IN THE SUPREME COURT OF NEW ZEALAND SC CIV 8/2004

IN THE MATTER of a Criminal Appeal

BETWEEN **FISO SILOATA**

Appellant

AND **THE QUEEN**

Respondent

Hearing 17 November 2004

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel R M Lithgow for Appellant
S P France for Respondent

CRIMINAL APPEAL

10.01 am

Lithgow If the Court pleases, I appear for Mr Siloata.

Elias CJ Thank you.

France May it please the Court, France for the Crown.

Elias CJ Thank you. Yes Mr Lithgow.

Lithgow Thank you Your Honour, if the Court pleases, my intention was to firstly deal with the question as framed but in saying that it may be that it is accepted that the Court of Appeal Decision is wrong and is not being actively supported by the Crown. The second proposition is that I would seek to go through why that is so, so that this Court has an

opportunity to give a definitive Judgment which would be relevant to a number of similar reverse onus type, using that shorthand, reverse onus type cases. And to underscore the importance of the unanimity issue. This third area that I'd seek to cover is how exactly this arises in reverse onus cases, in particular the error that has crept in, I submit. And with respect and with our thanks to the Court, really made understandable by the American cases and that is the error of using a tentative or presumptive guilty verdict at some earlier stage in the case other than at the end. And therefore what the concept of due process and the respect for due process means when faced with reverse onus cases. And then lastly the directions in this case which appear to be standard or have been standard for many years. Why exactly they're wrong. The importance of unanimity being re-emphasised and the error that gets into cases if a default position of guilt is allowed to creep in at the end of Crown cases. And my final proposition would be that there's one case, there's various evidential tasks along the way, but it's not over until it's over and it's not over until all the evidence is in, all the submissions have been made by Counsel and all the directions given by the Judge and a single verdict is delivered on the whole of the evidence. Now is that a suitable way to go about it for the Court? No doubt the Court has had the opportunity to see their own perspective on perhaps the way to attack this.

Elias CJ Could you just explain to me, just very briefly, why you say the standard directions are wrong. Is it in not re-emphasising unanimity, is that your claim?

Lithgow Well, the first practical problem with the standard directions is that there's a series of directions which are general in nature whereas in this case the onus of proof and the need for unanimity are outlined but then there is the convention of saying in reverse onus cases, but drug cases in particular, but this case is different, without articulating that the difference only applies to an evidential onus. It doesn't apply to any other aspect of the case. And also the repeating of the propositions.

Tipping J The essential point Mr Lithgow is this isn't it, that there has to be in your submission a more express warding off of the risk that lack of unanimity will be equated with guilt because of the presumption?

Lithgow Because of the presumption yes and because of talking about the presumption as though at the end of the Crown case the accused is in fact provisionally guilty and that if nothing else happens the default position is that he's guilty. The American cases dealing with jury verdict on death penalty where perhaps at first glance they were two separate issues, the Supreme Court has decided, struggling with not dissimilar concepts to what our Court of Appeal thought was important, but on the majority came to the view that they should be seen as one whole decision to avoid the danger that we've got into. That where in fact there's no unanimity on one issue, one evidential

issue, the jury then think well, you can't decide that, therefore the default position is that if we can't sort that out, then he's guilty.

Elias CJ Doesn't it depend on the facts because as I understand it there was no context on the elements of the Crown case in this case.

Lithgow No, that it was over 28 grams.

Elias CJ Yes.

Lithgow Yes but what goes wrong is that when you get to the end of the Crown case at the end of day one let's say, and it's colloquially called half-time, he's not provisionally guilty at that stage. Somehow this proposition that one piece of evidence, that is the requirement to prove the purpose of supply which the Crown is given the benefit of proving by presumption, is somehow equivalent to guilt in the whole case. Now that's not how we conduct ordinary cases and there's no reason why that should be conducted in this case. The simplest analysis of this in a different context is one I'm sorry I only thought of this morning and it's a Decision that doesn't involve any Judges here but that's the Decision of **Flyger** [2001] 2 NZLR 721 dealing with the issue of what happens at the end of the Crown case when the defence make a submission of no case to answer in the summary jurisdiction or a s.347 application in the trial jurisdiction.

Blanchard J Could you give us the citation of that please?

Lithgow I have copies here, but it's [2001] 2 NZLR at 721.

Tipping J Thank you.

Lithgow Perhaps since we're having a look at that now. Now this Court of Appeal Decision did reconcile or sort out the differences between certain High Court Judges' Decisions on Judge alone trials and District Court Decisions on no case to answer, preferring the District Court Judges' approaches and described as they being more familiar with the problem. But at the bottom of page 272, sorry 727, at the bottom of 727, paragraph 23, in a Judge alone trial, the interests of justice indicate that as a generality, the Judge should not form a view possibly that the Crown evidence is conclusive of guilt without the benefit of considered argument on the whole of the case and before evidence adduced by an accused has been heard. There's an unacceptable risk of injustice and certainly the appearance of it in a Judge forming and declaring a settled view on proof of guilt at a premature or potentially premature stage of the trial. So in the analysis that our jury Judges have used to juries, even though it comes at the very end, they are saying to the jury, do say to the jury, that at the end of the Crown evidence, that there is a presumption of guilt, not a presumption of supply, they don't seem to use that expression, they use the expression a presumption of guilt but that the accused has the opportunity, it's

sometimes called, to persuade you that the drugs were for some other purpose. Now that's all round the wrong way. The case isn't over until we've heard what everybody has to say, the Crown have established certain things that they have to establish and then the defence establishes certain things. But it's not, we haven't reached a weigh point in which there's provisional guilt.

Gault J Can you just take us to the form of direction that this argument is directed to?

Elias CJ In the particular direction given?

Gault J I don't mind whether it's there or in the standard.

Elias CJ I'd like to see in the particular direction as well.

Tipping J I think you might be referring to paragraph 11 on page 58 of the Case.

Lithgow I think that's the.

Blanchard J Where it says the effect of the presumption is that the accused must be found guilty unless etc. Is that it?

Lithgow I'm sorry, I've highlighted it in different places in which we've all put the same thing. So if we all look at the one that's got the paragraph numbers, that's probably the most useful. If we start at paragraph 9 on page 57. And they're talking about 28 grams, that means the Crown must prove then to the point where you're sure or satisfied that they have been established. If you're left in a reasonable doubt about any of those matters, you're not sure or satisfied about them, then you should acquit. Equally if you have no reasonable doubt about them then, subject to what I'm about to say regarding the accused's opportunity to rebut the presumption, you should convict. Now if the Crown proves those three things, the law is that the accused is presumed or deemed to have the drugs for the purpose of selling them to others. In other words if the Crown gets to that point, the case is proved. Now that can't be right. Most Judges say at the very beginning of the case, it's not over until it's over. Don't reach conclusions before you've heard the whole case and you'll be told again at the end to consider the whole of the evidence.

Tipping J Isn't in context, in the context of the paragraph as a whole, there's not really much room for misunderstanding is there Mr Lithgow?

Lithgow Well that's where it starts.

Tipping J Well if it was taken in the abstract then clearly you're right but it's made very clear isn't it that the case is proved subject to the accused in effect disproving it. Now I suspect that's where your argument really focuses.

Lithgow We don't conduct any other cases like that. We don't go, civil or criminal, we don't say, oh well somebody's proved certain critical elements, so the onus is now on them. Se simply say we listen to all the evidence, then we sort out who's got to prove what.

Tipping J Are you really saying that the shorthand reverse onus is wrong? That there is no reverse onus?

Lithgow The shorthand reverse onus is unhelpful to the whole thing. That's correct. We've started calling them that. But how that helps the jury I don't know because there's just an onus.

Tipping J Well you see this involves the word proved doesn't it. Which you're no doubt going to come to talk on in a little while. I'd like you to. But the connotations of the word proved in the expression, until the contrary is proved.

Lithgow Yes. I hadn't seen that as particularly a problem but we can come to that.

Tipping J Well I will need some help as to how the word proved fits into the thesis which both you and the Crown are espousing.

Lithgow Right.

