IN THE SUPREME COURT OF NEW ZEALAND SC 17/2019
I TE KŌTI MANA NUI SC 18/2019
[2019] NZSC Trans 24

BROOKE CHRISTIE ROLLESTON

BRANDON JAMES ROCHE

Appellants

V

THE QUEEN

Respondent

Hearing: 20 June 2019

Coram:	Winkelmann CJ
	Glazebrook J
	O'Regan J
	Ellen France J
	Williams J
Appearances:	E Huda and T D A Harre for the Appellant Rolleston
	A J Bailey for the Appellant Roche
	M J Lillico and K L Kensington for the Respondents

CRIMINAL APPEAL

MR HUDA:

As Your Honour pleases. Counsel's name is Huda. I appear for Rolleston with Mr Harre.

WINKELMANN CJ:

Thank you Mr Huda.

MR BAILEY:

May it please the Court. Counsel's name is Bailey. I appear for the appellant Roche.

WINKELMANN CJ:

Mr Bailey.

MR LILLICO:

Tēnā koutou, e ngā Kaiwhakawā, ko Lillico māua ko Ms Kensington, e tū nei mō Karauna.

WINKELMANN CJ:

Mr Lillico. Mr Huda. Just a preliminary indication Mr Huda. We've looked at the materials and the issue, as we see it, doesn't necessarily or usefully entail the other jurors. The issue is really whether or not the foreman, or foreperson I suppose, had this relationship with the brother of the accused and

recognised that, because that affects both bias and the appearance of the bias. But of course you don't really need to take it past that for the foreman, do you, because if you have a foreman of a jury who has animus, that would be the point you've be pursuing I suppose?

MR HUDA:

Correct. I'll confine my oral submissions to that, bearing in mind what Your Honour just said. To follow on from what the Chief Justice just indicated, the end purpose of today's hearing, from the appellant's perspective, is to obtain further evidence to assist in advancing the grounds of appeal as appearance of bias. Now I've organised my oral submissions under a few headings. I'm happy to depart from that. But first I'll seek to address Your Honour on the proper approach to section 76, with a particular emphasis on section 76(2). Second, I'll address Your Honour on the proposed questions recorded in the first schedule of my written submissions and third, I'll turn to the merits.

So turning first to the, what I would submit is the proper approach to section 76, Mr Lillico and I are not too far apart but there are some key differences and in terms of the statutory interpretation point, I want to address it under three questions, just for convenience. The first is, why is a person not permitted to interview a juror without the permission of the Court. The second is, what is the threshold that needs to be satisfied before the Court will permit a request to interview a juror, and third, is how should that threshold be applied. The parties agree that the threshold should be interest of justice, so I'm not going to focus on that any more than just now. I'll focus on why a person is not permitted to interview a juror, without the permission of the Court, because in my submission the reasoning there will inform how that interest of justice test is applied.

WINKELMANN CJ:

On that second point, interest of justice, I noticed that the Court of Appeal applied I suppose you'd say it's an evidential threshold, which is a very high one, they described it. Are you going to address that?

MR HUDA:

That's right. In terms of the reasons why a person is not permitted to interview a juror without the permission of the Court, the brutal reality is there's plenty of reasons but in my submission the focus must be on text and purpose, i.e. section 76 of the Evidence Act 2006, and I've put together a supplementary bundle of authorities, which I hope has reached Your Honours, and I've really put what are the obvious statutes, so the Interpretation Act 1999 is there, and section 76 is there.

So if we were to start looking at section 76 and I say the reason why me or someone in my position cannot approach a juror is because of the confidentiality of jury deliberations, and that's the word I pick up from section 76(4). Mr Lillico, as I understand it, had tried to put in this concept of bringing this concept of juror privacy, and I'm going to address Your Honours as to why that cannot be a factor to be taken into account. The reason why I started by asking why a person is not permitted to interview a juror is because section 76, whether it's subsection (2) or subsection (3), does not deal with the status of the person who is purportedly reviewing what it is that has happened in the jury room, and just for example if the foreperson told his friend that he was bullied by Mr Rolleston's brother, and that friend approached me, I could have properly, in my submission, obtained an affidavit from that friend. So section 76(3) or subsection (2) does not deal with that question. But if, for example, counsel or an intermediary wants to obtain an affidavit evidence from the foreperson or any other members of the jury, they cannot do so and quite rightly they shouldn't be able to do so, because there should be an institutional safeguard, and the institutional safeguard should be the Court not a concept of juror privacy, because privacy is a concept which has been promoted by the Crown, which firstly is not anywhere to be found in the text of the legislation, and second of all, my understanding of concept of privacy, and I stand to be corrected, is that it can be waived. So you cannot have a juror approach me and say, I'm going to tell you what it is, and I'm going to waive my privacy rights, or I can take him to an independent counsel and give him advice and then he says, I'm going to tell you anyway. So we

can't have that. The institutional safeguard should be the Court, not any juror or their privacy concerned.

So the starting point always when counsel, usually it's a defence counsel, seeks an order, the starting point is it engages the deliberations of the jury. Whether that's correct or not, that's just the default position, because it's for the Court to decide whether it does or does not. Then counsel comes to court, seeks an order, and then the Court decides whether section 76(2) is engaged, or section 76(3) is engaged. If subsection (3) is engaged, then there is not a whole lot of conversation to be had because the legislation does provide a pathway. There is a threshold and there is a balancing test that the legislation clearly provides and one applies that. Of course, like anything in legislation, there may be difficulties in doing so, but it's there. But, if section 76(2) applies, the question is what happens then, and in my submission that's where the interest of justice test comes into play.

I've taken a fairly strict or conservative approach, at least I say so, in this evidential threshold. I say that in my submission the appellate court will be able to take into account any factor it considers relevant and assign appropriate weight to it as it sees fit simply because in deciding whether it is in the interests of justice to order the interview because what I saw from the cases, or my understanding is they arise in some really weird and wonderful situations, so the appellate court will have to have the discretion to say I'm relying on this factor and this factor and we can't have an exhaustive list. So the Court should be able to take into account whatever it wants, as long as it articulates, says why, like, follows what this Court says in *Sena v Police* [2019] NZSC 55 really about Judge alone trials and the reasoning. Identify what it is, tell us why it is so anybody on review can know what has happened.

GLAZEBROOK J:

So, you accept that there is at least an evidential threshold that has to be passed to consider an interview, that's at least the first stage?

MR HUDA:

Absolutely. Where I depart –

WINKELMANN CJ:

Are you going to that point, back to that point? Are you going to address what the Court of Appeal said?

MR HUDA:

That's right. In terms of the Court of Appeal threshold there is some difficulty simply because the Court of Appeal threshold arises from *Knight v R* [2018] NZCA 71 and *JM v R* [2016] NZCA 383. Now *JM v R* was the case where an interview was ordered and in my submission it almost looks like from reading the decision of the Court of Appeal that the policy considerations that inform section 76(3) has somehow crept in, into section 76(2). In fact *JM v R* is I believe the now Chief Justice then wrote the decision. Justice Winkelmann works through it and the Crown sought to rely on a section 76(3) case and she works through this and says, look, no, there is this distinction in common law, always been there. *Pearson v R* [2011] NZCA 572 doesn't help us. It's extrinsic to the deliberations of the jury so we can take that into account. Now this overall interest of justice and whether, if an interview were to prove the allegations, it could provide a successful ground of appeal. That's the test that the Court of Appeal applied.

Now I'm not hugely critical of that concept, but I'm critical of the threshold at which it is put. There is, and there must be, an intuitive appeal in saying why are we going to order an interview, if it could never provide successful ground of appeal. You're wasting everyone's time. So that is a factor that must be taken into account but there are some dangers in reasoning from that simply because we don't know the entire case and in my submission it shouldn't have been put in that way of whether if an interview were to prove the allegations it could provide a successful ground of appeal. It should be kept simply to the interest of justice. The critical point, if section 76(2) is engaged, i.e. matters that are extrinsic to the deliberations of the jury, the question will arise, whether the evidence offered is credible, and if it is credible, then what is the

ground of appeal that the appellant is seeking to rely on because, and this is a critical point that I intend to address Your Honours on, so I'll quickly touch on it, is what I would call error classification, just for a simple user phraseology. So there is the outcome error, which in the old 385 term is the real risk test, and you take into account the inevitability of outcome, i.e. the strength of the Crown case, or, under section 232(4)(b) it can be an unfair trial issue, because both limbs are now in the Criminal Procedure Act 2011. In my submission when the suggestion is a bias because under section 25(a) of the New Zealand Bill of Rights Act 1990 everybody has a right to a hearing by an impartial court. If the court was not impartial it matters not how guilty the defendant was then he needs, it's a process error as opposed to an outcome error, and conversation along those lines have been had in this Court in the decision of *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 where there was a split that then Chief Justice Sian Elias and Justice Glazebrook said when extraneous folder was put into the jury room it was an unfair trial issue, albeit that case was decided under 385. Justice O'Regan said, no, we'll apply the *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 approach, not going to be concerned with whether it was unfair trial, and the minority, Justice William Young and I forget who the other Judge was, said, look, this is a total distraction, it takes us nowhere.

