IN THE SUPREME COURT OF NEW ZEALAND SC 88/2013

[2014] NZSC Trans 10

C

Appellant

v

THE QUEEN

Respondent

Hearing:	8 April 2014
Coram:	Elias CJ
	McGrath J
	William Young J
	Glazebrook J
	Arnold J
Appearances:	W Lawson and T D Grimwood for the Appellant
	M J Lillico and A R Van Echten for the Respondent

CRIMINAL APPEAL

MR LAWSON:

May it please the Court, counsel's name is Lawson along with Mr Grimwood for the appellant.

ELIAS CJ:

Thank you, Mr Lawson, Mr Grimwood.

MR LILLICO:

May it please the Court, counsel's name is Lillico along with Ms Van Echten for the respondent.

ELIAS CJ:

Thank you, Mr Lillico, Ms Van Echten. Yes, Mr Lawson.

MR LAWSON:

Thank you, Ma'am. May it please the Court, as you will be aware I've filed relatively detailed submissions in relation to the introduction and background to the matter, and if I can just traverse those in a brief way, on the 7th of March 2012 the appellant was charged with four charges of rape, three charges of indecent assault, and three charges of inducing an indecent act. At the time the charges were laid, they related to a period between 1971 and 1975. Prior to the commencement of trial, the indictment was amended and expanded the period from October 1969 to 1975.

The preparation for the trial commenced and it became increasingly clear that the investigations in relation to the normal aspects of supporting what would be the accused's evidence and his defence, those investigations were not bearing fruit. It was consistently coming back that witnesses that we were trying to track, particularly in relation to the hang gliding, could not be found and there was a whole lot of blind alleys or dead ends, however you want to refer to it, and it was at that time that Mr C gave me the instructions to file a stay once that was explained and that process was explained to him. I accept that it was relatively late, although notice was given in February, at the callover in February, but that explains the basis upon which the application was made and of course the background is that Mr C was happy to voluntarily come back to New Zealand, and Rotorua in particular, to answer the charge and deal with the matter because, of course, it has family implications for him. So the application for stay was launched because of those reasons.

In the general sense, the application was dismissed by His Honour from the District Court. I'll deal with that in more detail later, but after the complainant gave evidence the situation changed significantly in that she not only had not come up to brief on a number of areas, there was a marked change in what was expected that the evidence would be versus what the evidence actually was, and so the result was that the Crown applied to amend the indictment which, of course, wasn't opposed. There were some 347 applications. Again, the application to stay was renewed. Of course, that was identifying the increasing concerns about an evolving complaint and the difficulty in narrowing down exactly what it was that the accused at the time had to answer.

So ultimately that second application was declined and the defence elected to give evidence. A very interesting aspect of the trial during the defence evidence, in my submission, or at the conclusion of the defence evidence, I think it was, was that the jury made an enquiry about the existence of records to speak to whether there was a basement at the address in Taupo. Now, of course, the background identifies that the complainant had made a complaint about

what she initially described as a sexual violation by rape in the basement or darkroom, which was a very small room, downstairs at the address in Taupo and, of course, the existence of that room became very important because Mr C said there was no such room at the first instance in his statement and then in evidence he said there was no such room and his wife, KC, confirmed that.

My submission is that at this point the jury were searching for some corroboration or objective assistance with this issue. Of course, it speaks generally to the credibility because at this stage that count in the indictment had gone, so it was clearly an enquiry, in my submission, directed at the issue of credibility.

So the point in the general sense is that there was evidence available to Mr C in the form of his own evidence and his wife's evidence, but it could not in any sense be said that that evidence was objective in the true sense. It was arguably partisan in favour of Mr C, the appellant.

So the real concern was – which we had right from the outset – corroborating – probably a bad word – supporting the peripheral material and the statements Mr C was making to assist in his overall credibility, and that was primarily the area of inquiry.

Ultimately the trial continued. We could not get an answer to that enquiry. We – Mr Grimwood and the officer in charge of the case – made some detailed inquiries about trying to find those records and they simply had gone. So ultimately the jury retired and they delivered verdicts which are at 1.9 of my submissions and those verdicts were – in relation to count 1 there was a guilty verdict which was unanimous. Count 2, the rape in relation to the dredging pond, that was a not guilty by unanimous verdict. Count 3, which was considered by all of us to be an unusual verdict, this was the allegation of rape at the gravel bank, was a not guilty by majority, and then the inducing the complainant to do an indecent act was guilty by unanimous verdict.

So ultimately the appellant appealed to the Court of Appeal and that appeal was dismissed, and then we have in this Court whether the prosecution should have been stayed because of the delay between the alleged offending and the prosecution and, of course, the opportunities to stay were before the trial and then again at the close of the Crown case.

It's my submission that a thorough consideration of that issue requires looking into how the existing approach is working and thereafter whether the existing approach is giving sufficient weight to section 25(a) of the Bill of Rights Act because that really is the primary focus, in my submission.

To provide a little bit more detail in relation to the factual background, it's clearly identified that the appellant is an Australian national. He lives in Australia. He returned to New Zealand to answer the allegations. He married a New Zealand woman in 1967. The family returned to a little town, M, just outside Rotorua, in 1970. At that stage that town was a thriving logging town and had industry and so it was quite busy. At the time, the appellant was 23 years old. He came with his children. Obviously the complainant is his wife's sister.

So initially when they arrived – and the evidence is reasonably clear that they arrived in November of 1970 – and I should say that apart from a minor issue in relation to the reference to the niece, I don't take any issue with my learned friend's chronology, so if that is of some assistance. But coming back to this chronology in the general sense, the appellant and his family stayed with the appellant's wife's mother and father at this address In M or the Quarry. The complainant lived there in that house with her siblings and obviously the mother and father were there, the complainant's father, JR, he worked as the caretaker at the Quarry and the house was situated on that quarry. That's their family home. The evidence was that he worked, that the quarry had a busy operation, the quarry operated six days per week and he, JR effectively worked seven days a week. He kept unusual hours on a Sunday, coming and going, in relation to the requirements for maintenance and general caretaking on the Sunday and so he was in and around the quarry on a regular basis.

What is clear is that the appellant left M at some point to go to Auckland. We don't know exactly when but we know that it was before Christmas and we know that the appellant left before his wife and family; he was a musician and he went to Auckland to pursue his musical opportunities and play in nightclubs in Auckland at the time and he stayed with a person by the name of PK who was a friend of his father-in-law. PK has since died. The appellant and his family, when the appellant's family moved to Auckland they had some issues with getting paid and eventually they returned to M and it appears that that was around about the end of February 1971 so there is a reasonably significant period of the summer in my submission, a significant period of that summer, that he was not at the address in M. Shortly after that the appellant obviously needed to work – he took up work in Tokaanu and the arrangement was that he would return from there every second weekend, on a Sunday, and he worked there until approximately May, it's not clear exactly when he left, there are no records in relation to at what point he started work there and what point he finished and how often he was able to come and go. It is very vague in relation to that.

So then we come to the allegations which are taken from the original indictment, alleged offending in M, that's counts 1 to 3, in Taupo counts 4 and of course, the count 4 was the allegation of sexual violation by rape in Taupo and then the Rotorua counts which were fully sexual violations, counts 5 to 7. And if I can just expand on that somewhat, because in my submission it assists in understanding the difficulty that the appellant had at the time, if you

understand the scope of the original allegations because the scope of the original allegations were significantly broader than was ultimately the case. So it's best to identify for convenience, we can see what the scope of the allegations were by using the summary of facts which is contained at page 12(a) of the case on appeal, oh, it starts at 11(a) but the substance of it is at 12(a). And you can see there that count 1 relates to the allegation in or close to the Quarry where it is alleged that there was the indecent act in what has been referred to the animal warren or the bush area. And that really didn't change throughout, so there is no significant difference there.

In relation to counts 2 and 3 which you can see at page 13(a), the allegations there are that there was numerous times where there was a sexual violation by rape and it appears to be numerous times and at three separate locations. You can see there that it is alleged there was multiple or it happened on a number of occasions at the dredging pond at 13(a), she says a number of occasions. The tree hut, she says there was sexual violation or sexual intercourse on a number of occasions and in the bush near M, she mentions that as well. And of course the significance of that, that's in stark contrast to her ultimate evidence where she only gives evidence in relation to these allegations, of one event in the dredging pool, or dredging pond. She doesn't mention the tree hut at all, she doesn't mention the bush near M but she mentions a whole new allegation on the metal bank. So what we were expecting to answer in relation to those counts, there was a significant change. We then move on to count –

GLAZEBROOK J:
But the actual count was made clear, it was just the gravel bank one, was it?

MR LAWSON:
Ultimately it was Ma'am, yes. So what happened –

GLAZEBROOK J:
So they didn't mix up the difference occasions, in one count.

MR LAWSON:
No they didn't Ma'am, because originally these –

GLAZEBROOK J:
Because this would have been mixed up, wrongly.

MR LAWSON:
Well these were representative counts.

GLAZEBROOK J:

Well whether they are representative counts or not, if there is a distinguishing feature they should be in separate counts.

MR LAWSON:

Yes there should be.

GLAZEBROOK J:

And it would have been a distinguishing feature, gravel bank or bush or tree hut.

MR LAWSON:

Yes I agree, yes, thank you.

GLAZEBROOK J:

So ultimately it was made absolutely clear it was just the gravel bank, was it?

MR LAWSON:

When the indictment was amended –

GLAZEBROOK J:

Yes.

MR LAWSON:

It was Ma'am, yes. So then we come to count 4 which was the Taupo allegation and as far as the summary is concerned, you will see it identifies there that this is supposed to be a representative count and it is a sexual violation by rape again. The tenure of the allegation suggests that it occurred in a basement room which was used as a photographer's studio, there were photos of naked adults and children and there was intercourse on a number of times in that room. And of course that explains the representative count. But again we've got a stark contrast of what the ultimate evidence was because ultimately what the complainant said was that he required her to masturbate him which is a significantly different allegation obviously and that there was clearly only one occasion, that's what the allegation was so again there was significant movement on this issue. We then come to counts 5 to 7 and this over the page on 14(a). Again these are representative counts –

GLAZEBROOK J:

Can I just come back to the – you said ultimately the issue about the basement was only credibility but was it still related or not to count 4. Because I'd thought it was still related a bit to count 4 but is that not the case?

MR LAWSON:

Count 4?

GLAZEBROOK J:

The requirement to masturbate as against the rape.

MR LAWSON:

Well that count, the original count 4 completely went Ma'am.

GLAZEBROOK J:

No I understand that but was the allegation about the requirement to masturbate somewhere else, than the basement?

MR LAWSON:

No that was in relation to the M offending, the ultimate count 4 was in relation to the inducing an indecent act in and around the M address when he was ….

GLAZEBROOK J:

Oh okay, sorry, I've got confused.

WILLIAM YOUNG J:

The ultimate count 4, isn't that summarised at 232, isn't that at Taupo?

GLAZEBROOK J:

That's what I thought but…

WILLIAM YOUNG J:

I'm just looking at the question trail at 231, 232.

MR LAWSON:

Sorry? I missed that.

WILLIAM YOUNG J:

I'm just looking at, if you look at page 232 of the case, that's the Court of Appeal case?

MR LAWSON:

Yes.

WILLIAM YOUNG J:

That's got count 4 and that refers to an incident at Taupo.

MR LAWSON:

Can I just take a moment to check that? See the ultimate, the indictment that went to the jury and the verdicts were delivered on is at 6A.

GLAZEBROOK J:

Okay. It's probably – yes. I mean it's probably not…

MR LAWSON:

And that is count, that count 4 –

GLAZEBROOK J:

Oh okay.

MR LAWSON:

– solely relates to the inducing of, the touching of his penis.

GLAZEBROOK J:

Oh okay.

MR LAWSON:

So the Taupo count was –

GLAZEBROOK J:

So all of them went in, everything went all together?

MR LAWSON:

Well the Taupo count in its entirety went and it wasn't – there was no amendment of it to inducing an indecent act.

GLAZEBROOK J:

Okay but there was evidence of that?