Tipping J Not instantly but at some stage.

Lithgow I'll just make sure we don't.

Tipping J I'm not saying you're wrong, I just would like some help with it.

Gault J Just before you resume, it seems to me that the way you're presenting this argument by reference to the end of the Crown case, is not particularly helpful. Is not the Judge there simply directing on the effect of the law. The Judge is not saying you discount any evidence that might be called for the accused. Similarly, it might be something that helps the accused in the Crown case or vice versa. I just don't see how that really bears upon the question.

Lithgow Well, I'm not quite sure if I have got correctly what Your Honour is saying.

Gault J Well if the Judge says you've got to remember, in the general directions, you've got to consider all the evidence And then comes to the legal directions and says if the Crown has proved this then so and so. That is not saying you only focus on what the Crown case was. It's not saying you disregard the whole of the evidence. So I don't see why it helps your argument to draw in this point about what happens at the end of the Crown case.

Lithgow Well what it compounds is the ambiguity of the proposition that what they should do if they are unsure, because it lays a proposition like with the death penalty cases, it lays the proposition if they can't reach a verdict on that part of the case, or they can't reach a decision on that part of the case, that it's kind of a separate issue so the pre-existing presumption or the pre-existing verdict that he's guilty because he's got over 28 grams kicks in. And it disguises from the jury the proposition that they haven't in fact made a decision about the whole case. Bearing in mind the ambiguity as to whether the failure to agree is a … (coughing).

Tipping J But … if the Crown can't get to this point, you acquit him. If he gets to this point, that's all the Crown has to prove. Now let's have a look at what the defence can say. I mean listening to this as a juror, that's I think how I'd understand it. If the Crown can't prove possession and amount, acquit him. If the Crown can prove that, they've proved all they have to prove to sustain the charge. But let's look and see what the accused can do about it.

Lithgow Well proved all they have to prove, just leaving aside to sustain the charge, prove all they have to prove is a perfectly logical way of working through it. But what's got into the directions is that he's actually guilty at that point. Now there's no such thing as, we don't pause during a jury trial, it doesn't have a point at which somebody is provisionally guilty.

Tipping J But don't you agree that in practical terms he would be guilty, he should be found guilty subject to what he can say if the Crown can reach that point.

Lithgow Well that's what I am submitting is faulty thinking.

Tipping J Leave aside altogether the unanimity issue. Surely if the Crown reaches this point, he's guilty unless he can do something about it. In practical ordinary layman's terms.

Lithgow Yes, that's the impression that's given. But it's not like that because it isn't solely if he can do something about it. Because, as all the directions intend to get across, where the evidence upon which the jury may find that it was for another purpose resides is supposed to be entirely neutral. But what these directions give is the impression that somehow the defendant has got to get his boots on, the accused has got to get his boots on and push back the tide. Now that's not correct.

Elias CJ Why not?

Lithgow Well because the evidence may reside in the Crown case for example. And I say because, I say that under s.25(c) of the Bill of Rights Act he has the right under the Bill of Rights Act to be presumed innocent until

proved guilty according to law. Now when is this until? Is it that he has the right to be presumed innocent until the end of the Crown case? No, he has the right to be presumed to be innocent until we've heard the whole case.

Elias CJ But we've heard the whole case.

Lithgow No we haven't.

Elias CJ Yes, the whole case has been heard. And the Judge is trying to assist the jury in terms of the legal shifts in proof as to how they might usefully address the issues. What's wrong with it?

Lithgow Well like the American sentencing cases, the proposition has come in that when you go back and you think your way through the case and take it chronologically that the Crown goes first and what they have proved etc and then who went when, that he was only presumed to be innocent until the Crown case finished and after then, he's not presumed to be innocent at all until you've finished your whole deliberation and reach a set of factual decisions which are sufficient for a verdict. He is provisionally presumed to be guilty at the end of the Crown case and then it's a fight-back situation. Now that's wrong, as the American cases demonstrate.

Tipping J Well it would be wrong if the Judge was addressing the jury at what you call half-time. But I'm not sure that it's wrong when the Judge is talking to the jury after all the evidence is in and the closing submissions have been made. If the Judge were to relate it back to half-time that might also be wrong. But I didn't understand that this is what the Judge was doing here.

Lithgow There's only one time in a criminal case in which the accused is presumed to be guilty. And that's at the very end when a verdict is announced. Up until that time he's presumed to be innocent. In fact anyone who practices in the criminal courts finds it extraordinary the change that comes over a person's status and the whole court atmosphere between the second before the verdict is announced and the second after the verdict is announced. That is the only time in which the presumption shifts.

Tipping J Well it doesn't, it's not a presumption after verdict, it's a finding. If one's going to get pedantic about language.

Lithgow Well (coughing) in the Bill of Rights Act, he has the right to be presumed to be innocent until proved guilty according to law.

Elias CJ According to law. So you're into what are the elements of the offence.

Lithgow Well the law is the due process of waiting 'til the end to decide, not reaching provisional decisions along the way.

Elias CJ Can they reach a provisional decision that he's not guilty because the Crown hasn't established possession of 28 grams?

Lithgow Well that is an irreversible weigh point isn't it. That's an irrebuttable presumption.

Tipping J I think your argument is trying to prove too much. Your best point is surely that the Judge in the course of this summing up and the answer to the question, didn't make it clear enough that if they had the disagreement, it was a hung jury rather than guilty. That seems to me to be the essence of your point in looking at all this like the way we are. I can't, like my brother Gault, I can't really see where it's heading or getting us. In fact it's getting me less with you than I was inclined to be when we started.

Lithgow That couldn't be right, that would be a faulty way to go about things too.

Elias CJ That's a presumption.

Lithgow Why we're dealing with it in this way is because we're looking at why this form of direction leads to faulty direction to the jury. And this repetition, because we've only started on the page before the one referred to by Justice Blanchard, we've only used it for the first time, so paragraph 9, paragraph 10 and then.

Tipping J You see the thing is put pretty accurately, at least in conventional terms, in the middle of paragraph 11 isn't it? If you are satisfied that the Crown has proved the three elements then, as I have said, the effect of the presumption is that the accused must be found guilty unless he satisfies you etc. I can't honestly see anything wrong with that. I don't see how one could put it simpler or better. If that's wrong we've been wrong for 50 years. And I don't think you're going quite that far are you? Your case is concerned with lack of unanimity. Not with when there is unanimity one way or the other.

Lithgow I believe that the American cases which the Court provided argue, and ultimately determine, that there shouldn't be this distinction between a certain point at which there is a tentative decision. Because that is the core of why the jury's reasoning can go wrong. And that's the death penalty cases. And the arguments that Your Honours give are those arguments favoured by the minority. That is that.

Tipping J I'm not actually presumptively even against you on the lack of unanimity point, Mr Lithgow. But I just think that your argument is biting off more than it needs to.

Lithgow You may well be right. We had originally tried to keep it as simple as possible. But we do have to face.

Tipping J Well the reference to the American cases was not an invitation to overcomplicate it. It was a suggestion that they might actually help on the key point.

Lithgow Well they don't, the American cases are really in the categories of the mitigation of penalty cases, which underscore the importance of using a separate staged reasoning and not focusing on the fact that there has to be one verdict that encompasses all the factual decisions along the way. And so the propositions that indicate to the jury that there is sort of like two verdicts, or that the failure to sort out the second issue leaves you in a default position, that is in the case of Misuse of Drugs Act, a default position that he was guilty when the Crown case ended, that that is wrong. And although the cases aren't the same by a long measure, I adopt that reasoning because I think it does explain how lay people could have fallen into the trap on those directions, when you stand back and see the struggles the American jurisdictions have had to make sense of it, fallen into the trap of thinking that he's guilty but for his own efforts.

Blanchard J What you're really saying I think is that the American cases demonstrate that there has to be unanimity on all of the elements and then one final unanimous verdict.

Lithgow Yes because I say this is just one element of the offence. This is one element of the offence and the defence. What has been pointed to in the evidence can rebut the evidential presumption so it's just one of the elements in the pool. Nothing special happened at the end of the Crown case. Well nothing special happens because defence counsel conceded this element or that element

Blanchard J Well there has to be unanimity on what I'll loosely call the reverse onus point. The question is what does unanimity mean in that context.

