IN THE SUPREME COURT OF NEW ZEALAND SC 95/2012

[2013] NZSC Trans 12

**KOVINANTIE VAHAFOLUA FUKOFUKA**

Appellant

**v**

**THE QUEEN**

Respondent

| | |
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| Hearing: | 16 July 2013 |
| Court: | Elias CJ<br>McGrath J<br>William Young J<br>Glazebrook J<br>Arnold J |
| Appearances: | D R F Gardiner for the Appellant<br>D J Boldt and M J Lillico for the Respondent |

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**CRIMINAL APPEAL**

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**MR GARDINER:**

Your Honours, counsel's name is Gardiner appearing for the applicant.

**ELIAS CJ:**

Thank you Mr Gardiner.

**MR BOLDT:**

May it please your Honours, Boldt and Lillico for the respondent.

**ELIAS CJ:**

Thank you Mr Boldt, Mr Lillico. Yes Mr Gardiner.

**MR GARDINER:**

Thank you. Your Honours, the approach that I will take is to go through those parts of my submissions, not verbatim but focusing on particular areas and then address, perhaps, points that are made by my learned friend which appear to be pertinent and, of course, I understand that I have a right to respond –

**ELIAS CJ:**

Yes.

**MR GARDINER:**

– in the end when he's made his submission.

**ELIAS CJ:**

But it would help us if you would respond to his written arguments in the course of your opening, yes.

**MR GARDINER:**

Thank you.

**ELIAS CJ:**

And we have read your submissions, of course, Mr Gardiner, so just emphasise what you particularly want to take us to.

**MR GARDINER:**

Thank you. I'll go to page 2 which essentially deals with the issue of the appeal which is the approved ground is was the Court of Appeal correct to find no substantial miscarriage of justice occurred despite the error in the Judge's direction under section 126 of the Evidence Act 2006?

Now that error and section 126 is reproduced at the bottom of page 4, going to page 5. That error involved an incomplete, if I can put it from the applicant's point of view, and incomplete dealing with the special need for caution. Now my learned friend, in dealing wi – in his submissions, in dealing with the issue of section 126(2)(a), which is the need for a warning, even if it's not in particular words, the warning must, firstly,

that's 2(a), warn a jury that a mistake in identification can result in a serious miscarriage of justice.

Now he has spoken about that, and I'll say this right at the outset, as being an introduction, an introductory provision which, I would submit, is a reading down of the section and I would put a different emphasis on it which is, first and foremost, the requirement of this section, the primary requirement of this section, which is stated so no one is under any illusions about it in section 126(2)(a) is to warn the jury that a mistake in identification can result in a serious miscarriage of justice.

Now it can be, one can talk about the jury being, in a manner of speaking, omniscient and be able to, you know, come to the conclusion at the end of the day, and there is a certain amount of conjecture in relation to how the jury might have approached the subject in relation to the very full dealing. This is the respondent's perspective, the very full way in which – and to some extent it's, in fairness, it's the applicant's perspective, the very full way in which the trial Judge dealt with the issue of identification. But one can deal with a subject in a fulsome way but not necessarily hit the legal requirements, and the legal requirements are unequivocally set out in section 126.

And the applicant's view, in relation to 126(2)(a) is first and foremost is a requirement to have that warning about the risk of a serious miscarriage of justice even though it doesn't have to be in those words, although unless one's Shakespeare, it's a bit hard to anticipate how one can deal with that very concept without actually using those words. So that is clearly the issue for appeal as stated in paragraph 10 and just to put it into context, I've gone to 126.

There is an additional, and it's really a corollary and it's not necessarily the subject of the question for appeal, and that is (2)(b), whether there is a requirement to alert the jury to poss – whether the jury was alerted to the possibility that a mistake in witness may be convincing.

Now, my learned friend, in his submissions, has said, "Look, that particular requirement," and I don't want – it's really a corollary of the first point in terms of purposes for the appeal. My learned friend, with respect, has said, look, the Judge said that this is an honest witness, so an honest witness may be a mistaken witness, but an honest witness may be a convincing witness but he or she may also be

mistaken. So the concepts are not necessarily one and the same. Convincing, the requirement that a mistake in witness be – the jury be alerted to –

**McGRATH J:**
Which paragraph of the address is that at?

**MR GARDINER:**
I'm going to section 12 – I'm talking about 126(2)(b).

**McGRATH J:**
But when you're saying what the Judge, you're using –

**ELIAS CJ:**
Paragraph 23 is it?

**MR GARDINER:**
23, yes.

**McGRATH J:**
Thank you.

**ELIAS CJ:**
He says an honest person may be mistaken but he doesn't say mistaken. Honest people can be convincing.

**MR GARDINER:**
Correct, correct.

**ELIAS CJ:**
Yes.

**McGRATH J:**
He didn't use the word convincing?

**MR GARDINER:**
No he didn't.

**McGRATH J:**
No.

**MR GARDINER:**
And, in fact, the Court of Appeal acknowledges that that was a – and that's the reason why I pick it up and I just make an observation, is his Honour Judge Ronald Young actually acknowledges that the summing up is a bit weak. I hope I've put it fairly.

**GLAZEBROOK J:**
Well the requirement just wasn't met was it?

**MR GARDINER:**
No.

**GLAZEBROOK J:**
I mean it says you have to say that and the Judge didn't.

**MR GARDINER:**
No he didn't.

**GLAZEBROOK J:**
So there are two things the Judge didn't say that he was bound to say under section 126.

**MR GARDINER:**
Correct.

**GLAZEBROOK J:**
That's the submission isn't it?

**MR GARDINER:**
Correct, your Honour.

Now the summary of the argument from the Appellant's point of view is at paragraphs 11 to 13 –

**ELIAS CJ:**

Sorry, can you just remind me what the Court of Appeal said? Did the Judge say it was wrong?

**MR GARDINER:**

He dealt with the issue, your Honour, at paragraph –

**ARNOLD J:**

Well in relation to the honesty convincing point, that's dealt with at paragraph 36 at page 15.

**MR GARDINER:**

Thank you, your Honour, that's of the Court of Appeal's judgment.

**ARNOLD J:**

Yes. "We are satisfied –

**GLAZEBROOK J:**

So the vibe was that it might be convincing, rather than the words used.

**ARNOLD J:**

Yes.

**MR GARDINER:**

Thank you, your Honour, that is correct.

Now the summary of the applicant's argument is basically at 11 to 13 in terms of the identification, and the argument that there's been a substantial miscarriage of justice is addressed at paragraph 12. In that regard there has been –

**ELIAS CJ:**

I'm sorry. I'm just slightly behind on this but the Court of Appeal doesn't say he's wrong. The Court of Appeal says it was all right but your submission is that it's wrong.

**MR GARDINER:**

Well the primary submission must be, in light of the question posed by the Court, it must be section –

**ELIAS CJ:**

385.

**MR GARDINER:**

126(2)(a). I mention (b) because that is a loose end and it does, the Court of Appeal, itself, recognises that there is a bit of an issue there, and I raise the issue in relation to – and I have in my written submissions, in relation to the convincing, failure to warn that a mistaken witness may be convincing. I raise that with a reservation because it's actually not identified as the issue, and –

**ELIAS CJ:**

Sorry, what are you talking about, the issue in this Court?

**MR GARDINER:**

Yes. The issue in this Court is pri – would appear to be primarily (2)(a).

**WILLIAM YOUNG J:**

Why do you say that?

**GLAZEBROOK J:**

Well, not necessarily because – well, aren't you saying –

**MR GARDINER:**

Yes.

**GLAZEBROOK J:**

– and you don't need to be tentative about it. You can just make this submission as forcefully as you like –

**MR GARDINER:**

Thank you, Your Honour.

**GLAZEBROOK J:**

– but you're saying there are two errors in the Judge's summing up –

**MR GARDINER:**

I am.

**GLAZEBROOK J:**

– and you're saying the Court of Appeal's wrong to say that the vibe was okay in respect of 126(2)(b).

**MR GARDINER:**

Correct.

**GLAZEBROOK J:**

So you're saying there were two errors?

**MR GARDINER:**

Yes I am.

**GLAZEBROOK J:**

That's the submission?

**MR GARDINER:**

Yes.

**GLAZEBROOK J:**

So not just one?

**MR GARDINER:**

Not one.

**McGRATH J:**

Don't worry if the lead judgment puts it in the singular, Mr Gardiner.

**MR GARDINER:**

Righto, thank you. I was a bit uncertain about whether to –

**ELIAS CJ:**

Well I must say, I had read the lead judgment as directed to section 385 of the Crimes Act and I think the lead judgment may be in error in describing the Court of Appeal as having found there to be error in the Judge's direction. So –

**WILLIAM YOUNG J:**

It was an error as to (a).

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

They did say there was an error but –

**ARNOLD J:**

The Crown conceded that.

**ELIAS CJ:**

Yes, yes.

**MR GARDINER:**

And the Crown concede that point here today, too, in their written submissions.

**ELIAS CJ:**

Yes.

**McGRATH J:**

But (a) was omitted. In relation to (b) it may be that the indication of subsection (2) of section 126, the particular words don't have to be used but might be a basis for excusing –

**MR GARDINER:**

Yes I appreciate that.

**McGRATH J:**

– a failure to say, to use the word "convincing" and that's really what the Court of Appeal seemed to conclude.

**GLAZEBROOK J:**

But your submission is, if it says to say convincing, then it needs to say so, or you say, presumably, that you couldn't imply from what was said that an honest witness may be convincing.

**MR GARDINER:**

Well you can have an honest witness who –

**WILLIAM YOUNG J:**

It's unconvincing. It doesn't really matter. I mean if the honest witness is entirely unconvincing, then the jury's not going to convict, so it's not really a problem, is it, in that sense? I mean it's the sort of playing with words issue and I know the statute says the words have to be used and it is clear that in one respect they weren't and it's arguable to distinctly that in another they weren't.

**GLAZEBROOK J:**

Well one of the difficulties I think is that it's been shown through research that juries are very convinced by identification evidence and that they, especially if a witness appears very sure that they don't put enough weight on the difficulties there are with identification evidence, and that's one of the reasons that the Law Commission has been incredibly careful to make sure that those particular words are said whether, of course, it makes any difference to what a jury does in the end is possibly a moot point. But never the less, they are requirements that were put in to deal with the very special difficulties of identification witness and the research that had shown that, unfortunately, juries are very convinced by that type of evidence when, in fact, they shouldn't be. They should be very sceptical of it.

**MR GARDINER:**

Just going back to paragraph 12, your Honour, the argument is that the error of law has led to a substantial miscarriage of justice as identification was the primary issue and the evidence of identification was sparse and very questionable and because of that, the impact of the warning was likely to be even more important and all the greater.

So, you know, it's all very well going on about – and the other issue in relation to the identification is that it was a retrospective identification. There was a general description at the time. There was no recognition at the time of the attack. There

was some dispute about whether the witness was concussed, whether he was unconscious, whether he was dazed. The next day the police, notwithstanding that, the officer who interviewed him, saw fit to ask him questions. He didn't think he was incompetent to answer questions at that stage and when he was about to be discharged from hospital the following day with what one might have been described as routine pain relief, Codeine, Ibuprofen and something of the same ilk, he was subjected to an interview which went for an hour and seven minutes in which the police asked him about what he remembered and his best shot then was a general description and no clear identification of the person whom he had seen at the time of the attack, six metres away, in a vehicle, passing by and had a clear view and there was a bus carriageway. There was a median, a concrete median strip and then there was a vehicle with this guy allegedly leaning out of the car and, subsequently, he was one of two people who came as the first wave of the attackers and allegedly he was talking to him face to face and, notwithstanding the gold tooth and all that, there was just a general description that came out the next day.

Four months later he was shown a photo montage and that was in March, March the 24th. The attack was on the 9th of November 2010. Four months later, 24th of March 2011, he's shown a photo montage, he recognises no one. The officer in charge, as a result of a discussion, goes away and then, subsequently follows up the line of inquiry because apparently he mentioned he might have been at an educational institute with this person and he shows him a second montage which was, I believe, I think the 7th or 8th of April 2011, and that is just under – I think it was the 8th of April, it was just under five months later and his recall at that stage has improved.

Retrospectively he, then, identifies, there's a retrospective identification of the person, his attacker, as being the applicant, and that was essentially the prosecution case.

**GLAZEBROOK J:**
Can I just check? You and the – before the Judge had made two submissions about it, one about the photo montage itself –

**MR GARDINER:**
Yes.

**GLAZEBROOK J:**

– I don't think we have the photo montage, so we can't assess that submission for ourselves, but you also made a complaint about the four months later as not being within the requirement of section 45. Do you want to say anything about that because four months does seem an awful long time in an attack of this kind before they brought the first photo montage out?

**MR GARDINER:**

Firstly, I do have a copy of a photo montage amongst my materials so I could produce that if the Court were inclined to go down that route and, secondly, in relation to the four months, just if I can – if Your Honour could refresh my memory. Just repeat that point, I'm sorry.

**GLAZEBROOK J:**

Well, I think you'd argued that that wasn't the first available opportunity under, was it section 45, in terms –

**MR GARDINER:**

That's right.

**GLAZEBROOK J:**

– of the photo montage. I think you'd also ask why they hadn't made other inquiries at the establishment because I think your clients evidence was that there were other people with gold teeth and that in that establishment at the same time. So I was just asking for any comments you might have on that because that, obviously, relates back to this substantial miscarriage of justice point if there were some difficulty with the evidence in the first place.

**MR GARDINER:**

The, essentially they got round to – first of all they had a general description and this is the point that the Court of Appeal picks up in looking at whether or not the police have acted as soon as practicable and, basically, they had available to them a general description and the argument seemed to be, as I recall, was that they didn't have that much to go on –

**GLAZEBROOK J:**

But they presumably had something to go on when, four months later, they brought out a photo montage. There's no suggestion they had any other evidence that helped them at that stage is there?

**MR GARDINER:**

No there's not, and at that stage –

**GLAZEBROOK J:**

So they just pulled some photos out of the system that met the general description one assumes.

**MR GARDINER:**

That's correct.

**GLAZEBROOK J:**

And it took them four months to do that?

**MR GARDINER:**

That's correct.

**McGRATH J:**

But didn't they at least have one new piece of information, namely the advice that the victim though he recognised his attacker, or one of his attackers, from having been at the same tertiary college? And that presumably gave the police a lead they could –

**GLAZEBROOK J:**

That was the second photo montage, not the first one.

**McGRATH J:**

Yes, sorry, yes.