MR LAWSON:

Yes and that's –

GLAZEBROOK J:

I wonder if the jury was just confused as –

WILLIAM YOUNG J:

They might look – looks as though they've been given the wrong issues sheet or this is the wrong issues sheet?

MR LAWSON:

To be honest with you I, when you mentioned that Sir it completely threw me because I'm not sure that that issues sheet was the one that ultimately went to the jury.

GLAZEBROOK J:

Well you hope it didn't.

MR LAWSON:

No. I'm sure it wouldn't have because both Mr Pilditch and I would have picked up on that, I'm sure.

ARNOLD J:

If you look at paragraph 10, page 220, where the Judge talks about count 4, it's at M.

MR LAWSON:

Yes.

McGRATH J:

What page was that?

ARNOLD J:

220, paragraph 10.

GLAZEBROOK J:

Yes, I understand the point, thank you.

MR LAWSON:

So certainly by keeping in mind the jury had a copy of the amended indictment. So if I can come back to 14A, page 14A, where we're talking about representative counts 5 to 7, where it's alleged that the complainant was taken up Mt Ngongotaha to go hang gliding. There was photographs, naked photographing, photography, and that she's alleging there was, he frequently had intercourse with her at various locations including the side of Mt Ngongotaha so again we've got a multiple allegation situation and it's alleged on a weekly basis and the contrast again is clear that she gave evidence which was very different to that. She didn't mention a sexual violation or any sexual violation by rape at all. What she mentioned was that she was asked, sent by her mother significantly to go and pick mushrooms and at that

point she was required to masturbate the appellant and there was photographs taken and her evidence in relation to that is at page 22 of the case.

So she does not disclose sexual intercourse even though she's alleging in her statement and in the allegation generally is that multiple acts of sexual violation by rape, it identifies the real problem that we were having with the movement of the complaint and the significant change in her evidence from the statement and obviously it created real problems of cross-examination. Do you go there, do you not? How far do you go and obviously those judgement calls were made to the best of my ability at the time but it was, to say the least, harrowing for the appellant to try to deal with it on an ongoing basis.

The interesting thing about this is that these allegations in a general sense are said to be linked to, some of them at least, to the hang gliding assertion that he, the appellant, took – was encouraged to take, more importantly, the complainant to go hang gliding with him alone and that these things occurred in that process but of course the appellant filed an affidavit which said, that's simply not the case. It was a dangerous sport, you needed a buddy adult. At the very least these things were massive, you wouldn't do that on your own, and then whether that had influence on the change in evidence or it was just another example of a change of evidence we will never know but in my submission that issue is, it's important to identify that there is a significant change and an evolving and developing complaint.

So obviously it's clear from the appellant's statement that the allegations were denied and in his statement he – and my submission clearly identified that there was no downstairs room in the Taupo address. The appellant's family eventually moved back to Rotorua after Taupo and then shortly thereafter in 1975 returned to Australia.

On the 20th of July, this is part of the chronology, and I'll skip through this reasonably quickly, 1994, the complainant's father JR died and of course the interesting, or the important aspect of his evidence is that he was in and around the quarry where a large number of these allegations were said to have occurred. He was in the house and his movements around the quarry were very important. The complainant made her statement to the police in August of 2007 and on the 2nd of June 2009 the police took a statement from AR, that's the complainant's mother, and AR later died on the 10th of August 2009.

On the 3rd of August 2011, some four years later after the complaint was made, the appellant was interviewed by the police, and his statement clearly identified the difficulty that he was having recollecting events. It is clear that in the appellant's statement made on the 3rd of August 2011 he did not accept the allegations. It was a categorical denial. The appellant challenged the accuracy of some of the alleged circumstances and in my submission this is a relatively important factor, particularly in relation to the basement and darkroom downstairs in

the Taupo address because the police just simply did not follow that up at all, there was no investigation, and when Detective McLeod was asked about that at trial he acknowledged that the delay was not normal between complaint and interview, and thereafter charge, and he acknowledged that he didn't look for the address in Taupo in any significant way.

So the trial was scheduled to commence on the 4th of March 2012 and as I've previously mentioned a pre-trial application was made. In relation to the pre-trial application the appellant filed an affidavit which is 10 pages long. It detailed a number of things the first of which was that he found it very difficult to remember the events so far in the past and he did not keep a diary or any other source material to use. He found it difficult to reconstruct events from this time of his life as he was extremely busy and due to the passage of time, the death of witnesses, he considered that he had lost opportunities to interview and possibly call relevant witnesses. The affidavit provided details of the people that he considered may have been able to help him and they were JR, the father of the complainant; AR, the mother of the complainant, RA, who was his flatmate in the Taupo address; and OT who was the owner of the Taupo address, all of which have since died. The affidavit also detailed information surrounding the hang gliding problems, the finding the associates that he was hang gliding with, and also the loss of the diagrammatical, or physical evidence surrounding the M Quarry and the plans of the Taupo address. The issue by both counsel at the application was, in my submission, clearly framed and that issue was whether the appellant, due to the general specific prejudice, could not get a fair trial. The evidence I should say was not challenged, there was no cross-examination of it, of the appellant and there was no other evidence called so in a pure sense, it was unchallenged evidence that in my submission ought to have been accepted, give or take the statements of opinion that could properly be set aside. Crown counsel in my respective submission take it to a very responsible view to the initial application. He indicated that it was opposed in the formal sense but he conceded a number of factors which identified the concerns that were appropriate in relation to this matter. He acknowledged the lengthy period of time and he acknowledged that the Crown could not articulate with any more specificity, the allegations that were in the indictment, effectively acknowledging the very general nature of them; that the period of time between the complaint and the accused, he described as less than desirable and the fact that the physical locality had changed and there was an absence of diagrams which make it harder to explain or amplify those points to the jury in any objective sense. And of course those sorts of issues speak to questions of opportunity which are regularly used to assist with both defence and Crown cases. That evidence had gone.

He also noted that there had been a loss of the ability to capture the scene in the M in a truly independent way, and over the page at page 8. The inability of the complainant to say if the address in Taupo was SR or another street, for the accused to answer that aspect of the allegation was very difficult because of the lost evidence; the absence of plans which I have

mentioned and the loss of the ability to confirm that he did not go hand gliding which lends a degree of cogency to the application.

Now the learned District Court Judge dismissed the application and effectively traversed the complainant's statement in some detail. He did identify what he considered was the relevant law at the time and focussed in my submission heavily on what he called internal consistencies of the complainant's evidence. Interestingly enough he, at one point rejected the assertion in the affidavit of the appellant that he could not find his associates that he was hand gliding with and said in any event that could be dealt with by way of cross-examination, that was His Honour's position.

Ultimately the learned District Court Judge did not place any weight on the fact that the case involved one complainant, rather than multiple complainants which has been an identifiable factor in the past. In my submission the factors that were identified weren't given sufficient weight and there was an over-focus on the complainant's credibility and it was almost a sufficiency of evidence test, it certainly became that on the second application.

Which brings me to the second application. At the conclusion of the Crown case, the situation has changed as I have mentioned and for the reasons I have mentioned, the evidence was significantly different. The Crown made the applications to amend the indictment and we were down to the indictment that I identified earlier which is at page 6(a) of the casebook.

ELIAS CJ:
Sorry, what page was that?

MR LAWSON:
That was, the final indictment Ma'am, was at 6(a).

ELIAS CJ:
Yes, thank you.

MR LAWSON:
So the renewal of this application for stay canvassed the issues that had already been traversed in relation to the evidence that was lost and the problems that it created and also accentuated and highlighted the change in dealing with an evolving or movement complaint, the difficulties of cross-examination in those circumstances and the general problems that were associated with the broad and general allegations and the concern over the significant changes in the allegation. The focus was again brought down to whether it was fair for the accused to answer those charges and that was what Crown counsel quite fairly identified and

he acknowledged at that point that it was a border line case, even in his view and the Crown were very fair in identifying what the issues were.

Finally at 4.13 of my submissions Crown counsel wrote the following. In light of the warnings that the Court will be required to give about reliability, if they are taken on board as well, the Court may ultimately like to ask itself whether a conviction would actually be safe in those circumstances.

WILLIAM YOUNG J:
It is fair to say the Judge didn't give much of a warning.

MR LAWSON:
No he didn't Sir.

WILLIAM YOUNG J:
He said "I meant to caution you." But then he didn't as I read it although this wasn't a ground, this wasn't flagged in the application for leave to appeal.

MR LAWSON:
No and I didn't take issue with it because my focus was on the stay and my submission could have been granted at the two stages in the warning, perhaps on reflection I should have taken issue with it and I didn't and if that is my error, then all right, I apologise.

WILLIAM YOUNG J:
The warning is at page 227.

MR LAWSON:
Yes.

WILLIAM YOUNG J:
Para 39, I think that is all there is, isn't it?

GLAZEBROOK J:
Well do you want to take issue with it now as a backup argument or?

MR LAWSON:
Well I suppose the point, it fits in, in a general sense. If the Court is of the view that a warning is appropriate, it really comes back to this issue of whether warnings can cure the level of prejudice.

GLAZEBROOK J:

I understand that is your primary submission, that in this case at least, a warning could not cure the difficulties given the multiple issues including the shifting allegations.

MR LAWSON:

Yes, and to answer your question, Ma'am, I would say that the warning was totally inadequate in the circumstances of this case if you look at the authorities.

WILLIAM YOUNG J:

Well it is hardly a warning actually.

MR LAWSON:

Yes it is just a -

WILLIAM YOUNG J:

He says, "I am bound to give you this general caution." But then he doesn't really say anything, I think.

MR LAWSON:

- no. And if you compare it to some of the cases and the warnings that have been given.

WILLIAM YOUNG J:

Well it is nothing like the Australian warning that is given.

MR LAWSON:

No, not at all Sir.

WILLIAM YOUNG J:

The *Longman v The Queen* (1989) 168 CLR 79.

ELIAS CJ:

I have lost it now, which page is it?

WILLIAM YOUNG J:

Para 39 of the summing up I think.

ELIAS CJ:

Oh yes I have got it.

MR LAWSON:

So again the learned District Court Judge dismissed the application and if you look at his decision which starts at 164 of the case on appeal, it appears to be, in my submission his focus appears to be on a sufficiency of evidence type approach which is more akin to a 347 rather than properly considering the aspects of a fair trial that the accused had lost and ultimately he just felt that he could not, in the circumstances because of the complainant, having given prima facie evidence of the complaint, taken away from the jury.

WILLIAM YOUNG J:

Where is your client's affidavit?

MR LAWSON:

I was unsure whether you had that Sir, but I've got spare copies which I can provide to you.

WILLIAM YOUNG J:

Yes I couldn't see it –

MR LAWSON:

It's not on the case on appeal Sir, it's not in that, I can provide those to you if you wish. So that really completes my review of the facts, unless there are any questions in and around the facts. I'm happy to answer those. But I can do that on the way through, if you wish.

This appeal in the general sense is brought on the basis that in my submission it's become increasingly difficult to – for want of a better phrase – get home on an application to stay proceedings because of the required assessment in relation to probity of lost evidence and there was a discussion at the Court of Appeal level on this issue in that the very nature of lost evidence is very difficult to identify its probative value. You simply do not know and so if there's a creation of a threshold which cannot be met, ultimately that certainly cannot contribute to the fairness of the situation.

GLAZEBROOK J:

One thing is in issue here is that if your submission is accepted then lost evidence is a major indication into whether a trial can be heard fairly. Now, let's assume, as I understood it, the complainant's father died in – I think it was July 1994. Well, let's say that the death of her father may have, at that stage, meant that she felt free to make her allegations so that there was a link, effectively, between that and say in November she felt able to make an allegation in 1994. Well, the evidence of the complainant's father, which you say might well have been favourable, may well not have been favourable, it's hard to assess, might be a factor that would say there was not a fair trial but it's not the delay that caused that evidence – obviously there's going to be more likely to have loss of evidence over delay but it's not going to by itself

cause the lost evidence because in the scenario I've got she made a complaint quite quickly afterwards, say, in November. Nobody could suggest that there was a particular delay in making a complaint in those circumstances and yet the same argument could apply that there'd been major lost evidence and therefore not an ability to have a fair trial.