Lithgow Right well if we move onto that, and then we'll see if we have to come back to deciding what the, I think I had intended that the question of how the directions or how right or wrong they are, could come at the end because the Court may be looking to adjust the directions or completely rewrite them.

Blanchard J Well you may be wanting to address the matter in abstract and come back to the particular directions. But I don't want to take you out of your intended sequence.

Elias CJ I'm struggling for the sequence I'm afraid Mr Lithgow. And in particular whether you're developing an additional point, not the one that was the question that's been framed for this case or whether it's simply a make-weight point.

Lithgow Well it's not a make-weight point because it is something which flows naturally from the question, well if the Court of Appeal are wrong, but the direction is ambiguous, what are we going to do about it. What have they done about it in other jurisdictions, and we found nothing. But the Court has found American jurisprudence on the topic which is so closely parallel that it is useful. If we go back to the original proposition which is that all that should be in one way necessary to determine this appeal, that is the Decision of the Court of Appeal and the question as framed, where a jury is not unanimous as to whether an accused has proved possession was not for the purposes of supply, whether in the terms of s.6 of the Misuse of Drugs Act, is the proper outcome a guilty verdict or a hung jury outcome. Now clearly if they are not unanimous in accepting or rejecting the evidence that's been pointed to, establishing that possession was not for sale we'll call it in shorthand or to supply to people under the age of 18, was not for sale, then the jury haven't reached a verdict. I don't know whether, I understand that the Crown concede that, but that must be right because the interpretation that the Court of Appeal gave it, which was again the concern that one juror may frustrate a finding of guilt, in fact doesn't bear analysis because all it would lead to was a hung jury and the opportunity for the person seeking, well a hung jury and the jury wouldn't say why it was that they hadn't been able to reach a verdict but in this case where it was overwhelming or conceded that there was over 28 grams, one could assume the reason for the hung jury was that some of the jury were satisfied that the purpose asserted was correct and others were not satisfied. Now if that is the situation then every decision that forms part of a verdict in a jury trial has to be unanimous. It doesn't have to be identical in the reasoning processes or identical as to what the jury think is the reason for their decision one way or the other.

Blanchard J Well you and the Crown seem to have the same position on that.

Lithgow Yes.

Blanchard J As I understand it. What I'd be interested in is your view on this highly theoretical situation. What if the matter is so finely balanced that no jury member is able to come to a conclusion? In other words, all the jury members would answer yes to the proposition that the scales are so balanced that they're in equilibrium, assuming they knew the meaning of the word equilibrium.

Lithgow Well.

Blanchard J Is that a hung jury on your view or is that a failure to discharge the reverse onus?

Lithgow We have been debating this between Counsel even as late as last night. And I just wondered, pondered, whether there is anything written in judges' training as to what a judge, an individual judge, what situation

an individual judge which the jury members are, what individual judges are expected to do if, having worked out where the onus of proof lay, and what the standard of proof was say in a civil case, what they do if they genuinely cannot decide one way or the other.

Elias CJ Well you apply the onus. And you've made the point very well. But there's a difference between the onus of proof and the question of unanimity and for myself I don't have any problem, it's what we do with juries in terms of the onus of proof on the Crown. If they're unanimously of the view that the Crown hasn't discharged proof beyond reasonable doubt, then they have to acquit. It's the same thing I would have thought in terms of the reverse onus on the defence. That if the jury is unanimously of the view that that burden, the burden on the balance of probabilities hasn't been discharged, the jury must reject the defence. But the unanimity question is different.

Lithgow Just dealing with this dainty balance business. Now the assumption is that a judge can't, reaching that stage, can't refuse to make a decision, therefore they look to the onus and standard of proof and they say, hasn't got it beyond that theoretical equilibrium.

Blanchard J And that happens.

Lithgow Therefore the case is not proved.

Blanchard J And that happens occasionally in a civil trial.

Lithgow Now it just seems to me, without wanting to be disrespectful, it would seem artificial that 12 would all be in equipoise, but theoretically it's possible, I guess theoretically.

Blanchard J Well I put it that way to try to make the point sharper. But in practice you might well have a situation where some think that the scales have gone down on the side of the accused and some might think the other way, in which case there'd be a hung jury. And it wouldn't much matter that there were some in the middle who thought they were evenly poised. But what if you had a combination of those who thought that equilibrium had not been achieved by the accused? In other words he hadn't discharged the onus and some thought that there was absolute equilibrium. On the Crown's argument the onus is not discharged. There is unanimity on that point.

Lithgow And that, if they analyse it carefully in that way, they have not unanimously decided that he has crossed over the artificial line.

Blanchard J They've unanimously decided he hasn't crossed over.

Lithgow Yep.

Blanchard J Now what I'm trying to get at is whether you accept that?

Lithgow Well I think I have to, I've tried to think of ways.

Blanchard J Well in that case there's no difference between you and the Crown.

Lithgow One difference which would have to form part of any modified direction is not as dainty as that but is essentially the same human problem. And that is if the jury collectively can't actually, don't actually know what to do. They can't decide. They don't reason it in terms of perfect balance. They just don't know what it all means. They've heard a lot of stuff but they find it impossible to reach a decision. And I think I'm also forced to the position that if that is correct, if they are all unanimously unable to reach a decision, then he's failed to discharge the onus.

Elias CJ Well it's really failing to reach a decision. It's deciding that the onus hasn't been discharged. They're not satisfied on the balance of probabilities.

Tipping J None of them are satisfied.

Lithgow Well I've, I've tried that out mentally. So a person says to you, look I just can't decide and you say to them, well that's because you haven't reached the stage where he's discharged the onus. Now that's perhaps not quite the only way of thinking about it but the effect is the same I think, that I agree that that must be a failure to discharge.

Tipping J Well what it proves must support that mustn't it? Some people think he's miles short, some think he's much closer but still short, some people think he's on the line. But they're all of the view that he hasn't tipped it his way. We're making very heavy weather of this. It's elementary law that if you've got the onus, and you can't tip it over your way, you lose.

Lithgow Well it's become worthy of a little bit of teasing out I think because it's such a clean miss by the Court of Appeal. So I think we shouldn't just jump to conclusions that this is so easy. Because when you try this problem out on people.

Tipping J I'm not saying the ultimate issue is easy Mr Lithgow. But what I'm saying is that surely it's elementary that if you haven't achieved the onus, if you haven't satisfied the onus, it doesn't matter how close you get.

Lithgow No and it can be extrapolated to Jesuitical proportions, but in the end it doesn't matter how close you get. There has to be some over the line.

Tipping J My provisional problem with the stance that both you and the Crown take is that the words seem to suggest that you're deemed to be in supply unless you prove the contrary. And proof traditionally means

satisfying the tribunal of fact and that means with a jury satisfying all members of the tribunal of fact. That's what I want some help on. Otherwise, subject to that, the consequences are so grave of any other conclusion than that for which you contend, that there's a great deal of force in the argument. But how can you say that someone has proved it, that they're not in possession for supply, unless they've satisfied all members, because that's what proof means for the Crown. Why shouldn't it mean that for the accused?

Lithgow Alright, well if the Crown failed to satisfy all members, what happens to them?

Tipping J Hung jury.

Lithgow Yes, well why should it be any different for the defence?

Elias CJ Well I don't hear anyone really arguing against that.

Lithgow I think that's what Justice Tipping was teasing out.

Elias CJ I'm sorry, I was thinking something else.

Tipping J Yes but the hung jury there is, the rule that the Crown has another go is a different rule isn't it from the suggestion that there's a deemed position unless the accused can prove something. There's no deemed position behind the Crown preventing it from having another go. That's the common law, they get another go.

Lithgow Yes, you're deemed to be innocent. Why should they have another go if they can't?

Tipping J But no, you're deemed to be in possession for supply unless you prove to the contrary.