**MR GARDINER:**

And the other thing is that I noticed my learned friend has, amongst his enclosures to his submissions, got some copies of Law Commission papers relating to evidence

and recall and that type of thing. And the first article, which is at schedule A, that's tab A –

**ELIAS CJ:**
One, tab 1.

**MR GARDINER:**
No tab 1 rather, deals with the three, I think the three elements of meaning acquisition, the acquisition of the knowledge, or the enc – the acquisition or encoding phase and how there are factors that go into that and lead to a particular perspective, the retention phase and then the retrieval phase.

Now we have a situation here where the complainant was, had been drinking. He hadn't drunk as much as the other witnesses. We have a situation where it is the subject of an assault, even he was concussed. He was dazed. There is a view, and I took issue with this at trial, whether he was unconscious or not and – because there was an embellishment by the police constable who actually tended to him at the time. Suddenly he was utterly unconscious and there was no mention of this in the police constable's earlier statement, which I cross-examined him on at the trial, and the – notwithstanding the fact that even on a worse case situation, he's unconscious, best case he's concussed, he's dazed, no recognition of the person on that day. The next day he only has a general description and then four months later, hey presto, he remembers someone.

And I refer in my submissions, in my closing address I refer to being unaware of these Law Commission articles. I spoke about this retrospective identification. The one that sort of suddenly occurred late in the piece, and these articles, and there's also another one at tab 2, tabs 2 and 3, they do show how evidence, how memory is very variable, how it can deteriorate over a period of time and I would submit that those particular concerns must be present in this particular case, particularly not – and even then there is nexus placed on the got tooth.

The complainant, even with his retrospective account regarding the gold tooth, got it on the wrong side of the mouth. You know, it was on the – he said it was on the left side but the complainant, the offender's – correction, my client's, the applicant's actually had it and it was a formal admission at trial, on the right side of the mouth and there was evidence given by the applicant in relation to gold teeth, about family

members, about members of his, the Tongan community quite commonly having gold teeth. It wasn't an unusual situation. So there are big question marks, I would submit, and there were, over the issue of identification.

Now I'll just put that to a side and move on. The general description is covered at paragraph 16. My learned friend summarises, or draws it together. He talks about the statement and, in fact, that description came because I cross-examined at the trial and put various points that were made in the statement to this witness at trial.

So the general description looking at it as it is represented verbatim at paragraph 16 is very, very general in one sense. It's specific in the sense that it excludes various people obviously but there is no issue of anyone being actually identified. I talk about the ID situation which I've already addressed in the following paragraphs. There was a situation at paragraph 8 – that's at paragraph 17.

At paragraph 18 I did refer earlier the educational institute. It's my submission that the Court of Appeal actually overstates the extent to which the applicant accepted the evidence of the complainant in relation to how they knew each other at that educational institute. It wasn't as high. It was somewhat less, I would submit, than the –

**ELIAS CJ:**
What paragraph are you referring to?

**MR GARDINER:**
I'm at paragraph 18, your Honour.

**ELIAS CJ:**
No, no, of the Court of Appeal decision.

**MR GARDINER:**
The Court of Appeal deals – I do cover, address it more specifically at the end of the submissions but the Court of Appeal's judgment –

**ELIAS CJ:**
Is it 43?

**MR GARDINER:**
It's at, yes, 42, 43. It's in that area, Your Honour.

**GLAZEBROOK J:**
Although realistically that's probably where he did recognise him from. Whether or not he was the attacker is another matter.

**MR GARDINER:**
Yes well that's correct, and even if he did, my point is that even if he did recognise him, so what, because this is four or five months after the event and we've had a lot of time passing. He didn't recognise him at the time. He didn't recognise him the next day and he didn't recognise him in the months in between until the police came knocking with the first photo montage. And there's no evidence in the meantime that he'd contacted the police and said, "Hey, hey, I've had a Eureka experience. I recognise this guy. He's the one. Go for it." It didn't occur.

I deal with the concession at trial at paragraph 20. I've covered section 126. I spoke about that at the outset, just for the starting point. The trial Judge's summing up, there's been – I deal with that more generally and I come back to it later but at paragraphs 27, 28 following, the 27, 28, the Judge gave a very helpful summing up and I concede that Your Honours, but it was deficient in that it didn't – it fell short in relation to the two areas that I've identified. He did identify, however, and looking at that summing up, it is worth looking at the structure of the summing up because he had a lot of other big issues to deal with, like standard of proof, the onus and so on, quite apart from identification.

And he started off by saying look if identification is the primary issue, and he covered that at paragraph 1, but then he didn't return to the issue of identification until six pages later in his summing up. In the meantime, the jury's sitting there manfully and womanfully, all of them, there was a mixture, taking all these big concepts in –

**WILLIAM YOUNG J:**
But I mean this is standard, though. I mean there's nothing wrong with that. I mean most Judges will start off with the general matters that affect all trials –

**MR GARDINER:**
I'm not taking issue with that, your Honour.

**WILLIAM YOUNG J:**

So what's the problem? I mean should he –

**MR GARDINER:**

The problem is, if one looks at the Court of Appeal decision, there is the suggestion that the whole damn summing up was about identification, but it wasn't. It's structured in a particular way.

**WILLIAM YOUNG J:**

But it couldn't be just about identification.

**MR GARDINER:**

No of course it couldn't.

**WILLIAM YOUNG J:**

I mean the Judge could probably have said, "If you're satisfied beyond reasonable doubt that the defendant was one of the men that attacked the complainant, find him guilty on both charges. Now let's talk about identification." Now that could probably pass muster with me but it doesn't pass muster with a lot of people, so he felt he had to describe what it means to be sure and everything else.

**MR GARDINER:**

That's right, your Honour. The point is that the effect of what he says in relation to the identification one can argue is being softened to put it mild – euphemistically by his need to address, the need that he has to address other concepts. So he starts off with identification. My learned friend has referred to in his submissions to – he starts with identification, he finishes with identification but there's a lot of stuff in between which is not about identification.

**ARNOLD J:**

But when he comes to talk –

**GLAZEBROOK J:**

So is your submission that there should have been some of the warnings up front, it would've been a stronger summing up if there's been some of the warnings up front to say, this is all about identification. Identification evidence is notoriously difficult.

You really need to listen very carefully to what I'm going to say later about identification but in the meantime...

**MR GARDINER:**
Exactly, your Honour, and that would to position or situate the summing up in terms of identification which was the one and only issue in relation to the trial.

**McGRATH J:**
He really did make plain, though, it was the central issue in the trial, didn't he, at paragraph 20 for example?

**GLAZEBROOK J:**
Well, and paragraph 1 actually.

**WILLIAM YOUNG J:**
But it's perfectly obvious.

**MR GARDINER:**
Say again, your Honour.

**WILLIAM YOUNG J:**
It's perfectly obvious. I mean –

**MR GARDINER:**
Well, we're lawyers, well preached. You're the Judges.

**ELIAS CJ:**
But your submission can simply be that because it was the central issue at the trial, it's even more important that the statutory approach is adopted.

**MR GARDINER:**
Correct, well that is exactly it. It is true, your Honour and, in fact, especially in a case which was finely balanced, because the jury took a very long – well, it seemed to be an inf – I don't – I'm not sure.

**WILLIAM YOUNG J:**
About four or five hours.

**MR GARDINER:**

– exactly how many hours it took.

**WILLIAM YOUNG J:**

Four or five hours.

**MR GARDINER:**

Four or five hours, but they – this was a situation where that warning could've tipped the balance in terms of in favour of the applicant or those two warnings. It was quite, it was evenly poised. So the omission was even more telling in this particular case in terms of its impact upon the applicant.

**ARNOLD J:**

Why didn't you raise this with the Judge at the conclusion of the summing up?

**MR GARDINER:**

Well, I've thought about how to deal with that issue. It didn't occur to me at that stage, your Honour.

**ARNOLD J:**

But you had said in your closing, you'd identified identification –

**MR GARDINER:**

Yes I had.

**ARNOLD J:**

– as a critical issue –

**MR GARDINER:**

I did.

**ARNOLD J:**

– and you said to the jury, "The Judge is going to give you some important instructions on this."

**MR GARDINER:**
And he did, he did, he did, and I'm not saying he didn't deal with the issue of identification. I'm just saying that, given section 126, he didn't go far enough.

Now, first of all, even though I didn't do it, the Judge, the primary responsibility for doing it rested with the Judge and the issue then, is that that's the requirement under the section.

**ARNOLD J:**
Well, of course you're right but it's often interesting that counsel who sat through the trial, experienced counsel, didn't see any particular wrong in the instruction at the time. So, for example, in relation to the honesty convincing point, it can be an indication that counsel thought what the Judge said, although it wasn't precisely in the language was, never the less, adequate in the circumstances of the particular case. So that's the significance, I think, of counsel not raising it.

**MR GARDINER:**
I accept that point, your Honour, but that's looking at it with hindsight. We're all looking at it with hindsight, but the legal requirement to do it and this is not the point, it's not, it's arguing the point on behalf of my client, rests upon the trial, the Judge and, you know, that's the requirement of the section. And the reality is that when one deals with issues of appeal once looking at what issues might be raised on behalf of one's client, that's the process. So this is not a case, for example, of me sitting back and thinking, oh, I'll reserve that for appeal, you know, because I didn't.

In retrospect, and had I thought of the point, I would have certainly have got up and raised, you know, I concede I would've raised it at the time and I would have pushed it and I would've had an issue, I would submit, of how I did it. Whether I did it – how I raised, the most appropriate way to raise it. If I dealt with the issue now I would certainly do it specific in terms of section 126.

**ARNOLD J:**
All right, thank you.

**ELIAS CJ:**
Can you just help me because it's probably that I haven't read all the evidence but in paragraph 45 of the Court of Appeal decision, after going through the three factors,

once the jury had rejected the appellant's claim that he wasn't present at the scene which they must have done to have convicted him, then the jury would inevitably have convicted him. What – I had thought that it was only the identification evidence that put him at the scene. Is that not right?

**MR GARDINER:**

No, that is correct, but there was – he did give evidence on his own.

**ELIAS CJ:**

Yes I understand that but he couldn't have been convicted on that.

**MR GARDINER:**

No.

**ELIAS CJ:**

So it's only – so this statement is really erroneous, arguably, it seems to me. It's circular.

**MR GARDINER:**

Mmm. I suppose one could view it that way. I think they're looking at it pragmat – the Court is looking at it and saying, "Look he gave evidence that he wasn't at the scene. We had identification from someone which put him at the scene. They must have believed the complainant, therefore, he was at the scene and the jury was sure of that and they convicted him."

**McGRATH J:**

But it's not suggested there was something about the way he gave his evidence that he wasn't at the scene that indicated he should be disbelieved was there?

**MR GARDINER:**

No. My learned friend, at the trial, sort of implied that he had a remarkable memory and his girlfriend with whom he lived had a remarkable memory, but I sought to explain that because most of us are creatures of routine and it's not unusual that we can say we get up at say six o'clock in the morning. We're at work between seven and eight or whatever, and most people regulate their life in that way and evidence was given that they had a child that affected their ability to –

**McGRATH J:**

But you're making, perhaps, implicitly the point it could be the Court of Appeal's referring to his evidence of an alibi, and the suggested weakness in that and that that might have been the basis for disbelief.

**ELIAS CJ:**

Well it couldn't have been the basis for conviction or has the Evidence Act now changed that?

**WILLIAM YOUNG J:**

Well I don't think – I mean it can't.

**GLAZEBROOK J:**

No, well they gave it – they would have to have, first of all, rejected that presumably, and they were given the tripartite warning. So I suppose the Court of Appeal might be just saying, well they obviously rejected that evidence and then they positively decided on identification. I'm assuming that's what they mean because they'd have to have positively – they couldn't have just been unsure about his alibi evidence because they couldn't have convicted him in that circumstance.

**McGRATH J:**

But my impression was that they reasoned from their rejection of his story that he wasn't there to saying, in terms of the proviso, there was no substantial miscarriage here.

**WILLIAM YOUNG J:**

There's probably a circularity the jury concluded. The Court said, "Well, the jury concluded he was guilty, therefore, it wouldn't have made a difference if they'd been asked to go through an extra hoop before finding him guilty."

**ELIAS CJ:**

Yes.

**WILLIAM YOUNG J:**

I mean I think that's the only rational – well it's an explanation.

**ELIAS CJ:**

Well, it's not a rational –

**WILLIAM YOUNG J:**

It's the only explanation of what was said.

**ELIAS CJ:**

But this is the dispositive reason –

**McGRATH J:**

Yes.

**GLAZEBROOK J:**

Yes.

**ELIAS CJ:**

And it's subject to what the Crown says. It doesn't seem to me to be acceptable.

**MR GARDINER:**

Thank you. Right well, the comments, the bullet points that I have at paragraph 6 to some extent are self-explanatory. I don't nec –

**GLAZEBROOK J:**

Paragraph 6, sorry?

**MR GARDINER:**

Paragraph – page 6.

**GLAZEBROOK J:**

Page 6.

**MR GARDINER:**

I've got various bullet points. This is – I do come back to the way in which his Honour, the trial Judge, structured his summing up, but I do do it here to some degree, and as his Honour, Justice Young, has pointed out, he – the trial Judge did go much further than perhaps His Honour might have done in looking at the evidence

and explaining the evidence and so on but that, of course, doesn't dispose of the issue in this case, and that's really where the applicant comes from.

Section 385. There is – the issues that arise in relation to 385 and this Court's approach in *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 154 are actually very well covered by my learned friend in his submissions and, in particular, I would submit in a *New Zealand Law Journal* article which is at –

**WILLIAM YOUNG J:**
Dale La Hood's article?

**MR GARDINER:**
Yes, Mr La Hood's.

**WILLIAM YOUNG J:**
Well, we've had a fair bit of – well, four of us anyway, have had this issue teased out in a case called *R v Guy* [2012] NZSC 120.

**MR GARDINER:**
So essentially I'm going to fast forward on that particular issue because it has been set out in a very, in an academic and very clear way in that *New Zealand Law Journal* article which is at, my learned friend has put at tab 4 of his submission.

I, then, deal with a number of cases, starting with *R v Hohepa* [2008] NZCA 316, *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 and then a more recent one in *R v Turaki* [2009] NZCA 310, all of which provide useful comparisons with the current situation.