MR LAWSON:
No one has ever suggested that there was a motive in delaying the complaint. We couldn't prove that.

GLAZEBROOK J:
No, I know. It just happened.

MR LAWSON:
Yes.

GLAZEBROOK J:
But all I'm saying is that even – whatever happened, if she had made the complaint promptly no delay in anything, no delay in – no very odd four year delay before he even got a chance to answer the allegations but let's assume none of that happened and if you look at whether you can have a fair trial if evidence that might be helpful no longer exists then actually it's not the delay. It would arise in my scenario where she made her complaint promptly. The police investigated promptly. He got a prompt ability to deal with it.

MR LAWSON:
Yes.

GLAZEBROOK J:
Are you suggesting there should be a stay – I know you're not suggesting there should be a stay in those cases but what's the difference between the ones where the loss of evidence has been caused or exacerbated by delay and that …

MR LAWSON:
Well, I think it's a threshold issue, Ma'am, and just on its own the death of a witness relatively proximate to a prompt complaint, it would be, I would have thought, extremely rare to use the phrase that's regularly coined, extremely rare for that on its own to justify a stay unless it's one of those situations that's been identified where the allegation is that the dead witness was present during the offending.

GLAZEBROOK J:

Yes, but then the threshold would be met in a delay case, as well, so the threshold that's been set of showing that the evidence is likely to be of major significance.

MR LAWSON:

Well, it depends where you set the threshold and, look, to be frank I can see it's a very difficult area to identify the threshold and one of the problems that I've had, if I can say this, is that there appears to be – and I know my learned friend has criticised me for conflating the general and the specific prejudice and I understand that criticism, but the importance of – if you look at specific prejudice there is two types, in my submission, and the specific prejudice where you can clearly identify – and it's obvious that the death of a witness will cause significant loss of evidence and the example is the situation where you have, it's alleged, a person was present during the offending and that person is now dead, or there is two complainants and one complainant's evidence is inconsistent with another, and the second complainant is not available. So in that situation, the specific prejudice is very clear and obvious. But the situation which we've got here is a specific witness or witnesses have died but we don't know exactly what they are and its identity – what they could say but it is clear that they are likely to be able to comment in and around the evidence and corroborate various aspects of the case or deal with various aspects of the case. And so it's a combination of general prejudice – what's been called general prejudice – with the loss of a specific witness. And so the conflation of general and specific prejudice is required to deal with the issue is witnesses who have died where we don't know exactly what they could contribute and I'm not sure if that answers your question, Ma'am, but that's the type of problem that I've been trying to manage and the test that I've suggested and I'm not sure that –

ELIAS CJ:

What is the test that you suggest?

MR LAWSON:

Well, to skip to that, Ma'am, what I'm suggesting is that we identify in keeping with the accused's right to a fair trial – this is at page 27 8.5 – which rights of the accused have been negatively affected, because what I'm saying, Ma'am, is that the right to a fair trial is an umbrella right under which a number of aspects apply, the right to access to information, the right to access to examine witnesses, and the rights that I mentioned in the submissions. And so if you identify what rights are affected or negatively affected –

ELIAS CJ:

But you're not really able to identify what rights are affected.

MR LAWSON:

It's very difficult, I appreciate, Ma'am, but –

GLAZEBROOK J:

You say the access to the witness in particular, so it's the access to the particular witness?

MR LAWSON:

Yes, exactly, Ma'am.

ELIAS CJ:

But that's always going to be the case. Well, no, it's not always going to be the case because there will be cases based on evidence or something like that, but there will be many cases which depend on witnesses who, with the effluxion of time, will have died or their memories will have dimmed. We don't have anything like a limitation period, so what – perhaps you can't do anything better than to point to factors that could raise general unspecified prejudice as you've done, but it would be much more comforting if we could …

GLAZEBROOK J:

Is the submission, really, that that shouldn't be a threshold test for not taking that into account, so that your criticism of the approach is, well, you can't identify something positive the witness would say, therefore we don't take it into account at all?

MR LAWSON:

Yes.

GLAZEBROOK J:

Is the submission rather that when you're looking at all of the prejudice that might have arisen from the delay, including the very odd delay, the four year delay in the later stages, that it still should be a factor that's taken into account, is that as far as, perhaps, you can really go, given that witnesses die and evidence is lost, even in my scenario, for instance, where there's been absolutely no undue delay at all?

MR LAWSON:

Perhaps. I'm sure there are much better brains than mine who are able to come up with a test but I've done my best to identify it because there are – it is clear that when we were preparing for this matter the witnesses that we wanted to go to, to interview, to discuss these issues, to get access to, to get potential evidence were gone and so that access to interviewing witnesses, that access to people who could contribute, was gone and so I can't put it any higher than that. I couldn't say they would have said, (a), (b), (c) and (d). I can only say that on some of the assertions that were made by the complainant, they would have been

able to comment and the classic example is where the complainant alleges that her mother said go with the complainant and pick mushrooms on the side of Mt Ngongotaha and this was when this offending occurred, alleged offending. Now the mother could clearly, well if she could remember, the potential for comment there. The relationship that the complainant describes, she says that the appellant made a fuss of her. Now that is something I would have thought adults in the house could comment on, effectively she is suggesting a type of grooming. Now it is not put in that sense but that is how I interpreted it and in my submission that is what was being suggested and of course, adults in the house could comment on that.

ELIAS CJ:

All of these things, all of this speculation is going to be present in many cases of historic sex abuse. So what are we driven to, that if there is no objective check on the complainant's evidence as in corroboration, that there is prejudice?

MR LAWSON:

Well I don't think that would be fair to the Crown, the community, to anyone. I think that's far too easy a threshold to meet. I would have thought though that in assessing these things by virtue of the individual aspects of the right to a fair trial and seeing when you look at the back drop of the Crown case, identifying where there are possible areas of loss and you can call it general prejudice or specific prejudice, but it really probably is general prejudice, which is contributed to by a number of factors; the memory issues, the availability of witnesses, the loss of the diagrammatical evidence, all of these factors contribute. And then at some point we get to a threshold where we are tipped over and I have suggested the unacceptable risk test where you look at these aspects and to adopt the Australian Supreme Court comment about a grant of stay of the Court must be satisfied that there was an unacceptable risk of a fair trial. Now I don't know whether that ultimately will answer Your Honour's question.

ELIAS CJ:

I am just trying to – I do not have a problem with that, that if there is unacceptable risk that the trial will not be fair, it should be stopped. It is how you make that assessment that I am trying to understand.

WILLIAM YOUNG J:

Can you take us to the best and most recent and succinct statement of the principle applied by the Court of Appeal?

MR LAWSON:

Um –

WILLIAM YOUNG J:

Or is it all just fragmentary.

MR LAWSON:

It is quite fragmentary in my submission. I think the *Hazlewood v R* [2013] NZCA 406 is the most recent.

McGRATH J:

R v O [1999] 1 NZLR 347 is the case of the Court of Appeal that sets out an approach that you feel has been departed from adversely to be interested as a defence is it not?

MR LAWSON:

That's right Sir and *Hazlewood*.

McGRATH J:

Yes I don't want to distract you from the more recent cases but likely at some stage to discuss the principle in that case.

MR LAWSON:

Yes Your Honour is absolutely correct.

GLAZEBROOK J:

So where do you want to?

MR LAWSON:

I beg your pardon Ma'am?

GLAZEBROOK J:

Oh no it's all right, I don't think I have got the authority.

WILLIAM YOUNG J:

I am just looking for a sort of statement of the test that can be more specific than unacceptable risk of fair trial, to fair trial.

MR LAWSON:

Well it seems that the approach which, in my submission, started to go wrong because there's a suggestion that we are looking at this probity of lost evidence, starts with the *R v Harmer* CA324-02, 26 June 2003.

GLAZEBROOK J:

Although *Harmer* was a –

MR LAWSON:

Yes is a different –

GLAZEBROOK J:

- difference case because in fact the evidence was lost for the very reason, that he was actually saying there hadn't been a crime.

MR LAWSON:

Absolutely Ma'am, but it appears to have been picked up on.

GLAZEBROOK J:

It doesn't seem to have been picked up on, probably in quite the wrong context.

MR LAWSON:

Yes and so I think that's why we have come to this let's assess and look at the probity of the lost evidence, or the evidence that could have been called. And that's where the problems appear to have started and clearly in *Hazlewood*, that's continued on, in my submission.

GLAZEBROOK J:

Although it probably does illustrate the point that I was making before, that evidence can be lost for all sorts of reasons. Somebody can wipe over a CCTV tape that, if they had been five minutes earlier would actually have shown the whole thing and nobody would have had to rely on their memory for instance.

MR LAWSON:

Absolutely.

GLAZEBROOK J:

But that's just what happens with evidence, and people's memories are, and ability to observe obviously diminish over time but they were still pretty bad if one looks at it to start with.

MR LAWSON:

Yes and the cases identify a multitude of different ranges of delay and in my submission this must be at the outer range. We are talking about 40-odd years. It's a long time for anyone to remember in my submission and that on its own must be a significant factor in my submission.

McGRATH J:

Well that was being said, perhaps was that in *R v O*, was that Justice Gault's statement?

MR LAWSON:

Yes it is Sir. There is two *R v O*s. There is the Court of Appeal, Justice Gault and then there's an *R v O* which His Honour Justice Young in Christchurch.

McGRATH J:

Perhaps if you could take us to the cases, whenever they were, which you think is showing at principle that is trying to take aboard the concerns you are mentioning and is not reflected in current Court of Appeal jurisprudence.

MR LAWSON:

Yes Sir, well *R v O* I detail at 5.2 of my submissions and that is the decision of Justice Blanchard, as you've quite rightly identified. But in that case –

GLAZEBROOK J:

Where, should we turn to it?

MR LAWSON:

Yes please Ma'am. Now my bundle is the original decision at tab 3. That's the decision and I think the Crown bundle is the reported decision, that's probably the difference. But the factors in terms of the appellant's bundle, identified in the appellant's bundle at tab 3 articulated at page 4 where it states, the central issue in the middle of the page, the essential question is whether a fair trial can still take place in the particular circumstances. And then there's a number of issues identified.

GLAZEBROOK J:

I am just trying to find it.

McGRATH J:

Page 4, is that the paragraph beginning "Some prejudice"?

MR LAWSON:

That's right, Sir, in the middle of that paragraph, "Whatever the length and cause of the delay."

GLAZEBROOK J:

Okay, thank you.

MR LAWSON:

"The essential question is whether a fair trial can still take place in the particular circumstances." And the question identified is, "Are important defence witnesses no longer available; have relevant documents been lost or disposed of?"

GLAZEBROOK J:

Well you would say, important defence witnesses whether or not we know what they're going to say.

MR LAWSON:

It doesn't qualify it Sir, Ma'am, sorry, it doesn't qualify that.

GLAZEBROOK J:

Don't worry.

MR LAWSON:

"Has the accused's physical or mental condition deteriorated to the point where it would be unfair to expect him to defend himself?" This is an interesting point because there is no mental or medical physical condition but clearly he's identified in his affidavit that he simply cannot recall and one wonders how much that is a factor that can be considered under that head. "Is the complainant's evidence so fraught with memory problems, that the accused is unfairly faced with trying to defend himself against accusations which are insufficiently specific in relation to place or circumstance?" and again in this case, that's exactly what I've complained of and probably more pertinent is the changing nature, evolving nature of the complaint.

Concerns about pinpointing the exact time and place at which, then, an incident has occurred may be greater when an isolated act of offending is alleged than they will be if a representative charge will be laid, has been laid. So clearly there is a distinction considered where you're talking about an individual specified count rather than a representative charge.

I should just at this stage comment about factors which are, which have been used such as to justify the non-giving of a stay, and I'm talking about factors such as the public interest or the community interest in having a trial, and it's regularly referred to. In my submission, from a pure logical basis, it's a difficult and unfair approach because in my submission the public can only be said to have an interest in a fair trial. The primary issue must be the fairness of the trial. The, the mere fact of having a trial cannot in any way contribute to a proceeding if it cannot proceed in a fair way. And so I just, in my submission, we should exercise real caution around that submission, the interests of the community.