Lithgow No but the Crown position is they walk into Court, the person is presumed or deemed to be innocent until they convince with unanimity beyond reasonable doubt the decision-makers that he's guilty. Alright. They can't do that because there's 12 of them and they don't all see it the same way. They've simply failed to overcome the presumption of innocence. There's nothing different about it. And so in the reverse, say with insanity, the person, well it's strange that it hasn't come up except in the American cases, but if a person was unable to persuade 12 but could persuade 11 on Your Honour's analysis, he hadn't proved it and that's the only go he gets.

Tipping J Yes, well there's the rub. And you might have a situation mightn't you where the accused has persuaded 11, the other one is on the equipoise, but you still have to have a finding of guilty even though no-one is satisfied even on the balance of probabilities. Affirmatively …

Lithgow Well that's what the Crown has found an unpalatable proposition to put forward. I think that's what the majority.

Tipping J Well I accept immediately that that is unpalatable but all I'm looking for is a little bit of help as to how you deal with the word prove.

Lithgow Well I think the error in thinking, if I might say so, is to thinking that proved in the statute is any more important than proved as a general proposition in the cases at common law, that is, we say, the Crown have got to prove it. The person who alleges has to prove it. And it's a no difference sort of proof and proving than the proving in the Misuse of Drugs Act.

Tipping J I wondered whether a better argument, Mr Lithgow, might be that the presumption is directed at a situation and only at a situation where the jury were unanimous one way or the other and the presumption should not be read as carrying the day in the face of lack of unanimity.

Lithgow Well this is where, if I was able to persuade the Court that there's only one verdict, that is in the combination of all the elements, prosecution and defence, then this doesn't become a problem because if the jury aren't unanimous in their verdict then theoretically we don't know why that is and it doesn't matter, they are hung. Because they haven't signed off all the elements. That's where the proposition that there's some kind of default position causes trouble. Because the moment they think that there's a, or we think, we get to thinking that there's a default position, we create these artificial problems about whether the jury, whether one person can correctly force a finding of guilt.

Blanchard J So there needs to be unanimity on this element for either a guilty or a not guilty verdict.

Lithgow Yes.

Blanchard J But in between that, there is no default position.

Lithgow Yes.

Blanchard J There is simply a disagreement. That's the essence of the argument isn't it?

Tipping J Yes, that's the argument.

Lithgow Yes, and that's.

Blanchard J I don't think I have any great problem with that.

Lithgow Am I allowed to canvas the Court because, do we have any problem with that because that's.

Tipping J You make your arguments, don't ask me questions Mr Lithgow.

Lithgow Well I have reasoned it through and I understand that the Crown don't dispute this, that it's simply a question of looking at any court case and in any court case there are various presumptions at work. Some are statutory, some are common law, and it doesn't matter. The first presumption is, which is common law, that he's innocent until proven guilty. That's now also in the New Zealand Bill of Rights Act. There's a presumption which I guess began at common law and now's part of our law, that he is sane. And so there's also ingredients of offences. And then this.

Tipping J I understand the argument. I don't need it repeated.

Lithgow Right now, Your Honour looks at the wording of the Misuse of Drugs Act and it says, a person shall, until the contrary is proved, be deemed to be in possession of cannabis for one of the above purposes if he is in possession of 28 grams or more. It does not say, that until the contrary is proved, a person shall be deemed to be guilty of possession for supply. It simply says that that ingredient the Crown has the benefit of a rebuttable presumption, that's all. It's no more or less than that. So for example until the contrary is proved it could say there, until the contrary is proved we repeat the proposition that the defendant is deemed to be sane until the defendant proves otherwise.

Gault J I wonder Mr Lithgow whether you can get there just looking at the words of the section. It seemed to me that this is what Justice Frankfurter was troubled by in arriving at the concurrence in his case. The words, deemed to be in possession for sale until the contrary is proved, are perfectly and normally capable of being read as a default position. But the policy of the law involves unanimity in criminal cases. And it is necessary to try to read the section to accommodate that policy. And that is what the Crown really has come to accept, that the words aren't easy to deal with but they must be construed in the light of that policy.

Lithgow Yes well I understand exactly what Your Honour is saying and I understand that Frankfurter's expressions that we shouldn't just, I think what's the expression he used, virgin analysis, we shouldn't just start with a clean piece of paper and try and work it out from first principles. Which is what in fact we'd done after both Counsel failed to find anything in the English common law, we did do exactly that. But although Frankfurter's analysis, of holding it up to what they would call constitutional obligations and that kind of thing, strengthens the case, my submission is that it can be worked out perfectly well just on the ordinary words because the section has got away on us by assuming that because the Crown have one piece in the chain of evidence given to them as a presumption if they prove a certain thing, that we can start using the word guilt or conviction in substitution of that. Because there'll be other circumstances in which it is only a small part of the

case. For example where there was a very small amount over the presumption. So we have looked obviously at Frankfurter's concurrence and the way in which he goes about it and if that's the way Your Honour sees as more logical and more suitable for a final Court to see it in terms of a constitutional protection of a range of circumstances, then of course that's appropriate. That's not to say that I see it as the easiest and strongest way through it.

Gault J Well I can't see a way through just on the words of the section. So if you can carry me through there, please do. But I think I'm with Justice Tipping on that.

Lithgow Well I have and do argue that it's a what's good for the goose is good for the gander argument. That is that the Crown normally go about the task on their own that the defence now share with them in the court case. The Crown have to prove a number of elements of an offence to whatever the standard is, and we couldn't find a criminal case that went beyond, that didn't have beyond reasonable doubt, but there may be some.

Elias CJ But just stay with beyond reasonable doubt. It's axiomatic that there has to be unanimity. If the jury's divided and some think that he's guilty beyond reasonable doubt and some think that he is not, we don't say the burden of proof has failed, therefore an acquittal. That's not the way we go about it. So unanimity, and it isn't in the statute, it isn't in the text that you're looking at but its fundamental to our system of criminal justice.

Lithgow We call that the Crown proving their case and if they fail to prove it to all 12, they've failed to prove it. But that doesn't mean thereby that he is acquitted.

Elias CJ Exactly. That's the point I'm making.

Lithgow Right, so then we get to the reverse situation.

Elias CJ And the same thing applies.

Lithgow We start from the other side. Well I'm not sure that everybody does accept that. The same does apply. We used proved in the New Zealand Bill of Rights Act, and the word proved in ordinary language and we use proved in the Misuse of Drugs Act, it's exactly the same, that is that someone bears an onus, subject to a standard, and if they can persuade all 12, then a decision is reached. If they can't persuade all 12, then no decision is reached. There is no verdict because there is no underlying decision or set of decisions in this case. So it is my submission that it just follows from the ordinary use of the word proved and the ordinary flow of civil and criminal cases. Is there anything more that anybody wants me to say about that?

Elias CJ Well what do you say about the suggestion of three possible ways of looking at things. Because it does seem to me that that was most unhelpful. And that that may have been where things went unstuck in the Court of Appeal. Because they were concerned to say that it was unhelpful.

Lithgow Well that hinges really on the problem of the words, or the third possibility is that you cannot decide one way or the other. That the defence contention is more likely than not to be true. If that is so then again has not rebutted the presumption and you should be found guilty. And in the jury question version, the third possible conclusion is that you cannot decide one way or the other whether the defence contention is more likely or not to be true. If that is so then again, he has not rebutted the presumption, he should be found guilty. Now what that doesn't assist the jury to know is what kind of inability to decide and who's you. Now the Crown don't think there's anything in the question of who's you. But there's a thought for some time that New Zealand English should adopt the variation given from Maori and from almost every other language that you have a separate word for the plural of you. So that we should simply say you and yous. You for the individual and yous for the plural. It has been used in England. It's referred to in the books, in the writing of the Oxford English Dictionary, but the English middle classes don't like yous.

Blanchard J I can think of one District Court Judge who used to use the expression, at least when he was in practice, addressing juries.

Lithgow Well there's one now I can promise you who says exactly that and says to the juries, now over to yous to decide unanimously.

Blanchard J Probably the same person. Are you accepting that the words "you cannot decide one way or the other" is a reference to an equilibrium situation.