WINKELMANN CJ:

I don't know that I'm understanding your point because it seems to me the threshold *JM v R* is a very low one, it's simply saying well you can' t be having an enquiry if it couldn't possibly make out a ground of appeal, and you're submission is that bias can make out a ground of appeal.

MR HUDA:

That's right.

WINKELMANN CJ:

So you don't accept that you have, are you really arguing that you don't have to show that the enquiry is somehow relevant to a ground of appeal?

MR HUDA:

Well I'm saying the enquiry is relevant to the ground of appeal, so it doesn't matter where we pitch the threshold. My issue is it seems to me from the reading of the Court of Appeal's decision that there was a degree of conflation going on between the –

WINKELMANN CJ:

In this case?

MR HUDA:

In this case, between the policy that informs matters intrinsic to the deliberations of the jury, because they're talking about this policy consideration, because they're talking about these policy considerations, and then applying it to section 76(2).

WINKELMANN CJ:

No, I thought you were going to take us to the Court of Appeal's comments about the evidential threshold which I think says is very high.

MR HUDA:

That's right, and that's where I say is the confusion. I say it's a confusion because it is very high if section 76(3) is engaged. It's extraordinarily high if subsection (3) is engaged, which is intrinsic to the deliberations of a jury.

ELLEN FRANCE J:

Sorry could I just go back to the question the Chief Justice asked. In *JM v R* what's said is it will not be in the interests of justice to direct an enquiry into allegations of misconduct of a trivial and inconsequential nature. Do you agree with that or not?

MR HUDA:

I agree with that if the ground of appeal would engage section 232(4)(a) because that phraseology, whether the Court in *JM v R* intended to or not, actually comes from *Matenga*. *Matenga* says inconsequential errors, we're

not going to look at. So if we're addressing the ground of appeal under 232(4)(a), i.e. the real risk test, then absolutely it's correct.

ELLEN FRANCE J:

But we're not talking here about that sort of error. We're talking about the nature of the misconduct in relation to the juror.

MR HUDA:

Absolutely, I agree. If it's inconsequential then – and an example that is already in the cases is *R v Absolum* CA118/03, 21 August 2003, a case where one of the jurors, and there are two parts of *Absolum*, one I criticise but one I completely agree with, where one of the jurors approached the police officer to find out why the defendant was not immediately interviewed. That, I would say, is an inconsequential error, it takes us nowhere, no problem.

WINKELMANN CJ:

So what I was hoping you were going to address us on was paragraph 16 of the Court of Appeal's judgment, which is at page 33 of volume 1.

MR HUDA:

Yes. In my submission that's where the conflation starts. The policy behind the high threshold to be reached applies quite properly if section 76(3) is engaged. But the Court of Appeal accepts explicitly that the questions I put forward did not engage section 76(3) and that's why I'm – because it's in the judgment and they don't directly refer to it, I don't want to be too critical of the Court of Appeal, but this policy behind the high threshold has crept in, so there's a degree of conflation between what's happening intrinsic and what's happening extrinsic.

WILLIAMS J:

It may just be a suggestion that the standard in subsection (2), which is sort of a liminal disqualification, competency, capacity or other disqualification factor, is itself inherently not easy. In your case you're seeking to show partiality and

you say that's inherently disqualifying ab initio. To that extent you might say that's a high standard. You don't get to that standard easily.

MR HUDA:

No, in the sense that the Court are slow to come to the conclusion of appearance of bias.

WILLIAMS J:

Yes, maybe that's all they were saying.

MR HUDA:

That's why I'm hedging my criticism because they don't quite go and apply it in that way. But the problem with the cases, and *JM v R* is the first case that deals with it, is it makes the distinction clear. Every other case there is a bit of, with respect, muddled thinking in dealing with section 76(3), matters intrinsic and matters extrinsic.

It goes on to say, so if one strictly reads paragraph 16, as pointed out by the Chief Justice, it says, "It reflects the essential rule that jury deliberations not be disclosed…" That's true. Prima facie the rule is jury deliberations ought not to be disclosed. I'm not seeking to go into jury deliberations at all.

WINKELMANN CJ:

I suppose they might think that you are actually going into jury deliberations if you're asking the other jurors whether in the course of deliberations he brought to bear his information about the conduct of the accused brother at school.

MR HUDA:

And that would be a very legitimate thing to say and in my submission it depends on how one defines what is deliberations of the jury, and in saying that I'm not trying to be overly cute about it, but the real point is I cannot imagine why anybody could legitimately go back and say we can undo jury deliberations. Juries don't keep minutes. They don't keep notes.

They'll never be able to recreate the integrity of their thought processes. At what point do we say, let's ask what weight you put into this thing. I mean it's going to be a meaningless question to ask, in my submission, and the Court should not allow that to happen.

O'REGAN J:
Well I think what the Chief Justice is saying is that as soon as you start asking the other jurors about how the position of the foreman affected them, you are getting into the deliberations. But anyway, we're not dealing with the other jurors now.

MR HUDA:
No, no.

O'REGAN J:
So I think we just put it to one side.

MR HUDA:
But I mean the only thing I must say very quickly is that if the other jurors were told, I don't want to know what they did with the information, this is like bringing in a folder that was never admissible, were they told or not? If they're told, they knew, that's the end of it, I don't need to know anything about it. It stops there.

GLAZEBROOK J:
So you're making a distinction, for example, if somebody says, and let's get it away from this case, if other jurors were told, "Well I've Googled this man on the Internet and he's got all of these prior convictions," you say it's not looking at jury deliberations to say were you told about that. Did that actually occur. If you said, "And then what did you do when that information," that second stage is going into jury deliberations.

MR HUDA:
Correct.

GLAZEBROOK J:

Maybe a bit of a cute distinction, possibly not one Parliament was thinking of in section 76(3), but as we say we're not dealing with that, I guess we've heard the submission then.

MR HUDA:

Yes and –

WILLIAMS J:

But do you need to go there.

GLAZEBROOK J:

Well, no, we don't I think because –

WILLIAMS J:

Because if by some means you establish partiality, isn't your argument that that's the equivalent of the folder in the jury room?

MR HUDA:

Correct.

WILLIAMS J:

The foreperson is the folder in the jury room, and it's fatal.

MR HUDA:

That's right.

WINKELMANN CJ:

Well, no, I think the –

WILLIAMS J:

Well that's your argument, isn't it?

WINKELMANN CJ:

If it was passed on that might be the folder in the jury room, that's why we don't need to go into other jurors. We started out with that because it's really simply whether or not there is an issue of bias or apparent bias.

MR HUDA:

With this juror. So in terms of – so what I say as to why the policy that should inform section 76(2) is not a very high threshold one or a very high whatever way the Court of Appeal put it, the concept is jury deliberation is not engaged if one accepts, or the Court accepts section 76(3) is not engaged, you look at, as they do in the UK, is there credible evidence. If there is credible evidence the next question must be, would it provide a successful ground of appeal, and here –

GLAZEBROOK J:

Or could it provide you might want to say.

MR HUDA:

Yes, could it provide, and I was just about to say that, I can't remember the exact phraseology, but I'd rather use the phraseology used by Justice O'Regan in *Guy*, makes the distinction between something that could have happened or might have happened and was put quite nicely there. I'll bring up the actual passage.

In terms of if it could then we go and we ask because once again as I said in my written submissions, an allegation, and here we have a proven connection. So the yearbook is there, nobody can refute that. We've got the teacher who speaks to the brother's behaviour at school, and I add as a matter of procedural clarity, because this is something I'm going to turn to, because there are certain inferences Mr Lillico is inviting this Court to draw, these witnesses were available to be cross-examined. They were not. They were witnesses, their evidence is unchallenged. So the rule in *Browne v Dunn*, as it applies in section 92 of the Evidence Act, the Crown didn't seek to challenge any of them and that obviously still leaves open the question. A cynic may

say, well, that's fine, we accept he was a bully, the brother was a bully. We accept that there is a connection, but you do not have any direct proof that he bullied the foreperson and you do not have any direct proof that the foreperson himself recognised Mr Rolleston, the brother.

The Court of Appeal made something about the fact that it was a packed courtroom. How could he have recognised this person? I'm not quite sure whether Your Honours have access right now to the submissions seeking leave to appeal, but I've got copies with the registrar, and I don't mean to reinvent the wheel but it's something that I've addressed.