Similarly in terms of the interests of the victim, this is – we're dealing with a statutory right in the Bill of Rights Act for a fair trial. Yes, it is important that justice is done and seen to be done, but not at the expense of a fair trial, so these factors which are often used to justify the non-giving of the stay in my submission must be approached with real caution, and they don't, or they watered down the requirements of section 25A of the Bill of Rights Act, in my submission.

Another factor related to that – no, perhaps it's not necessary for me to deal with that issue right now but there has been comment about these cases that they should be exceptional or exceptionally rare that a stay will be granted. It's a comment which, with respect, I have difficulty with because it should not be a front-foot approach that we won't give this because it's only in exceptionally rare circumstances because it means that there's an avoidance of the consideration of the appropriate factors. If a test is developed which is sound and in keeping with the factors of a fair trial, it may well be that they are exceptionally rare that they're given, but that shouldn't be a leading factor, in my submission. So when you consider or remove those, what I call irrational or improper factors, you're left with an assessment of what is, what aspects of the fair trial are undermined, and *R v O* approach which I've just mentioned in my submission adequately deals with that.

WILLIAM YOUNG J:
But where does the burden of proof on the defendant first arise? Is that from *R v Harmer*?

MR LAWSON:
I think it does, Sir, yes.

WILLIAM YOUNG J:
So it's shown more probable than not the exculpatory evidence has been lost?

MR LAWSON:
Yes, Sir. I haven't dared to challenge that but the – obviously the presumption of innocence and the fact that the Crown bring the case and should prove it beyond reasonable doubt are factors but I don't quibble, in the circumstances of this, with the defendant or the accused having an obligation to satisfy the Court that a stay should be given.

WILLIAM YOUNG J:
Yes, but the more – well, the defendant is applying for the stay so he has to do some sort of persuasion but it seems to me that perhaps the point of principle the case raises is whether – and it's said in quotes of page 13 of your submission – whether the defendant has to show it more likely than not that exculpatory evidence of real benefit has been lost. That is a pretty

high threshold because given the fact that it's been lost, it's hard to know that it would have been exculpatory.

MR LAWSON:

Absolutely, and therein lies – it's very circular, this argument. Therein lies the problem and Your Honour's approach in *B v The Christchurch District Court* (HC Christchurch CP 49/98, 26 June 1998) where you identify the backdrop to the Crown case and what needs to be met to deal with that in my submission is a really good place to start and then, as I've indicated, looking then at the aspects of the fair trial that are lost.

GLAZEBROOK J:

Well, maybe it's not a factor, it's not an undue burden when your only argument is the evidence has been lost for whatever reason, not necessarily delay. Again, the point that effectively to stay you stop the trial because evidence is lost all the time. People burn their diaries or they've lost their diary for that particular year, it may not be an unfair burden because you're saying, "Because I lost my diary for last week," or, "Because the police somehow lost my diary for last week, having seized it, therefore I can't have a fair trial." It may be that you need to show something more in those circumstances.

MR LAWSON:

I agree, Ma'am, yes.

GLAZEBROOK J:

But your argument is that you shouldn't have to do that before it's even considered in an application for stay as a possibility?

MR LAWSON:

Yes, absolutely. It's simply impossible.

GLAZEBROOK J:

And your argument here is that on just about every aspect there were witnesses who could have said something. You and Mr C doesn't know – well, Mr C probably does because he takes a particular stance in terms of not having these offences so he probably does actually think that they will have said something helpful.

MR LAWSON:

That's right. That's clear from his affidavit.

GLAZEBROOK J:

Yes, but that's the point of the trial.

MR LAWSON:
I can't prove that, is the point.

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
You haven't referred to anything other than one might say are the authorities. Are you aware of any literature about the accuracy of jury verdicts in historical sex abuse cases?

MR LAWSON:
No, I'm not aware of that, Sir, and perhaps it's something I should have looked at in more detail.

ELIAS CJ:
Well, there may not be anything.

WILLIAM YOUNG J:
Well, it's quite possible there isn't anything.

MR LAWSON:
Yes. I can't answer your question, I'm sorry.

WILLIAM YOUNG J:
The cases are of a kind which make it very difficult for something new to turn up after trial, which is normally what triggers a miscarriage of justice inquiry.

GLAZEBROOK J:
There have been studies showing accuracy of evidence, I think, of children, at least, based on confessed sexual – ie they're assumed because somebody has accepted responsibility which, of course, in itself might be slightly problematical and they have done some testing on that in terms of accuracy of children's evidence but that's not really in an historical sense. But I think there probably will be similar sorts of studies but not – I doubt they're very conclusive.

MR LAWSON:
I'm generally aware of some information out of the United States about memories every time they are recovered they are adjusted in terms of the change to the individual recovering the memory and so they can significantly differ from the original memory when it was stored, but I didn't think to bring it as part of this case and I apologise for that but what is important here is

you may recall there was cross-examination and in relation to the gravel bank or the metal bank that was a recovered memory. It was referred to as a recovered memory in that she hadn't specifically mentioned it, the complainant hadn't specifically mentioned it, in her statement or her formal written statement, or to the prosecutor when she met with him just a few days before and suddenly she claims to have remembered it during that meeting but didn't mention it to the prosecutor at the time and that was put to her that this was a recovered memory and she accepted that it was and one questions the veracity of that, in my submission. It's questionable.

GLAZEBROOK J:

Well, of course, the other approach to this may have been to ask for a mistrial and then call expert evidence of which there would be a lot on recovered memory et cetera, not probably to any great effect one would imagine because, of course, the evidence would probably have been, well you can recover memory like that, legitimately, in that something has sparked off something, that recovers a legitimate memory. Equally that memory could be a false memory but I suppose at least it might raise some aspect of reasonable doubt but you went for the stay rather than that approach, in response to the change of evidence of the complainant.

MR LAWSON:

Yes, to be honest with you Ma'am, I didn't think of the approach you suggested. I had two bites at the cherry and both unsuccessful. I didn't think I was going to make much headway having another crack, so to speak.

GLAZEBROOK J:

But that may well be something else that possibly went wrong with this trial, not as a criticism of your approach at all, you understand.

WILLIAM YOUNG J:

The jury acquitted on the recovered charge, or recovered memory charge.

MR LAWSON:

They did and ironically that's the one that was the majority not guilty verdict, rather than the unanimous one. I don't know how that worked myself. I couldn't understand the logic of it, but yes, Sir, to answer your question, they did acquit.

ELIAS CJ:

The jury clearly struggled.

MR LAWSON:

Yes. I have an increasing concern Ma'am, for what it is worth, of what I call compromised verdicts and I couldn't get any traction in relation to that, when I raised the issue at the Court of Appeal and probably rightly so, because it did require some speculation on my part. But I did, I mention it only because of the concern in relation to the count, His Honour Justice Young mentioned.

WILLIAM YOUNG J:

This is entirely she says, he says that there is absolutely no reference point.

MR LAWSON:

That's right..

GLAZEBROOK J:

Apart from he was in the particular location.

WILLIAM YOUNG J:

Apart from opportunity.

MR LAWSON:

Yes, Sir. The only evidence that we were able to call was in relation to the assertion that he had large orange freckles on his stomach and his wife said that he never did and we produced a photograph which was produced for the jury and that was some independent material that we could find, and that was the best we could do, however, if you call it independent. I can't take the matter any further unless you have any further questions.

ELIAS CJ:

No thank you Mr Lawson.

MR LILLICO:

May it please the Court. The respondent's answer to the question is that the prosecution, of course, should not have been stayed because in the end Mr C received a fair trial and as my friend has said, the central question is whether the trial was fair and I would add to that, in the light of the events as we now know them to be, in relation to the criminal trial, the jury trial that was actually held. In my submission the Crown would say that the trial process itself operated as it should and was governed by the burden and onus of proof, the charges that that specificity were met by discharges at the invitation of the Crown, at the close of the Crown case and the remaining matters which the complainant, RW, could be detailed about in terms of the animal warren charge and the other three charges that you've heard about; went

to the jury with the Judge warning them in the terms that Justice Young has bought to our attention, to be careful in view of the length of the delay.

WILLIAM YOUNG J:

But it's so hopeless really isn't it, because it didn't give any shape to that compared to say and I think, possibly I am rather inclined to think the Australians go too far but it makes pretty odd reading against the *Longman* warning.

MR LILLICO:

It does although as a generalisation in New Zealand, we are a little bit – we are more robust it would be said, in relation to actually granting stays. We are more ready perhaps as a general matter, to grant stays. The direction under section 122 is weaker. So if we look at *Longman* and it is not a case which –

WILLIAM YOUNG J:

It is in one of the bundles, it is in the appellant's bundle.

ELIAS CJ:

I must say I have always been very much attracted to *Longman*.

GLAZEBROOK J:

But in this case, even if you are not attracted to *Longman*, what you've got is clear evidence that the complainant was having difficulty remembering everything.

MR LILLICO:

Yes.

GLAZEBROOK J:

And one would have thought that would have been something that the Judge would have drawn to their attention so it's – I mean there had been an absolutely major shift in the Crown case, whole piles of evidence not given; totally different evidence; suddenly thought of something that she had never thought of mentioning before. I mean I would have thought that at the very least something should have been said about that in terms of it is difficult after 10 years, well it was obviously incredible difficult for the complainant, can you really be sure that what she is now saying is accurate given that she obviously has major difficulties with her memory.

WILLIAM YOUNG J:

I mean the direction that, I mean I think just off the cuff, what might have been appropriate would have been well Mr C here is asked to give an answer to allegations that go back 40

years. He says that he has been prejudiced in this because there are a number of people he says, who could in some respects help his story, but they are all dead. If he can say that there are records that would have been available to show that the Taupo account can't be right, he will say that he never went hand gliding in the circumstances deposed. The inability, it's up to you, but the inability to find that evidence may have affected his ability to produce a defence. But in assessing whether the Crown has proved its case to the very high standard, you must bear in mind that there are a whole series of huge unknowns, given those unknowns can you be sure that he is guilty. Something along those lines.

GLAZEBROOK J:
Not to mention the change in the complainant's side.

WILLIAM YOUNG J:
And then tailored it – and then something along those lines would of course have been a bit of an invitation to acquit.

MR LILLICO:
Yes and that is the criticism made of *Longman*. I am not going to recommend to this Court that the direction that was given by the trial Judge, in this case was some sort of model direction. I am not going to make that submission but I think in my submission there is two.

WILLIAM YOUNG J:
Well can it really be defended?

MR LILLICO:
Well there is two things.

WILLIAM YOUNG J:
I know that leave wasn't sought in respect of it, but I was sort of a bit taken aback when I saw how limited it was.

MR LILLICO:
No I wasn't going to mention that Sir but there is two things that I think ought to be said about that direction. First is just the rather trite position that of course the direction has to be read in the context of the summing up as a whole and it is to be seen in this particular summing up that the trial Judge did raise the criticism that were made in relation to delay by my friend.

WILLIAM YOUNG J:
But these were simply by paraphrase of what Mr Lawson had said.

MR LILLICO:

Of the case Sir, yes.

WILLIAM YOUNG J:

As opposed to, it didn't as it were, lend the imprimatur of the bench to the problems that are caused.