Lithgow No I don't accept that. It may be intended to convey that.

Tipping J You say it could equally be understood as a lack of unanimity.

Lithgow Yes, you just haven't, that if you lot can't decide, then we revert to the default position. That's the problem.

Tipping J One way or the other tends to emphasise the equilibrium but I understand your point that it could be understood as referring to a lack of unanimity with some firmly one way and some firmly the other.

Lithgow Yes because we would say, if we were talking about a meeting we'd just attended, that we couldn't decide. But there was a huge range of views, some fierce, some moderate in all directions. We couldn't decide. Could you decide? No. Why not? Well, we don't know that in this case.

Tipping J Deciding is an inherently ambiguous word in this context I think is your argument, isn't it? If the expression had been tilt the balance, if you can't decide whether the balance has been tilted or some such, then it would be less open to misconstruction. If you think that the balance hasn't been tilted by the accused or something like that. You would have to refer, if it was to be fully precise, to an equipoise concept wouldn't it? Because that's what the Judge is trying to say I imagine.

Lithgow Well I prefer the analysis that the verdict is the natural result of a cluster of critical decisions that the judge identifies that have to be made unanimously. And if all the necessary decisions in that cluster are made unanimously then a verdict should follow from the judge's directions. But if they can't tick off all the decisions in the cluster along the way, they should be made to understand that they can't achieve a verdict because there is no default verdict arising from deciding some of them and not others. And that's what I think the American cases make clear.

Tipping J Just before we go to the Americans, we're just looking sharply at the direction at the moment. Do you say that the equipoise can fairly be comprehended in the second possible conclusion, therefore it's not necessary to mention it?

Lithgow Well I think the simplest way through all that is to just remind them about unanimity at that point.

Tipping J Would you mind answering my question? Are you able to answer the question? Is it your case that the equipoise or the equilibrium is sufficiently comprehended in the second possible conclusion? And therefore that reinforces the ambiguity inherent in the third. This is what I understood your argument to be but I may have it wrong.

Lithgow If I have you right, I think (2) does indicate that they've got to get over it, not just sit on it.

Tipping J Yes.

Elias CJ Well isn't the problem that, I said that it was unhelpful, and it seems to me that it's unhelpful because it doesn't refer to the discharge of the onus which is the statutory requirement. If the Judge had directed in terms of that, it wouldn't have been necessary for him to set out these other options because they're both the same. The defence doesn't get over the onus. And that, it seems to me, is what the Court of Appeal was concerned about and I don't see that the Court of Appeal is saying that the jury doesn't have to be unanimous on that point. The Court of Appeal is simply saying there aren't three possibilities, either you get over the onus or you don't.

Tipping J And that must analytically be correct.

Elias CJ Yes.

Tipping J There are two ways of not getting over the onus if you like, because one could be said to be well short and the other could be said to be on the line. But they both equally lead to the same result.

Elias CJ Yes, and so I don't see that the Court of Appeal is wrong in what it says unless it's wrong in saying that there was no need to stress unanimity again in this context.

Lithgow Well there's quite a lot in that short interchange, but can I just get clear which part of the Court of Appeal Decision Your Honour's thinking of may not be wrong.

Elias CJ Well which are you complaining about? Presumably it's 19 20 isn't it.

Blanchard J 17.

Elias CJ Oh 17, right yes of course.

Blanchard J The beginning of 17.

Lithgow They say it can't be tenable that if only some members of the jury should be satisfied.

Elias CJ Yes, yes, I'm sorry yes.

Lithgow And so they are wrong on that. Now going back to how to state a proposition, by simply talking about the onus. Well can I take you to the onus and the standard for a moment, which juries are often told, and you look at any set of facts, if it's important to your decision or important to an ingredient in the case, you ask yourself who's got to prove it, the onus and to what standard do they have to prove it, and in this case, who's got to prove it, is the defence have to show you or there has to be elements in the case wherever they're contained, that show you that it wasn't for supply and that that must be sufficient that each of you individually and then collectively believe that that goes beyond the balance of probabilities. Those are my words, not very elegant, but I think that's right nonetheless.

Now can I just add in while we're talking about this that in paragraph 7 at page 56 of tab 3, the Judge has given a series of general directions. Now of course they're not numbered when the Judge reads them and they're not handed out but it goes through, every criminal trial, the onus of proving the charge rests on the Crown from beginning to end and does not shift. He said in almost every trial the onus rests on the Crown from the beginning of the trial until the end of the trial, that does not shift. No onus on accused person. This trial's one of those exceptions to the rule I've spoken about. And in fact the onus can shift

if the Crown establishes certain things etc. The Crown must prove necessary elements. Proof beyond reasonable doubt means what it says. If you're not sure or not satisfied, then you should acquit. The verdict you give is to be the unanimous verdict all 12 of you. And then he immediately says, now I wish to explain that exception to the general rule which I've just adverted to. And it is assumed to those in the business that the jury know immediately that he's only talking about the onus question, he's not talking about the unanimity question as well which he's wrapped in there.

Gault J Doesn't he make it clear in the next sentence?

Lithgow Well, the next sentence again, I've told you that in all criminal trials the onus of proving the charges rests on the Crown. Well that is what the Judge no doubt believes, tells the jury that he's only talking about one of the things he's grouped together there. Even though he has said twice that this case is different. Now that is an ambiguity that can be simply cured by ensuring that unanimity is made explicit in relation to so-called reverse onus.

Gault J Are you making the point as a general suggestion for improvement or is it a submission of misdirection?

Lithgow Well it's a submission that in this case it is an inherently ambiguous direction and therefore it is a misdirection.

Tipping J That's not really quite the point that leave's been given to appeal on has it? I know you say it's all sort of introductory and all the rest of it. But really it's this unanimity point isn't it that we're. Are you saying that this somehow or other is going to put the jury into the frame of mind that there is an exception to the unanimity point?

Lithgow It puts them in the frame of mind that the rules that they've been given are all different when you get to consider the defence bit.

Keith J The real essence of it comes out does it Mr Lithgow if you go, I'm looking again at paragraph 12 and the Chief Justice's point about the three possible conclusions and just thinking of you and yous or thou and you or whatever it was at that time. You're really saying, are you, that the first possible conclusion is that you all accept the defence contention. The second possibility is that you all do not accept the defence contention and in that event it's guilty, in the first case it's acquittal. And then the other possibility is of course that they're not all agreed one way or the other and in that event there is no result. So you're really, the third is a different type of conclusion where it's a non-conclusion as compared with the first conclusion which goes the accused's way, the second conclusion goes the Crown's way and the third one is no conclusion at all. And it's really there, isn't it, that you're saying the direction should be?

Lithgow Yes, you used the expression you all which is in some American dialects and, in Old English, y'all was one word for the collective.

Keith J There's a new New Zealand dictionary being launched today, I don't know if it helps or not.

Elias CJ Yous is probably in it.

Lithgow Yous and y'all are both perfectly unambiguous functional attempts to distinguish between the individual.

Keith J Well it's partly whatever expression you use.

Lithgow No, but that could work.

Keith J But I was really focusing as well on the third point because it's of a different character isn't it, just going back to the Chief Justice's point about there being two real conclusions. One is that y'all agreed on one side or y'all agreed on the other. And the third is you're not agreed because some of you are on one side and some are on the other and in that event there is no verdict.

Lithgow If that is the basis of your inability to agree, that some are on one side and some are on the other, then you haven't reached a decision so you can't reach a verdict. You haven't reached a decision on that part of the proof, or that part of the evidence, and therefore you can't deliver a verdict. But if it is you cannot decide one way or the other, you all can't decide one way or the other, then you haven't been persuaded. You haven't been individually and collectively persuaded.

Keith J And as you were agreeing earlier, that should in theory be part of the second shouldn't it? That's part of the second one. You're all at equipoise, going back to the pretty unlikely hypothetical that my brother Blanchard gave you. But why should the Judge be really focusing on that third highly unlikely possibility when it's part of 2 isn't it? And if what he's meaning to talk about is genuine disagreement within the jury, well that's a different animal from the other two where there was full agreement with one side or the other side.