The focus in the Court of Appeal from the applicant's point of view was on *Uasi v R* and, basically, the argument, it appeared in *Uasi v R*, in that particular case, the Court found – in *R v Hohepa* they found that there was an error of law that the proviso didn't apply. In *Uasi v R* they found that there was an error of law but the proviso did apply – correction. And they also found, to put it more positively, they found there was a substantial miscarriage of justice. The reasoning in *Uasi v R* I would submit, putting aside the points made by Mr La Hood and the actual, the different stages that one goes through, the reasoning in *Uasi v R*, I would submit, is actually, is quite compelling, even though the Court might have missed or fast-

forwarded some of its reasoning. In terms of the outcome in that particular case, I would submit that if the Court of Appeal could reach the outcome that it did in that particular case which, in terms of identification, was weaker, I would submit, than this partic – the argument for invoking the proviso was, if it was strong enough in that case, then it follows, I would submit and I submitted it in the Court of Appeal, that the argument following on in this particular case and saying that it was a substantial miscarriage of justice is all the greater because the identification evidence was even less compelling.

**GLAZEBROOK J:**
Well, there's absolutely no way, if this a proviso case, that the Court could have applied the proviso and I think that's probably conceded by the Crown.

**WILLIAM YOUNG J:**
Unless – would it have made a difference arguing that it was available under the proviso.

**GLAZEBROOK J:**
Well it shouldn't be under *R v Matenga*, should it, because *R v Matenga* says the Court itself has to be convinced.

**WILLIAM YOUNG J:**
Well *R v Matenga* suggests not. The problem is that one of the grounds of appeal in section 385 is an error of law. Now would the error of law have made a difference? It seems only able to be applied under the proviso.

**ELIAS CJ:**
But that's –

**WILLIAM YOUNG J:**
Sorry, I mean it's a problem we've –

**GLAZEBROOK J:**
Yes, it is a problem.

**WILLIAM YOUNG J:**
– got with the structure of section 385. It's a perplexing section.

**GLAZEBROOK J:**

Well, the proviso couldn't be applied if, in fact, the *R v Matenga* tested the proviso that the Court, itself, had to be satisfied if it's the other part of the proviso. So if the other *R v Matenga* that the error of law wouldn't have made a difference is proviso rather than merely not a substantial miscarriage of justice but...

**ELIAS CJ:**

I'm not sure that it can possibly be because the error of law must be material. That's what is required by section 385(1)(a). What have I missed? It can't be a non-material error of law.

**WILLIAM YOUNG J:**

Well it depends on where the immateriality comes in –

**GLAZEBROOK J:**

That's how I understand it.

**WILLIAM YOUNG J:**

– I mean it is quite a – *R v Matenga* looked at the application of *Weiss v R* [2005] HCA 81, (2005) 244 CLR 300 in New Zealand. *Weiss v R* was concerned whether the proviso should be applied if the Court, itself, was satisfied of guilt or whether you look through the eyes of the jury or a notional jury. There wasn't really much discussion in *R v Matenga* as to whether the "would it have made a difference" argument is excluded from the proviso? But it certainly suggests it is.

**ELIAS CJ:**

But the "would it have made a difference" can't be subjected. It must be was it logically linked?

**WILLIAM YOUNG J:**

Yes, well that's – would it have made – well, anyway. This is all reasonably familiar territory actually, although the answer to it is not that clear.

**McGRATH J:**

There is, then, the final proposition, though, which might be important in this case that in the end unless the Court is –

**ELIAS CJ:**

Satisfied.

**McGRATH J:**

– satisfied on the matter, then it's got to acquit which may –

**WILLIAM YOUNG J:**

Yes that's right.

**ELIAS CJ:**

Or will return.

**WILLIAM YOUNG J:**

Well that depends – that depends on whether it's within the miscarriage –

**ELIAS CJ:**

Yes it does.

**WILLIAM YOUNG J:**

– or whether it's within the proviso. It is quite a complex issue.

**McGRATH J:**

Sure.

**GLAZEBROOK J:**

But I think the one thing that we can be sure of is the Court, itself, could not have been satisfied under these circumstances if it was having to be satisfied about the guilt of the accused and the identification.

**ELIAS CJ:**

Well Mr Boldt is going to try and convince us to the –

**WILLIAM YOUNG J:**

No he's not going to. I don't think he's – it's not the case for the Crown that the Court of Appeal could have dismissed this appeal on the basis that it was affirmatively satisfied of guilt. I don't think that's the position is it, Mr Boldt?

**MR BOLDT:**

We'll come to that in due course, Sir. You may have detected that part of my submission was somewhat faint and I'll leave it at that for now.

**ELIAS CJ:**

Thank you. Well, Mr Gardiner, is there much more for you to cover?

**MR GARDINER:**

No, no there's not your Honour but there are – I just want to emphasise, I'll take you to paragraphs 56 and 57, Your Honour. Those state – in which I refer to statements, comments made by his Honour, Justice Clifford. Those points appear to be particularly appropriate in this particular case and, in particular, the quote that I source from him at paragraph 57.

Now in *R v Turaki*, and I, again the comments that I've made do to some extent speak for themselves but I wish to just highlight a number of paragraphs. The paragraph 66 deals with a quote from *Archbold* and the early part of the quote is what I want to emphasise. They talk about the risk in a recognition case of the person. "It is not that the person will pick out the wrong person on a parade but that at the time of the offence he mistakenly thinks he recognises the offender."

So we could have – just taking that as it stands, we could have a situation, and it's a matter which her Honour, Justice Glazebrook, identified earlier where the issue is not whether he identified a person who he was at the educational institute at that – when the second photo montage was put to him just under five months later. The issue is whether or not that person was the person who was the offender, just two days short of five months previously. And there is a retrospective element very much in this case and that is a point I did actually make as I recall in my – just going – when I was reading the transcript yesterday, I think it was in my closing address, this retrospective reasoning.

Now there is a key passage at paragraph 67 in looking at the issue of miscarriage of justice and where mention is made the identification evidence being of exceptional good quality. Now in this particular – and that's when a situation might arise where the warning has been not given as it should have been, perhaps quite as strongly as it should have been, but the evidence is exceptionally strong, therefore, the proviso there is no substantial miscarriage of justice. Well, that's not the case here,

Your Honour, the evidence is decidedly weak in terms of identification and those are the very, is the very strong submission.

**WILLIAM YOUNG J:**
Can you tell me, which is your client?

**GLAZEBROOK J:**
Oh, we have got that have we?

**WILLIAM YOUNG J:**
It's in the back of the Crown volume.

**MR GARDINER:**
Yes, I think from memory, I think he's second –

**WILLIAM YOUNG J:**
It's in the back of the Crown –

**MR GARDINER:**
Second on the left I think.

**WILLIAM YOUNG J:**
Sorry?

**MR GARDINER:**
I think he's second on the left at the top. Yes I think that is.

**GLAZEBROOK J:**
Oh we have got that have we?

**WILLIAM YOUNG J:**
It's in the back of the Crown folder.

**MR GARDINER:**
Yes. We have. He's – I think from memory – I'm a bit short-sighted Your Honour. I think he's –

**WILLIAM YOUNG J:**
It's in the back of the Crown –

**MR GARDINER:**
Second on the left, I think.

**WILLIAM YOUNG J:**
Sorry?

**MR GARDINER:**
I think he's second on the left at the top. I think, I think that is. I haven't got my glasses, so...

**WILLIAM YOUNG J:**
Well if you look at the back of the Crown submissions, the Crown booklet, bundle of materials, it is the last page.

**MR GARDINER:**
Oh. Thank you Your Honour. Yes it is. Second from left at the top. And he's, I would submit just on that, he's, he looks darker than any of the others. But that's...

**ELIAS CJ:**
The others might be seen more to fit to description than to – than he does?

**MR GARDINER:**
Mmm. Mmm. And one of the points that I made in challenging the similarity of the photos related to some of the background, and, for example, my chap is the only one with a black collar. You know, standing out. This is on the photo montage. So the eye goes – the argument was when I made –

**WILLIAM YOUNG J:**
But he would have been – it is a bit silly though, because he would have been able to identify this guy from the photo montage anyway because he knew him from – because he knew him anyway. He had seen him before anyway.

**MR GARDINER:**
That's, that's ...

**GLAZEBROOK J:**
Mmm. That is the difficulty with recognition evidence and photo montages, because you don't know whether they are recognising them as the offender or recognising them because they know them.

**MR GARDINER:**
That's right. And whether they, because they know them and the memory's a gold tooth, a gold tooth, a – and this is the –

**GLAZEBROOK J:**
Although you could not see the gold tooth in these photos.

**MR GARDINER:**
No you couldn't. But the, the extracts from the Law Commission reports show the fragmented nature of – the, the variables that go into, or can affect, identification evidence and affect its reliability, and the further the time, the further the passage of time out, the, the tougher it becomes and, arguably, in, I would submit very strongly, in having an accurate identification.

**ELIAS CJ:**
Now is there anything else you want to develop?

**MR GARDINER:**
Perhaps just in terms of summing up, your Honour, I'll just move on quickly to the Court of decision in relation to, Court of Appeal decision in relation to the appellant, applicant.

I come back to the way in which the summing up is structured. At paragraph 85 following and make the, again conclude that section 126(2)(a) was not complied with and I talk about section 126(2)(b) not being complied with.

I also, at paragraphs 30 to following, I address, as I did in the application for leave to appeal, the deficiencies from the applicant's point of view in the Court of Appeal's

reasoning, in the judgment anyway, regarding why they consider that there was no substantial miscarriage of justice. In fact I do that at 33 following.

My learned friend has commented in relation to those viewpoints. He thinks that I think in one respect in relation to the identification, the, the contact at the education institute he takes issue with, he thinks I might be a bit harsh in my criticism of the Court of Appeal by way of counterpoint, but essentially what I am saying is what I am submitting in relation to this area is that the Court of Appeal's reason is pretty thin and doesn't stack up when one actually analyses it and thinks, is this really the basis upon which the Court has decided there is no substantial miscarriage of justice, and my reasons actually do speak for themselves here.

And I just come back by way of conclusion to the Mr La Hood's article does deal with the structure of the *R v Matenga* approach and the deficiencies in this particular Court of Appeal decision in relation to the reasoning in *R v Matenga*. I don't think that I can improve upon the reasoning of Mr La Hood in that regard. It speaks for itself. My learned friend has to some extent covered that, taken those points up in his submissions. But I'm submitting that the section 126(2)(a) is not an introduction to the requirements of section 126. Basically, arguably, the legislature has said first and foremost this is what the Judge should do. Not an introductory – it's not an introduction. It's, it's a linchpin of that particular section. And then of course the convincing argument follows on in quick succession and so on.

Now, while the, there is a bit of latitude given in relation to precise wording being used, as long as the, the argument is, as long as the effect is, is there that could be enough. It has been acknowledged that the Court was deficient. Well, correction, the trial Judge was deficient in the way in which he dealt with this issue and that's been acknowledged by the Crown. The Court of Appeal in *R v Turaki* said that it's preferable that the full warning should be given. It spoke of that not being fatal if the evidence is exceptionally strong. This is not a case where the evidence was exceptionally strong in terms of identification. Arguably it was exceptionally weak. And I'm submitting that in all the circumstances this is a case where Your Honours could quite properly uphold the applicant's appeal and in the process provide some very helpful advice in terms of how Judges deal with summings up in relation to section 126.

**McGRATH J:**

In *R v Turaki* the Court of Appeal said that omitting reference to a serious miscarriage of – sorry, omitting the reference to the possibility of a serious miscarriage of justice would be all right if the direction was full and appropriate, particularly if the evidence was of good quality. I have a bit of difficulty with that.

**MR GARDINER:**

No. I – well I'm not – I'm, I can understand that approach and that's what I'm actually just said. The, the evidence in *R v Turaki* held – in this case was not of exceptionally good quality. That's the, the difficulty. We, we had the deficiencies in compliance with section 126. Not just one but two. We had one of those deficiencies is a crucial – first it's a primary requirement of that section. It wasn't addressed. It wasn't addressed in the way that Justice Clifford it should be addressed in *Uasi v R*. He – there are a number of provisions which I brought Your Honours' attention specifically to.

**McGRATH J:**

I suppose just *R v Turaki* in particular, I mean to me section 126 gives a direction of a warning of general concept, of a special need for caution. But it then goes on to require that a particular aspect of that warning be that mistaken identifications can cause miscarriages of justice. Now Parliament obviously thought that the matter had to be addressed in that specific as well as general way, and I don't really understand that it is necessarily going to be adequate that a full appropriate direction, as you have said, a very full direction was given by Judge Blackie in this case, is sufficient to meet Parliament's particular concern, which was a specific as well as a general direction.

**MR GARDINER:**

As the Crown conceded in their submissions, if this, prior – under the old regime was the *R v Turnbull* [1976] 3 All ER 549 warning in section 344, I think it's A, of the Crimes Act. This – or D. This would've been a, an okay direction. But it's deficient under the, under the new order, under section 126, and the deficiencies, I would submit, are quite crucial, particularly in relation to section 126(2)(a), and in relation to (b), the point that I made, and it's not a circular argument, it's not a semantic argument, it's actually a very valid argument, in relation to an honest witness being, being mistaken, just saying an honest witness may be mistaken is not the same as saying an honest witness may be convincing but also mistaken, and this is not a

situation, as, as his Honour, Justice Young, referred to of an honest witness being unconvincing and not being believed. That's, that's not the situation that we're talking about here. We're talking about one witness who was allegedly knocked unconscious. The evidence, I would submit, doesn't necessarily go that far. He was concussed. He was dazed. He was certainly knocked down. He was interviewed the following day and his best shot at that stage was a general description.

So, overall, I'm saying that the evidence on identification doesn't come up to scratch, that it's – when it comes to the process that hasn't been followed by the Court is quite properly set out by Mr La Hood in his article, and that the, there, this is a situation where the Court can quite validly accept that there has been a substantial – a risk of a substantial – there has been a substantial miscarriage of justice –

**ELIAS CJ:**
Well we do not probably even need to get into that.

**MR GARDINER:**
Righto.

**ELIAS CJ:**
If we are with you on error of law, the issue is then the proviso and your submission on that is for all the reasons that you have given and I think are repeating –

**MR GARDINER:**
I don't think – no more.

**ELIAS CJ:**
– that we could not be satisfied.

**MR GARDINER:**
Righto. Thank you Your Honour.

**ELIAS CJ:**
Thank you Mr Gardiner.

**GLAZEBROOK J:**

Can I just – these are probably points mostly for the Crown but I would quite like your comment on it. If you could turn to page 96 of the case on appeal, and if you look at the, it is the evidence of the police officer about how the photo montage was set up which, if the suspect has a photograph on our police system, now presumably the jury could only take from that that the photograph was on the police system because he was known to the police.

