of Detective Ward (and/or the staff at Strawberry Sound), no one who has listened to the tape "unprimed" would appear to have heard and construed the disputed sounds in this way.

[222] The defence seek to have the disputed sounds section of exhibit 1 excised for two reasons:

(a) The allegedly doubtful authenticity of exhibit 1 as a whole; and

(b) The potential for prejudice if the Crown relies on the doubtful sounds as part of the case against the appellant.

Authenticity – the admissibility threshold

[223] The Judge approached this issue on the basis that he had a screening role as to authenticity (relying by analogy on s 28(2) of the Evidence Act). In exercising that screening role, he concluded that he should allow exhibit 1 to be played if persuaded on balance (presumably of probabilities) of its authenticity.

[224] In the course of argument before us, the appellant's case seemed to proceed on the basis that the authenticity (or otherwise) of the tape was a preliminary or underlying fact which had to be determined by the Judge. The argument for the appellant was very much that unless the Judge was persuaded beyond reasonable doubt of the tape's authenticity, he should have excluded it.

[225] We have taken the words "preliminary" and "underlying" not from the argument of counsel but rather from three articles by Professor Rosemary Pattenden: "Authenticating 'Things' in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials" (2008) 12 E & P 273, "The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division" [2009] 1 Crim LR 15 and "The Proof Rules of Pre-Verdict Judicial Fact-Finding in Criminal Trials By Jury" (2009) 125 LQR 79. In the last article (at 79), she defines a "preliminary fact" as one that:

(i) must be proved whenever the judge applies an adjectival rule (which is often concerned with the admissibility of evidence); or

(ii) determines whether a discretion arises.

She regards (at 80) an underlying fact as "any empirical fact which the judge must decide because it is reasonably relevant to the exercise of discretion that has arisen".

[226] Under the New Zealand common law evidence rules in relation to preliminary facts, the Crown has been required to prove beyond reasonable doubt the voluntariness of any confession (as to which see *R v McCuin* [1982] 1 NZLR 13 (CA)) and to adduce "reasonable evidence" of the existence of a relevant common purpose, in order to justify the application of the co-conspirators' rule: see *Qiu v R* [2008] 1 NZLR 1 (SC). All other issues (for instance, as to the apprehension of immediate death in the case of a dying declaration) have been required to be established on the balance of probabilities: see *Police v Anderson* [1972] NZLR 233 at 249 (CA), *R v Livingston* [2001] 1 NZLR 167 at [16] (CA) and *R v Smith* CA389/00 22 November 2000. On this last point the approach usually taken in New Zealand authorities has differed from that taken in England and Wales: see *R v Ewing* [1983] 1 QB 1039 (CA) and *R v Minors* [1989] 1 WLR 441 (CA), albeit that confusingly this Court in *R v Sim* [1987] 1 NZLR 356 followed *Ewing* but without reference to *Anderson*.

[227] We see no need to explore further the law as to preliminary (or underlying) facts because we are satisfied that the authenticity of an exhibit is best characterised differently, as what Professor Pattenden calls "a conditional fact" (see 125 LQR at 99 (fn 191)), being a fact on which the relevance of the evidence depends. She regards such a fact as primarily for the jury to determine. Broadly the same approach is taken by Richard Mahoney ("Proving Preliminary Facts" (1993) 15 NZULR 225). He would treat the tape as conditionally admissible subject to the jury being satisfied as to authenticity.

[228] To what, if any, standard, must the jury be satisfied as to an exhibit's authenticity before taking it into account?

[229] On the approach taken by this Court in *R v Thomas* [1972] NZLR 34 at 38, there is no requirement for the jury to be sure of authenticity before taking the tape into account. The beyond reasonable doubt standard does not normally apply to sub-issues (unless the sub-issue, eg authenticity, constitutes an indispensable part of

a chain of reasoning towards an inference of guilt). This point was made by the Privy Council in *Campbell v Hamlet* [2005] 3 All ER 1116:

> [24] … A sufficient number of strong probabilities (or even mere probabilities) can in aggregate amply support a finding of proof beyond reasonable doubt. That, indeed, is how many a criminal case is proved in reliance principally upon circumstantial evidence.