MR LILLICO:

No I agree that that is the case but, of course, it was quite a brief summing up. It lacked that imprimatur but you will see at paragraphs, probably 23 to 31, that the Judge went through the criticisms that were raised by my friend relating to delay so at 23 this is page 223 of the case, why would you forget an entire rape? So this is the metal bank incident, the one that my friend referred to as recovered memory. "40 year allegations," this is at paragraph 24 to 25, "40 year allegations, change of allegation of rape to allegation of indecency." That was in relation to the Taupo account, that was discharged but you'll recall that that was an allegation in a dark room, changed to indecency. He summarised the problems caused for the defence in terms of checking things out at 25 and 26. Delay of causes or creates rather all manner of the problems and that's why the Evidence Act allows for a warning, 27. Details of fantails et cetera, simply to support a lie. 29, rape on a metal bank, not something that you would forget, 31. So –

ARNOLD J:

I thought also that what the Judge said at 42 somewhat sort of undermined the impact of the 40 year delay. It's not only that what is said in 39, that's not a particularly strong caution, but at 42 where he's actually making another point, it just seemed to me the way the Judge has expressed it somewhat undermined the significance of the 40 year thing because he says, "Offending of this kind, you've only got two people present, so whether it's yesterday or 40 years ago you've got to decide who you believe and juries have to grapple with that the whole time." Now, the point is fair enough. I mean, there are many cases where there are just two versions, but the fact that this was 40 years ago is actually a significant difference from ordinary cases.

MR LILLICO:

Perhaps that's for two reasons, one that I've already mentioned in terms of our preference for not erring on the side of virtually inviting the jury to acquit the person because of the length of delay and I mean that's appeared in the Court of Appeal's jurisprudence in cases like – it's not in your casebook but *L v R* [2013] NZCA 191 where the Court said at 42 – in that case there was a delay but no warning had been given under 122 because, of course, the Judge has got a discretion, and the Court of Appeal said that if a warning had been given there would have

been a risk that the jury would have seen it as an invitation to reject the complainant's evidence in its entirety so if we have a strong *L v R* type warning then –

ELIAS CJ:
Who was the Bench?

MR LILLICO:
President O'Regan and Their Honours Goddard and Lang, Ma'am.

WILLIAM YOUNG J:
A section 122 warning should identify the particular features of the case which are affected by delay, one of which will be the possibility that the complainant has come to believe things that aren't true. The other is that the defendant has been prejudiced because of the inability to locate exculpatory evidence. Now, that would be the bare minimum of a proper direction, wouldn't it?

MR LILLICO:
I haven't looked at it in any depth, other than to – I'm not saying that just to be clear that this is a model direction but if the direction as a whole can be read as including my friend's warnings to the jury, submissions to his jury, if you like, about the difficulties in causing delay then it's my submission it's sufficient, bearing in mind it's not the only trial mechanism which is there to guard against the problems of delay because –

GLAZEBROOK J:
Well, surely it would also have to deal with memory issues which are very well known in terms of the sort of matters that Mr Lawson was referring to in the difficulty of recall, the fact that you can recover memories that have been distorted in some manner, the difficulty that some people have of remembering what happened yesterday, let alone 40 years ago.

MR LILLICO:
I can only point to the fact that the Judge summarised the case for both the Crown and the defence and those things were a feature, if you like, of both of that and the Crown were, as is their duty, quite dispassionate about it and said, you'll see at paragraphs 12 and 18, that a lot of what RW said was vague but there were things she does recall and the allegations – this is at 18 – were not plucked from her imagination because they had specific detail.

GLAZEBROOK J:
Yes, I think we've got evidence from Mr Pilditch about how you remember important things rather than unimportant things, which isn't actually borne out by the research, I think.

MR LILLICO:

The other thing that ought to be remembered is that the 122 direction is not the only trial mechanism to guard against this problem, the other one being, of course, the capacity to have a discharge in relation to matters which don't reach the evidential threshold and that's what happened, in this case. So the 40 year delay creating lack of specificity and vagueness led to three of the counts being discharged and another count being substituted, the metal bank charge. So there are other ways which the trial process has in dealing with these things.

GLAZEBROOK J:

You said you had two points, I think, and I only got one. Was that the second point?

MR LILLICO:

That was the second one, Ma'am, yes.

So the burden of proof, as I said, operated to assist, if that's the word, difficult for Mr C, of course, to see that but the burden of proof overall being on the Crown and being to the highest standard serves to protect him in terms of the counts that ultimately went in front of the jury with this amended four count indictment because they reflected the charges that she could be specific about and we've endeavoured to summarise those in the submissions at page 22 where you'll see the four counts and the details that were able to be given by RW. So specific matters, matters which she had a clarity of recollection, went to the jury because the trial process had already functioned in the way that we'd all expect it to and the indictment had been pared down to those four matters.

And then when it came down to address the jury Mr Lawson was able to attack even those four specific counts that the jury was left with by classic and orthodox means, making an attack on her credibility and he was able to raise things like this recovered memory, if you like, the metal bank incident which had appeared only at the time she gave evidence and hadn't been mentioned previously, but other matters that he was able to take RW to task on are also summarised in our submissions and they include the transmutation of the alleged rape in the basement or the darkroom becoming an indecent assault and those matters. So they're at paragraph 27 of the submissions from the Crown.

So those orthodox means of dealing with inconsistencies, changes in evidence, lack of specificity, and vagueness, all operated in this case. I don't want to place any great weight on it, but there were – because, of course, you could have an unfair trial, a very unfair trial and be acquitted in the end, but the fact that there were two acquittals returned on two of the counts probably reminds us, in my submission, that there was a very high standard of proof

operating and the onus resting on the Crown and that's an important protection in these sorts of cases.

ELIAS CJ:
It doesn't give me a huge amount of comfort, however, that those verdicts …

MR LILLICO:
No, Ma'am, I don't want to place too much weight on it.

ELIAS CJ:
No.

WILLIAM YOUNG J:
I suppose – and I haven't read the evidence closely enough to get this in my mind but the great thing the Crown had going for it was that there was no obvious reason for the complainant to make the story up. There was no family dynamic which might have encouraged someone to suggest to her a story which would get the defendant in trouble and I don't think anyone, any motive to lie was presented.

MR LILLICO:
No and, of course, it's not something the Crown would want to raise in and of itself.

WILLIAM YOUNG J:
Yes. Whether the complainant had a motive to lie or more commonly didn't is a legitimate consideration for a jury. Presumably the incident that resulted in her making the complaint wasn't the subject of evidence. That's the incident involving the complainant's niece.

MR LILLICO:
No, it was a matter that was considered by His Honour on the first occasion when he considered the stay.

WILLIAM YOUNG J:
Yes, I saw it there.

MR LILLICO:
But it wasn't a matter in front of the jury.

McGRATH J:
And that incident seems to have been, what, triggered in the police enthusiasm for investigation, doesn't it?

WILLIAM YOUNG J:
No, it made the complainant go to the police.

MR LILLICO:
The Court should have available to it the chronology produced by the Crown and you'll see that actually the complaint was made by the niece on the same day as the complaint made by RW and what seems to have happened is that the niece went to stay with RW. They must have talked about what had happened. Then the complaints were made.

WILLIAM YOUNG J:
But that was, presumably, for tactical reasons not explored at trial?

MR LILLICO:
Yes, Sir.

ELIAS CJ:
It wasn't the subject of any ruling?

MR LILLICO:
No. The police and the Crown were prepared to deal with it because – and this feeds into a question that Your Honour Justice Young asked my friend at the conclusion of his submissions, were there any other reference points and the Crown say yes there were reference points, not just in relation to the specially the locations in M and the quarry but also in relation to people because JM, now called JM, one of the siblings, one of the sisters of the complainant and KC, she was at the house at the time of the offending, at least according to some of the evidence, and –

WILLIAM YOUNG J:
But she was a support person, wasn't she?

MR LILLICO:
She was briefed, Sir, in relation to the complaint of the niece by the police so she was available in that sense. The mother, I think, if memory serves, LR, the mother of the niece, was available in Australia as it turns out so we do say, the Crown does say there were reference points in relation to these other witnesses apart from KC, of course, herself, who was also called and gave evidence about what kind of person RW when she was 12 years old and living in M.

I see the time is 11.30.

ELIAS CJ:
Yes, we'll take the morning adjournment now, thank you.

COURT ADJOURNS 11.32 AM

COURT RESUMES 11.49 AM

MR LILLICO:
I would just like to raise two brief matters with the Court before I go on to outline the tests, there are, that we do have in relation to specific and general prejudice. The two points I would like to make just briefly, are firstly that, if the Court would be assisted by further submissions about the direction which aren't dwelt on at any great length, in either my submission nor my friends. And that's a matter that might be helpful because I understand that the Law Commission did, when in relation to the evidence code, did dwell on what the situation was in terms of delay and the point raised by Her Honour Justice Glazebrook earlier about complainant's memory. So that's something that we would be able to make available to the Court if that would assist.

The second matter is the point that we left, when we took the adjournment and that is relation to reference points and it is a matter raised in my submissions, the Crown submissions at paragraph 76. So you will recall that one reference point at least was in relation to JM. She was briefed by the police in relation to a recent complaint, it didn't raise its head but she provided a statement. The other witnesses whose name I would need to remind myself about, is LR, another sister of the complainant and KC and she lived in Australia and was known at least to the police.

WILLIAM YOUNG J:
Sorry just pause. Where is – I have got para 76 of your submissions and I can see the references, you make reference to reference points and there is a discussion about the timing, the locality and so on. Now where is the sister?

MR LILLICO:
Oh I go on in that paragraph later on Sir, to say that the detail of the complaint also provided him with several leads to further enquiry.

WILLIAM YOUNG J:
I thought you mentioned something about a recent complaint witness?

MR LILLICO:

Yes and that witness was JM, Sir, and she was briefed by the police, a sibling of KC and RW. So she was one of them Sir, another possible avenue for enquiry.

WILLIAM YOUNG J:

So just so I understand it because it is referred to in the Judge's stay ruling. It appears that the complainant told her former husband about what had happened.

MR LILLICO:

And he was –

WILLIAM YOUNG J:

I take it he is L is he, is his name L?

MR LILLICO:

P I think Sir.

WILLIAM YOUNG J:

She referred to it as L then sharing it with other members of her family.

MR LILLICO:

Maybe he was, that's the name he used but he was also briefed Sir as a recent witness, so was JM. There was a second sister Sir, LR and she was in Australia, she was the mother of the girl who was allegedly offended against in Australia so that's another possible lead that could have been followed up in the Crown submission in relation to the defence. And just for the sake of completeness, there was specific reference points in relation to location at the M quarry and they enabled Mr C to hone in if you like on the working hours of the quarry. The evidence was that the quarry worked six days a week but that JR, the father of KC and RW, worked irregular hours and sometimes worked seven days a week so it allowed him to concentrate on that. It also allowed him to raise that the metal bank, where one of the violations allegedly took place, was in view of the work shop and potentially in view of anyone moving around and that in the relation to the dredging pond incident. For instance that he was not in the habit of swimming in New Zealand because he found it too cold. So there were things, reference points to hang his hat on if you like, in terms of location in the quarry.

In terms of the tests and what the law tells us about those. Just as an overview, most of the cases about delay, when it is raised as an aspect of fair trial, will look at both specific and general prejudice and perhaps the way to characterise them is to –

ELIAS CJ:

So does that mean that the Court of Appeal decision, in this case, is out of line?

MR LILLICO:

No Ma'am, because in my submission both general and specific prejudice were available if they needed to be answered or investigated by the Court and the Court of Appeal case law is tolerably clear about that. And that's in relation, probably - His Honour Justice Young asked what the clearest statement about general prejudice was and probably the best statement about it is the *R v Accused* (CA291/90) [1991] 3 NZLR 405/*R v Accused* (CA260/92) [1993] 2 NZLR 286 which is in the Crown bundle at tab 4.

GLAZEBROOK J:

But you're saying in this case the Court of Appeal did take into account general prejudice as well? Sorry, I didn't quite understand the answer to the question, which was whether this Court of Appeal decision was out of line.

MR LILLICO:

I'd need to refresh my memory about that. Is it at paragraph 11 where the Court says, "We have reviewed the transcript in this case and are satisfied that the length of time that has passed from the date of the incidents to trial has not so affected the evidence to make the trial process unfair." And as I will try to make clear to the Court –

ELIAS CJ:

What on earth does that mean?

MR LILLICO:

Well, that, unfortunately, is essentially the test and it's in two parts. The test is whether the lapse of time is so exceptionally long that a fair trial is impossible and the way –

ELIAS CJ:

So exceptionally long?

MR LILLICO:

So exceptionally long.