**MR GARDINER:**

Well they'd take it, they take it, I take it from that that all the photos, all the people in the photo montage were known to the police.

**GLAZEBROOK J:**

Well yes, but in particular your client, which would assume that he had prior conviction.

**MR GARDINER:**

That, that is the risk. That's –

**GLAZEBROOK J:**

The other question relates to further down the page where the police officer is giving definitive evidence that he's never known a wrongful identification and everybody he's done a photo montage of has been correctly identified. If you look at about line 25 on –

**MR GARDINER:**

That's, that's correct. That was a gratuitous –

**ELIAS CJ:**

Well it's not gratuitous because –

**WILLIAM YOUNG J:**

Well yes, it puts –

**ELIAS CJ:**

– he is being asked.

**WILLIAM YOUNG J:**

You asked the question.

**MR GARDINER:**

Yes, yes. Yes.

**WILLIAM YOUNG J:**

I mean you led with your client's chin on that one I think.

**MR GARDINER:**

Even the best boxers do Your Honour.

**WILLIAM YOUNG J:**

Yes.

**GLAZEBROOK J:**

Yes, although it's quite –

**MR GARDINER:**

Hopefully you don't get a knockout.

**WILLIAM YOUNG J:**

Normally their own chin.

**GLAZEBROOK J:**

Mmm. The other issue was just a bit further on in the voir dire, and this is just a puzzled comment. It obviously didn't go in front of the jury, but say at line 20 on page 3 of the voir dire, that he was 100 per cent sure it was the person he met in prison.

**MR GARDINER:**

That didn't come, that didn't –

**GLAZEBROOK J:**

Well did he meet him in prison or...

**MR GARDINER:**

I think they were in prison. That was a – but I don't – the extent to which there was an overlap where – they weren't in the same wings, they weren't in the same part of the prison or whatever. So that was something which I was prepared for at trial but it never came up. He never gave evidence on that in, in evidence in evidence-in-chief. So – and it wasn't an area that I chose to explore.

**GLAZEBROOK J:**

No. No, I can understand that it was just a – it's just a question because it was a slightly puzzling comment.

**MR GARDINER:**

And he, he wasn't undergoing imprisonment. He was a prisoner – I think he was – when one looks at his history he was actually on – he was in custody pending bail or something like that.

**WILLIAM YOUNG J:**

He has not been sentenced to prison. I had a look at that myself.

**MR GARDINER:**

No. That's correct. So he, if he was in prison at the – I believe he was in prison at, for part of the time.

**GLAZEBROOK J:**

Well yes. I think your – the victim said that that was before he went inside at one stage.

**MR GARDINER:**

So...

**GLAZEBROOK J:**

It happened just before he went inside, I think, didn't he? Or he might have gone inside after he had been at the institute or something.

**MR GARDINER:**

That's right. Yes.

**GLAZEBROOK J:**

It was something along those lines. The other issue is the jury question, because it is slightly unfortunate that the jury does not seem to have known how long afterwards this man suddenly realised that he did know someone. So the jury question I think was given in answer that we do not know how long afterwards it was, which presumably is because it came, that came out in the voir dire but not in the evidence. The jury question is at page – but it was obviously something that was exercising the jury's mind and they did not get the right answer to it.

**WILLIAM YOUNG J:**

Or was it that they did not get the right answer or –

**GLAZEBROOK J:**

They did not get any answer.

**ARNOLD J:**

They did not get an answer. Once –

**WILLIAM YOUNG J:**

Was that because there was not evidence or –

**GLAZEBROOK J:**

There obviously wasn't evidence.

**MR GARDINER:**

No, there wasn't. The, the – I think, think from memory the jury's question was whether, or one of the jury's questions, was whether or not he had actually contacted the police, whether there was any evidence he had contacted the police.

**GLAZEBROOK J:**

Could someone help me what page that question is on?

**ARNOLD J:**

It's 170.

**GLAZEBROOK J:**

170.

**ARNOLD J:**

And it says, “At what point did the complainant go to the police and say that he recognised one of his assailants as a person he’d seen at the college?

**MR GARDINER:**

Yes.

**GLAZEBROOK J:**

Oh, it is a very unhelpful answer, frankly.

**ARNOLD J:**

Mmm.

**GLAZEBROOK J:**

And the other question is, given the real deficiencies in the whole issue of identification here in terms of timing, the time it took for them to get that first montage, the difficulties of recognising somebody from an institute two years before, four months, five months, four or five months afterwards, never mentioning that, should the evidence of identification have even gone to the jury?

**MR GARDINER:**

The Judge, the Judge was of the view that – that’s a good question. I think if I’d made a – my, my feeling was that if I’d made a submission to that it wouldn't have succeeded. That’s the feeling I had. And that’s probably going through the voir dire where the – and the views that the Judge had in relation to how the matter should be dealt with. But that – I might be – of course that’s pure supposition on my part.

**GLAZEBROOK J:**

Well do you want to make any submission on whether it should have gone to the jury now?

**MR GARDINER:**

Well if the, if the, if a witness was to be believed, that’s Mr Vao, and he did make an identification, then the issue – and if he, if – and that was, he was quite categoric when he gave evidence that the person who he recognised was the accused, then that of itself, I would’ve thought, was taking it technically, was sufficient to justify the

matter going to the jury. Now, I – and the Judge, of course, equally, if he had felt – well, that's, that's where I was coming from anyway. And I might add if the, if the – well, if the Judge was of the view that if he disagreed with that he, he could've raised that issue himself.

**GLAZEBROOK J:**
Well you're saying you brought those points in the voir dire and – I'm not criticising you –

**MR GARDINER:**
Yeah. No, no.

**GLAZEBROOK J:**
– for not making the submission. It's just a question as to whether in all the circumstances it should actually have gone before the jury, and it must be a fairly close run.

**MR GARDINER:**
Mmm. Yes, no, I accept that your Honour.

**ELIAS CJ:**
Thank you Mr Gardiner.

**MR BOLDT:**
May it please your Honours.

Now, perhaps at the outset I'll clear up the answer to your Honour Justice Young's question about the Crown's attitude to the proviso in this Court. What I have sought to do in my submissions in that, is in that very last section of the submissions, is to say whatever I think can be said –

**WILLIAM YOUNG J:**
Can I just pause there. The strength of the Crown case is material to a consideration of a "would it have made a difference?" argument. And that's what I took you were, took you to be relying on. But it's – I didn't take it to be your submission that whatever said, whatever was said by the Judge, it's perfectly clear that the appellant was guilty and the jury would have concluded that.

**MR BOLDT:**

That's, that's fair Sir. It may be that we, we find ourselves in proviso territory towards the end and if that is the situation then I will also seek to rely on that final part of those submissions for that purpose. But I must say, perhaps incorrectly although I think the analysis that preparation for this case has required in terms of the way *R v Matenga* is being applied and the, the fact that what I've characterised in my submissions as a three stage approach to the question of miscarriage of justice doesn't appear always to have been followed in the Court of Appeal. It certainly hasn't been followed here. And the great –

**WILLIAM YOUNG J:**

Well what case is here? I know it has not been applied in the Court of Appeal. The Dale La Hood article shows that very clearly. But what cases here has it not been applied in?

**MR BOLDT:**

Well in this particular case there is, if you like, a conflation of what should be two quite distinct steps.

**GLAZEBROOK J:**

No, no. The question was when has it not been applied in this Court?

**MR BOLDT:**

Oh, I, I certainly don't say it hasn't been applied in this Court.

**GLAZEBROOK J:**

Oh, okay. Sorry, "here", you meant "in this case"?

**MR BOLDT:**

As in this –

**GLAZEBROOK J:**

Okay. I see now.

**MR BOLDT:**

– this case in particular. I'm sorry. I don't, I certainly mean in this Court.

**WILLIAM YOUNG J:**

But look, I mean, the "would it have made a difference?" argument either comes in under section 385(1)(c), which is what *R v Matenga* suggests, or it can also come in under the proviso as part of the language of the proviso, which is what a number of Court of Appeal decisions suggest, but it does not actually make a decision, difference, because it comes in somewhere.

**MR BOLDT:**

Correct, Sir. The, the way the two questions are –

**ELIAS CJ:**

It might come in at both stages.

**WILLIAM YOUNG J:**

Yes. It might come in at both stages. Yes.

**MR BOLDT:**

*R v Matenga* describes, and I, I don't, don't think we need to dwell long on this because really the, the substance of the question and the substance of the issue here is exactly as it was in the Court of Appeal, but in *R v Matenga* the, this Court indicated really the first question for the Court of Appeal is in the context of this trial, and in terms of the matters genuinely in issue before the particular jury, would the error in question have made a difference? And in my submission that doesn't matter, it doesn't matter whether you're dealing with an error of law under section 385(1)(b) or a suggestion of a miscarriage of justice under section 385(1)(c).

**ELIAS CJ:**

Is that going further, though, than saying whether it is error or law or whether it is substantial miscarriage of justice, although one would have thought the weighting – well, or whether it is miscarriage of justice, one would have thought the values in miscarriage of justice take you a long way, but whether it is under error of law or miscarriage of justice, it has got to be material.

**MR BOLDT:**

Indeed, before the proviso is even engaged.

**ELIAS CJ:**

Yes.

**MR BOLDT:**

And that's, and that's where –

**McGRATH J:**

And that – does that mean it has got to be capable of affecting the result of the trial?

**MR BOLDT:**

Exactly.

**ELIAS CJ:**

Yes.

**McGRATH J:**

That is what "material" means in this context?

**ELIAS CJ:**

Yes. Yes, exactly.

**MR BOLDT:**

And in, in the context of the particular case with all the – everything that ebbed and flowed during the course of the trial and what was genuinely in issue before the jury –

**ELIAS CJ:**

Well... I wonder. If you have an error that is capable of affecting the result, does not that then take you to the proviso in which it has to be assessed in context?

**MR BOLDT:**

I think, Ma'am, and this is just an example off the top of my head, let's, let's say we'd had a miss direction here about, say, the definition of, of grievous bodily harm, say. One of, one of the elements that wasn't in dispute and which actually the Judge said, "Look, I need to set all this out for you but really that's not the – these aren't the matters you're concerned with here, members of the jury." Now, you can say, "All right, you've got an error there. It's probably an error of law as well. But it's an error of law that, in the context of this trial, doesn't matter at all, and so we can move on."

**ELIAS CJ:**

Then it does matter, surely, if you're going under error of law or miscarriage of justice. If you have got an error of law and it is material to the charge, why do you not then go to assess it in the context of the proviso?

**MR BOLDT:**

Well, two, two answers. One comes just directly from the wording of the statute. And, again, this is an area where the Court of Appeal has on occasions fallen into error, and that is to say as soon as there is an error of law we then proceed directly to the proviso.

**ELIAS CJ:**

A material error of law.

**WILLIAM YOUNG J:**

It has to be an error of law that warrants the appeal being allowed.

**MR BOLDT:**

Indeed. And so that's –

**WILLIAM YOUNG J:**

Does this really matter?

**ELIAS CJ:**

Yes, does this really matter?

**WILLIAM YOUNG J:**

I mean, does this matter? The section has been repealed.

**MR BOLDT:**

No.

**WILLIAM YOUNG J:**

It does not affect the outcome of this case.

**MR BOLDT:**

I, I know.

**WILLIAM YOUNG J:**

It does not affect anything for the future.

**MR BOLDT:**

No. No. It doesn't. And –

**ELIAS CJ:**

And the complication in *R v Matenga* was because it was a miscarriage of justice case. Here you have indisputably got an error of law, have you not?

**MR BOLDT:**

You, you have. And it's our case, Ma'am, that, however, it's not an error of law –

**ELIAS CJ:**

Capable of –

**MR BOLDT:**

– of, of a kind that should lead to the verdict being set aside. And that, in substance, also, is what the Court of Appeal has held in dismissing the appeal. So it was an error of law but in the context of this trial and in particular in the context both of the evidence the jury heard and the balance of the summing up, the Court of Appeal at least has held we don't find ourselves in a situation where –

**ELIAS CJ:**

How can you make that submission when it's a legislatively imposed mandatory requirement with a history of experience behind it? Do you not have to accept the legislative judgment that this is a material error of law? Go past that and then into the proviso if you must, but how can you argue that not giving this mandatory direction is not a material error of law?

**MR BOLDT:**

Well, I'm – there are, there are a number of parts of the answer to that question. The main one, however, is section 128 – 126(2)(a). It's a new provision. It replaced an equivalent provision in section 344D, which simply required that the reason for the

warning be given, and it provided for a mandatory introduction to this topic which the Court of Appeal has held, and, and I respectfully submit, correctly, tells the jury nothing more than they would ordinarily and quite naturally infer from the whole of the identification direction and in particular the very special need for caution, the special caution that witnesses might be perfectly honest but mistaken, and then the very elaborate direction juries always get about the particular facts of the case and the dangers of identification inherent not just in theory but in the particular case.

**GLAZEBROOK J:**
Well –

**WILLIAM YOUNG J:**
Can I – sorry.

**GLAZEBROOK J:**
But isn't the issue more what was said in *Uasi v R* about making it clear that the risk has been identified on the basis of actual cases? So in fact, yes, of course the jury would infer that there could be a miscarriage of justice in this case, but would they necessarily infer, and I cannot remember the statistics, but I think some unbelievable percentage of the DNA exoneration – it might be 75 per cent of them, the DNA exonerations in the United States have been based on wrongful identification evidence.

**ARNOLD J:**
I think the –

**GLAZEBROOK J:**
So these are absolutely clear cases. Is it 75?

**ARNOLD J:**
That evidence is summarised in the case under tab 4, *R v Edmonds* [2010] NZCA 303, [2010] 1 NZLR 762 at paragraph 43.

**MR BOLDT:**
Indeed, indeed. And –

**GLAZEBROOK J:**

So that the jury of course would infer that if they wrongfully identify in this case it will be a miscarriage of justice. What they will not know from what is said by the Judge, that in fact wrongful identification, and these are DNA exonerations, so slam-dunk wrongful identification, have caused major miscarriages in the States and probably in the United States, actually wrongful executions, one suspects.

**MR BOLDT:**

Oh, and I, again I don't, I don't disagree with any of that Ma'am. Although again it, interestingly, that's not what section 126(2)(a) says. It would make – it, it –

**GLAZEBROOK J:**

But that's the added requirement that the Court of Appeal has suggested, I would put to you quite rightly, because otherwise it's a warning in a vacuum, effectively.

**MR BOLDT:**

Mmm. What –

**GLAZEBROOK J:**

But – so the added requirement that the Court of Appeal has suggested would seem to me to be a useful one.