[230] In practice, judges confronted with authenticity challenges have tended, erroneously, to assume that the admissibility of the disputed exhibit turns on the jury being "sure" as to authenticity, a point discussed by Pattenden in (2008) 12 E & P 273 and illustrated by *R v Robson* [1972] 1 WLR 651 at 656, *R v Rowbotham (No 4)* (1977) 2 CR (3d) 244 at [8], and *R v Murphy* [1990] NI 306 at 342 per Kelly LJ. At a practical level, this approach, while technically incorrect, has the advantage of being easy to explain to juries and is unlikely to lead to major problems given that authenticity should usually be able to be established to the criminal standard of proof.

[231] What then is the role of the Judge?

[232] Judges who have taken the view that the jury must be sure of authenticity before taking a disputed exhibit into account have tended to see the judge as having a screening role in terms of being satisfied that there is a "prima facie case of originality" before allowing the exhibit to be produced: see *Robson* at 653. In *Robson,* Shaw J regarded this function as turning on the balance of probabilities test rather than proof beyond reasonable doubt, something which had been left open by Kilner Brown J in *R v Stevenson* [1971] 1 WLR 1 at 3 (Assizes). Broadly to the same effect is *Murphy*, where *Robson* was followed.

[233] Since the formal position (in accordance with *Thomas* and *Campbell v Hamlet*) must be that the criminal standard of proof does not apply to sub-issues (as to the elements of a circumstantial case), it follows that there is no requirement for the Judge to be satisfied beyond reasonable doubt of authenticity before allowing a disputed exhibit to be produced. So, at the very most, a prima face case, of the kind envisaged by Shaw J is required. As a matter of principle, however, it is difficult to see how the Judge can properly, and without trespassing on the role of the jury, go

further than inquire whether there is a reasonable evidential basis for the jury to conclude that the exhibit is authentic.

[234] On this basis, the threshold adopted by the Judge was, if anything, higher than was required.

Authenticity – the evidence

[235] The relevant evidence can be summarised reasonably simply.

[236] The conversation between the appellant and Mr Dempsey was recorded on a system which used continuous 24 hour tapes. The system should have recorded the entire conversation. On the morning of Monday 20 June, Mr Anthony Howard, an officer of St Johns, recorded the conversation onto an Ampex audio cassette tape. "Wednesday 1A" was already written on the cassette case. Mr Howard gave the cassette to his supervisor, Mr McMillan, and it was later picked up by Detective Inglis. It is this tape which became exhibit 1.

[237] Later on 20 June 1994, Detective Tony Arnerich made a copy of exhibit 1. We will refer to this as the Arnerich copy.

[238] In July 2003, exhibit 1 was sent to the Electronic Crime Laboratory where the 2003 compact discs were produced.

[239] As noted, Detective Ward originally heard the disputed sounds on one of the 2003 compact discs. Exhibit 1 was taken to the Electronic Crime Laboratory in October 2007 and the conversation was copied on to more compact discs. We are not sure whether the disc we have played was a 2003 or a 2007 disc (see [221] above). Exhibit 1 was then taken to Auckland in April 2008 for testing (by a defence expert) and later in the same month to London for testing.

[240] The police retain documentary records as to the movements of exhibit 1. The only period of time when exhibit 1 was out of the possession of the police or the court exhibit system was between 16 May 1997 and 16 April 1998 when it was with the Police Complaints Authority. In the High Court, the Crown did not seek to prove

the chain of custody in a particularly formal way. Instead it produced a schedule showing who had possession of exhibit 1 since 20 June 1994 and issued an associated hearsay notice. Given the unparticularised nature of the authenticity challenge in the High Court (see below at [243] - [244]), this is hardly surprising. It seems probable, however, that the Crown will, if necessary, be able establish a proper chain of custody. Further, because the evidence at trial will be more elaborate than what was relied on at the s 344A hearing, we see no reason to engage with challenges made by the appellant to the entitlement of the Crown to rely on its hearsay notice.