ELIAS CJ:

Is that from *R v Accused*?

MR LILLICO:

Yes, Ma'am, and the way that that is detected, if you like, is that it will only be legitimate to infer prejudice in certain circumstances and there's an aggregation of case law which tells us what sort of circumstances it will be fair to infer prejudice, rather than requiring the accused to make out a probity threshold and show that specific evidence would have assisted him or her and that the absence has therefore prejudiced his defence.

ELIAS CJ:

Is there any indication in the case law of what "so exceptionally long" means?

MR LILLICO:

It doesn't hang on the length of time, Ma'am. There are cases where really the test seems to be in certain circumstances prejudice will be inferred, and the circumstances are – we know those circumstances by way of example from the case law. So if we look at the test first, perhaps, in *R v Accused* at tab 4, it becomes clearer, I suppose, when you look at paragraph 12. The Court then says, "We then turn to the specific prejudice," and that's a theme, really, of all the cases where Judges confronted with delay arguments will consider both specific and general.

ELIAS CJ:

So the first is the general, the answer is that she gave enough detail of the places and circumstances that the Court thought there was no prejudice?

MR LILLICO:

Yes, Ma'am.

GLAZEBROOK J:

What did they say about the witnesses?

ELIAS CJ:

Thirteen.

MR LILLICO:

So in terms of *R v Accused*, 288 is a statement of the test, tab 4 of the Crown bundle. The main pagination is page 22 at line 10 onwards, is probably the best place to look. "Where the period of delay is long, it can be legitimate for the Court to infer prejudice without proof of specific prejudice. Whether that inference should be drawn or whether in all the circumstances of a particular case, it is unfair to place the accused on trial. It must depend on the particular circumstances. So that really is as much of a test as is ever been articulated

and it's repeated in other Court of Appeal cases, *R v O*, which has already been dwelt on by my friend, *Hazlewood v R* and also in High Court decisions –

GLAZEBROOK J:
This isn't a test for when the stay is. This is just a test for when you can infer prejudice, or are you saying it's a test for general prejudice?

MR LILLICO:
That is the test for general prejudice, Ma'am, and it's put alongside the case examples, if I can put it that way, so we know because of a number of decisions that have been made, the kinds of case circumstances that it will be legitimate to not place a burden on the accused and prejudice can be inferred, and so –

GLAZEBROOK J:
If there's general prejudice, you're not inferring prejudice, are you, you're just saying because of that general prejudice a fair trial cannot be held, aren't you? This almost says you can infer prejudice without – you can just sort of decide it's so long ago, 65 years ago, so long ago and presumably there's just so many difficulties with evidence, depending on the circumstances of a particular case.

MR LILLICO:
Yes, and it recognises on the one hand – well, it does recognise the problem that my friend is raising with you, that how on earth can he show prejudice when things are so stale?

GLAZEBROOK J:
But you're inferring prejudice without anything specific but if you go through and say every single witness has died, all of this documentation is gone, there's absolutely no possibility of getting work records because there was a major fire, well, you don't infer prejudice from that, surely you look at whether in light of those circumstances a fair trial is still possible. You're not inferring prejudice without proof, are you?

MR LILLICO:
Yes, that is the test. You are inferring prejudice without proof.

GLAZEBROOK J:
Well, no you're not because there's prejudice because all of those things happened.

MR LILLICO:
If you could show that those missing work records were probative then you would get home on a specific basis.

GLAZEBROOK J:

Well, of course they're probative. They might be probative for the prosecution rather than the – I mean, that's all that's being said in this because work records you don't know whether they're probative for the prosecution or probative for the defence but they're going to be probative in some manner because if the allegation is that there was sexual intercourse during this time and you're saying you were working in Timbuktu then the records are going to be probative. They'll either show that you weren't working in Timbuktu or that you were, so they may be useful for the defence or the prosecution.

MR LILLICO:

So the submission from the Crown, Ma'am, if we take work records for one moment, under general prejudice – well, maybe if we take specific first because that seems to make sense, if you were asserting specific prejudice, if an accused person is asserting specific prejudice in relation to work records, then on the case law – which I haven't come to in relation to specific prejudice – but on the case law the accused would have to name someone, name the record and show the controversial areas in the case that that work record related to. Was it a genuine issue in the case and is it likely that the work record would have actually assisted their defence.

WILLIAM YOUNG J:

Don't you have to – I mean, you can almost read some of the cases as saying that the defendant would have to show that it was more likely than not that the work record was exculpatory.

MR LILLICO:

Yes, they do say that, Sir.

GLAZEBROOK J:

Well, with my Timbuktu example, they would not only have to show that the work records had gone but they would have to show that if they hadn't gone that it was more likely than not that they would show that he was working in Timbuktu.

MR LILLICO:

Yes, they would, they would for specific prejudice, but the test – the burden of having to show that goes when the case – in relation to general prejudice in certain circumstances.

GLAZEBROOK J:

Well, then, what do you say general prejudice does, that you infer? Because it's actually just the loss of a chance of evidence that might be exculpatory but it's certainly the loss of

probative evidence because if the issue is whether you were in Timbuktu or not then it's always going to be probative evidence. It's just that you don't know whether it's probative for the Crown – i.e. yes you were working in Timbuktu but unfortunately for you it was the month after the allegation, not the month of the allegation.

MR LILLICO:

Yes, and it can be seen most easily, perhaps, in relation to alibis because the Courts have said in relation to general prejudice you don't even have to show – you don't even have to name the potential alibi witness. Things are so stale that all the leads have gone. There's no one to talk to. There's no aunts to talk to, no siblings to talk to. You don't have to name the witness. In this case because it's a single incident matter it's not interfamilial. It's particularly susceptible to alibi but that door has been completely closed to you because the case is 50 years old and you can't chase up any of these leads and that possibility has gone. That chance, as Your Honour says, has gone. So that's apparent in His Honour Justice Young's case of *R v O.*

GLAZEBROOK J:

But what I don't understand is why you're inferring prejudice from that. Isn't it just a factor that you take into account under a general prejudice so the difference between specific and general? It is just that I can't see why you are inferring prejudice without proof of specific prejudice in a circumstance where you can work out exactly what the prejudice is, i.e. the prejudice is, I can't, and let's have something close to home. "I can't have records that show that I worked at McDonald's every day for the whole of the month that she says that I was at home."

MR LILLICO:

Yes and if it had been a one-off incident then the Court might have been prepared to say there's general prejudice here. We're not going to require you to give us those actual records, they've disappeared. But this is the kind of case where work records, if she'd been specific, could have shown that you were working elsewhere at the time.

GLAZEBROOK J:

Well what do you say the test is, because yes that's right, so what's the test then?

MR LILLICO:

It's less of a test and more of an, as I said before, an aggregation of case law which shows examples of types of circumstances.

GLAZEBROOK J:

No, I understand that point, but what's your test then, having shown an aggregation of circumstances as to when you would grant a stay and when you wouldn't, on the basis of general prejudice?

MR LILLICO:

Is this the sort of case that Courts before us have said that there is general prejudice and been prepared to stay, is it an alibi case?

GLAZEBROOK J:

It doesn't help decide in whether I stay, does it?

MR LILLICO:

No it's not –

GLAZEBROOK J:

I mean I would prefer to have a more general test, when I just didn't see it as coming from *R v Accused*.

MR LILLICO:

Well it, it's not just *R v Accused*, that's probably just the clearest articulation of it. It's repeated in the *R v O*, the Court of Appeal decision at tab 2, it's repeated in *Hazlewood v R*, tab 8 of my friend's bundle –

GLAZEBROOK J:

But that doesn't give me a test.

MR LILLICO:

I'm afraid that's simply what the cases say and the best guidance for a Judge is to ask themselves is this the sort of case that has been recognised as giving rise to general prejudice so is it a case where there is an absence of leads? Is it a case where there are no reference points such as location, time, date and place? Those were both situations that were raised in *B v Christchurch District Court* which is at tab 4 of my friend's bundle.

GLAZEBROOK J:

So is it a case where there are no reference points, and that's in *B v Christchurch District Court*?

MR LILLICO:

Yes Ma'am and –

GLAZEBROOK J:
And what's the other case, what was the other example?

MR LILLICO:
Of the *R v O* but it's the High Court decision Ma'am which is at tab 15 of our, of the Crown's bundle. So just to take *B v Christchurch District Court* first, if you could refer to tab 4 of the appellant's bundle at page 34. So at page 34 His Honour is dealing with prejudice arising from general circumstances and one of the matters that concerned the Court in that case is that, and this is at the bottom of that first paragraph, where the Judge says, "That another problem is that if exculpatory evidence was only available from a non-obvious source, Mr B's memory may be such that leads to such evidence can no longer be recalled. As well the relevant individual may have forgotten the potential evidence or have died." So no requirement to even name a witness or to say what they might have said or to show that that evidence would have assisted the defence. Simply an absence, if you like, of leads, and we say obviously that's not the situation here because of the presence of the siblings.

So that's the first kind of circumstance where it might be legitimate to infer the general prejudice. It doesn't hang on any kind of numerical specification of a length of time. It hangs on the type of circumstance.

The second assistance we get from this case is that not so much leads but His Honour's reference, what His Honour calls reference points, against which the jury can evaluate the allegations of the complainant and the accused's response. So here there are things to respond to, there are pegs to hang one's hat on because we can talk about M, we can talk about the circumstances in which it operated, it operated seven days a week and so forth. So there are things for the defence to pick up and take forward and present to the jury because they have those nodes.

Other circumstances I've taken which might give rise to general prejudice or the kinds of cases in which general prejudice may arise, are where and it doesn't raise its head in this case. But in the other case I mentioned, *R v O,*
and that's at tab 15 of the Crown's bundle, it might assist if the Court turn to that.

ELIAS CJ:
Sorry I'm just a little lost about what you're asking us to take from these cases.

MR LILLICO:
Yes.

ELIAS CJ:

What's your submission?

MR LILLICO:

The submission is that we only know when it is legitimate not to require the accused to come up with or discharge a burden in certain types of circumstances which have been defined by case law. I suppose an analogy might be duties of care in negligence. So we know from the cases, the kinds of factual backgrounds that will lead to general prejudice and if the case can be slotted into that kind of circumstance if you like, then the accused won't need to deal with the problem that my friend has articulated for you which is, how on earth, given the length of time, do I tell you about a witness I don't know about or how do I tell you – if I can name them, so one of his hand gliding friends, how on earth do I tell you what their evidence would have been, they are gone. So in terms of those circumstances, the *R v O* in my submission helps as well because there are three sets of circumstances discussed in that case which were capable of giving rise to general prejudice. The first one was peculiar to that case. In that case one of the charges was indecency on a girl between the ages of 12 and 16. Now at one point, at the time that this trial was decided, that crime had a time limit of one year, statutory time limit, limitation period and Justice Young said in that case, at 73, that "The effluxion of time had compromised the defence's ability to investigate timing issues." Because obviously if she was indeed under the age of 16, then the case hadn't been brought properly.

That doesn't apply in this case but it does give a touchstone as to what kind of cases general prejudice will be suitable but a matter that does arise in this case is at paragraph 85.

McGRATH J:

Which case are you on now?

MR LILLICO:

Sorry still on *R v O*, the High Court decision at tab 15. So the set of circumstances is more applicable to this case and in it His Honour said, "Cases involving allegations of interfamilial abuse involving people who were living within the same household at all relevant times, Courts have tended not to stay prosecutions on the basis of presumptive prejudice.

GLAZEBROOK J:

Sorry whereabouts is this?

MR LILLICO:

The very top of 85, Ma'am.

WILLIAM YOUNG J:

So the tab 3 of the –

MR LILLICO:

15, sorry Sir. Tab 15 of the Crown bundle is the High Court case.

GLAZEBROOK J:

Sorry I misheard, I was on 35, I am slightly puzzled.

MR LILLICO:

Sorry.

GLAZEBROOK J:

No, no it was my fault.

MR LILLICO:

Sorry Ma'am. And it was 73 Ma'am, with the time limit issue.