Lithgow Well I don't have a fixed submission to make as to whether it should be shown as two alternatives or three. But if you get the third one right, if we're not scared of saying a bit more, instead of trying to reduce it to it's aesthetic minimum, and assuming that New Zealanders all speak the same language, which I think is a big if, and underlies rather too much of jury directions. But it doesn't hurt to give the three and I think it places the first two.

Elias CJ Well we don't require the third to be given in that sense, that you may disagree amongst yourselves, we don't require that to be given for the

Crown onus of proof. We simply say you have to be unanimous. I mean the real problem with this is that because it isn't directed at the onus of proof question and it postulates different factual conclusions and it doesn't make it clear that they have to be unanimous, there is a possibility that it's dealing with the disagreement amongst jurors issue. I don't think it's intended to, so I think it's a very unhelpful elaboration and it would have been better to stick to the statute. But I would be very reluctant to see a requirement that this elaboration should be given because it would also have to be given for the Crown case. And that's covered by the requirement that the jury has to be unanimous.

Lithgow Where there is a single direction on the whole case, the one set of directions fits every situation, then it doesn't really. I don't think there's anything stopping Counsel from saying that they can disagree if they feel like it. But there's no particular reason why the Judge should get into that because it does flow logically. But where you've got two, sort of said to be two, different perspectives on the same lot of evidence, the same big pot of evidence, then you have to come at it from two different directions at different stages and if you don't stress unanimity then you've got to stress the options. But if you make unanimity unambiguous, and the onus and the standard unambiguous, then it does flow naturally.

Tipping J I think this is a standard direction isn't it? I'm not sure, but I think it is. I wonder why it talks about conclusions rather than verdicts. The normal way of focusing the jury's mind is to direct them on the verdicts which they can come to, it being implicit that they have to be unanimous. And they come to a verdict of guilty if such and such, and a verdict of not guilty if such and such. I'm a little puzzled at the terminology of conclusion here. Are you able to shed any light on that?

Lithgow Well I submit that that follows the correct distinction between a set of decisions or a set of conclusions which are the elements of the offence and the elements of the defence. And until they're all ticked off, a verdict is impossible. Verdict doesn't come into it. So I do prefer the proposition that the jury make a bundle of conclusions. Those that are elements of the offence have to be made to the standard and have to be unanimous and if when you've got enough of them, or you've got all of them sorted out, like the American death sentence case, when you've got the lot ticked off, then you have a verdict. If you haven't got the lot ticked off, you haven't got a verdict.

Tipping J You see he has to say in relation to his third. He doesn't repeat the word conclusion because it's not a concern. You see it's an inherently awkward way of directing a jury. Three possible conclusions but the third one isn't a conclusion.

Keith J Although he does, doesn't he, just in terms of what you were just saying Mr Lithgow. Under each of the three he's got two steps hasn't

he? He's saying if you conclude (a), then (x) is the consequence. If you conclude (b) then (y) is the consequence. He's got those, if-so's, if that is so.

Tipping J I don't want to appear semantic Mr Lithgow, it's not really that at all, it's just attempting to create some form of formula which fairly covers the ground without, as the Chief Justice has said, because traditionally you never do invite them until you get to a jury disagreement situation, to consider what is the consequence of the hung jury.

Blanchard J On the word conclusions, I think in that context it simply means the end point of the deliberations. The end point may be one way or the other or it may be indecision.

Keith J And that is the standard direction isn't it, which you've given us? I was just looking at the Firearms one which is right near the back and there's, I suggest there are three possible conclusions. One you accept, if that is so, then. So it does seem to be.

Tipping J Well I don't like it particularly, frankly, because the word conclusion is not a happy one, I don't think. If they come to certain findings of fact, then certain verdicts flow. But this case is not going to turn on terminology. I was just perhaps thinking aloud.

Lithgow Yes well I must say I had seen the three possible conclusions there as being three possible states of decision.

Tipping J States of mind.

Lithgow But if you look at it Your Honour's way, there's three possible ends to this whole case depending on its, as you might come to in considering the evidence. The first is you accept the, so that's the decision. So you reach a decision.

Tipping J Well for me, if anything, it reinforces the ambiguity point. I'm not against you. This is actually that if anything, it reinforces the ambiguity of the indecision question.

Lithgow Yes, because some of us see the possible conclusions as being decisions in the cluster and some of us see them as the ultimate result that these different permeations take you to. But either way.

Tipping J This is the foundation for your argument that in this particular case there has been a miscarriage of justice because the jury could have found guilty when they were disagreed and they should have been hung.

Lithgow Yes, yes and you can't tell.

Tipping J But that's it in a nutshell is it, that's where there is the miscarriage in this case?

Lithgow Yes, yes.

Tipping J It's sharply focused on the third possibility.

Lithgow Mm. Now the Court of Appeal.

Elias CJ But if he'd said, remember you must be unanimous, that would have overcome it?

Lithgow Yes, remember, whatever you decide, you've got to be unanimous before you can reach a verdict.

Keith J And that effectively leaves out the third doesn't it?

Elias CJ Well, depending what it means.

Keith J Well if the third.

Lithgow It makes this third and unstated obvious.

Keith J Well if the third is, going back to my brother Blanchard's point, is equipoise then it's, where they're all 12 of them sitting on the fence, then doesn't that become part of the second, that the defendant, the accused, just hasn't got the matter over the barrier and so it's part of the second and highly unlikely anyway and what's the point of stating it if you've already stated it in two. And three is the different situation, isn't it, where you're not, where it's not yous, it's yous all on one, or yous all on the other.

Elias CJ Yous and yous.

Keith J It's half the yous on one side and half on the other. And in that event there's, I mean it's your point, there's no verdict.

Elias CJ I must say I don't see the third option as being equipoise at all. I think that it's directed at the factual conclusions that might be reached. You might not accept the defence case. And the third one really swallows up the real question which is, are you satisfied in terms of the onus?

Tipping J To a logician, if equipoise is logically comprehended in the second, it can't be that that's being referred to in the third. I mean I'm not saying everyone will be that logical. But you've got to treat them as being able to follow it logically.

Keith J Well there's also the fact, back to the Blanchard point, that it's just not terribly likely is it, that all 12 will be at 50%.

Lithgow Well I think the possibility that has been covered by, and it seems to have been a variation, that it's been around for a long time, although I don't think it appears, it doesn't appear in the insanity standard direction I don't think, but it's presumably intended to take account that the very questions that you as a Court and a set of Judges experienced in these problems raise, that a few of the jurors may inevitably raise, now what's the story if we, you know this balance business, what's the story if we're something.

Blanchard J In the middle.

Lithgow Yep. And so they're trying to short-circuit that and say something about that. So it may not be that it's dysfunctional, it just may simply be that its current wording is wrong, that we shouldn't be scared of just explaining how that all fits together with a few more words. But if we're going to do that, then it's got to be right and also not confuse those who are more logical in saying, well what does that add, I thought you already gave us the first two.

Tipping J You've either got to do two, it seems to me, or four. But not three. The 2 is unanimous one way, unanimous the other, remember you must be unanimous. The 4 is, one way, other way, equipoise, hung.

Lithgow Well I think Judges do sometimes actually say that, like the scales of justice that you see sometimes in American television, if it's only just balanced, then they haven't got past that point. And so that would cover that and there's nothing the matter with saying that even no matter how unlikely that would be with a jury of 12 where the question is the uniquely one such as possession of drugs for a certain purpose. But in other reverse onus cases it may be more likely to be useful.

Tipping J But whatever it is, it shouldn't be ambiguous.

Lithgow Whatever it is, right.

Tipping J And your point is that it's capable of being read as comprehending that a hung jury is a guilty verdict.

Lithgow I say it can be read like that. I say the Court of Appeal accepted that ultimately it could be read like that and it didn't matter.

Elias CJ Yes, we'll take the adjournment now thank you.

Court adjourns 11.30 am
Court resumes 11.48 am

Elias CJ Thank you.