[241] There is one anomaly (or possible anomaly) with the tape that we should explain.

[242] Transcripts of exhibit 1 prepared before the trial record the conversation starting with Mr Dempsey saying "St Johns Ambulance, can I help you?" Mr Dempsey has, on a number of occasions, verified transcripts of exhibit 1 which begin in this way. As we understand it, this is how he usually answers calls. But the conversation on exhibit 1 (and on the 2003 compact discs) begins with an incomplete word consisting of the last two syllables of ambulance (ie "bulance"), followed by "Can I help you?" In the evidence he gave to Panckhurst J at the hearing of the s 344A application, Mr Dempsey said that he was sure that the recording he had listened to in order to verify the accuracy of the transcripts began with the words "St Johns Ambulance …".

Authenticity – the challenge in the High Court

[243] It is right to say that counsel for the appellant did not give the Crown much in the way of notice of the specifics of the authenticity challenge which was mounted in the High Court. As to this it is sufficient to set out what the Judge said in his November judgment:

> [39] … Frankly, I am perturbed at the manner in which the authenticity challenge proceeded before me. The grounds of the challenge were not articulated in advance of the hearing on 4 November. The reports from Dr Foulkes dated 15 April 2008 and 15 August 2008 were made available to me on the afternoon of 3 November and to Mr Raftery at the point

> Mr Foulkes was called to give evidence by video link to the United Kingdom. For the first time these revealed that the authenticity challenge was not based upon expert evidence. A foundation was then laid for the cross-examination of Mr Dempsey, in that the experts were asked to confirm that the words "St Johns Amb …" were not on the recordings to which they listened. Finally, the Crown tendered Mr Dempsey for cross-examination and he said he was sure the tape-recording he listened to in 1994 and 2007 did include the additional introductory words, as appeared in the transcript which he was asked to verify.

[244] We agree with this criticism. The s 344A procedure is not intended to provide a forum for trial by ambush. The way in which the authenticity challenge was sprung on both the Crown and the Court meant that there was no adequate opportunity for considered investigation of the significance, if any, of the missing two and half words. We think that the Judge would have been well within his rights if he had simply declined to entertain the argument and had instead left it for determination at trial.

[245] The Judge, however, did consider the authenticity challenge and dismissed it. He regarded the chain of custody question and the associated arguments about whether the Crown could rely on its hearsay notice in relation to the custody schedule as a "distraction". He concluded in his November judgment that providing it was established the tape which Detective Ward gave to Professor French and Mr Harrison was the original "first generation" exhibit 1 which was created by Mr Howard, the uncontradicted evidence of Professor French and Mr Harrison established authenticity. In his December judgment, the Judge, having heard the evidence of Mr Howard, concluded that authenticity was established:

> [4] Mr Howard gave brief evidence. He outlined the steps taken to record the relevant conversation onto the cassette tape and identified Exhibit 1 as the cassette tape he used. The writing upon it he identified as belonging to another employee of St John's. In addition, in re-examination he was shown a hand-written note bearing the words "Tape Copy of 111 Call 20/06/94 0711 65 Every Street" made by him and placed in a plastic sleeve with the tape. This note is no longer inside the Ampex cassette tape cover, but comprises part of Exhibit 1 and is labelled 1.1.
>
> [5] Mr Howard was cross-examined by Ms Cull to the effect that he wound back the 24 hour system to the start of the relevant conversation, accepted her assurance that there was "a 10 second gap before the conversation started …" and agreed that he took special care to record the incoming call "in its entirety". These questions were intended to provide a foundation for the inference that Exhibit 1 could not be the correct Ampex

> cassette tape because the opening words of the conversation "St Johns Amb …" are missing. I disagree.
>
> [6] Mr Howard said he did not know whether there was a 10 second gap on the 24 hour recording before the commencement of the incoming call (since he hadn't listened to the 24 hour tape since 1994). Moreover, even if there was and despite his best intentions, he may have missed the opening words when recording onto the Ampex tape. This deficiency (if it is one) pales into insignificance alongside the balance of his evidence. I am in no doubt that Exhibit 1 is the Ampex cassette tape which he dubbed on 20 June 1994. The content of the tape, the handwriting on the case and the associated handwritten note confirm as much.