GLAZEBROOK J:
Well isn't your submission, in this aspect here, that of course we don't know that and that's why you're asking that there be an interview, because there's certainly evidence that he was in the same class as the brother, you say, uncontradicted, and that the brother was a bully, and that's why you're saying that you go and interview the juror.

MR HUDA:
Correct, so that's my first submission, and my second submission is, as I put at paragraph 15 on the submission seeking leave, is the bare fact of a packed courtroom cannot assume decisive significance without more.

WINKELMANN CJ:
What was the evidence it was a packed courtroom?

MR HUDA:
The Crown said it was a packed courtroom. My instructions were it was a packed courtroom. I accepted it was a packed courtroom.

WINKELMANN CJ:
Okay.

MR HUDA:

Now the reason I make the submission that the fact of a packed courtroom cannot assume decisive significance, is because even if one accepts that fact, which we do, it doesn't say anything about the seating arrangement.

WINKELMANN CJ:

Yes, I think we've got that point. What about the fact that they have the same surname, which is not a Smith kind of surname?

MR HUDA:

The surname and the age are the two things I would emphasise. The jury foreperson was between 18 and 20 years old. Would have been. And I've worked out the calculation in my written submissions how I arrived at that from the school yearbook.

GLAZEBROOK J:

And presumably at the same school at the same time as both brothers, at least at some portion of the schooling, is that the submission? Or that's certainly the inference from what we know.

MR HUDA:

That's right.

WINKELMANN CJ:

I think the appellant says he was a year ahead of him.

MR HUDA:

Correct. So this happened in the context of post-earthquake moving schools. That's how they all ended up in the same place. So putting what I would have thought is undue weight on the age, is what happened in the Court of Appeal. I think the age is very important. What happened at school doesn't matter a whole lot to me, doesn't matter a whole lot to my learned friend, or anyone of Your Honours perhaps, but school was only two and a half years ago from the

date of the trial so only two and a half years ago he could have been bullied. So that, in my submission, is a significant point.

GLAZEBROOK J:
Do you make anything of the fact that that sort of being in the same class as somebody, and just a year apart from the brother, may, in itself, even without the bullying, be disqualifying?

MR HUDA:
Well –

GLAZEBROOK J:
It might depend on the nature of the friendship or non-friendship but the bullying isn't necessarily needed for it to be disqualifying if the juror foreperson had said, well look, I was at school and in the same class as this person's brother, then he would most likely have been able to be excused if he'd asked for it. It's a closeness connection in any event.

MR HUDA:
That's –

GLAZEBROOK J:
Especially as you say, because it's not that far distant in the past.

MR HUDA:
That's correct, and in my submission that's actually one of the reasons why I included in my supplementary bundle of authorities section 22 of the Juries Act 1981, because I never understood why the Court of Appeal said what it said, that this person may not have necessarily been disqualified, and if we look at –

GLAZEBROOK J:
Well if true not necessarily because if you say he was in the same classroom, never had anything to do with him, maybe.

MR HUDA:

Yes.

WINKELMANN CJ:

What does section 22 say Mr Huda?

MR HUDA:

Ma'am, it talks about a number of categories. Section 22 of the Juries Act, which is in my supplementary bundle of authorities, the Court of Appeal, if my memory serves me right, and certainly the Crown in this court, seem to latch on to section 22(2)(d), "A juror is personally concerned in the facts of the case." I'm not quite sure why it's necessary to latch onto that when if one looks at (b) it says, "A juror is disqualified," and there is no overarching meaning of the word "disqualified" in the Juries Act. The word "disqualified" is also used in section 76(2), which is quite broadly framed in my submission, and it pays to quickly refer to it.

WINKELMANN CJ:

Don't you just rely on subsection (3), "A juror is closely connected with a party or witness."

MR HUDA:

That's right. So it could be any one of them. So just – it could have been under (b), it could have been under (e).

GLAZEBROOK J:

And that would depend whether the person was in the same class and never spoke a word to the person or was in the same class and – but in any event possibly even if they didn't speak a word, it might be a relatively close connection the closer you are to that period.

MR HUDA:

That's right and in this – I mean I'm not quite entirely sure that I need to make this sort of complicated submission, but if we look at 76(2) it's framed in quite

broad terms. "Matters that do not form part of the deliberations of a jury, including (without limitation) … any conduct of, or knowledge gained by, a juror that is believed to disqualify that juror from holding that position." It seems to me that one may become disqualified at certain different stages, given what we know. So at the starting point there may be an eligibility issue, certain people are, I use the word "eligible", one could use the word "disqualified" because they have been to jail. I think if you go to prison for more than five years you're disqualified. So it's that, and over here section 76 is also using the word disqualified.

ELLEN FRANCE J:
Just in terms of 22(2)(b), when it talks about a juror is disqualified, won't that mean disqualified in terms of section 7 of the Juries Act? Because that's headed disqualified, the following persons are not qualified.

MR HUDA:
That is certainly one extra protection that is available but that's using the section heading –

WINKELMANN CJ:
Which you can do.

MR HUDA:
Which can be done but –

ELLEN FRANCE J:
Well it's just that the other factors, apart from the other factors like (d), for example, seem to – the fact that you need to talk about that suggest that disqualified has a more technical meaning.

MR HUDA:
That could well be the case. I couldn't find any case that interpreted the section. Of course, that is a legitimate line of interpretation using the section heading, I'm not saying no to that. I'm just saying that there is no clear

definition which says disqualification means or includes A, B, C and D and there may be some vigorous research that it has a technical meaning at common law which is actually quite broad often as it happens to be the case, and then the legislation narrows it down, but the point is, as I think it was Justice Glazebrook put it in a succinct way, that depending on the circumstances the closeness of the relationship in and of itself, even aside from the bullying, could have raised issues.

WILLIAMS J:
Generally speaking that plays out and a person will come up to you and say I know A's brother.

MR HUDA:
That's right.

WILLIAMS J:
And you'll make a call at that point as to whether that's problematic or not. Often in provincial areas it's not, or if you're in a town with 30,000 people you start disqualifying for that reason, you're disqualifying a lot of people. But if he said, "I know A's brother and I hate him," that would be entirely different. I wonder whether that's just not a paragraph (a) issue.

MR HUDA:
And Your Honour is right, and it could be, there's a number of decisions in the Court of Appeal judgment, I haven't referred to them in this case, and neither has my learned friend. I'm not an expert on provincial New Zealand, and even if I was I wouldn't be permitted to give evidence, but some of these cases are from quite a long time ago. New Zealand has changed. I think Your Honours could take judicial notice of that. So, I mean this whole idea that provincial New Zealand, there's only going to be one type of person or one type of ethnicity, that necessarily doesn't play out anymore. Times have changed and to a certain extent that can be recognised. So referring to cases from 1970 that says this is how New Zealand towns are, may not necessarily be

reflective of how New Zealand towns are now, especially in the South Island after the earthquake, a lot has changed.

WILLIAMS J:
I'm not sure that's the point though. You're talking about scale.

MR HUDA:
Oh right.

WILLIAMS J:
If the trial comes from a town that's got 20,000 people in it, there's a reasonable chance people will know each other, in passing at least, so you're probably going to need more of a connection than that.

MR HUDA:
That makes sense. Just because you know someone in some way is not necessarily going to be enough in all circumstances. That seems totally likely. The point in terms of the threshold, and while adding to it, I wonder whether there is a degree of pragmatism, and quite rightly so, in the Court of Appeal's decision. While I don't agree with the conclusion I think Justice Thomas who wrote the decision says that, look, on the facts it doesn't raise the level of concern. I've sought to use the word "judicial tolerance" with my client and saying, look, it's up to whether five Judges will tolerate trials of this nature. I think, while I don't want to be getting in what sometimes in civil law you use the sniff test or whatever, but I wonder there has to be a degree of that. I think there's a toleration because issues will arise. People are not going to have perfect trials where we import jurors from Mars –

WINKELMANN CJ:
Which is already dealt with in the threshold test about whether it could ground a successful appeal, so you don't need to go on about that I don't think.

MR HUDA:

Certainly. In terms of the how to apply this threshold concept, there is diverging, or how it should be applied, there is a degree of divergence between what I say, how it should be done, and how my learned friend says. My learned friend inputs this concept of juror privacy, I've already talked about that, and effectively turns section 76(2) almost similar to section 76(3) using this balancing exercise and he brings in this concept of juror privacy, where is nowhere to be found in the section, and this is why I emphasise the Interpretation Act. Because in my submission the words of the legislation has constitutional significance. It's arrived at through the democratic process and –

GLAZEBROOK J:

But isn't it rather saying that unless the evidence could lead to a successful appeal, we don't bother jurors. It's finality of trial, also the fact that jurors have done their job and shouldn't be continually bothered afterwards for what aren't serious matters.

MR HUDA:

If it's, what, I may use the words "subsumed" in that way, that's just the way Your Honour put it, then there's no problem, absolutely.