GLAZEBROOK J:

Oh yes I had that one.

MR LILLICO:

So that is of general relevance and important for this case and then the other circumstance identified in this case and also in others is, we touched on earlier. A case that invites an alibi defence. So one off instance and this is at paragraph 65, page 282 of the larger pagination at the top of the page, about half way down, half way through paragraph 65. "Cases of this sort, i.e. those involving one-off incidents are usually seen as more obvious candidates for a stay on grounds of delay, than allegations involving serial and repeated abuse, taking place within a single household." So if the defendant can point to those kinds of circumstances then the Courts will find it legitimate to infer prejudice and not insist on the balance of probabilities standard. That is clear from the cases applies in specific prejudice.

GLAZEBROOK J:

You just can't help me with a test that actually means something, I just find it not a very helpful test that's all. I would have put it as something more than general prejudice can lead to that but it depends on the circumstances of the case and if you have a number of coincidences of general prejudice. I mean there can't be a fair trial, the matter can't proceed. Surely it has to be tied back to a fair trial rather than trawling through case law and saying, well you know this is sort of a bit like this, but not like this. Oh well there were reference

points here, even if a whole lot of reference points have disappeared because there were three reference points, that's okay.

MR LILLICO:

Well only because this effort to identify particular types of cases which are susceptible to general prejudice arising, will mean that the trial is unfair. Perhaps the only thing I can add that might be of use to the Court, is – and sorry to keep you flicking backwards and forwards but is again in *B v The Christchurch District Court*, where at paragraph 33 Justice Young describes –

GLAZEBROOK J:

Sorry I'm –

ELIAS CJ:

It's the appellant's bundle tab 4.

MR LILLICO:

At page 33 where – and you will see it's at the second paragraph down, page 33 of the case. And Justice Young describes the exercise to be undertaken by Mr B here, "Still a matter for Mr B to persuade a Court that prejudice arises from the delay which so severely impacts on his ability to make a defence that stay is appropriate. This assessment cannot be made without a consciousness of just how strong the Crown case is and where the true areas of controversy lie. It is not an assessment which can be made in a vacuum." So the task for the accused, in my submission, in general prejudice is to identify these true areas of controversy, the type of case that's before the Court, where the Crown case lies and try and slot it into these types of cases that we know about, these categories of cases that we know about.

GLAZEBROOK J:

Because even if you can show specific prejudice that by no means, means there's a stay so again the overall test must be surely whether there can be a fair trial because there could be quite clear specific prejudice but like the death of a witness you know could have said something helpful but not available to be cross-examined or –

MR LILLICO:

Both tests emphasise their trial rights and the phrase that I highlighted in *R v Accused* at 288 says, "That where the period of delay is long it can be legitimate to infer prejudice."

ELIAS CJ:

It's a very, slightly old fashioned flavour to it. I see that's the source of all this vividness which seems to keep being used in the cases.

MR LILLICO:

Fantails, Your Honour.

ELIAS CJ:

Yes. Should one have some concern that that doesn't accord with the way we treat, say, identification evidence and other things today.

MR LILLICO:

I don't rely upon that in terms of general prejudice. I don't rely on that so much as I do the opportunity that the accused had to find other witnesses to talk to the aunts and find out what they had to offer. He knew whereabouts in the quarry was being talked about so he could raise the fact that the places that these assaults happened were – some of them, anyway – were quite exposed, so not so much the detail in terms of fantails and animal warrens.

ELIAS CJ:

But it necessarily has to be a total reconstruction from his point because he can't remember those details, whereas if it were more recent he'd be able to at least give indications of what should be looked at. Here he has to look at everything.

MR LILLICO:

Yes.

ELIAS CJ:

Sorry, I didn't explain that very well, perhaps.

MR LILLICO:

Although of course he – his difficulty across the board has to be brought back to the true areas of controversy, as Justice Young talked about in the *B v The Christchurch District Court* case. We can't – and this is very much a theme in the case – say as an accused person, "Look, I'm missing work records," as Justice Glazebrook says, "But we can't sheet home the work records to any important issue in the actual trial." Because if it's an interfamilial sex abuse case which is very old, as they sometimes are, then work records aren't going to avail you much because opportunity is there and my friend has got criticisms of that being relied upon. But …

ELIAS CJ:

So what's the answer in a 40 year case worth once you get into the trial with considerable shifts in the case that the accused has to meet?

MR LILLICO:

Well, my friend Mr Wilson confronts the jury – well, firstly, there's a reassessment, as there was in this case, by the Crown of what really the complainant's evidence amounted to. There's discharges at their invitation although, of course, sometimes it would be at the invitation of the accused, there's an amendment of the indictment to reflect the evidence. The charges would then go forward. My friend is able to criticise those on the basis of orthodox sort of attacks on credibility and he also, in this case, as we dwelt on when we discussed the 122 warning, was able to plead to the jury about the difficulties caused for him by delay. So he was able to attack her in terms of, "Well, you've heard today for the very first time this allegation about the metal bank. That's nowhere reflected in the indictment." He'd established that she didn't raise it with Mr Pilditch, the prosecutor, before the trial and their meeting so he was able to deal with those things through orthodox means and that's part of the answer to why – and Justice Glazebrook has reminded us that the overarching concern is a fair trial and part of the answer for the Crown is that those mechanisms have provided that in part.

Would it assist if I outlined the test in relation to specific prejudice? Because again it does emphasise the overarching concern for a fair trial.

ELIAS CJ:

Yes. What do you say the test is, perhaps, first?

MR LILLICO:

The test for specific prejudice is where a real risk the defendant cannot receive a fair trial will arise where the defence can point to some specific prejudice and the assessment of that, again, lies in the consciousness of the strength of the Crown case and where the true areas of controversy lie. And associated with that test is a balance of probabilities standard and an onus on the accused.

WILLIAM YOUNG J:

But why – it seems a bit odd to have a real risk test that can only be satisfied by showing that the risk crystallised on the balance of probabilities. I mean, the criterion seems to be tougher than the test.

GLAZEBROOK J:

And also, I'm not really sure why the strength of the Crown case should actually make that much of a difference in the sense that the – the stronger the Crown case the more important it is to be able to mount a defence to it.

WILLIAM YOUNG J:

It may be the more – the less the likelihood of there being exculpatory evidence.

ELIAS CJ:

Or miscarriage of justice.

WILLIAM YOUNG J:

Or, in retrospective a miscarriage of justice because we –

GLAZEBROOK J:

Well, it may be but it may not be because there may be a very strong case but, in fact, a total Timbuktu answer.

ARNOLD J:

Well, one of the odd things is in the *R v Accused* in the passage after the inference bit the Court explains why it's not prepared to reach a conclusion in that case that there was prejudice arising, and it was very much based on the nature of the allegations, the language of vividness and detail, an assessment of the accused's response, which was characterised as being evasive and something else, I think, and also the fact, I think, that there were numerous complainants covering a range of issues. That, I mean, one can understand that on an appeal after trial but in a sense it doesn't provide a helpful test at an earlier stage of the process, does it?

MR LILLICO:

No. Some of those sound more like areas of general prejudice, particularly in terms of they raised in that case *Telford*, the English authority, which talked about alibi and was all of a piece with Justice Young's decision in *R v O* where it was said that the alibi cases are more amenable to being stayed for general prejudice, so there is sometimes confusion, if I could put it that way, in the case law between what might give rise to general prejudice and what is specific.

GLAZEBROOK J:

Is it a particularly helpful test to make a difference between the two? Isn't really taking account of any specific prejudice and general prejudice the person cannot have a fair trial and the public interest is that you shouldn't go ahead with that? It outweighs any feeling that you put someone on trial, the community interest in putting people on trial because it can only be a fair trial.

ELIAS CJ:

I must say, I'm in that sort of ballpark because it seems to me that the virtue of mentioning general prejudice is that it's a reminder that being able to point to specific matters is not essential, that there may be wider issues of prejudice but to regard them as in totally separate categories seems to me too much categorisation.

MR LILLICO:

Well, the value for the general prejudice in the Crown's submission is that not so much that it reminds us that we don't need to point to specific matters but that we don't need to discharge the onus in relation to it and that prejudice can be inferred.

ELIAS CJ:

Well, I'm not sure that there's an onus in respect of either.

MR LILLICO:

The case law, in my submission, shows that there is an onus, only in relation to specific prejudice. There's certainly not in general prejudice where it's simply inferred that if you can slot it into these categories that there will be prejudice.

WILLIAM YOUNG J:

But where would there be general prejudice? Forty years, I mean, was sort of like a rule of thumb but it's a pretty rough one.

MR LILLICO:

Sure.

ELIAS CJ:

Whose rule of thumb is that?

WILLIAM YOUNG J:

Well, I've seen it mentioned that it's around the 40 year mark.

MR LILLICO:

Justice Tipping in one case said 50 years but then reminded himself that there was no limitation period.

ELIAS CJ:

Well, the – as Justice Young reminds me, section 122 is indicative – I know it's in a different context – but it is indicative that 10 years was regarded by the legislature as raising some apprehension.

MR LILLICO:

Yes, but we don't have two things. We have fairness to the complainants and to the public at large and the absence of a limitation period which both, in my submission, require us to ask the appellant either in specific prejudice to discharge onus or in general prejudice at least be able to articulate why their case is analogous with other cases that the circumstances have led to general prejudice being found. In both specific and general prejudice, there is a task for the accused to undertake; it's either a hard balance of probabilities onus task for them that we are familiar with, or it's this difficult situation where we are asking the defendant to slot their situation into a circumstance, like that it's an alibi.

ELIAS CJ:

I wonder whether that sort of reasoning which is entirely understandable if it's being assessed against a miscarriage of justice end, requires reassessment post Bill of Rights Act. Because if centre stage now is trial fairness and the Court is left in a doubt about the fairness of the trial then whether it would have mattered, whether it was material to the verdict may not be as important.

MR LILLICO:

The case law which is all largely after the Bill of Rights does take us to this one.

ELIAS CJ:

But it builds on those earlier cases, R v Accused and so on.

MR LILLICO:

Well the case is really, the earlier case, when you talk about earlier in terms of this jurisprudence, in New Zealand at any rate, it does really arise in the early nineties.

McGRATH J:

And in fact in *R v Accused*, the reference back to the earlier decision, *R v Accused* is to the conclusion where the ultimate issue was, whether it was unfair to place an accused on trial. I mean the jurisprudence may well have influenced by the Bill of Rights language at that point. But the second *R v Accused* which you have focussed on, is really a judgment that is trying to qualify the generality of the first *R v Accused* which President, Sir Robin Cooke thought had been clearly stated too broadly and is trying to tie down the matter somewhat. That's my impression anyway.

MR LILLICO:

Yes so when we talk about earlier cases, we are just talking about early nineties which coincides with the Bill of Rights and also with the changes to evidence for making it easier for complainants to give evidence.

McGRATH J:

I just noted in the first of those cases, are you saying that it is impossible to imagine the case which allegations of sexual misconduct are so vague or related to a time so long ago without justification for the delay and then he comes to it, "That it would be unfair to place an accused on trial upon them,"

GLAZEBROOK J:

Whereabouts are you, sorry?

McGRATH J:

Page – if we go back to *R v Accused* which is under 4. We have been looking at page 288. If you go back to the foot of page 287. And the passage, I think, that Mr Lillico has been focussing on is really qualifying that passage as well as the *Telford* passage.

MR LILLICO:

Perhaps to pick up on Justice Young comment about where stays may or may not have been imposed as a result of, as I understand, of general prejudice. There are cases which fall on both sides of the line so examples of cases where no stay has been ordered is the only other previous case which we have found, which has come before this Court on an application for leave. The *R v R* (CA60/08) [2008] NZCA 318 which the Supreme Court, this Court's decision on the leave application is at tab 1 of our bundle but perhaps that doesn't help us much at this juncture.

McGRATH J:

It doesn't go very far.

MR LILLICO:

It doesn't go very far, no Sir. But the Court of Appeal's decision is at tab 7 and that case, one of the complainant.

GLAZEBROOK J:

Tab which sorry, sorry I just missed what you said.