**MR BOLDT:**

And, indeed, and I don't, I don't disagree with that -

**WILLIAM YOUNG J:**

Can I just – was it not –

**MR BOLDT:**

– for the, for a moment, Ma'am.

**WILLIAM YOUNG J:**

Was it not the practice or the better practice under section 344D which required the reason for the direction to be given to say that? To say that experience has shown that miscarriages of justice have resulted in faulty identification evidence?

**MR BOLDT:**

Well, that, that was some Judges' practice, Sir.

**WILLIAM YOUNG J:**

Because all the Judge did here is go on to pick up (b) and (c) of section 344D, which I can't believe was what 344D(a) was there, was on about, because it wasn't treated as a separate element. But the second thing that really disturbs me is that there are whole stream of cases where District Court Judges have summed up on the basis of their, their pre-2006 precedents.

**MR BOLDT:**

I, I can see that and we can see that in this case. In fact in –

**WILLIAM YOUNG J:**

I mean I have got four: *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788, R v *Turaki*, *R v Hohepa* and *R v Davis* [2008] NZCA 424. All, in all of these cases the Judge has omitted section 126(2)(a)."

**MR BOLDT:**

Indeed, and, and it seems there may need to have been some updating done to the, to the common precedent because this is not, I think, an area where District Court practice moved when the Evidence Act – when the requirement changed in 2007. So, of course, you know, the –

**ELIAS CJ:**

What is –

**MR BOLDT:**

– as a result of this –

**ELIAS CJ:**

Sorry. Carry on.

**MR BOLDT:**

I was going to say, as a result of this the Court of Appeal has on a number of occasions now had to grapple with what happens where this –

**ELIAS CJ:**

Happens. What is your best case? Is it *R v Hohepa* in the Court of Appeal?

**MR BOLDT:**

*R v Hohepa* and *R v Turaki*, and –

**GLAZEBROOK J:**

Well *R v Turaki* was, because I sat on that, quite a different type of case because you had slam-dunk recognition and the issue there was, as identified by the Court, whether the person slam-dunk recognition had actually done what they were alleged to have done, what they were alleged to have done.

Now, on reflection I am not sure that that was necessarily the correct, a correct way of looking at it, but it was, it was not saying that it was okay in a pure identification case not to make that warning. Because it was talking about the particular circumstances of this, of that case where the real question was whether the person who was undoubtedly there had actually done what they said they had done.

**MR BOLDT:**

And I, I don't, I must say, rely on, on *R v Turaki* for the particular outcome in the particular case because, I, I agree Ma'am, there were a number of different issues, and, and a key one being, is an identification warning required at all? But the, the key passage from, from *R v Turaki* can be found at paragraph 81 of that decision, and that's much more of a general comment. It is something of a retreat from *Uasi v R*, which really is as, as Your Honours have already observed, the, the high point for taking a very strict line with an omission, to mention the requirement in 126(2)(a). But if we look at paragraph 81, and in particular –

**ELIAS CJ:**

Is this proviso discussion or is it –

**GLAZEBROOK J:**

Well I do not think so, and it probably has to be related to 82 because what you have is the person was clearly there, did not contradict being there, there were three people, and the question was, did – was one – was the one of the three people who attacked the person Mr Turaki or not? Now, that was the question; not whether anybody recognised Mr Turaki because they clearly did and he did not contest that.

**MR BOLDT:**

No. And, and I accept, Ma'am –

**GLAZEBROOK J:**

So it is a quite different context if you are trying to take anything general from 81, it seems to me.

**MR BOLDT:**

Well, and, and I, of course, I defer entirely to Your Honour as, as the author of that judgment, but –

**GLAZEBROOK J:**

And I am not saying that I stick with the reasoning of the judgment either, but nevertheless, it was a totally different context.

**MR BOLDT:**

But, but certainly – and, and I, I, really, the, the sentence in particular that I rely on is, well, the two sentences: firstly, in effect, the endorsement of *R v Hohepa* and another case called *R v Davis*, which I've got a copy of for Your Honours. It does – if, if Your Honours need to see it. It does nothing more than what *R v Hohepa* does; but secondly the, the third sentence there, "the result in *Uasi v R* depended on the unusual combination of circumstances in that case. A failure to mention the possibility of a serious miscarriage of justice would not normally carry the risk of a miscarriage of justice where the direction was otherwise full and appropriate. This is particularly the case where the identification evidence is of good quality."

So – and, and, Ma'am, and with, with all deference to Your Honour as the author of that judgment, that is a departure from a case-specific analysis of the identification in that appeal and, and a statement more of general principle.

And what I do submit is that it reflects a realistic appraisal of the perspective in which a section 126(2)(a) omission can be placed –

**ELIAS CJ:**

This –

**MR BOLDT:**

– because 126(2)(a) carries with it the implication that if you get this wrong there will be serious consequences for the accused. That, that, in, in effect, is the message section 126(2)(a) carries. And in *R v Hohepa* the Court of Appeal said, "Well, the jury really was going to have no trouble working that out for itself. The jury would have understood the entire reason the Judge was talking to them for such a long time about identification evidence and why identification evidence assumed the absolute centrality it did in the course of the summing up was because there was a real risk to the young man or woman in the witness in the dock if they make a mistake here." And it's not a part of the section 126 direction that carries with it any substance. It's a suggestion to watch out because serious consequences can happen if you get this wrong, but then the substance of the direction, the thing that really is going to cause the jury to take this extra special care with the identification can be found in the surrounding provisions, particularly section 126(1) where the need for special caution is stressed, as it was quite appropriately here by His Honour, but also in the warning, don't get too carried away about how honest a witness is, how convincing a witness is –

**ELIAS CJ:**

Well it says nothing about honesty.

**MR BOLDT:**

No. And, and we can, we can come to section 126(2)(b). I do –

**McGRATH J:**

Well just before you do, Mr Boldt, what worries me about your argument is that Parliament obviously did not think it was sufficient to leave this particular factor implicit, the fact that mistaken identifications can result in serious miscarriage of justice with the implication laid bare: they do from time to time result in that. Now, if Parliament wants that to be explicit, how far can we go with your argument that, you know, "Do not be concerned" – or the Court of Appeal's argument, if you like, "Do not be concerned, it is enough if it is implicit"?

**MR BOLDT:**

Well, I – it really – well there are two possible approaches and one is to say, this is a, this is a mandatory requirement and I don't shrink for a moment from accepting that it is. It's not something Judges can feel free to dispense with. And to say we, we can't

make a scarecrow of the law here. We can't just allow this, we can't just allow this provision to be routinely dispensed with and only allow an appeal if there is something else that causes us a problem. But what the Court of Appeal has done, and what it's done in successive cases, because the outcomes from case to case have been different where this error has been made, has been to say, "All right. Let's look at this omission in its context and let's seek to make an assessment as to whether it has, it could have made a difference in this case." And that requires, in particular, an examination of the whole of the identification direction, and you could well imagine where there were – where the identification direction itself was somewhat threadbare and where the, perhaps, the need for special care or the jury's – hadn't been stressed or the jury's attention hadn't been directed to particular strengths and weaknesses in the identification evidence in the particular case. Where the Court might say, "Well, this well and truly tips the balance, because not only was the substance of the warning only very barely over the line, you also omitted this mandatory requirement."

**ELIAS CJ:**

Well the point that is being put to you, and we should take the morning adjournment now, but the point that is being put to you is that this is not a question of balance. It is a matter of obligation. It is an error of law. Now, the balancing may come into the proviso but, for my part, I cannot see that you are not immediately into proviso territory given the mandatory direction in section 126. And while you are quite right to take us to the Court of Appeal decisions, trying to make these errors better, I would prefer to see concentration on the statutory language, myself.

**MR BOLDT:**

Thank you Ma'am, and if it's the adjournment, I'll respond afterwards.

**COURT ADJOURNS:11.30 AM**

**COURT RESUMES: 11.51 AM**

**MR BOLDT:**

Now before the break we were talking about the statutory language in 126(2)(a) and my submission, for what it is worth, is that this is a provision which on its own it sets the scene but it doesn't, by itself, carry a lot of information for the jury which is likely to make a significant difference to the way they approach the task. I appreciate, as Your Honours have pointed out, that it has been suggested, in particular in *Uasi v R* was suggested that in fact that the mandatory direction in 126(2)(a) should be supplemented with additional information and that is again in my submission a recognition that the provision by itself doesn't, in fact, carry with it a great deal of weight. If the Judge had directed the jury here in precisely the language of the section, and the Judge had said, there's need for special caution with this identification, I need to warn you that a mistake in identification can result in a serious miscarriage of justice, but had gone no further. There could have been no criticism of that direction in the Court of Appeal. It would have been, the Court would have pointed to the statutory language and said it was complied with entirely in its terms but I can also mention the submission, and this really is what the Court of Appeal said in *R v Hohepa*, that if the Judge had directed in those terms, the jury might even have been forgiven for raising an eyebrow at being told something that was, with respect, a reasonably obvious proposition. If you get this wrong there are serious consequences for this accused. You may very well be sending an innocent man, or woman, to prison. And the Court of Appeal in *R v Hohepa* at least had little difficulty saying the jury would have understood not only from the other parts of the section 126 direction but also from the very case specific analysis of the strengths and weaknesses of the identification evidence. That that was the reason they were being directed to focus so carefully on that evidence and to take account of and, if possible, avoid any possibility of error.

**ARNOLD J:**

So are you saying then that the observation that there have in the past been many instances of innocent people being convicted on the basis of mistaken eyewitness evidence. Conveying that is not important because you said the jury would understand that the consequences for this appellant of the mistake are very important and that's obviously a thing they need to understand. But isn't there also that dimension that experience has shown this is a common problem?

**MR BOLDT:**

Well that was the gloss the Court of Appeal put on the direction in *Uasi v R* but it's not the language of the statute. The statute simply says the Judge must warn the jury a mistaken identification can result in a serious miscarriage of justice. Now that provision would have a great deal more substance and it would add materially to the statutory warning if it were expressed in the terms Your Honour has outlined just now. If 126(2)(a) said, must warn the jury that in the past there have been serious miscarriages of justice as a result of erroneous identifications. That would immediately put the jury on notice, okay, we are in very dangerous territory here so we need to be particularly cautious. But that's not the language that Parliament chose there and in terms of that introductory remark, the why are we talking about this, Your Honours formulation actually does come quite a lot closer to what I have always understood would be required as that much more abstract concept, the reason for the direction under the old section 344(d). Why am I telling you this? I'm telling you this because this is an especially dangerous area. Identification is notorious as an area where people can be perfectly honest and sincere and convincing but also wrong and a lot of people have gone to prison wrongly over the years as a result. That's the reason for the warning and –

**ARNOLD J:**

And if you're going to interpret section 126 in a purposive way I mean wouldn't – well isn't there an argument anyway that you would want to build that in as a matter of a proper direction?

**MR BOLDT:**

And the Law Commission in the papers it produced at the time of this reform indicated it had given careful consideration to a much more elaborate and prescriptive direction but ultimately had decided against doing so. So the only change, the only change in terms of the substance was to remove an abstract concept, maybe the reason for the direction which wasn't then, in fact, made clear with this.

**McGRATH J:**

But can't we assume, Mr Boldt, that the Law Commission would have contemplated that the Courts would build on the literal language.

**GLAZEBROOK J:**

Well they said so if you look at the jury directions at their place at 217 at tab 1.

**MR BOLDT:**

It's the very last page of that tab in the Crown's bundle and –

**GLAZEBROOK J:**

So they were saying that the Judges should build on those provisions based around the – so it's not enough merely to recite that. They're supposed to be tailoring the directions to the particular case?

**MR BOLDT:**

Well indeed but –

**GLAZEBROOK J:**

Which you submit the Judge did in this case, isn't it?

**MR BOLDT:**

Well indeed and the Court in *Uasi v R* said, and that's why the *Uasi v R* is a very strict and technical application of the statute because in *Uasi v R* the Court said this direction would have ably met the old standard under *R v Turnbull*, under section 344(d) but because it hasn't used the words in section 126(2)(a) and indeed hasn't added the gloss the Court thought should be added, then it falls short and we have an error of law and therefore unless we can apply the proviso the appeal should be allowed. Now as I say that is another area where the Court may have skipped a step in the *R v Matenga* analysis but in any event that was how the Court approached it in that case. But there was subsequently a retreat on the part of the Court of Appeal and the real question, the question in terms of this stage 2 *R v Matenga* analysis, and that is, is this an error which in this trial might have made a difference to the approach that this jury took.

**ELIAS CJ:**

Oh is that what *R v Matenga* says?

**MR BOLDT:**

Well in effect it is Ma'am and it's – well I and, in a slightly more elaborate way in his article, Mr La Hood has suggested there is a quite distinct step, one of which focuses

on the jury hearing the case and asks whether giving everything that occurred at trial this jury's approach was likely to be, could have been affected by the error. So that's the first step and that step applies whether you're talking about an error of law under paragraph (b) or a miscarriage of justice under paragraph (c).

**GLAZEBROOK J:**
Where do you get that from *Matenga*?

**ELIAS CJ:**
Do we have *R v Matenga*?

**MR BOLDT:**
We do Ma'am, it's in the bundle of authorities behind tab 6.

**GLAZEBROOK J:**
It's just I'm not sure I've ever got that from *R v Matenga*, so can you just show me exactly where that is?

**MR BOLDT:**
Well, for of all, Ma'am, for treating 385(1)(b) and (1)(c) the same, paragraph 10 effectively covers that but –

**McGRATH J:**
I think it's 31 of *R v Matenga*.

**MR BOLDT:**
It is, Sir. In fact, really it's 30 is the, is where that concept begins and this is where this Court departed from *Weiss v R* and the Court in the last two sentences at paragraph 37, "In the end, departing this respect from *Weiss v R*, we consider –

**GLAZEBROOK J:**
Well, we probably do need to go back to 10, don't we, because you say, "Where the Court may uphold a conviction where the issue of law must certainly have been immaterial to the guilty verdict."

**MR BOLDT:**
Indeed.

**GLAZEBROOK J:**
A peripheral decision.

**MR BOLDT:**
Yes.

**GLAZEBROOK J:**
So, "It might be expected the Court would not have formed the opinion that a conviction should have been set aside on the basis proviso can be applied." So first of all, your first step in terms of an error of law is that the issue of law must certainly have been immaterial to the guilty verdict.

**MR BOLDT:**
Yes.

**GLAZEBROOK J:**
And I thought your submission was in this case, it must certainly have been immaterial because it couldn't possibly have made a difference.