[246] Associated with these reasons was the Judge's conclusion that Mr Dempsey had been mistaken when he approved transcripts which started "St John Ambulance".

Authenticity – our evaluation

[247] There are some areas where further investigation is appropriate. An obvious example is the Arnerich tape, which will obviously have to be checked. As well, given the nature of the authenticity challenge, the Crown will be well advised to call the best evidence it can in relation to the chain of custody of exhibit 1, including evidence of the custody arrangements while it was with the Police Complaints Authority.

[248] That said, we see no reason to differ from the assessment of the Judge and with his reasons.

[249] Given that the disputed sounds and the contraction "bulance" are on the 2003 compact discs, any tampering with exhibit 1 must have occurred prior to the creation of the 2003 compact discs. It is difficult to see why anyone would have bothered to interfere with exhibit 1 at that time. The skill and knowledge attributed to the postulated tamperer are quite remarkable. The disputed sounds form part of an audible exhale which happens to be the way in which the appellant later gave some of the telephone numbers. The postulated tamperer would have had to have been a linguistics expert to have thought to add these sounds in this way. He or she would also have had to have been highly skilled technically to manage the insertion in a

way which escaped the notice of Professor French and Mr Harrison who checked exhibit 1 to see if it had been interfered with.

Relevance – probative value and prejudicial effect

[250] The evidence suggested that the disputed sounds give rise to two issues:

(a) Whether the disputed sounds represent speech; and

(b) If so, what was said.

[251] We see the first of these as more important. We say this because we think it reasonably obvious that the disputed sounds can be heard as the inculpatory sentence which the Crown wishes to have before the jury.

[252] On the first issue, the competing hypotheses are that:

(a) The disputed sounds consist of an audible out-breath which has been modified by random movements of the tongue and lips to produce what seems to be speech; or

(b) The disputed sounds are properly characterised as speech.

These competing hypotheses cannot be resolved by scientific analysis and both must be regarded as open.

[253] The expert evidence on exhibit 1 was reasonably narrow. It focussed primarily on the disputed sounds themselves albeit that the evidence shows that a little later in the discussion the appellant used the same exhalation mechanism to produce sounds (being part of the telephone number) that obviously were in the nature of speech. None of the experts appears to have reflected on the likelihood (or otherwise) of random movements of tongue and lips operating so as to produce sounds corresponding to a sentence which makes reasonable contextual sense (which the disputed sounds do if construed as the inculpatory sentence).

[254] The experts were quite right to point to the risk that jurors might hear what they expect to hear. But when some of the experts expressed the view that it would be dangerous to allow interpretations of the disputed sounds to go to the jury, they strayed from their proper roles. We very much prefer the approach taken by Professor French in his evidence. There are two relevant passages. In the first he noted the limitations of a purely scientific approach to the issues:

> q. So the experts can't agree what they [the disputed words] are and you are highly trained to evaluate this aren't you.
>
> a. We are not actually trained to evaluate intensely and it is what this comes down to. Whether or not this is exhaled lung air with random but unfortunately sequence[d] movements of the tongue and lips or whether there is some intention there, whether the person is talking. I don't think any speech oratist can leap backwards from the form of the things that they hear to what the intention is behind this. So no, I wouldn't agree that we are highly trained to determine breathing or whether it is speech.

In the second he dealt with whether the disputed sounds should be played to the jury in this way:

> I suppose there are two views on it. Ultimately it is for His Honour but properly advised by experts and my own feeling on it is that if a jury were simply to be warned that they would at certain points in this recording hear speech produced on breath which they do, in fact they hear the end of the telephone number produced on breaths. On other points in the recording you simply hear audible breathing and they should be careful in interpreting anything that is in the transcript, one way or the other, I would see no basis for removing it.