MR LILLICO:

Tab 7 of our bundle, the Crown's bundle. And that case was stayed at paragraph 36. Now it was of concern to the Court that the allegations in that case were in the case of the complainant, 41 years old. So I am not relying on it –

McGRATH J:

Sorry I thought you were in *R v R*. No you are not in *R v R*.

MR LILLICO:

I should be Sir, the *R v R* is at tab 7 of our bundle.

McGRATH J:

Yes and you have gone to paragraph 36.

MR LILLICO:

Yes and that's not correct is it. Sorry Sir, in that case and the delay point was finally dealt with in 45, in terms of an explanation for the delay.

GLAZEBROOK J:

That's a slightly different point.

MR LILLICO:

So this is an example of no stay, sorry. I am sorry.

McGRATH J:

Yes that's where I was getting confused.

MR LILLICO:

Yes, so even though it was a case of 41 years delay, there was no stay on the point of delay and 36 merely repeats what the decision is. So in that case there were detailed and specific allegations and importantly there was a pattern of conduct. So where does a pattern of sexually abusive conduct, the Courts have said, usually in interfamilial circumstances, where there is a pattern of conduct, then they will be less likely to see this is being able to be met by general prejudice, that general prejudice won't usually arise. So those were the sorts of concerns in that case and so despite the quite long delay in the complaint, no stay was ordered.

GLAZEBROOK J:

The real issue was at 28 to 36 and it was quite a detailed analysis of the evidence, as to whether it would have assisted.

MR LILLICO:
So in other words, no reference points, or an allegation that there were no reference points if you like or anything really to respond to, for the accused. The work records raise their head at paragraph 33 and that was a matter raised by the accused in that case. The point didn't concern the Court at paragraph 34, because it wasn't the total answer to the allegations. He was endeavouring to show as you might think, that he was at work when the abuse occurred but the problem – and this is bearing in mind our discussion earlier that the Crown case has to be assessed for its traversaries of controversy and its strength because in that case, word records weren't really an answer because her father was home sick when some of the abuse was said to have happened.

Just about cases of general prejudice where stays have been ordered. In terms of the bundles before you at tab 15, the *R v O*, the High Court decision, 80 to 85. A stay was ordered partly on the basis that the accused was seen as being in grave difficulty because he could do little more than deny the allegations in his memory with interaction with the complainants was impaired and there was possibly –

WILLIAM YOUNG J:
But it was a very unusual case because the complainant has attempted to extort money from him.

MR LILLICO:
Yes, yes, and that's reinforced, Your Honours, as I read the decision, reinforced the decision to grant the stay.

A matter that does really seem redolent of general prejudice is the possibility that there was once supportive evidence that was no longer available. So in other words there was no requirement by the Court to name names of potential witnesses and elucidate what they might have said but simply that it was no longer available, it's a long time, and that gave rise to general prejudice.

So that's at the bottom of paragraph 85 where there's an assessment of the strength of the case and His Honour says it's not so overwhelming – the Crown case – that is, however, to render irrelevant and fanciful the possibility that there was once evidence which would have supported G – the accused in that case – which is no longer available or able to be remembered by reason of lapse of time. So although there was this unusual circumstance of an extortion attempt, an aspect of general prejudice did feed into the Court's decision, it seems, to grant a stay in that case.

So it's palpably clear that you're discussing there, Justice Young, general prejudice because in terms of the start of paragraph 85 you're discussing there presumptive prejudice and in that case even though as an interfamilial – at least part of the time it was an interfamilial situation there was a difficulty there in terms of general prejudice.

We were talking about the run of cases in relation to delay only really extending as far back as the early '90s, and so when we talk about the test for specific prejudice in particular we can identify cases earlier than *R v Harmer*. There was quite some discussion with my friend about what that case meant and its place in the jurisprudence. There are cases earlier than *R v Harmer* which deal purely with delay and the need for a test on the balance of probabilities and perhaps the best place to find that is in the appellant's bundle at tab 2 where His Honour Justice Randerson – this is at page 36 of the Law Report under the subheading "relevant principles" the Judge distils there principles from Justice Penlington's decision in *S v R* T17/93, 16 TCL 41/5, which, you'll note, was a 1993 decision. So as far back as 1993 – *R v Harmer* was in 2003 – so 10 years earlier – Justice Penlington had set down these principles, including onus to the balance of probabilities and the concept of fair trial being the important one and the overarching one. That's at bullet point 2.

Justice Randerson also distils from Justice Tipping's decision three years later, in 1996, in *R v R* [1996] 2 NZLR 111, a further set of principles, five more principles, so the importance of fair trial and the need, at least in relation to specific prejudice, to hold the accused to a burden and onus appeared at least in 1993.

GLAZEBROOK J:
What happens post trial when somebody says, "I didn't have a fair trial." Do they have to show on the balance of probabilities that's the case? Isn't it just a risk that there wasn't a fair trial?

MR LILLICO:
Yes.

GLAZEBROOK J:
Then you'd have a miscarriage of justice, so it seems odd. I mean, maybe there is a difference pre-trial or post trial but …

MR LILLICO:
It's the source of the risk, though, in my submission, Ma'am. So they have to show that there's a real risk of an unfair trial or a miscarriage but the burden lies in relation to this – if we're talking about specific prejudice the probative value of the piece of missing evidence, as it usually is, that gives rise to that. So with specific prejudice it's not sufficient simply to point

to an absence. The name of the missing witness or the type of evidence that they would have been able to give, has to be shown, if you like, on that standard.

WILLIAM YOUNG J:

Well, Mr Lillico, can I take you to tab 16 of the appellant's authorities, an English case called *R v RD* and a judgment of Lord Justice Tracy. If you look at page 3 the Judge there says, "In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show and missing evidence which represents a significant and demonstrable chance of amounting to a sizeable, strongly-supportive evidence emerging on a specific issue in the case." Now, that seems to me to be perhaps a slightly more realistic approach to the case where the test as to whether there was a real risk that the trial wasn't fair is addressed by reference to criteria that focus on real risk rather than some higher standard. Have you got a comment about that?

MR LILLICO:

Yes. I'm just reminding myself about another decision from Justice Randerson which deals with the same issue. Sorry, I can't find it for the minute. I think it's Justice Randerson writing a judgment for the Court of Appeal, *P v R* [2011] NZCA 321 at tab 8 of the Crown's bundle where, at paragraph 18 page 73 of the case, the Court of Appeal says that there's an entitlement to assess the veracity of the prejudice assertion, so that wouldn't sit badly with the UK decision. The second part might, nature and strength of any evidence a witness might have given and impact may have had on trial. That third part doesn't sit too badly with the UK authority either. So other Courts have put it more mildly in terms of the evidence simply can't be speculative, that's in *R v Hazlewood* a case referred by my friend where again it said that, "The exercise can't be a speculative one." That's at paragraph 20. So where the Court examined the exercise perhaps it's not holding to proof of what actually would have been said but holding to proof in terms of the impact on the trial, that it is likely that the witness would have assisted the defence. So in some cases, for instance a particular witness has been identified, they've been named, so that's the challenge with specific prejudice, they do have to be named and it is said that they could evidence about a particular occasion where there is said to be abuse has happened, but then the Courts have said well is this likely that they would have assisted you, that they would have agreed with your point of view because we note that this particular witness was in fact the accused's wife and she was estranged in recent times and is very unlikely to have given evidence for you. So that kind of assessment where it is investigated, whether the particular witness would have been really likely to have helped you, given their relationship with you in that instance, is looked at. Perhaps it is putting it too highly to say that the accused has to discharge the balance of probabilities on a sort of "will say" basis. They don't have to provide "will say" statements if you like for those witnesses but they do have to point to relevant areas where the witness can offer evidence,

bearing in mind what the Crown case was. They do have to name them; they do have to show that it's realistic, that they would have been someone who was sympathetic if you like, or would have been able to offer positive evidence for the defence.

GLAZEBROOK J:
You might want to say, so what or even if they do all of that, does that necessarily mean that a fair trial is not possible because evidence is lost all the time. So do the Crown say, if you show all of that, then you get a stay, never mind?

MR LILLICO:
If it was relevant to the trial and it's fallen so far short of the standards that we expect in the trial, there is a gross inadequacy in the way that the trial takes place in terms of *Condon v R* [2006] NZSC 62 then yes, that's exactly what would happen, Ma'am.

GLAZEBROOK J:
But then it's nothing to do with delay then, if any evidence disappears in that category.

MR LILLICO:
Yes and in *Harmer* would say much the same.

GLAZEBROOK J:
Which I very much, I don't recall it would say quite the same.

MR LILLICO:
And I think the reference is paragraph 91.

GLAZEBROOK J:
So where is that?

MR LILLICO:
Paragraph 91.

GLAZEBROOK J:
I understand that. But I don't know where *Harmer* is in your authorities.

MR LILLICO:
Oh sorry, Ma'am, so it is in the appellant's at tab 1. So at the bottom, just at the foot of that paragraph Ma'am.

GLAZEBROOK J:

"Well a particular significance of the missing evidence will necessarily have to be considered in light of all the available evidence."

MR LILLICO:

So that's not far difference I wouldn't have thought –

GLAZEBROOK J:

Well it doesn't mean that as soon as you prove that it would have helped you, you get a stay.

MR LILLICO:

No it doesn't.

GLAZEBROOK J:

Well that was the only point I was making.

MR LILLICO:

Only if harping back to *Condon* it is seen as a departure from the kind of trial that New Zealanders is expect their Courts to be able to facilitate. So *Condon* discusses good practice and whether there is a departure for good practice so that's so gross or so persistent or so prejudicial or irredeemable. So if the item of missing evidence can be proven by the accused to meet that standard, that we've discussed earlier, it bites against the true matter of controversy in the trial. It can really be to have expected to have helped the defence, and taken the defence forward and cast a reasonable doubt on the Crown case. Well if it's central enough to the trial and is a gross or irredeemable problem, then the trial won't have been fair.

ELIAS CJ:

Mr Lillico, I am just wondering what progress we are making. What do you want to cover with us that you haven't already done.

MR LILLICO:

Well if I can just check my notes with my friend because I actually anticipated that I would raise as much as I wanted to raise. Unless I can assist, those were the submissions for the Crown.

ELIAS CJ:

Thank you Mr Lillico. Yes Mr Lawson, do you want to be heard in reply. Mr Lillico, can we just have you back for a moment. The s 122 warning, is that something that you want to develop further, or would you want an opportunity to put in written submissions on that?

MR LILLICO:

Yes the Crown would be very pleased to have the opportunity to file some further material about that. As I said before I understand that the Law Commission devoted some attention to it in the code.

ELIAS CJ:

Yes.

MR LILLICO:

Including touching in some research.

ELIAS CJ:

Yes I think we would appreciate that, it may be that after we have had an opportunity to confer we will decide that that is not necessary but at the moment I think we would be grateful for it. Could you get that to us in the next –

MR LILLICO:

Fortnight Ma'am.

ELIAS CJ:

Next fortnight is a bit difficult for us. Okay, yes that's fine.

MR LAWSON:

Thank you Ma'am. Just one thing very briefly. There's been discussion about identifying the true areas of controversy so that we can understand how possible missing evidence could assist. And of course true areas of controversy vary according to the case and often in these cases we have got one person's word against the other and the true area of controversy is the difference in their evidence. But my submission is, where there has been a significant passage of time, and you are dealing with one person's word against the matter, the peripheral matters in relation to credibility assume a greater importance so these peripheral matters which speak to credibility in one person's word against the other, assume a greater importance and therefore do become two areas of controversy. So in the situation such as the complainant, it is the complainant alleging that it was her mother who said, "Go out and pick the mushrooms" and there was offending there. That is something that could be independently checked and so I only raise it, to identity that although the bigger area of controversy is the one person's word against the other. The peripheral matters assume a greater importance in the context of these cases, that is all I have, thank you.

ELIAS CJ:

Thank you counsel for your submissions. We will expect the further submission which Mr Lawson you will have a further two weeks to respond to if need be and we will reserve our decision.

HEARING CONCLUDES