WINKELMANN CJ:

And it might be that at times confidentiality is relevant if you've got an enquiry that sits in that sort of awkward space between section 76(2) and (3) but you think it probably isn't this, on this section 76(2) side, you might weight confidentiality?

MR HUDA:

I want –

WINKELMANN CJ:

It's not excluded.

MR HUDA:

No, what I want to emphasise is while all speech is seldom perfect, confidentiality as in privacy or confidentiality in jury deliberations, I'm drawing a very big distinction –

WINKELMANN CJ:

Yes, I'm talking about confidentiality in jury deliberations.

MR HUDA:

That's perfectly, absolutely. And I say that the Court takes into account, as I said before, whatever it feels like is relevant, and I've said that in some circumstances it should be cautious in saying that the order should not be given because it could not provide a successful ground of appeal. I think a degree of cautiousness ought to be exercised. I'm not quite sure how to better put it because I may be criticised for saying, well, the Court of Appeal won't take an uncautious approach, but all I'm trying to say is one just needs to be very careful, and –

WILLIAMS J:

When you say "cautious" do you mean cautious about agreeing to it or cautious about not agreeing to it?

MR HUDA:

Cautious about not agreeing to it simply because in *Absolum*, if I can quickly refer Your Honours to that, it's in tab 6 of my main bundle of authorities. I only refer to this very quickly in passing because it creates an odd situation. There are two issues in *Absolum* and I think paragraph 9 and 10 contains a summary of the issues. The first one was where it reads half way through paragraph 9, "It is said a juror had called a police officer to discuss the reasons why the police would have taken so long to act on the complaint."

So as I said before, inconsequential. However, let us look at the next one. "The same complainant described in evidence the appellant pulling off her jersey and her sports bra over her head. It is said a juror had discussions with

a clothing manufacturer about the nature of sports bras and whether they would tear."

The Court of Appeal says there is no concern. One can immediately see how a concern can arise from undertaking that type of an enquiry from the clothing manufacturer. The judgment is very thin on the facts but I can imagine a situation where defence counsel is cross-examining a witness saying, this thing was pulled off you, yep, yep, and you go through those lines, so wouldn't it have torn, and suddenly somebody has gone and got collaborative evidence which corroborates the witness' view. Says, no, despite the fact he was pulling this sports bra off me so hard, it still didn't tear, so the Court was quite quick to dismiss, and I don't really want to criticise the Court because it appears counsel was not very prepared, as the Court records at paragraph 5, 6 and 7, but that's what happens when we take what I would describe as an uncautious approach in saying that, look, this is not going to provide a ground of appeal. You just need to be a bit careful coming to this sort of conclusion.

ELLEN FRANCE J:
I thought all they were saying in that case was that they didn't think it related to anything that was in issue in trial.

MR HUDA:
That's the point I was trying to make Ma'am. That if, for example, we don't know a lot about this case, if the cross-examination was around those lines, how could it not, it just corroborated the witness' evidence.

ELLEN FRANCE J:
Well they are essentially saying it wasn't about those things, because that wasn't an issue. I mean they might be right or wrong about that, but I don't read them as giving anything other than making an assessment as to whether it was actually something that related to something that was an issue.

WINKELMANN CJ:

In any case, Mr Huda, isn't your submission simply that we should do our job properly?

MR HUDA:

I'll move on.

WILLIAMS J:

That's a radical submission.

MR HUDA:

I'll move on. The other point I do make, however, is about *Tuia v R* [1994] 3 NZLR 533 (CA), and I don't need to take Your Honours to that case, but in *Tuia* is one of the odd cases where the Crown sought an order and *Tuia* was decided on the common law. Section 76(2) was not there and there seems to be this issue whether section 76, subsection – sorry, section 76 wasn't there when *Tuia* was decided, so the distinction was between intrinsic and extrinsic, and the Court did not grant the Crown an order when all the Crown wanted to do was poll the jury and ask whether anybody had looked at this folder. In my submission that was an erroneous conclusion to come to because the appellant's submission was they've looked at the folder, fair trial issue, appeal should be allowed. It all hinged on if somebody has looked at the folder. So, I'm not quite sure why the Crown can't poll the jury and say, and Crown counsel took a very sensible approach. They said, look, if even one person says they've looked at the folder, appeal should be allowed, but we need to know that, we're not going to assume that. But there, again, there is this conflation between section 76(3) or extrinsic and intrinsic, so I just bring that up in passing.

ELLEN FRANCE J:

As I read that they proceeded on the basis that in fact it wasn't clearly extrinsic.

MR HUDA:

That's right.

ELLEN FRANCE J:

So on their approach they were applying …

MR HUDA:

The higher threshold.

ELLEN FRANCE J:

The higher threshold.

MR HUDA:

That's right and I'm just saying the case law since then, even in the UK, shows that it may actually have been an extrinsic point not intrinsic to jury deliberations because extraneous material inadmissible being brought in is seen as more often than not as extrinsic to the deliberations of the jury.

WINKELMANN CJ:

Okay, but you don't need to deal with that, do you?

MR HUDA:

Not directly no. In terms of –

GLAZEBROOK J:

So you say that's extrinsic, the fact of it is extrinsic. The use they made of it is intrinsic.

MR HUDA:

That's right, so all I'm trying to say is this polling of picking straws should have just been extrinsic. The other point, and I say this very quickly in passing, which is I put a number of English decisions. *R v Adams* [2007] EWCA Crim 1, [2007] 1 Cr App R 34 and *R v Baybasin* [2013] EWCA Crim 2357, [2014] 1 WLR 2112, *R v Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (EWCA), they're all in the submissions. In the UK they've cross-examined

jurors. I don't purport to go down that path, I don't need to, but all I'm just trying to say is their jury system doesn't seem to be falling away, so they draw a very clear distinction between intrinsic and extrinsic and I say that once that is drawn, provided there is clear and credible evidence, an order should be made to check what has happened.

A very quick point before I turn to the merits of the case relates to that perhaps Your Honours will think, and it's already clearly set out in my written submissions, about whether it's prudent for trial Judges to give a direction of the type given in the UK in *Thompson*. It's already laid down there, I don't need to advance anything. If Your Honours have any questions I'm happy to answer it. I've looked at the Bench book, the UK one is obviously available online, it's a two or three sentence thing, and I think that would assist future trials because then again that will be a factor that the Court will take into account and saying, look, the Judge didn't give that direction, nobody raised it, and the evidence is not credible enough, or however, so that's just a forward looking submission, because there is evidence in the UK. In *Thompson* they've cited that sometimes jurors are not sure what to do, and that was conducted by the Ministry of Justice there.

That takes me to the substance of the merits of the argument. One of the points that the Court of Appeal in *Hatch v R* [2016] NZCA 339 makes is jurors who are questioned about possible misconduct will not easily draw the distinction that section 76 makes. So *Hatch* is in my bundle of authorities in tab 2 and at paragraphs 26 it says, "Having said that, we think the underlying principle … concern to maintain the confidentiality of jury deliberations – remains a relevant factor. Jurors who are questioned about possible misconduct will not easily draw the distinction that s 76 makes. For that reason, a threshold assessment is appropriate and can only be made on the basis of the materials before us."

It could be interpreted in two different ways. One way is how Justice Glazebrook suggested, that look there is a threshold, and the Chief Justice suggested it as well, we're going to take all these things into

account in the threshold and if section 76(2) is engaged we don't have to worry about it.

WINKELMANN CJ:
Isn't it also the point I was making which is that in those cases that sit on that line, for instance where it's about bringing extrinsic material into the room, it might be necessary to bring that issue of confidentiality and finality of deliberations into bear?

MR HUDA:
That's absolutely right, and I think that it may also assist, and I don't know whether Your Honours agree, that's one of the reasons why I set out these proposed questions. There was one thing missing from the questions and I'm going to address on that, but I think jurors do follow those sort of questions and question trails, or they're assumed to follow them perfectly correctly. So if they ask pinpointed questions, yes, no, yes, no, that can take some of the risks away.

WINKELMANN CJ:
So you're going to take us to this case now are you? To the merits of this case?

MR HUDA:
That's right. In terms of the merits it'll be very easy, or easier if I perhaps take Your Honours to page 16 of the Crown's –

WINKELMANN CJ:
I think we understand the facts, Mr Huda, we've read the affidavits.

MR HUDA:
Certainly. The connection then is truly there is only one thing that I need to emphasise before going absolutely directly to the merits by referring to the Crown case, the Crown submissions, and if I may refer Your Honours to paragraph 42.7, which is page 17 of the Crown's written submissions.

Every other point has more or less been dealt with, but for that one. The Crown case was strong. I say that because the ground of appeal that Mr Rolleston will seek to advance deals with the appearance of bias. It's an impartiality, it's a fair trial issue. When a fair trial issue arises, the Court does not take into account the strength of the Crown case. The strength of the Crown case is linked to the inevitability of the outcome, which is a section 232(4)(a) issue. Whether there was a real risk the error, blah blah blah, caused a miscarriage of justice. The error, occurrence or irregularity.