**MR BOLDT:**
Yes, Ma'am.

**ELIAS CJ:**
But that would be to say that it never will really make a difference because this is a case that totally turns on the identification evidence.

**MR BOLDT:**
I wouldn't say "never would", Ma'am and I think to an extent a failure to follow one of these mandatory provisions can be saved, if you like, by an otherwise very thorough and good identification direction, and –

**ELIAS CJ:**
But that will only be on the facts won't it? I mean this is a direction which is required as a matter of law –

**MR BOLDT:**
Mmm.

**ELIAS CJ:**

How can, fully referring to all the factual considerations that the jury would have to take into account, overcome the deficiency in not making this direction as to how they should go about their task?

**MR BOLDT:**

I probably, Ma'am, can't improve on the way that the Court of Appeal put it in *R v Hohepa*, which is to say the jury can be expected to absorb the summing up as a whole and to have no difficulty as a result, drawing the inference very clearly that the whole reason identification has assumed such great prominence and why we are being warned about it, why all these other particular warnings are given and why there is such a focus on the strengths and weaknesses of the identification in a particular case, can only be because we wish to ensure we avoid a miscarriage of justice by convicting them the wrong person and reliance on that identification evidence. So in other words, although the words haven't been uttered, the impression would overwhelmingly have been made upon the jury that that's the whole reason we're here.

**GLAZEBROOK J:**

But only in the particular case miscarriage of justice which is what you say is all paragraph (a) is related to because they certainly wouldn't take from a full direction that other miscarriages of justice have happened.

**MR BOLDT:**

No, no.

**GLAZEBROOK J:**

All right, so, all right.

**McGRATH J:**

Mr Boldt, can I just come back. You emphasise *R v Matenga*, paragraph 30 but really it seems to me that paragraph 31 does sum up the, sort of the two elements, the second one going to what's a substantial miscarriage. That's the way I've understood it.

**MR BOLDT:**

Yes, yes and –

**GLAZEBROOK J:**

So paragraph 10 is the error of law not material and then you have another two-stage step after that. Is that the submission or...

**McGRATH J:**

Well, I think it's summed up in paragraph 31.

**MR BOLDT:**

It is, Sir, and just one last thing before we leave paragraph 10 in a moment, the last sentence is also important. "If it were otherwise, different approaches might be required as between paragraphs (b) and (c), which would add an additional complication to what is already a troublesome provision."

**GLAZEBROOK J:**

Well, the proviso can be applied so that just makes it clear. You can go to the proviso if you decide that it wasn't certainly immaterial, you can then go to the proviso and then what do you do under the proviso? It has to be capable of affecting the result. Is that the first step?

**MR BOLDT:**

I think before you get to the proviso you need to be satisfied because –

**GLAZEBROOK J:**

No, no, we do section, paragraph 10 but we have to find it must most certainly have been immaterial and then we don't get to the proviso at all.

**MR BOLDT:**

Indeed.

**GLAZEBROOK J:**

But if it could have been material or wasn't most certainly not material or whatever the – we then go to paragraph 31? Is that the submission?

**MR BOLDT:**

It is. It's –

**GLAZEBROOK J:**

Oh sorry, I'm just trying to –

**MR BOLDT:**

Indeed, Ma'am. And it's introduced at the end of paragraph 30 but you're right, Sir, it's that first, first sentence in paragraph 31 which sums up in a nutshell what we're talking about as miscarriage of justice: "something which has gone wrong and which was capable of affecting the result of the trial". And in fact that's the analysis the Court of Appeal applied in this case, even if it, right at the end of the judgment, used some loose terminology and in fact spoke about a substantial miscarriage of justice, which implied it had in fact considered the proviso, but it didn't. It didn't reach the proviso because it said, "We are satisfied in all the circumstances of this trial that this error wasn't capable of affecting the verdict."

**McGRATH J:**

And if it is capable, then?

**MR BOLDT:**

Then we are –

**ELIAS CJ:**

Second stage.

**MR BOLDT:**

– in the next stage.

**ELIAS CJ:**

I mean the first stage does seem to me simply the miscarriage of justice ground, I must say, but...

**MR BOLDT:**

Yes.

**GLAZEBROOK J:**

Well, or –

**McGRATH J:**

Yes. And the second stage is a –

**GLAZEBROOK J:**

– it is just a repetition of what is said.

**McGRATH J:**

– substantial miscarriage?

**ELIAS CJ:**

Yes.

**McGRATH J:**

That is the way I have always understood it.

**GLAZEBROOK J:**

Or a repetition of what was said in 10 in the error of law. Because if it was a, if it was immaterial it cannot have been capable of affecting the result of the trial. But if it could have been capable, if it was material then it was capable of affecting it, and that is just in the abstract, and then you go to the facts. But once you got to the facts the Court itself has to be satisfied. And I just put to you there is no way on earth the Court itself could have been satisfied in these circumstances.

**MR BOLDT:**

And I think that is probably where I do depart from Your Honour in terms of what is required in, before you get to the proviso, because it's my submission that –

**ELIAS CJ:**

Well do you accept that if you do get to the proviso the Crown cannot succeed?

**MR BOLDT:**

I accept we are in difficulty there Ma'am.

**ELIAS CJ:**

Yes.

**MR BOLDT:**

It's, it's – and that's – and *R v Matenga* itself makes it clear there can be an enormous number of cases and particular types of case where you could hold there

has been no miscarriage of justice in circumstances where you could never hold there has been no substantial miscarriage of justice, because at that first stage, at that miscarriage of justice stage, you are still, as long as you are satisfied the error, whether it's an error of law or some other kind of irregularity –

**ELIAS CJ:**

Well I think it's quite confusing, really, to use "miscarriage" as a total catch-all at that first stage because if you have an error of law it has to be one capable of affecting. There is a difficulty with the miscarriage of justice one because you have already got to the stage of saying that there is am miscarriage of justice. But here we have indubitably, if the appellant is right, an error of law. Non-compliance with a mandatory statutory direction. So is not the issue, is that capable of having affected the result? You have to put on the argument you have just put to us everything on that. You have to say it is not capable of affecting the result.

**MR BOLDT:**

That is – I entirely accept that's the, that's the burden Ma'am.

**ELIAS CJ:**

Yes. Yes.

**MR BOLDT:**

And –

**GLAZEBROOK J:**

And you say you take the particular facts of the case in effect at that stage?

**MR BOLDT:**

Yes.

**GLAZEBROOK J:**

Although that mightn't be quite right because it's actually incapable. So you're taking the facts into the mix at both stages of that – and I'm using "proviso" loosely because I accept that you could arguably say that that first stage is outside of the proviso rather than inside it –

**MR BOLDT:**
Mmm.

**GLAZEBROOK J:**
– but it doesn't matter.

**MR BOLDT:**
Indeed. And I can – it's clear from *R v Matenga* itself that even this Court struggled to, to piece together these provisions, but the way I read paragraph 10 in particular is that – is the Court saying, "Let's treat B and C the same. They each carry with them a qualitative evaluation before you say the paragraph has been engaged. Miscarriage of justice, well that's easier because a miscarriage of justice is something capable of affecting the trial and we can define that for ourselves. Error of law such that the verdict should be set aside, that also imports a qualitative analysis of how bad the error was and whether it might have made a difference in this case." And the way I read paragraph 10, and in particular those last couple of sentences, is to say, "Those are sufficiently similar for us to treat them the same in, as part of this, of the stages we have to go through in deciding first whether we need to apply the proviso at all."

So I completely agree with the way your Honour the Chief Justice put it to me now in terms of what the Crown has to show in order to, to hang on to the conviction, notwithstanding what we acknowledge was an error. And whether you call it an error of law or a miscarriage of justice doesn't matter. The question is, was that capable of affecting the verdict in this case?

The Court of Appeal in effect said no. That was the – the whole of the analysis the Court of Appeal undertook was to seek to place this error in the context of all of the evidence at trial, in the context of the remainder of the summing up, and informed by a number of decisions of that Court already where the same error had occurred.

**ELIAS CJ:**
But leave aside the, you know, informed by the other cases, because I think we have got past that –

**MR BOLDT:**
Of course.

**ELIAS CJ:**

– and we have encapsulated what your argument has to be. So it just a question of application.

How do you get around the rather puzzling first sentence in paragraph 45 which is the dispositive reasoning?

**MR BOLDT:**

This is of the –

**ELIAS CJ:**

Of the Court of Appeal.

**MR BOLDT:**

– Court of Appeal's decision? I can, I can understand why Your Honour asked the question.

**ELIAS CJ:**

And also, given the argument you've just addressed to us and your view that although they referred to substantial miscarriage of justice they're not really into proviso territory here, really that sentence looks very much like proviso stuff to me.

**MR BOLDT:**

It – well, it is, and that is where the Court of Appeal –

**ELIAS CJ:**

Yes.

**MR BOLDT:**

– has made an error, and that's why I say right up front in my submissions, in fact, the answer to the approved question is, "No." The Court of Appeal shouldn't have been talking about substantial miscarriages of justice at all. It, it really was engaged in the stage of the exercise we've been talking about just now, namely: was this error one capable of affecting the verdict? And the Court concluded no.

**ARNOLD J:**

Can I just be clear about this? The Court did think it was applying the proviso. Or are you saying it did not think that? It used the wrong terminology and it was really –

**MR BOLDT:**

I – yes Sir. I do believe it's the second of those.

**ARNOLD J:**

Well, just on that, I mean if you look at the way the Court identifies at paragraph 30 the way the Crown argument was run, they summarise there the argument that the Crown made that the Court could be satisfied no substantial miscarriage of justice had occurred. And then you look over at 31 and the reliance on the use of a proviso, and that seems to me to link in to the conclusion at 45. And the Court did see itself as applying the proviso.

**WILLIAM YOUNG J:**

Can I just suggest that there's – the Court seems to have thought that the "would it make a difference?" argument comes in under the proviso.

**MR BOLDT:**

Maybe. I, I don't – it could well have Sir.

**WILLIAM YOUNG J:**

But it never says, "We are satisfied beyond reasonable doubt –

**MR BOLDT:**

No.

**WILLIAM YOUNG J:**

– that the appellant is guilty."

**MR BOLDT:**

It did not in substance apply the proviso in this case.

**WILLIAM YOUNG J:**

Well that is – it did not apply the *R v Matenga* approach to the proviso.

**MR BOLDT:**

No.

**WILLIAM YOUNG J:**

It does seem to have – what it has done is applied a, "would it have made a difference?" test.

**MR BOLDT:**

Mmm. Mmm.

**WILLIAM YOUNG J:**

Which is available to it but probably under section 385(1)(c).

**MR BOLDT:**

Indeed. Exactly. Although, as I say, I think the same approach under paragraph (b) also applies. But in answer to your question, the, the Crown was also loose in its language in its submissions in the Court of Appeal and that was, that perhaps also led the Court to be a little loose in its terminology too.

**McGRATH J:**

Well what it really did in the end was to conflate the two concepts –

**MR BOLDT:**

Exactly.

**McGRATH J:**

– of miscarriage of justice and –

**MR BOLDT:**

And substantial miscarriage of justice.

**McGRATH J:**

– and substantial miscarriage of justice in the Act and that's where, the heart, its own approach is somewhat dubious.

**MR BOLDT:**

Well, indeed. Although as – if you remove the rogue word "substantial" from I think it's paragraph 45 of the judgment under appeal then you actually have a perfectly solid *Matenga* analysis because you're saying, "We're not considering the proviso here. We don't need to reach the proviso because there's been no miscarriage.

**ELIAS CJ:**

Well –

**McGRATH J:**

That might be major surgery in the context of this statute.

**ELIAS CJ:**

And I still have problems. I know you say that there's materially no difference between an error of law and a miscarriage of justice but the difference is that the miscarriage ground is at large. Here, you've got a ground for the appeal to be allowed, provided you demonstrate materiality. So it does seem to me conceptually very messy to try to assess whether there's a miscarriage. It's a conclusionary term "miscarriage of justice". You can say that an error of law, which is material, is a miscarriage. That's fine. But if you have an error of law, why don't you simply look to whether it is material?

**MR BOLDT:**

I agree, Ma'am. Ultimately I submit the analysis is going to be the same whichever way round that you do it.

**ELIAS CJ:**

Well the result is going to be the same but I'm not sure that the analysis is aided by just jumping straight to that assessment because it is not an at large assessment if you have an error of law. You're focusing on something, you get past that. The only question then is whether it's material.

**WILLIAM YOUNG J:**

But then there would be a proviso.

**ELIAS CJ:**

Yes, yes. I fully understand that.

**MR BOLDT:**

What that would require, though, what that would mean is you're potentially in mis – you're potentially in proviso territory whenever there's an error of law.

**ELIAS CJ:**
That's material.

**MR BOLDT:**
That was capable of affecting the verdict.

**ELIAS CJ:**
Yes.

**MR BOLDT:**
Which is what renders material – which is what brings us into the same language as we have when discussing paragraph (c) and paragraph 31 of *R v Matenga*. So it is – I think we're all talking about exactly the same thing. The question is, is this error, this irregularity, which we accept, and always have accepted here, was it capable of affecting the verdict in this case? And I'm happy to give my best shot as to why the answer to that is no and why the Court of Appeal was right in substance to conclude it was no.

As I say, the reference that the slight trespass into proviso territory with the language in the Court of Appeal judgment doesn't alter the fact the analysis the Court conducted was entirely directed to this very question we've been discussing, namely, could this error have – could it realistically have resulted in a not guilty verdict in this case? And there are a number reasons why, in my submission, the answer to that is no.

The first one echoes a submission I made to Your Honours before the break and that is that this is a very light provision. It adds little more than the weight of feather to the overall identification direction. It doesn't with, of itself, carry the substance of the warning and it is, indeed, so lacking in viscosity that this, the Court of Appeal had suggested it needed to buttressed in order to give it some substance, with reference to miscarriages having occurred in other cases because, by itself, it is little more than a statement of what really every part of the summing up is ultimately directed to, particularly the statement of the burden and standard of proof, which is you need to be very careful, you need to be very sure, and with a particular focus that could not possibly have been lost on the jury on the need to care in the identification.

**ELIAS CJ:**

Mr Boldt, I want you to say what other points you rely on because you were about to do a list but I want to come back to that first point. But I'd like to see the shape of your whole argument, so by itself you say it's not – it's a viscous.

**MR BOLDT:**

It lacks viscosity and it has needed suggestions to thicken it in order to give it a bit of substance.