Lithgow If I could just tidy up a couple of matters. One is that in the directions the proposition talks about, "he has not rebutted the presumption",

accepting the defence contention, there's various variations of "he has not rebutted the presumption" but the words of the Act and the intended meaning to be given to the jury always is that, until the contrary is proved, it doesn't suggest for one moment how that is to be achieved and hopefully all judges make it clear that that could come from anywhere. And we see in the American cases that's part of the statute, for example in the directions in Hawaii that wherever that arises. So that, in my submission, reinforces the faulty thinking that there's a default to guilt when in fact it's just a proof step. If I could quote passages which put the matter reasonably elegantly. **Andre's** decision (**Andres v United States** Supreme Court, No.431, 26.4.48). The Supreme Court case, at page 884, they're discussing unanimity as regards the death penalty as well. The whole of paragraph 5 and 7, unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues, character or degree of the crime, guilt and punishment, which are left to the jury. A verdict embodies a single finding, embodies in a single finding, the conclusions by the jury upon all the questions submitted to it. And so that language is not so very different from the way in which our direction is written where there's a distinction between decisions along the way, sometimes called conclusions, and when you've got enough of them or you have all the ones which are submitted to it for decision, then you can have a verdict. "Therefore although the interpretation of s.567 of the Code urged by the Government cannot be proven erroneous with certainty, since the statute contains no language specifically requiring unanimity, on both guilt and punishment before a verdict can be brought in, we conclude that the construction placed upon the statute by the lower court is correct - that a jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous."

Now if we then go to **Harris**, which is a decision of the Supreme Court of Rhode Island (**State v Gordon G Harris**, Ex No. 9803, Supreme Court of Rhode Island 9.6.59). It doesn't tell you who the other Judges are, but it seems to me that it's unlikely it was a single Judge.

Blanchard J Well as he keeps referring to we, that's a fair conclusion Mr Lithgow.

Lithgow Paragraph 2 and 3, in our opinion the above portion of the charge to the jury contains prejudicial error. It is fundamental that the verdict of a jury must be unanimous. "In criminal cases this requirement of unanimity extends to all issues".

Blanchard J Well that's just **Andres** again.

Lithgow The verdict embodies a single finding. And then it goes on over into the second column, "the jury's determination on an insanity defence is as demanding of unanimity as the determination on the plea of not guilty." And I adopt that as a recognition of it simply being a mirror

image of the normal position that the Crown faces when they start any trial. And that there cannot be a possibility that there is a difference.

Then in **Miyashiro** which is 979 Pacific Reporter 2nd Ed page 85. I'm looking at page 95 (**State v Miyashiro** 979 P 2d 85 (Hawaii 1999)). If the jurors unanimously agreed that all the elements of the charged offence have been proved beyond reasonable doubt.

Gault J Have not been proved.

Lithgow Have been proved beyond reasonable doubt but are unable to reach.

Blanchard J Where are you reading from?

Lithgow Second column on page 95. "Finally, if the jurors unanimously agreed that all the elements of the charged offense have been proved beyond a reasonable doubt but are unable to reach unanimous agreement as to the affirmative defense of entrapment, no unanimous verdict can be reached as to the charged offense because some jurors would vote for conviction and others for acquittal. In such instance a mistrial would have to be declared due to a hung jury." And then it refers to **Harris**, "if the jury could not agree upon the defendant's affirmative defense of sanity then no verdict could be reached." Both the **Harris** sanity/insanity defence and the entrapment defence which we don't have but there's otherwise an identical proposition, then that is the clearest example of it. That's the Intermediate Court of Appeals of Hawaii. But in **Yamada** (**State v Yamada**; 57 P 3d 467 (Hawaii 2002) which is a very different and complicated facts situation, at page 477, the Supreme Court of Hawaii adopted **Myashiro** dicta on that.

In my submission it is firstly easier for a jury to understand that as a bundle of decisions leading to the possibility of a verdict if they're all achieved unanimously, that otherwise there is no right to have a verdict or, in other words, there just isn't a verdict. And that's why all this talk about a kind of a default position leads to error. The alternative views are pretty well canvassed in the Supreme Court case, but in my submission the majority is to be preferred.

Although the Court wasn't immediately receptive to the application of s.25(c) which is the right to be presumed innocent until proved guilty according to law, it seems to me that that is a direct reference to the due process of a trial where both the decision-making process and the trial itself is supposed to wait until it's all in, and that there isn't a point in the trial until verdict where a presumption shifts, that is faulty thinking. The advantage of that analysis is that it would, if we're looking at the big picture, it may give greater ability to find that reverse onus statutes are able to be reconciled with the Bill of Rights Act. When in fact they've been under severe attack in other places in the world because, provided we keep clearly in mind that reverse onuses do not shift the presumption of innocence, but simply are a tool to

deciding certain factual weigh points, then there isn't a problem with 25(c).

Gault J On two occasions earlier on you used the reference or the expression evidential onus. Is this another way of saying, or foreshadowing an argument, that all of these should be evidential onuses and not persuasive onuses?

Lithgow Whenever I said evidential I was just meaning the subject matter of what the jury were looking at. I haven't meant to in any way, and I've set out in the Submissions, in any way try to re-argue distinctions, long-standing distinctions between evidential and.

Gault J Yes.

Lithgow So I'm sorry if I've created any confusion about that. So the advantage of the whole of case reasoning, that is set out in **Andres**, even as I started, even in a set of statutes which on the face of it look as though there's two separate decisions, the advantage of ensuring that under our Misuse of Drugs Act we don't start making a construct of two separate stages, which is what we have done I submit, then we don't get into difficulty with s.25(c). Now I understand that then, subject to anything the Court may wish to ask, that the outstanding issues would then be what exactly should be done about it, if the Court is of the view that the conviction be quashed. And I suggest that we could perhaps wait and see where the Crown considers things are up to and we could come back to that in reply.

Elias CJ Well what is the position you take?

Lithgow The position that I take is that the conviction should be quashed, no new trial ordered. He pleaded guilty to one offence of cultivation and was found guilty of possession for supply in respect of the same cannabis. And he has completed the home detention phase of his 18 month sentence. He's currently on parole and remains on parole and would remain on parole in respect of the cultivation. And so no purpose would be served.

Elias CJ Thank you Mr Lithgow. Yes Mr France.

12.02 PM

France There is, I take it in the end, to be no real dispute as to the need for unanimity. There is, with respect I suggest, a slight variation in how one gets to that point. The two routes would seem to be a reading of s.6(6) that says it has nothing to do with unanimity at all. The other approach is to say that the use of the concept of proof and deeming does create a type of default situation which is then subject to normal criminal law principles. So to use the words of Justice Gault, the context comes in and provides an answer. I saw in the first approach,

well the best exposition of the first approach, which I suggest the first half of is represented in the Court of Appeal Judgment, is in my submission Justice Frankfurter in **Andres** and if I could perhaps refer the Court to page 887 of that Judgment. I do this in part because as Respondent I'm conscious of the need to explain with respect the Court of Appeal 's approach and it seems to me to be captured exactly by the paragraph at the right hand side of page 887 beginning, "The fair spontaneous reading". If one reads that paragraph and, as reading it, thinks of the Misuse of Drugs Act, it is in one sense completely applicable. The fair spontaneous reading of this provision in connection with s.275 of their Criminal Code would be that Congress has continued capital punishment as its policy, that one found guilty of murder in the first degree must suffer death if the jury reaches such a verdict but that the jury may qualify their verdict by adding thereto "without capital punishment". Since Federal jury action requires unanimity, when unanimity is not obtained by the jury in order to qualify their verdict by adding the phrase, the verdict of murder in the first already reached must stand. And that really in my submission is what the Court of Appeal has said in its Judgment. That s.6(6) creates that situation and why I mention it is because here's an example of Justice Frankfurter who clearly was troubled by the slightly more dismissive primary opinion, saying that with respect he can see the merit of that. It's a fair spontaneous reading. And just a little bit down, it's also important, I think, certainly if construction called for no more than reading the legislation to interpret it as just indicated would not be blindly literal reading of the legislation. On the contrary, it would heed the dominant policy of Congress that every person guilty of murder shall suffer death unless. And one could make a similar argument for the Misuse of Drugs Act. If you choose to possess a certain quantity of the prohibited drug, then the policy is that you do so at your peril. And so what I attempted to articulate in my submissions is with respect better captured in this paragraph of, in a sense the analysis, the reading of the statute that takes one to the situation where a default position is conceived of. But Justice Frankfurter, as the Crown's submissions have, comes to the position that the normal criminal law rules and principles require a gloss as it were to be put on that. And it comes, as my learned friend has suggested, from applying what could be called the one verdict approach. If there's only one verdict and if our law requires unanimity then that in a sense is the complete answer.