I made the same submission in the Court of Appeal. The Court of Appeal implicitly seems to have agreed because they didn't take into account the strength of the Crown case, and these are truly fundamentals until and unless Your Honours disagree I'm just going to say that what's set out in *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 it sets out the two different limbs and the commentary on it is just quite obvious. So I've included *Wiley* in my supplementary bundle of authorities and unlike the time when cases were decided under *Matenga* or 385, we now have two clear distinct limbs set out by Parliament. So, if the fair trial limb is engaged, this Court agrees that the fair trial limb is engaged, then there is no scope to say but the case was overwhelming strong or however and the verdict would have inevitably been the same. That must follow from the appearance of bias test anyway because it'd be slightly odd, in my submission, to say, ask whether a fair-minded observer might reasonably apprehend the decision maker might not bring an impartial mind to the resolution of the question to be decided, and then go on and say, yes, we agree, could not have brought an impartial mind but the strength of the case is so overwhelming it takes us nowhere. So, I think it's a process issue, a fair trial issue. Even the guilty have the right to a fair trial, or an impartial trial, and I say that is the absolute concept of the right to a fair trial. I'm not really a fan of this concept of right to a fair trial being absolute. I'm more a fan of the fact that impartiality is absolute.

In terms of the questions, if I may I've missed out –

WINKELMANN CJ:

Well they need to be amended based on what we have said to you, if we were minded to direct this, wouldn't they?

MR HUDA:

That's right, and the first thing I say about the question is it's just an attempt by me. I'm not married to it in any way. It's just what I was trying to set in stone, set in frame.

GLAZEBROOK J:

Can I suggest that they're very directive and I wondered whether more open questions might be better, at least to start with, but did you have a comment on that?

MR HUDA:

The honest point is, Ma'am, open questions will be better. I was fearful of what would be told to me if I had put more open questions, so I've narrowed it down as much as I can, because this argument will arise from the Crown, this is going into section 76(3), so I'll try to narrow it down as much as I can. Open questions –

GLAZEBROOK J:

When I say "open questions" did you know or recognise anyone in the public gallery, so a specifically open question related to the level of knowledge is what I was meaning.

MR HUDA:

Yes, and that could be a factor. I've missed out a question and that is whether he was actually bullied.

GLAZEBROOK J:

Sorry?

MR HUDA:

Whether the foreperson was actually bullied. I've missed that question out regrettably. It should be there. What is your relationship, how did he treat you, I'm happy to adopt those from any amendments suggested by Mr Lillico.

WINKELMANN CJ:

Well, the trouble with that is, if you have the questions that go onto what was your relationship, how did he treat you, it might tend to tell you the answer to the beginning questions. But if it's been handled by – so you envisage it with a counsel undertaking this?

MR HUDA:

In an ideal world it'll be a senior member of the police and counsel.

WINKELMANN CJ:

So they could handle that.

MR HUDA:

That's right. I do have, I wonder, I've tried to give high resolution photographs, so that's there. I don't think there'll be any, because it's already with the Court, I wonder whether if an interview is directed the person should have access to the actual yearbook. I'm happy to leave it with the registrar if Your Honours think but I've taken the high resolution parts from there and attached it to the affidavit. But I also gave the Court of Appeal a very high resolution screen so Your Honours have that, so you can read the names. But I've got the actual yearbook in my possession.

WINKELMANN CJ:

Yes, I think we'll take that thanks Mr Huda.

MR HUDA:

The relevant pages are bookmarked, that's before the Court. The remaining questions can then be cut off because of how the conversation started that, look, the focus is on the juror. I do ask one question in focusing on the juror.

Taking a slightly cynical approach, do we ask a biased person whether they were biased. I accept there's a degree of cynicism there but …

O'REGAN J:
Well you're only alleging apparent bias anyway.

MR HUDA:
Apparent bias, sorry for imprecision in speech, but I mean –

O'REGAN J:
Well you don't say, "Are you apparently biased," because that's for someone else to judge.

MR HUDA:
No, no, like I mean obviously the question, all I'm trying to say is I think, without putting too fine a point on it, if this foreperson was being cross-examined it wouldn't be difficult to get to the conclusion that you know this person because I've got this yearbook. So the question arises, what then. He may say, I have got nothing to do with this person. As Justice Glazebrook said, look, yes, we're in the same class, I never recognised him.

O'REGAN J:
I think we just have to cross that bridge when we come to it, don't we?

MR HUDA:
Certainly.

O'REGAN J:
I mean you make the enquiries and see what comes out of it.

MR HUDA:
Certainly.

GLAZEBROOK J:
I think you might be saying that, well, I think that's probably enough.

WINKELMANN CJ:

I think you might be saying that you might need to structure the questions to get more particular.

GLAZEBROOK J:

Or at least, I wasn't suggesting you didn't, but you might start with some more open questions and move forward.

MR HUDA:

Certainly, and look I'm not in any way married to these questions, they're there to be amended. It's just a trail. So that truly covers most of the points I make about this issue about taking the strength of the Crown case into account. I say that can't be done. Everything else is – there are one or two points that I make is about section – sorry, paragraph 42.1 in the Crown's submission, which is on page 16. The last line, and I've made the broad submission before, it reads, "Perhaps, at the time, they too thought the connection was tenuous." I take into account the Chief Justice said, look, it's a small amount of evidence and we've read it. The brother did come into the trial after it started, so he did not hear the Judge's direction, and most importantly none of that was put to the brother. The brother said what he said. He thought he recognised and then he went and confirmed. So in my submission he cannot invite the Court to draw that inference now.

Paragraph 42.2 seems to downplay the important, or the effects that bullying can have. There is the report in the submissions, I'm not going to repeat that. it also tends to downplay the age.

Paragraph 42.3, already touched on that. There is two answers to that. One, that's why we need the evidence, and two, cannot come to the conclusion that just because of a packed courtroom, because they were staring at each other, that's the point and the Chief Justice suggested that that was already understood.

Paragraph 42.4, now that's a matter of interpretation. How broadly one interprets which line, and the Chief Justice was talking about where it falls. The Crown seems to somehow think it would engage section 76(3), given that we're not asking other jurors anything else, that may fall away, and in any event there is no material difference to the questions that are set down in the proposed schedule to the ones that are before the Court of Appeal. I'm happy to provide my written submissions. There's no difference and the Court of Appeal said …

WINKELMANN CJ:
I think we've dealt with most of these things that you're raising.

MR HUDA:
That's right, and most of them have been dealt with as have been the automatic disqualification point. So there's not a whole lot more I can add in my submission. Ultimately it may well come down to, as I said, that does the evidence as it is raise a level of concern that this needs to be looked at because, in my submission, the evidence is credible. There is a proven connection, unlike other cases, and the teacher corroborated the behaviour. One submission that I'm slightly hesitant to make, but given that I'm here and this is my client's only chance I make it, it is slightly speculative, I still don't, I'm still very troubled by the fact, there may be something relevant in the fact that 11 people thought an 18 or a 20 year old was the right person to be a foreperson, when Judges up and down the country say members of the jury, you choose one amongst your member who is experienced chairing meetings –

WINKELMANN CJ:
Well that's not going to take us anywhere though, is it, Mr Huda?

MR HUDA:
If we ask the question I suppose no.

WINKELMANN CJ:

It's speculative.

MR HUDA:

It is speculative –

WINKELMANN CJ:

As you say, it's really not taking us anywhere.

O'REGAN J:

It's ageist as well.

MR HUDA:

It is and as I say it is slightly speculative. The only other point about the one juror point is that the House of Lords cases set out in my submissions seeking leave *Abdroikov*. *Abdroikov* deals with the situation where it's the membership in and of itself. The Court of Appeal took this idea that somebody has to influence somebody for there to be an appearance of bias so in my written submissions seeking leave to appeal, paragraph 22 to 25 clearly deals with those. There is no point my repeating it. In that case it was the membership. Nobody had to do or say anything. That gave rise to an appearance of bias. The case is in the bundle of authorities.

GLAZEBROOK J:

Well it's also the same matter with collegial courts, that's not an answer the other members of the Court wouldn't have been influenced, even if they'd tried, to an issue of apparent bias with one of the members of the Court.

WINKELMANN CJ:

Thank you Mr Huda. Those are your submissions?

MR HUDA:

Those are my submissions.

WINKELMANN CJ:

Thank you. Mr Bailey, have you submissions to make?

MR BAILEY:

Your Honour, I can be extremely brief, given…

WINKELMANN CJ:

Yes, because Mr Huda's submissions have certainly been pretty thorough.