**WILLIAM YOUNG J:**

Well you say section 126(2)(a) is a statement of the obvious, so much so that it goes without saying.

**MR BOLDT:**

Almost Sir, yes. So that's the first point. So an omission isn't going to detract from the strength and substance of the identification warning significantly or, at least not very often and that also was what the Court of Appeal said in *R v Turaki*. It's no usually by itself going to be enough to give rise to a miscarriage of justice because it doesn't, itself, carry a lot of weight. So that's the first point.

The second is to look at what the Judge did say to the jury and how there could have been no doubt in the jury's mind that in this particular case it needed to be extremely careful and note the learned Judge, and I'm referring now back to my friend's exchange with Your Honours this morning, it not only introduced the case, the summing up with reference to identification, he concluded the summing up with reference to identification. He directed the jury in normal and standard terms about the burden and standard of proof but in introducing the identification evidence at paragraph 20, put it as high as certainty, the need for certainty on the part of the jury, which is –

**ELIAS CJ:**

Well it did have, the jury did have - contextually the jury had to be satisfied.

**WILLIAM YOUNG J:**

They'd have to be satisfied. They didn't have to be certain.

**ELIAS CJ:**

Well, okay, you'd have to be certain to convict.

**WILLIAM YOUNG J:**

No, you have to be sure to be convicted.

**ELIAS CJ:**

All right, well what's the difference?

**MR BOLDT:**

And paragraph 20, and I'll read it to your Honours but, here is the issue which you've got to decide and you've got to be certain of this issue beyond reasonable doubt. "Are you sure the accused acted together with any other person or persons in wounding with intent to cause grievous bodily harm?" He acted together with the others.

**GLAZEBROOK J:**

Well that's actually not – I mean the certainty there is whether he acted with others. It's not actually introducing identification there.

**McGRATH J:**

It's whether the case was proved beyond reasonable doubt.

**GLAZEBROOK J:**

Yes.

**MR BOLDT:**

Of course. What the Judge is saying to the jury, "You've got to be –

**GLAZEBROOK J:**

It's not saying, "Are you sure he was there," and "Are you sure he was the person," and "Are you sure identification," he's actually mixing the two concepts together because you had to also be – because he then goes on to say well it's acting with others.

**MR BOLDT:**

You – yes.

**GLAZEBROOK J:**

So he's really asking – because they didn't just have to be sure of identification. They had to be sure he either, as the evidence of the victim was actually clocked him one himself or that he was there encouraging.

**MR BOLDT:**

Yes, and you are right, Ma'am.

**GLAZEBROOK J:**

And that was at large in the trial because it wasn't something that was accepted that.

**MR BOLDT:**

Albeit, it came down in the end because the evidence was quite clear that the men who did this, with the exception perhaps of the theft, there may have been some suggestion as to whether that was one of the people or not.

**GLAZEBROOK J:**

And there was some suggestion of somebody standing back I think. Anyway, it doesn't really matter. All I'm saying is that it wasn't just one issue in the trial and here he seems to be talking about that acting in concert. I accept at paragraph 22 he goes and talks about identification.

**MR BOLDT:**

Well, indeed but quite. Of course if the jury's not certain that he was there at all, it's certainly not going to be certain he was acting in concert with others.

**GLAZEBROOK J:**

Well no but I thought your submission was that the Judge said you have to be certain about identification. That's not how I read paragraph 20. That's the only point.

**ARNOLD J:**

Well, what he says is you have to be certain and there are two elements to that.

**GLAZEBROOK J:**

Yes.

**ARNOLD J:**

Here's the first one and the second one's identification.

**GLAZEBROOK J:**

Although the identification is probably much more important than the...

**MR BOLDT:**

And the Judge then, at 22, he says, "The essential thing is identification. I need to talk to you about identification." And it really, and what we, then, have and there is no, in my submission, real dispute about the thoroughness of the identification evidence, the identification direction the Judge subsequently gave. It was –

**GLAZEBROOK J:**

Well, actually, to be honest, I'm not actually that keen on it because I think there were some major points that weren't brought out in that. They were certainly brought out in the description of the case for the accused in terms of the retrospective nature, the time it took. Also just that very unsatisfactory part of the evidence where the jury didn't know how long afterwards he suddenly decided he did know someone. So for myself, I would have thought the Judge, himself, should have actually indicated the unsatisfactory, the difference from description and then put the Crown and the defence case in respect of that. It shouldn't have been something that was left to the description. It should have been something that the Judge, himself, actually put to the jury.

**MR BOLDT:**

Well it's true. In fact, quite a bit of what His Honour says in his summary of the respective positions is, if you like, editorialising rather than simply reproducing. So, for example, at paragraph 25, when he was asked immediately afterwards, as Mr Gardiner pointed out – so this is the Judge talking but endorsing the defence submission, he wasn't able, he was able to give a description and so gave reasonably thorough outline, endorsed, though, by the Judge rather than simply saying, well, the defence says this to you which is a lot – which perhaps would carry a lot less weight –

**GLAZEBROOK J:**

Well yes, and then at the end he's saying, well obviously he's making a comment on the evidence to say, well obviously the man wasn't sure.

**MR BOLDT:**
Indeed.

**GLAZEBROOK J:**
Well that's a comment the Judge is making himself on the evidence, which is in favour of the Crown. It's not a repetition of the Crown's submission.

**MR BOLDT:**
And I accept that as well, Ma'am, and, indeed, even in this Court, the appellant notes that there were a number of key and helpful passages for the defence in terms of this summing up and that the jury, at the very least, in my respectful submission, had perhaps not a model direction before it but certainly a strong direction that could've left the jury in absolutely no doubt as to either the need for special caution in this area and the need to be conscious to avoid making an error in this but also a very clear articulation of the strengths and weaknesses of each party's case and with no doubt at all about the very strong criticisms and the very fair criticisms levelled by the defence against the identification process.

But, nonetheless, the jury was entitled on the basis of the evidence it had before it to be sure this complainant had not made an error when he identified the accused, or the appellant. And I can say, when we perhaps look at this in a *R v Turnbull* sense in terms of the quality of the identification. My friend spoke to you this morning about why there were a number of significant weaknesses with this identification but actually there were a number of strengths as well. There were some circumstantial features which corroborated the correctness of that identification. The key one, because the witness could have had no idea about this, simply from viewing that montage, and that was the reason I put it in the bundle, was that the assailant had a prominent gold tooth and by coincidence, after rejecting another montage entirely, when he received a second montage and, although this wasn't before the jury, it came out in the voir dire, he said he was 100% certain this was the man. He not only chose a man who, by coincidence, also had a gold front tooth, he also selected someone who was quite a lot shorter than him, and we can expect that in a montage where you have no idea of height, you're going to have a wide range of shapes and sizes. Well, also by coincidence, he picked somebody who was a good three quarters of a head –

**GLAZEBROOK J:**

Well can't you just say, "By coincidence he picked out the very person he'd said was the person that he recognised from an earlier – Well, I mean it's not coincidence that he picked that person out because the whole idea of that person was that he'd been someone at a course that he had coincided with.

**MR BOLDT:**

This wasn't a person he had nominated, though. He'd said, as I understand it now, and this –

**GLAZEBROOK J:**

But he's going to recognise someone who's on the course isn't he? That was his whole point about the evidence in the first place. I mean, if, by coincidence he'd just picked someone out of a montage that he'd never had anything to do with, that submission might have some basis but picking out someone you already knew, at least by sight, isn't very surprising is it, especially when you've said –

**ELIAS CJ:**

Your point is that at the, when he did the initial description, he came up with the height and the gold tooth.

**MR BOLDT:**

Indeed, and each of these are reasonably distinctive characteristics, but the height perhaps not so much but even then, and Your Honours will have probably seen in the evidence the estimate. His estimate was, and this is the complainant. He said, "I'm five 11," and he was asked, "Well where did the person who attacked you come to you on you?" and he indicted an area between the chin and the bottom of his earlobe and so you're looking at a good, significant, four-fifths of a head shorter than him, which would've taken him down to five four or so.

**ELIAS CJ:**

Do we have the – we don't have the statement he made which identifies these characteristics do we in the material?

**MR BOLDT:**

I've reproduced them and as my friend said in his submissions, Ma'am, he brought each of these characteristics out in cross-examination with reference to the

statement that was made, and I've reproduced it at paragraph 10 of my submissions. And so there was real – there was criticism of the fact, well, you said he was fair, a fair-skinned Polynesian but in fact the appellant is, is relatively dark skinned. And you said, "Five foot," well he, he, by our best estimates, would probably have been more like five three or five four, but still, a significant, significantly shorter than, than the complainant. So you have at least a degree of circumstantial corroboration of the identification the complainant made when he looked at that montage. Now –

**GLAZEBROOK J:**
Is that how the statement said it? Because you have referred the evidence rather than the statement.

**MR BOLDT:**
I – yes Ma'am, and that is how the statement said, and each of those details was brought out line by line.

**GLAZEBROOK J:**
So that was – you have – sorry, just to be clear, the way it is written there was how it was written on the statement?

**MR BOLDT:**
Yes. And –

**GLAZEBROOK J:**
And that was presumably in somebody's notebook, was it?

**MR BOLDT:**
I am not sure whether it was a notebook or a – well it would originally have been in a notebook and that was what – it was an evidential statement. My, my friend confirms. And –

**GLAZEBROOK J:**
Well it wouldn't have been in that form then, would it? If it was an evidential statement, because they do normally put them into sentences for an evidential statement.

**MR BOLDT:**

Well, Ma'am, I'm happy to defer to, to my friend if, if there's any clarification required on that point. However, my, certainly my understanding, Ma'am, is that those were the five –

**GLAZEBROOK J:**

Oh no, no.

**MR BOLDT:**

– things he, he said.

**GLAZEBROOK J:**

It is not any –

**MR BOLDT:**

And, and they were brought out line by line in the course of the cross-examination as well, quoted verbatim, and I've just sought to collapse them there for the, in the interests of the common ... I'm very grateful to my learned friend and I can confirm that that is exactly how it appeared in the statement –

**GLAZEBROOK J:**

Thank you.

**MR BOLDT:**

– the way it appears there in paragraph 10.

**GLAZEBROOK J:**

Well it – so presumably it just came out of someone's notebook? It looks like it.

**MR BOLDT:**

I, I – yes, it was, it was an interview, and he, the, the way it simply was stated was, "He was male, Tongan, fair skinned, short, skinny, five foot," et cetera. So...

**GLAZEBROOK J:**

Thank you.

**MR BOLDT:**

Now, and in, in *R v Turnbull* the House of Lords spoke of looking around for incidental details to corroborate an identification and the importance of those where they are to be found. Gave the example of someone who is observed running away from a scene and up some steps and into a house, is identified by a complete stranger. Maybe on its face a very weak identification, but becomes a very strong identification if it turns out the person identified, if it's the house of the father of the person who'd been identified, for example. The Court – the House of Lords there said, "Well, that is something that can give real strength and confidence because you've got an independently corroborated detail which shows it is unlikely the witness in fact made an error.

**ELIAS CJ:**

You've got consistency here, really. That's all.

**MR BOLDT:**

You, you have consistency, Ma'am, but what you, what you critically have is no possibility the identification from the montage was being tailored to fit any sort of an earlier description or recollection because – to, to fit what the complainant had said on the night, because you can't tell from looking at that montage that the appellant is, is below five six and you certainly can't tell he has a very prominent gold tooth, both of which the assailant had. Now, had this identification nominated someone with neither of those features, well, you would have a real problem. But they are both distinctive features and both were there in the man who the complainant pointed to in that, in that montage. So the jury was – in order to accept there was a reasonable doubt the jury was going to have to say, "Well that is entirely coincidental."

**WILLIAM YOUNG J:**

Well no, they wouldn't actually because as Justice Glazebrook's pointed out, he may have seen the person at the institution who he thought had it, committed the offence, had a gold tooth. So, I mean, it helps you but it does not really show that it is a complete coincidence.

**MR BOLDT:**

I suppose this is one of those cases where in fact the element of recognition, at least on Your Honour's analysis, weakens rather than strengthens the identification.

**WILLIAM YOUNG J:**

Well no, not really. It does not – it is just it is not necessarily a huge coincidence.

**ELIAS CJ:**

It is not a strong strand corroborative of weak identification.

**MR BOLDT:**

Well –

**GLAZEBROOK J:**

What may have happened is that at the time he might have thought, but we do not know whether at the time he thought he recognised someone or not because he has only said that five months later. But he might have thought he recognised him and then became convinced it was that person.

**MR BOLDT:**

Sure.

**GLAZEBROOK J:**

You know, "I'm absolutely convinced I saw the former Prime Minister Helen Clark walking down the street, and then when I later said, "Well, who did you see walking down the street?" I say, "Oh, well it was Helen Clark." And it was not at all. She was somewhere else.

**MR BOLDT:**

Of course. Of course. But that's not quite the, the sequence here because he never named the person. He didn't know the name of the person. He said, look, it's someone whose face I recalled from the wānanga. It was somebody, and he was able to give a vague and general description of the types of situations in which he'd seen the person.

**GLAZEBROOK J:**

Well he had, but he did not at the time say it was someone he knew. That is the point.

**MR BOLDT:**

No. He didn't. And he said that on the occasion of the first montage, and that was how it was that within a couple of, within a few days after that there was a second montage, and of course the delay in recognising that wānanga connection was one of the very key factors relied on by the defence at trial. That was very clear for the jury and it was one of the things the jury had to take careful note of. But –

**GLAZEBROOK J:**

But without knowing how long afterwards?

**MR BOLDT:**

It – that's true, Ma'am, and that was – I agree, unfortunate, although I, I suspect a deliberate decision on the part of the defence to decline to elicit that additional information.

**GLAZEBROOK J:**

Well I suspect it was there was a mistake because they thought it had been in front of the jury because it was there on the voir dire.

**MR BOLDT:**

Well that's, that's a possibility. That is a possibility. And I, I can understand why defence counsel would not wish to elicit that, because –

**GLAZEBROOK J:**

I cannot understand any reason why they would not want to elicit that, but –

**WILLIAM YOUNG J:**

Perhaps he was in jail.

**MR BOLDT:**

I – well, simply because it, the trail led very, very quickly and directly to this person and that, it, it – the moment that detail was supplied the, the police zeroed in and, and had an offender almost instantly, and that's, because that's the, that's the sequence that occurred.

**GLAZEBROOK J:**

Well, which the jury was told. They had it because they had found a police photo of him.

**MR BOLDT:**

Well...

**GLAZEBROOK J:**

Which was not particularly helpful, was it?