[255] In short, we think that it would be open to the jury to conclude that the disputed sounds should be construed as speech for two reasons:

(a) This hypothesis is open on the expert evidence focussing on the sounds themselves and is consistent with the way in which the appellant later gave his telephone number (when doing this, he initially expressed the numbers by the same form of exhalation of air: it was clear that this was deliberate speech, because the ambulance officer asked him to repeat the numbers and he confirmed those which had been given in the course of the exhalation); and

(b) The jury may regard as implausible the theory that these sounds, which can be construed as a sentence making contextual sense, were created by random movements of the tongue and lips.

On this basis we see the evidence as plainly relevant.

[256] As to prejudice, the primary risk is that the jury may wrongly construe the disputed sounds as an inculpatory sentence – in other words, may simply get the facts wrong. But risks of this sort – that the trier of fact may get the facts wrong – are an inescapable part of the trial process and do not in themselves usually represent the sort of prejudicial effect which warrants evidence exclusion. It is, of course, the responsibility of the judge to guard against any obvious risk (and particularly one that will be more apparent to a professional judge than lay jurors) of misunderstanding. In this case, there is an obvious risk, namely suggestibility, which must be addressed. But providing this happens, we see no reason why the evidence should not be admitted.

Mechanics

[257] As the Judge noted, it is well settled that the interpretation of an item of real evidence, such as a tape-recording, is a jury question: see for example *R v Wickramasinghe* (1992) 8 CRNZ 478 at 481 (CA) and *R v Taylor* [1993] 1 NZLR 647 at 650 – 651 (CA). The Judge took the view, with which we agree, that a transcript is not required, given the short length of the conversation (about a minute).

[258] We think it would be best if the jury first heard the tape without being primed, except perhaps with a request that they listen to it carefully and possibly advice (as recommended by Professor French) that they will hear some speech produced on breath. If they initially do not hear the disputed sounds as an inculpatory sentence (which we think is likely given past history) but, once primed, subsequently do hear the disputed sounds in this way, this should provide a graphic indication of the power of suggestion.

[259] The Judge concluded that after the tape has been played to the jury "unprimed", expert evidence should be received concerning the interpretation of the disputed sounds. We agree.

[260] We have no doubt that in his summing up the Judge will warn the jury of the dangers of suggestibility.

Standing back

[261] Before we leave this topic, and standing back from the detailed arguments we have heard and addressed, it is right to recognise that it would be quite extraordinary for this Court (or the Judge) to deny the jury the opportunity to listen in full to what the Crown can credibly claim is a recording of the account given by the appellant, within 25 minutes or so of the completion of his paper round, of what he found when he returned to the house.

Overall outcome

[262] As indicated at the beginning of this judgment, there have been in total seven different applications before the Court which have been dealt with at three separate hearings and in three separate judgments. In this section of the judgment we set out the Court's decision in relation to each of the points raised in the seven matters before the Court.

CA312/2008

[263] This application for leave was dismissed for want of jurisdiction in [2008] NZCA 585.

CA572/2008

[264] There were 25 grounds of appeal identified in [6](a) of the notice of application for leave to appeal. Except where otherwise stated, we grant leave to

appeal. The outcome in respect of each ground of appeal (using the numbering used in the notice of application for leave) is as follows:

(i) Use of the trial transcript: appeal dismissed, transcript admissible: [2008] NZCA 585.

(ii) Recusal: the issues raised by this ground were dealt with in [2008] NZCA 455 in which the Court found it had no jurisdiction to consider the appeal against the Judge's decision not to recuse himself. So leave on this ground is declined.

(iii) Marjory McCormick: appeal allowed, we rule that the evidence of Ms McCormick is not to be led at trial: see [48] - [61] above.

(iv) Ms McCormick: as above.

(v) Privilege: appeal dismissed: [2008] NZCA 585.

(vi) Ambulance officers and Constable Andrew: appeal dismissed: see [5] - [38] above.

(vii) Doctor Pryde: appeal dismissed: see [62] - [76] above.

(viii) Constable van Turnhout: appeal dismissed: see [39] - [47] above.

(ix) Thomas Samuel: appeal allowed in relation to the reference to nervousness and age of bruising, but otherwise dismissed: see [77] - [88] above.