MR BAILEY:

They have been, and very good too. So just following on from Mr Huda's last matters he discussed, and I'm more than comfortable with the proposition that if the Court does grant an order it would be limited to the foreperson. I would say, perhaps, that at this stage, given you never know what's going to come out of enquiries of this nature, that it be left open that at a later time the other jury members could possibly, or there might be a need for them to be spoken to as well.

The discussion about the confidentiality and how much section 76(2), how much of a factor confidentiality is when it's only 76(2), i.e. extrinsic matters, I concede, and I might not have done so in my written submissions, that in certain cases confidentiality, even if it strictly can be classified extrinsic matters, can come into play, but I think one of the advantages in this case when we take out the other jurors, and not interviewing them, it's a lot cleaner in that regard, and we'd really be focusing on trying to determine whether the foreperson knew the appellant and his brother in the way it's been alleged. So there's less offence, in my submission, to that being asked then perhaps the other jury members being asked what happened in terms of their conversations between the foreperson and them, if anything was said at all.

The only theoretical, I suppose, advantage would be if the other jurors were interviewed and they said, yes, we were told background information by the foreperson, then it would intend to increase the ability for the appellants to say that he certainly was bias or at the very least there's definitely a threshold of

apparent bias made out. The only, I suppose, second potential benefit would be if the foreperson did not, or was dishonest and didn't admit the knowledge or downplayed it and the information from the other jurors was contrary to that. But again, as a starting point I'm more than happy for the approach which has already been suggested will be taken if an order is granted.

The only other matter I wished to raise was where essentially put the line in the sand because the Court is always conscious of the downstream consequences to changes or judgments. Obviously the factors that have been quoted and cases from the various jurisdictions discussed about why it's not desirable to, unless it's necessarily desirable, to pester jurors, can't really be argued with. But on the other hand perhaps an argument could be made that if there's complete immunity from even enquiries of an extrinsic nature being made, then that has its own risks, and comments, there's a comment made by Lord Steyn, this is in the *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118 case. It's at tab 11 of the appellant Roche's bundle of authorities. Using the page number of the judgment itself, page 1137, which I think is page 20 or thereabouts of the PDF, but page 1137. Now this is an argument about intrinsic material being looked at, so it's a little bit different, and this was the dissenting Judge's judgment, and I'm looking at the first five or six lines of page 1137. He took the sort of contrary view that it will in fact enhance the moral authority of the jury if enquiries were done in that case. The bit that I'd really like to highlight is –

WINKELMANN CJ:
This is a dissenting judgment is it?

MR BAILEY:
Yes, but again it related to intrinsic material rather than extrinsic. At paragraph 22 he recognises that we, counsel, Judges, expert evidence, expert witnesses et cetera can all be responsible for causing miscarriages of justice and therefore there shouldn't be a, almost an immunity for juries to do what they like whenever they like, and I think in my submission that's one important thing to bear in mind, and I said in the written submissions that we

all know juries do, unfortunately, do things that they aren't meant to do, even despite strong directions. So what I'd say in tying it to this case is if there is a reasonable basis to say that something may have gone wrong, then yes the Court should bear in mind the good reasons for having the starting point of juries won't be contacted, but if necessary sometimes that is necessary, and I submit, and again I'm not going to go through the reasons which have been repeated, that this case is one such case where the enquiries need to be now made.

Other than that I really adopt the submissions that Mr Huda has made this morning on behalf of the appellant Mr Roche as well.

WINKELMANN CJ:
Thank you Mr Bailey. Mr Lillico.

MR LILLICO:
May it please the Court. The main controversy, in terms of the law at any rate, seems to boil down to what does the overall interests of justice test or threshold look like and both Mr Bailey and Mr Huda have talked about the factors that maybe at play in applying that test. So in other words they've gone from saying, interests of justice is the test. Here are some of the factors. And the thrust of the Crown submission really is that before we look at those factors, before we look at the micro-considerations that may be in play in any particular decision, it's important first to ask yourself what the competing interests might be when we look at the overall justice of the case. Because the intellectual exercise in determining those interests will only make sense if you identify where the tension lies. Here the Crown say that the tension lies between privacy, juror privacy and miscarriage. Now –

GLAZEBROOK J:
It doesn't sound very wonderful when you put it like that.

MR LILLICO:
Well I'm sorry.

GLAZEBROOK J:

So in the interests of juror privacy we're prepared to tolerate, I mean that's exactly what Lord Steyn's talking about, isn't it? In the interests of juror privacy we'll tolerate miscarriages.

WINKELMANN CJ:

I mean isn't it pretty straightforward, Mr Lillico, which is that if you've got trivial or not very persuasive evidence you might say the jury shouldn't be bothered with what's really speculative evidence.

MR LILLICO:

Yes, and what I'm simply saying is it's important to identify why you're saying that Your Honour. So you're saying here, and I agree with what my friend has said, that the test is not in terms of consequentiality, in terms of materiality, it's not a high test, it's only where you can dismiss the connection and materiality is, in the words of *JM* trivial and inconsequential. It's only if you –

GLAZEBROOK J:

But that means there can't be a miscarriage so you're not weighing anything up, you're just saying it couldn't possibly amount to a miscarriage and therefore we're not going to bother jurors about it.

MR LILLICO:

And it's important to identify that because you've just said, Your Honour, that you're not going to bother jurors, and the reason you're not going to bother jurors –

GLAZEBROOK J:

Is because there isn't a miscarriage. It's not because you're saying well there might be a miscarriage but, oh, we can't bother jurors.

WINKELMANN CJ:

Mr Lillico, is your point rather not that it's not at the *JM v R* test, but really when you're looking at the evidence it shows if it's low quality, speculative sort of thing that someone's heard, a friend heard from a friend –

MR LILLICO:

Yes.

WINKELMANN CJ:

That the jury were in the room on someone's phone Googling, or something like that. If it's low quality evidence, that's when you really bring in this other –

MR LILLICO:

Yes Your Honour and the reason that you're asking yourself about the quality of the evidence is because of the interests that we have, we place in the juror, and their privacy, no matter whether it's extrinsic or intrinsic, and –

WILLIAMS J:

Do you think it's that or just the system's strong preference for finality unless re-opening is necessary in the interests of justice. Because it's not a particularly private process, the selection and seating of jurors and the hearing of the evidence and so forth.

MR LILLICO:

It might be that finality point because – and that's how it was picked up in the *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) case, that's in the Crown bundle at tab 9, where you may recall that the journalist did the tour and he or she went to see all of the jurors, and in that case, I think it's at 79 of the report where – sorry, 62 to 83, and it's right at the bottom, "The privacy of the jurors is an equally important consideration. The responses and reactions of eight of the nine jurors approached in the present case confirm our own belief that generally jurors serve in the impression that their privacy will be respected and their identity remain undisclosed; that they will not be interviewed about their deliberations nor

called upon to explain or justify their verdict." So perhaps it's that last bit Sir which picks up on your point about finality. They don't expect when their service is done and they've delivered a verdict and they've created a legal fact, the fact of the verdict, that they'll be again taxed about what they did. So either privacy or finality but we don't, it doesn't serve us in making the decision if we don't identify that there is some tension. I'm not saying that the privacy interest of the finality interest has such a high value if we're truly talking about extrinsic matters, but the difficulty is, of course, and this emerges with my friends' submissions to you, where they say, Mr Bailey says well we may end up wanting to talk to the other jurors, and Mr Huda told you he had difficulty in framing the questions because he was worried about the answers he might get. That's very much the difficulty in drawing a bright line between extrinsic and intrinsic, and that's one reason why, another reason why privacy has to play a part. You're just, you're going –

GLAZEBROOK J:

Well when you took us to that case they were talking about privacy from other people going. I don't think privacy has anything to do with the Court's analysis. That has to be, surely, looking at the miscarriage of justice and the possibility of that.

MR LILLICO:

Well miscarriage of justice has to be there. It's the – or unfair trial, it's there because of, by virtue of the statutory provision.

GLAZEBROOK J:

How high – we've agreed that trivial and otherwise, but what say it's middling evidence, what do you say it has to be, because if it's trivial then it couldn't possibly cause a miscarriage of justice in the first place.

MR LILLICO:

If the connection, if the materiality is middling, Your Honour.

GLAZEBROOK J:

So you are saying there's a higher threshold than merely could it have caused a miscarriage of justice. So what exactly – how do you, I'm not interested particularly in a balancing test, because I don't think that helps very much, especially when you're balancing miscarriage against privacy which seems to be – so how high does it have to be then, do you say? Because your friends say could it have caused a miscarriage. Is there credible enough evidence that could have caused a miscarriage of justice, what do you say it is?

MR LILLICO:

Well anything above inconsequential I'm happy to say is, if we're just simply looking at the materiality part, I don't contest what they say about that.

GLAZEBROOK J:

So anything about inconsequential, where does your balancing come then? There isn't any?