**MR BOLDT:**

Well, I, all I can do is repeat the comment, but I don't wish to sound harsh, but if – that, that was the question that was asked of the officer and –

**GLAZEBROOK J:**

But would not, in those circumstances, normally the Judge have given a direction that they can have photos for all sorts of reasons?

**MR BOLDT:**

Well, I, I suspect, if the matter was thought about at all, it could well have been decided not to draw any further attention to that topic at all because it, it may very well have otherwise reminded the jury of a detail that hadn't assumed any real prominence at that point.

**ELIAS CJ:**

So, Mr Boldt, just – that – there are three points then that you make: by itself it was a statement of the obvious; the Judge adequately dealt with the whole question of identification in his summing up; and thirdly, there were circumstantial features of corroboration which come down to the height and the gold tooth?

**MR BOLDT:**

Indeed. Those, those were the three, those are the three things. It's, it's perhaps a bit harsh to say it's a statement of the obvious. Actually no it's not. It is a statement of the obvious. Section 126(2)(a).

**ELIAS CJ:**

I do want to go back to that because I would like you to consider that section 126(2) what hasn't been dwelt on is that it is, it does describe a cumulative requirement. The third one obviously in contextual and it doesn't apply here, but the second one, and this really also, I think, highlights the adequacy of the Court of Appeal approach in saying that well, it's a matter of inference that a mistaken witness may be convincing, from what was said. That reference to a mistaken witness may be convincing is an acknowledgement of previous experience effectively. So I wonder really whether it's a bit artificial to split up these two things. They are cumulative and the picture that the Judge is required to put to the jury is be very careful because you can get serious miscarriages of justice, mistaken witnesses can be convincing. Now on that basis it is an acknowledgement that that is the experience of the law.

**MR BOLDT:**

Indeed and, in fact, in the old – under *R v Turnbull*, under the 344D directions, it was very common for Judges simply to say, "I'm required to warn you of a need for special caution in this area. The reason for that is because a convincing witness can be mistaken." So, in other words, the – what's now 126(2)(a) was simply a bridging passage between the need for special caution and it was, itself, thought to be the reason for the warning, or often Judge's direct it in terms as though that was the reason for the warning and, to an extent it is, although it's also to do with other matters we've been discussing today, such as the fact that there have been miscarriages of justice in other cases in the past and this is an area where people are notoriously, and quite innocently, mistaken.

**ELIAS CJ:**

Well on the basis that I've put to you that it's cumulative and it can only really be, this is me, the Judge, telling you as a matter of experience or law, why, because (b) is an explanation. I think (a) is too. Can you really say that it's just a statement of the obvious which can be obviated by the way the Judge directs the jury on the evidence as to identification?

**MR BOLDT:**

It's going to depend on context always and, as I say, I think a superficial or a threadbare identification direction or, perhaps also, the type of identification direction Judges sometimes give when they don't, when they erroneously conclude a full

direction isn't required because that happens from time to time as well, as we've seen from these other cases. In those circumstances –

**ELIAS CJ:**
Must - I just find it very difficult to find to get beyond language of the statute. The Judge must do this.

**MR BOLDT:**
And I accept that completely, Ma'am. We always have said, "This isn't optional," and it's extremely unfortunate that direction wasn't complied with at the time, however, the issue is, all right, well, what difference did it make here and in this case?

Given the otherwise very thorough direction and given, more importantly, the centrality throughout the summing up of the need, of the fact identification was the issue, the need to be sure of the identification, the emphasis on the possibility of error and the need for caution, plus a targeted summing up, the question is, would it have come as the slightest surprise to the jury to know, "The reason I'm telling you this is because a mistake in identification can result in a miscarriage of justice," or, "If you get this wrong an innocent person could be convicted."

That is the self-evident, if I may say so, reason the entire direction is given. The Court of Appeal acknowledge that in *R v Hohepa* and said really the jury would have had no difficulty with that concept at all and, therefore, the omission couldn't or wouldn't have made a difference, in which case, although it is obviously well overdue for a reminder that section 126(2)(a) means what it says. The appellate Courts analysis is nonetheless still governed by this question of all right, in light of this admitted error, did it actually make a difference and certainly the Court of Appeal was satisfied it didn't. It's always an evaluative exercise, one the Court of Appeal apply, in my respectful submission, an entirely correct standard turn and the Court of Appeal concluded no. And there is ample basis, in my submission, for the Court to reach that conclusion.

So, it's my submission, in light of all of that, that once we put aside the, perhaps, unfortunate flirtation with proviso language, the Court didn't even – the Court plainly didn't get to the proviso and was clearly very satisfied, by and large for the reasons I've sought to encapsulate, your Honours, that this really wouldn't have made a difference. And perhaps to put it another way, and I'm happy to conclude after this

unless Your Honours have further questions or areas you'd like me to explore, the question is, can we conceive of a difference this would have made in the jury's analysis of the issues in this case?

In my written submissions towards the end in the conclusion I do make the submission that exactly the same careful analysis of the identification was going to be required whether this direction was given or not. More importantly, exactly the same considerations for and against the correctness of the identification were going to be apparent. It couldn't have been lost on a jury, particularly one which deliberated for some considerable time that this was an exercise requiring special care and this was a jury quite plainly at pains to ensure what it did was not to ensure an innocent person was sent to prison. And that was the very task the jury should have been reminded about under section 126(2)(a) but which, in my respectful submission, in light of the rest of the direction, it needed no reminder of because that was the very heavy burden the jury took on right at the beginning of the trial and which was reinforced to it throughout.

There is just – unless I can assist further, there's just one other matter. Your Honour, the Chief Justice, asked me about paragraph 45 of the Court of Appeal's decision and then I think I got swept away with other questions and, therefore, didn't get the chance to address Your Honour's question. What the – what I see the Court of Appeal is saying there is because the previous paragraphs have really sought to sum up the kinds of factors I have been discussing with Your Honours namely, you know, the rest of the identification direction, the fact that there was an element of recognition in there which, as we know, does somewhat reduce the error, the risk of error, the circumstantial corroboration provided by the tooth and the height and everything else.

And so the Court was saying, all right, what you've got there is, in fact, not as the appellant would have it, a weak or marginal identification case. You've got a not bad identification case fully supported by a good direction. And so all of those taken together satisfies. You've got a pretty good Crown case and all the Court was then really doing at the beginning of paragraph 45 was saying, of course, the jury would, as it was directed to, have started with the appellant's evidence because if it had accepted the appellant's evidence or even if it had thought the appellant's evidence might have some truth in it, it would've acquitted right there and then and it wouldn't have even needed to look at the quality of the identification.

**ELIAS CJ:**

I see. So really that's all in parenthesis and it's the three factors meant the jury would inevitably have convicted?

**MR BOLDT:**

Indeed, indeed.

**ELIAS CJ:**

Yes, I see, yes. Yes that's open, definitely.

**MR BOLDT:**

Your Honours, unless –

**GLAZEBROOK J:**

Can I just check, Mr Boldt, the submission of Mr Gardiner. If this, the appeal is allowed that given the time the applicant's been in custody, there shouldn't be a retrial. What's the Crown's position on that?

**MR BOLDT:**

We would seek an order for a retrial, Ma'am. Whether ultimately there is a retrial will be a decision for others but ordinarily this is an error of a sort which would lead for an order for a new trial and, as I say, whether that actually takes place would be a matter for prosecuting authorities in due course.

**ELIAS CJ:**

Thank you Mr Boldt.

**MR BOLDT:**

Thank you Your Honours.

**ELIAS CJ:**

Yes Mr Gardiner.

**MR GARDINER:**

Just one point of clarification right at the outset. There was quite clear evidence before the Court about the time, and I'll take the Court specifically to the evidence of the officer in charge, about the presentation of the first photo montage which was on

the 24th of March 2011 and then on the second, the presentation of the second montage on the 7th of April 2011. The question of the jury related to whether there was any evidence given specifically that he had actually contacted the officer in charge in the lead up to the presentation of the first montage and there was no specific evidence but the clear inference, I would submit, from the fact that the officer in charge, when he presented the first montage, it was only at that stage that he got anything from the accused and that's what led him – correction, from the complainant and that's what led him to make the enquiry at the educational institute.

So those issues were fully canvassed at trial –

**WILLIAM YOUNG J:**
Isn't it perfectly clear that the identification of an offender, the offender being someone who is at the institution was made after the first photo montage.

**MR GARDINER:**
Correct.

**GLAZEBROOK J:**
It's just a pity the question wasn't answered that way for the jury.

**WILLIAM YOUNG J:**
But he didn't go to the police. The question was did he go the police wasn't it?

**MR GARDINER:**
That's right. It was a different question.

**GLAZEBROOK J:**
Well it just was an unfortunate answer because it implied that he might have gone to the police.

**MR GARDINER:**
No, I take Your Honour's point. I'll just pick –

**GLAZEBROOK J:**
I would have thought the better answer would have been well, he didn't go to the police before the 7th of April.

**MR GARDINER:**

In fact before the 24th of March.

**GLAZEBROOK J:**

Well whatever, sorry the 24th of March, the first photograph montage.

**MR GARDINER:**

And that was over four months later and the second montage was presented two days shy of five months.

**WILLIAM YOUNG J:**

Yes, I think we know that.

**MR GARDINER:**

I don't intend to canvas the earlier parts of my learned friend's exchanges with the Court. I'll just cut to the end bit where he was actually asked why he thinks this matter should stand. He started off in terms of referring, he did use a curious expression, with respect, this was a very light provision, section 126, lacking in viscosity. If I – lacking in a bit of bite, stickiness, stickability. Basically it was almost the section, if I took my learned friend's submissions literally, it was almost inconsequential section 126.

Basically it just says what Judges do anyway. No requirement for it. Really the serious business of justice could get on without it. That's, if I can tease it through, that's the corollary of that sort of submission. In fact, he used the word "the weight of a feather". A featherweight provision and I would submit that is totally incorrect and clearly legislature is way buttressed by the Law Commission report and its views on the matter. It's decided to bone up this particular area of identification. That's why we've got section 126.

In the submissions, and I come back to the point that I made at the outset, we had my learned friend referring to section 126(2)(a) as being the introduction to the section. Well, it's no such thing. The submission for the applicant, it's the first and foremost. That's the consideration that you need to look at as a Judge in looking at cautioning in relation to identification evidence. Prime place, first on the list, top of the list, point A, and I would request that the Court approach it on that basis.

Now there was an exchange about distinctive features and my learned friend, when it came down to the, in his submissions when it came, oral submissions, when it came down to actually identifying the grant in terms of the ID, focused on two point of the general description which was made, given the next day, and he spoke about the height, then the distinctive tooth. First of all, the height, that's a pretty rough –

**WILLIAM YOUNG J:**
We know it's four, three or four inches out. We know the gold tooth's on the wrong side of the mouth.

**MR GARDINER:**
That's right, thank you. Now there are a number – he summed up, my learned friend summed up, he had about 13 or 14 points towards the end. He spoke about the very thorough direction, the central business of the ID, central treatment of the ID, possibility of error, the Court of Appeal targeting that. This, essentially what he's saying, what he was submitting I would, my learned friend was submitting was essentially that the approach adopted by the Courts of Appeal in, for example, *R v Hohepa* and so on, in order to rectify non-compliance with section, a part of section 126, is the way to go, and I'm submitting to the Court that's not the appropriate way to approach section 126. It should be taken a bit more seriously than that.

And while the – and I acknowledge, while His Honour, the trial Judge, there are quite a few aspects of his summing up on identification which were actually helpful and would've helped the jury, and I'm not denying that. I'm saying that he still fell short, he came under the bar, in retrospect, and there's now almost hindsight in my submission, he fell short in terms of crossing the line or jumping the bar when it came to the requirements of section 126. And I'm submitting that, at the end of the day, we have a material error of law and that it should be treated on that basis and that in the circumstances, the Court can apply the proviso and find that there was a substantial miscarriage of justice.

**WILLIAM YOUNG J:**
Not apply the proviso.

**MR GARDINER:**

Not apply the proviso rather. Thank you Your Honour.

Just in terms of the judgment, His Honour, Justice Arnold, went to, I think it was, paragraph 30 of the Court of Appeal's decision, and I just go to that again because there is a reference quite clearly that the Court of Appeal was having a look at section 385 as a whole, whether it conflated parts of it or not. We even have a footnote at the bottom of the page where is starts off, Mr Lillico submits that, "The Court can be satisfied no substantial miscarriage of justice has occurred," and then there's a cross reference down the bottom of the page to section 385. So, and His Honour, Justice Arnold, as I recall did go on to refer specifically I think in question and answer to section, paragraphs 30 and 31.

Just in summary, the position of applicant, for the applicant or appellant is that section 126(2)(a) was not complied with and furthermore that the summing up fell short in relation to (2)(b) although, and basically, although the witness, a mistaken witness may be honest, a mistaken witness may be both honest and convincing, that particular point wasn't brought out and clearly there was not a situa – there was a situation where section 126(2)(a) wasn't complied with.

So in the circumstances I'm submitting that the Court should quash the convictions of Mr Fukofuka

**ELIAS CJ:**
And do you say anything in response to the submission that the correct approach, if we get to that point, is for the Court to remit for rehearing?

**MR GARDINER:**
I'm submit – well, the Court does have, and this was a point raised by Her Honour, Justice Glazebrook, the Court does have the ability, it doesn't have to – my reading of the section –

**ELIAS CJ:**
It's not usual.

**WILLIAM YOUNG J:**

This is a serious offence for which he's received a strike warning. It would be quite a significant thing not to remit it for a retrial. It's not just a matter of having served, you know, a portion of the sentence.

**MR GARDINER:**

But this is a situation, though, where it's rather extraordinary in the sense that the, one could argue, that the evidence is, if it's remitted, still has the same blemishes –

**WILLIAM YOUNG J:**

But it might not have – with a bit of luck the summing up wouldn't.

**MR GARDINER:**

Well it still has these blemishes. If there is the ID was faulty two years ago, or three years ago –

**WILLIAM YOUNG J:**

But that's not an assumption we can make.

**ELIAS CJ:**

No.

**MR GARDINER:**

No, righto.

**GLAZEBROOK J:**

Well, unless we take the view that it shouldn't have been left to the jury.

**ELIAS CJ:**

A point that can always be run again.

**MR GARDINER:**

Those, your Honours, are my submissions.

**ELIAS CJ:**

Thank you, Mr Gardiner. Thank you counsel. We'll reserve our decision in this matter, thank you.

**COURT ADJOURNS: 1.01 PM**