(x) Experiment (timing of paper run) evidence: appeal dismissed: see [213] - [217] above.

(xi) Graham Letts: this point was not pursued and we formally dismiss the application for leave in relation to it.

(xii) Kathleen Mitchell: Ms Mitchell has died since the application for leave was filed, so that the issue which was before the Court has now changed, and no formal ruling is given: see [209] above.

(xiii) John Galliven: this ground was not pursued and we formally dismiss the application for leave in respect of it.

(xiv) Ivan Coward: this ground was not pursued and we formally dismiss the application for leave in respect of it.

(xv) Kathrine Bridgman: this ground was not pursued and we formally dismiss the application for leave in respect of it.

(xvi) Billie and Wayne Marsh: appeal dismissed: see [142] - [150] above.

(xvii) William Christie and Ingrid Dunckley: appeal dismissed in relation to the evidence of Mr Christie. In relation to Ms Dunckley, the appeal is allowed to the extent that Ms Dunckley's evidence in relation to Mr Wilden is not to be led as part of the Crown case, but, in accordance with the agreement of counsel, may be led as rebuttal evidence if Mr Wilden gives evidence for the defence: see [89] - [103] above.

(xviii) Kelly Gillan and Marcel Nader-Turner: this ground of appeal was not pursued and we formally dismiss the application for leave in respect of it.

(xix) Ms C: leave declined: see [151]- [157] above.

(xx) Kelly Gillan and Marcel Nader-Turner (s 42): this ground was not pursued and we formally dismiss the application for leave in respect of it.

(xxi) John Mouat: appeal dismissed: see [104] - [121] above.

(xxii) Ms A and Ms B: appeal dismissed: see [110] - [131] above.

(xxiii) Bain family members: appeal dismissed: see [132] - [141] above.

(xxiv) Mark Buckley: appeal allowed, evidence of Mr Buckley not to be led at trial: see [191] - [212] above.

(xxv) Further particulars: this ground was not pursued and we formally dismiss the application for leave in respect of it.

CA652/2008

[265] This appeal was dismissed in [2008] NZCA 455.

CA672/2008

[266] There were two matters dealt with in this notice of application for leave. The first concerned the admissibility of the transcript of evidence given by the appellant at the first trial, which overlapped to some extent with ground (i) of CA572/2008. This was dealt with in [2008] NZCA 585. The second related to the Judge's decision not to make an order under s 368 of the Crimes Act in relation to the evidence of Dean Cottle or Kyle Cunningham. It was accepted by counsel for the appellant that the Court had no jurisdiction to deal with an application for leave to appeal against a decision under s 368 and we therefore dismiss the application for leave in relation to that matter for want of jurisdiction.

CA727/2008

[267] There were three points of appeal raised in this application for leave. These were:

(a) Evidence of Mark Buckley: this overlapped with ground (xxiv) of CA572/2008. As indicated in relation to that ground, we allowed the

appeal and directed that the evidence of Mr Buckley not be led at trial.

(b) 111 tape: appeal dismissed: see [218] - [261] above.

(c) Admissibility of the appellant's police statement of 24 June 1994: appeal dismissed: see [158] - [190] above.

CA769/2008

[268] This notice of application for leave dealt with three points. The first, the 111 tape, overlapped with ground (ii) in CA727/2008. As noted in relation to that ground, the appeal was dismissed. The second ground related to Ms McCormick, and, as noted earlier, we allowed the appeal on this point and directed that Ms McCormick's evidence not be led at trial. The third matter relates to the Judge's decision not to make a direction under s 368 in relation to Leanne McNaught. As noted earlier there is no jurisdiction for a pre-trial appeal against an order (or a refusal to make an order) under s 368 and for this reason leave to appeal in relation to this ground is declined for want of jurisdiction.

CA571/2008

[269] This was the application for leave to appeal by the Crown. It related to the evidence of Mr Taylor, and was dependent on the evidence of Mr Buckley being admitted. In light of our decision in relation to Mr Buckley, the appeal is dismissed: see [212] above.

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