MR LILLICO:

Well we have to look at whether the information is credible to show that, for a start.

GLAZEBROOK J:

Well your friends agree with that, as I understood them.

MR LILLICO:

Yes.

WINKELMANN CJ:

So Mr Lillico, your submission really is that you can't take either confidentiality – you can't take confidentiality out of the equation in many cases, but it's not a mandatory but it may be a relevant consideration when you're looking at –

MR LILLICO:

It is and it's received little attention in our subs, so we can hardly blame our friends for it, but the focus has been on the Evidence Act, and the reason for that, of course, is you're not going to give permission for an investigation to take place in relation to evidence that won't end up being admitted. But if you're talking about the boring, procedural power that my friends are asking the Court to exercise, it hasn't received much attention. It's been explained in a case called *R v Ropotini* (2004) 21 CRNZ 340 (CA) which is at footnote 42, so it hasn't received much attention from us either because it's buried in a footnote.

GLAZEBROOK J:

Footnote 42 of your submissions on what?

MR LILLICO:

Sorry, Your Honour, yes, footnote 42 of our submissions.

WINKELMANN CJ:

Is it in your bundle of authorities?

MR LILLICO:

It's not, Your Honour, but I can tell you quite quickly what it means. It stands for what the mechanical power is that the Court is going to be exercising, which are the special powers in the Criminal Procedure Act, section 335.

ELLEN FRANCE J:

Is it footnote 42?

MR LILLICO:

Footnote 42, yes.

WINKELMANN CJ:

Because our footnote –

MR LILLICO:

Oh I'm sorry, footnote 45. My prescription needs changing.

GLAZEBROOK J:

I'm not quite sure what it means?

MR LILLICO:

You won't find the answer in the footnote itself, Your Honour, but that's the reference to the case.

GLAZEBROOK J:

So what does the case say?

MR LILLICO:

The case says that in terms of mechanics and the procedural power that the Court's exercising when they appoint an investigator, which is what you're being asked to do, or an interviewer, the procedural power that the Court is being asked to exercise there is under section 335 of the Criminal Procedure Act. So those are the special powers you'll be familiar with where the Court can appoint a special assessor and so forth. That's really what the Court is being asked to do here, 335(2)(b) is the relevant power. So that's where the Court may, "Order the examination of those witnesses to be conducted before any Judge of the court or before any officer of the court or other person…" here counsel or a police officer, "… appointed by the court for the purpose, and allow the admission of any formal statements before the court."

So that's the actual mechanical provision that my friends are relying upon and, so for instance that provision could be used by the Court to appoint an expert, or it could be used to appoint, issue a summons to bring a witness before the Court, all those sorts of powers, and it's worded under 335(2) simply with the discretionary language "may". So, the Court may do this and my simple submission is that it's not strange to think that jury privacy might be an issue in exercising that very broad discretion where the Court would, of course, consider the person or integrity of any use of private people in relation to the

use of any of those powers. So if the Court was going to issue a summons for an uninterested third party to bring documents to the Court, the Court would consider privacy values, integrity values, before they ask that person to come.

GLAZEBROOK J:
I wouldn't, I'd just say is this evidence relevant and should it be brought before the Court.

MR LILLICO:
But how relevant and what's the quality of the evidence.

WINKELMANN CJ:
Mr Lillico, I think we're going around in circles. Isn't the simple point that, as was explained in that *Radio New Zealand* case, the confidentiality of the deliberations is a relevant consideration. Jury privacy, noted that they've done their service and should be allowed to move on, is also relevant, and that's why you don't trouble the juror just on a sort of a fishing expedition, you actually do require some credible evidence of something –

MR LILLICO:
Yes Your Honour, I'm happy with that position.

GLAZEBROOK J:
The concern I had was that it comes in at the later stage that having got the credible evidence and the possible ground of appeal you then say well we don't do it because of jury privacy. And if you're not saying that then that's fine.

MR LILLICO:
I'm not suggesting that Your Honour, no.

WINKELMANN CJ:
And what do you say about what the Court of Appeal said at paragraph 16 where they said a high, described it as a high threshold?

MR LILLICO:

Well I think, well I submit that if, I have some difficulty with that, as my friends do. If the Court were meaning to import, as they say they had the kind of language that we see in relation to intrinsic evidence, so the word there is sufficiently, of the phrase used in the statute is sufficiently compelling, if the Court's importing at that point that sort of standard then the Court is not right about that, with respect, but perhaps that's not the meaning. The meaning is that despite the fact that we have, it's an extrinsic rather than an intrinsic issue, there's still a threshold to be passed. There's still a standard to be met. If the use of the word "high" is to remind everyone that that is the case, then perhaps that's why you need to read that particular paragraph, but if it's importing something akin to sufficiently compelling then the Court is not right, with respect.

ELLEN FRANCE J:

The Court at 13 does say, "The exceptional circumstances threshold does not apply," and they then cite *JM v R*.

MR LILLICO:

Yes. So perhaps it's capable of being read, Your Honour, as a reminder, if you like, that there is something to, there is a threshold to trip over before you actually get there.

WINKELMANN CJ:

But perhaps it may not mean this. May not mean use the word high but perhaps we might think that high is too high.

MR LILLICO:

It's not compelling I suppose is the only thing we know.

WINKELMANN CJ:

Yes.

MR LILLICO:

It's a reminder there's a gateway to pass through I suppose is the best way to understand it. It would be the fairest way to understand the Court of Appeal on that point.

GLAZEBROOK J:

I don't know. High doesn't import there is a threshold to me, but …

WINKELMANN CJ:

Because you're not saying it's a high threshold, you're saying that when you look at it, it just has to be cogent evidence that could give rise to a – that suggests it's something that could give rise to a ground of appeal.

MR LILLICO:

Yes Your Honour. In a credible fashion, yes. One point my friend raised, Mr Huda raised, and he did so very well, despite only being young, is in relation to the English practice which is that the Courts there basically the trial Judge will ask the jury members to snitch, if I can put it that way, on when they see any improper behaviour. Now, and he's put material which places that in front of you. The difficulty was that that point wasn't raised, I'm just making a matter of raising a point of procedure really. That sort of issue, what trial Judges should do as a matter of course, as a matter of practice, in terms of running jury trials, and whether or not this should be added to the New Zealand practice and is suitable in terms of the New Zealand experience wasn't raised in this kind of broad term, in the Court of Appeal, and the Court of Appeal classically is the supervisor of the trial courts. It needs to come here after the Court of Appeal dealt with it in a measured fashion then so be it, of course, but the Court of Appeal, to my knowledge, haven't had the chance to pour over this issue and then make a pronouncement about whether it should be a thing that trial Judges do in our context.

GLAZEBROOK J:

As I understand I think that English practice is particularly linked to the difficulty they've been having with Googling, and matters of that kind, on an

almost – so it would be something that, I don't think it would even be looked at by the Court of Appeal, it would be looked at in terms of just exactly what should be done for juries and discussed more generally.

MR LILLICO:

Yes, they've had jurors imprisoned so that's been a particular issue there, and whether it's one here remains to be seen.

GLAZEBROOK J:

I might be wrong, I'm not sure of the timing, but I know that they had had a major issue with that and did bring in some measures to deal with, or that they thought were going to deal with that.

MR LILLICO:

And one of the cases that's been put before you, *Baybasin*, is about that very issue isn't it, Googling.

WINKELMANN CJ:

Mr Lillico, it's 11.30, shall we take the morning adjournment. You're not about to finish in the next two minutes are you?

MR LILLICO:

I was actually. My main concern was the nature of the test. I don't intend to address you any further about this substantive case.

WINKELMANN CJ:

I think we might take the morning adjournment anyway and then we'll come back because we've got reply as well.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

MR LILLICO:

May it please the Court. I'm just very briefly going to relate our previous discussion mostly with Justice Glazebrook and the Chief Justice about materiality to the present case. So to be clear to resist the appointment under the Criminal Procedure Act through 355, to assist the appointment of an investigator, an interviewer, the Crown really, harking back to our previous discussion, have to show to you or satisfy you that in the words of the Court of Appeal in *JM v R* that it's not in the interests of justice to direct an enquiry into allegations of misconduct of a trivial and inconsequential nature. So that's what we have to satisfy you of in my submission. You recall that the language in the Court of Appeal in this case was that there was a tenuous link so of course that's what we say to you in relation to this matter and that the Court ought not to order an investigator because, even if we assume that the foreperson recognised Dante Rolleston, and we know, it's proven that he was a bully, that's not contested, even if we assume those two things, that we can say that the chance of a fair-minded and informed member of the public having a reasonable apprehension of bias, is so small as to be inconsequential, and the reason we say that is because it's not Dante Rolleston who's been given in charge of the foreman and the jury. It's his brother Brooke, and not just Brooke but another man entirely who has no relationship to the family other than his friendship with Mr Rolleston. He's taken an oath and the fair- minded and informed member of the public would know about the oath. The oath from the Jury Rules, we're all familiar with it, "Do each of you swear by Almighty God… that you will try the case before you to the best of your ability…" and importantly, "… give your verdict according to the evidence?"

Of course the Judge in this case also made directions, the usual directions about judging the case only on the evidence before the Court and not drawing on matters they might have heard outside of the court and there is some

weight that can be given to the fact that these charges were serious and there is the obviously solemnity and formality involved in the jury trial. So bearing in mind all those matters the risk, in the Crown submission, seems inconsequential that the fair-minded observer would see, or apprehend by some part of the foreman, in relation to Brooke and Mr Roche.

GLAZEBROOK J:

What do you say about the close connection issue? So that if – well what I said to your friend, I think Mr Huda, if this juror had come up and said, well, I was in the same class as this man's brother and knew of both the brother, of the person, even without the bullying, what do you say about section 22?

MR LILLICO:

Well it's knowing of and having a close connection, so that you couldn't perform your function properly as a jury member.

GLAZEBROOK J:

Well I don't think it says that, because (a) is incapable of performing or continuing to perform –

MR LILLICO:

I agree it doesn't say that but that is really the –

GLAZEBROOK J:

Well it's assumed if you're closely connected with someone, and I understand the issue of close, that you just –

MR LILLICO:

You can't.

GLAZEBROOK J:

– in and of itself then can't actually perform your function. I mean there might be an issue, because it says also to a prospective witness, so if the witness is just going there to say, here's a document.

MR LILLICO:

Yes, you know I –

GLAZEBROOK J:

So I do, from that point of view obviously you look at the actual function of the trial and what's related to the trial.

MR LILLICO:

We don't have any evidence about that importantly from Brooke alleging any kind of close relationship and it's –

GLAZEBROOK J:

Well we don't know at the moment, do we. We just know of the relationship with Dante and then whether the link was made with the brother.

MR LILLICO:

No, but it would've been –

GLAZEBROOK J:

So you're saying if somebody came up and said, I was terribly, terribly bullied by this man's brother, and I knew of the brother as well, that you wouldn't say, well there's a bit of an issue here and I'll excuse you under section 22(2)(e)?

MR LILLICO:

Two matters to raise in relation to this case. In relation to this case it would've been easy enough for Brooke to file an affidavit saying, yes, I didn't know the foreman myself. That's unlikely because of course the Court of Appeal found, I think it's at paragraph 16, that the Judge asked the jury whether they recognised the defendant or the names of any of the witnesses that were read out. So in relation to this case that scenario seems unlikely. In relation to a hypothetical situation the Courts are reasonably robust, in my reading of the cases about a close relationship is, and one of the cases that's in the Crown bundle, *Knight*, a very recent decision in the Court of Appeal, but in my submission illustrative. In that case the girlfriend of the accused was a sex

worker, and it was said that one of the jury members was a client of hers, and the Court didn't regard that as close.

WINKELMANN CJ:

Yes, the nature of, I mean it can't simply be, the extent of the emotional engagement must be relevant to assessing how close, and the emotional engagement might be affectionate or it might be loathing, mightn't it?

MR LILLICO:

Or it might be financial, yes.

WINKELMANN CJ:

Yes.

MR LILLICO:

But so difficulty answering in a vacuum but the Courts, there's a measure of robustness I suppose is what we come down to in terms of how the Courts regard close relationship.

WILLIAMS J:

If the evidence was that the foreperson had been bullied by Brooke, fatal?

MR LILLICO:

I'd say so Sir, yes.

WILLIAMS J:

So these arguments –

MR LILLICO:

Given it's only two years previous.

WILLIAMS J:

Sure. So given the other arguments you make about the quality of the oath, the solemnity of the process, the seriousness of the charges, they wouldn't have counted for anything, would they?

MR LILLICO:

No, not in that situation.

WILLIAMS J:

So the real distinction here is the one degree of separation.

MR LILLICO:

Yes, where to remove.

WILLIAMS J:

Yes, that's the –

MR LILLICO:

That's the point.

WILLIAMS J:

That's your king hit, you say?

MR LILLICO:

Yes Sir. Those sorts of protections aren't –

WILLIAMS J:

But how do you, the question is how do you know that's the king hit if, in fact, on enquiry it becomes clear that the problematic relationship with Dante, if it existed, was a driver in this guy's attitude? I mean how do you know one degree of separation is relevant to his attitude towards Brooke? How do you know, perhaps I'm putting that badly, how do we know he just doesn't transpose Dante into Brooke's shoes? It doesn't take much of a feat of imagination to get yourself to that point, does it?

MR LILLICO:

No it doesn't.

WILLIAMS J:

But if it was his first cousin, or his third cousin twice removed, I see your point, but this is pretty close, given the allegation, and the emotional impact, to take the Chief Justice's point, if it's made out.

MR LILLICO:

I suppose on these facts we have some reasonable comfort in thinking that Brooke and the foreman didn't recognise one another.

WINKELMANN CJ:

Well, we don't know about the foreman.

MR LILLICO:

We know about Brooke, yes.

WINKELMANN CJ:

All right, thank you Mr Lillico.

MR LILLICO:

Unless there are any further questions?

WINKELMANN CJ:

No, we do have some further questions. So if we were minded to direct questioning, would you be able to confer with counsel to settle a list of questions Mr Lillico?

MR LILLICO:

Certainly.

WINKELMANN CJ:

Do you think that would be the appropriate methodology to apply?

MR LILLICO:

I think it would be. It might, some commentary from the Court may be on the bounds of the questioning, might be helpful because, and this harks back to

my submission to you, that it's very difficult to draw a line between extrinsic and intrinsic, but if we turn up to the list of questions in Mr Huda's submissions, and we look only at the questions for the foreperson, we see there at question – now that Mr Huda I think would concede that we need to unpack what the first one but – and perhaps rather than writing questions there needs to be topics or maybe that's the best way of approaching it, but if we look at the second question, "B. Did you tell the other jurors that you knew Brooke Rolleston?" To me that seems to be getting into –

WINKELMANN CJ:
We'll take that out of course. We'll take that out because we're taking out the other jurors.

MR LILLICO:
Yes, thank you. But certainly I can confer with Mr Bailey and Mr Huda.

WINKELMANN CJ:
And also we think counsel should confer about who should make the enquiry.

MR LILLICO:
Yes, certainly Your Honour.

WINKELMANN CJ:
Mr Huda, anything in reply?

MR HUDA:
I'd just point out two passages. First, I won't take you there, in relation to finality point I would just ask Your Honours to perhaps have regard to what the Supreme Court of Canada said in *R v Pan; R v Sawyer* [2001] 2 SCR 344, it's set out in paragraph 17 of my written submissions, and it's paragraph 51 of *Pan* there's a discussion by the full court about the finality and that's already been touched upon but it's just there as a reference.

The second point I intend to make, and this case is not available on the bundle but I'll just give the citation if I may please, it's [2016] NZCA 37. The name of the case is *JRM v R*. This is the offshoot of *JM v R*.

ELLEN FRANCE J:
That's the first one, isn't it?

MR HUDA:
That's right. Now the reason I'm pointing to this case is I don't necessarily – maybe it doesn't matter, but I don't necessarily agree that the Court is relying on any statutory power because Justice Winkelmann, at that point was President Ellen France, and Justice Miller in that case says that the Court has inherent powers, "to make orders incidental to the conduct and disposition of an appeal," and then they go on to say, "a decision not to direct an inquiry of the nature sought in this case could, in some circumstances, be determinative of an appeal. Accordingly, we consider an application for an inquiry into juror misconduct should generally be determined by three judges of this Court." It's a very short judgment it's set down so it's an inherent power to the extent it's a difference between that a statutory basis *JRM v R* says it's the inherent powers being exercised, that's actually the reason why I've continued to call Mr Rolleston the applicant at this hearing.

ELLEN FRANCE J:
The earlier case that is referred to in footnote 45 does treat it as under the old Crimes Act provision which broadly equates to 335.

MR HUDA:
Certainly.

WINKELMANN CJ:
Does anything turn on it Mr Huda?

MR HUDA:
I don't think anything turns on that but that's all I can add.

GLAZEBROOK J:

Well you're just saying if that isn't wide enough, there's always the inherent powers to conduct…

MR HUDA:

That's right, and I'm more than happy to confer with Mr Lillico in terms of questions and so forth and we can take it from there. Unless Your Honours have any questions.

WINKELMANN CJ:

No, thank you Mr Huda. Mr Bailey?

MR BAILEY:

No submissions.

WINKELMANN CJ:

Thank you counsel for your very helpful submissions. We'll take some time to consider our decision and release it in the usual way.

COURT ADJOURNS: 12.01 PM