What section 6 subs (6) does not do is take the purpose of possession away from the jury. It changes the onus but it leaves that as a jury issue. And the moment it does that, then our normal rules would say it's a matter on which the jury must be agreed.

I wanted briefly to respond to the question of Your Honour Justice Tipping concerning the use of the word proved in subs (6). The answer I suppose in the approach I've taken that addresses that is that subs (6) says nothing about how one proves it. It just says that the contrary has

to be proved and by that formula it does what we call reverse the onus. But it's absolutely silent on how that is to be done. And so whilst one might say an accused hasn't discharged the onus unless 12 agree that he has, the other side of that is one has to go on and say, nor has he failed to discharge it until 12 agree that he hasn't. You don't stop half-way. If one brings in those concepts, one's got to put both sides. And in fact once one does the first half, that's the problem that was encountered with the jury directions in the American cases. The Judge actually directed on one half of the unanimity formula that you had to be agreed on the defence, without going on and directing on the other half, that you had to be agreed the defence wasn't made out. So it's that, in my submission, in terms of the jury instruction which I'll come to actually now, it's that specific reference to one half of the formula and not the other that causes the problem. What I'll be submitting, which I know the Court might not agree with, but that His Honour doesn't address it at all, he's not talking about unanimity so that concern doesn't arise. But that's how I would address the use of proof in the section.

Tipping J Thank you Mr France.

France I think unless the Court had questions, I've set out really on the issue of unanimity all I wish to in the Written, so I'll move onto the direction issue. But I ask the Court, in my learned friend's Bundle, the Casebook and materials, to go to page 63. And what one has in that section there is, paragraph 4 I'm looking at, this is His Honour's response to the question. Now it was this that was said to have caused the miscarriage. And it's paragraph 4. Which is very much as Your Honour's have discussed from the summing up, the initial summing up, but seeing this is the passage that's said to create the problems, it would seem to be the right one to focus on. I want to start by focusing on what is said to be the risk here. Where is it that this verdict might be flawed? And what's being said is that if one takes the first situation, this is what His Honour has told the jury, the first is that you might accept the defence contention as being more likely than not to be true. If that is so, he has rebutted the presumption and should be found not guilty.

Elias CJ Sorry, I've lost my place.

France I'm sorry, page 63, paragraph 4.

Elias CJ Oh, thank you yes.

France The second sentence. And the risk being talked about is that one of these 12 jurors might have put themselves in that camp and yet somehow thought that they had to agree with a verdict that said guilty, because that's the risk we're talking about. Despite being told that if you accept the defence as being more likely than not, you should find the person not guilty, there's a risk that one of these 12 jurors or more

of them have actually gone into Court and agreed when asked with a verdict that says guilty. Despite the fact that they believe that proposition. And my submission is that there is no risk that that happened. There is nothing in the second part or the balance of that paragraph that creates that risk.

Tipping J Why might a juror not reason, well yes the Judge is effectively saying that if we all think it's discharged we must find him not guilty? But bearing in mind what he said later, if some of us think it's discharged and others don't, the Judge has told us that that is guilty.

France My answer to that, in my submission, is that that direction, paragraph 4, has nothing to do with unanimity at all. And shouldn't be read that way. What it is is literally, if I could refer the Court to my paragraph 12 of the Submissions, of my Written Submissions, what paragraph 4 is, is exactly what paragraph 12 is. Not paragraph 13, it's paragraph 12, nothing more or nothing less. And with respect, and I know that doesn't matter, but it is the time honoured direction that has been approved over a long time. All it is saying is that in relation to a reverse onus, a balance of probabilities onus, there are three possible conclusions. That your state of mind, and I read conclusions as very much being states of mind. Because that's what it does. The first state of mind is that you might accept the defence contention as being more likely than not to be true. If so, what's the answer? That's guilty. The second state of mind.

Tipping J Not guilty.

France Not guilty, sorry. The second state of mind is that you might accept the defence contention as being more likely than not to be true, I've got that the other way around.

Tipping J Yes, I'm sorry I didn't help.

France Anyway, I mean, if one looks at my paragraph 12 and puts it across into paragraph 4 of the Judge's direction, that is all he's doing. He's just simply saying, three states of mind are possible, here's the answer that each state of mind produces.

Keith J Your (b) and the second are not quite the same are they Mr France? You do not accept. I mean on the face of it it includes everyone being equipoise doesn't it?

France Well it does. With respect, we know that because we understand burden of proof. It's quite a big thing to say to a Judge, ignore the possibility that some of these jurors mightn't be sure either way. Don't give them any help on that at all, because we know that technically the second possible conclusion covers that. So just assume that they'll understand that. Don't tell them at all that some of them may well be in a 50-50 state. Because that's what would be happening if one

dropped the third option. And so we're not going to give you any help on that.

Tipping J But you'd have to make it clear that the second included a 50-50. Rather than necessarily isolating that as a third. Isolating the third as though it was somehow different from the second.

France One would have to see the text of the second that included the third or alluded to it but wouldn't really carry any greater risk.

Keith J Your one doesn't does it? I mean yours is an improvement in that sense on what the Judge said because your second doesn't include the third.

France No, it doesn't.

Keith J Whereas the Judge's is capable of including the third.

France Well it's capable of but if one, in my submission, sees that pattern of, here's the possible state of mind and here's what the verdict is in relation to each of them, there's no real reason to assume that anyone was in any doubt at all. It never has been thought to be a problem. Because in the end that really just tells the jurors, well this is how it works. You think this, you think that. Then you go back and say, your verdict has to be unanimous and that's what His Honour said and there's never really been any suggestion of a requirement to repeat that. So my proposition is that there's nothing, and remember that the jury came back and asked for an explanation of the third possible conclusion. That was their question.

Tipping J No they didn't ask for an explanation of the third, they asked for.

Elias CJ The three.

Tipping J The three.

France I'm sorry, I thought it was.

Tipping J Well the way the Judge described the question in one is, can I please have a copy of the Judge's summing up and especially our three possible conclusions.

France That's right, I'm sorry about that. Yep.

Tipping J You see I was wondering whether the context of the question gave any particular help here but it doesn't really, does it? They just want a rerun of the three possible conclusions.

France Yes, which helps me in my submission because there's absolutely nothing in there to suggest there's anything about unanimity. This is

all in a sense a construct that's been put upon it that isn't there in the question. All they're asking, and it's even better than my misreading of it, I thought it was focused on the third, but if it's not, then all they're saying is, as they're invited to do, can you explain to us again really what the outcomes are of each state of mind. Nothing at all to do with unanimity. No reason on the record to suspect that anyone was in any illusion that when they came back into Court, as they're always asked to, do you have a verdict, is it a unanimous verdict, yes. Where is, in my submission with respect, the risk and the only risk given the verdict must be as I say that some jurors were in that first camp and yet agreed with a guilty verdict? And my submission is that there's simply nothing in that, in what happened, to suggest that they are.

Tipping J The only difficulty I have Mr France, and it may not prove fatal, is that if the juror thought that disagreement meant guilty, then they could legitimately, thinking that was the law, odd as it might seem to us, take the view that they had a duty to join in a guilty verdict.

France Yes, I accept that's absolutely right but my question is, my submission is, that there is no basis to suggest that any jury thought disagreement equalled guilty. All this direction says is that uncertainty equals guilty. And uncertainty is simply the burden of proof. And that's all it's addressing.

Blanchard J On that analysis the direction is unduly favourable to the defence because it wouldn't allow the jury to mix together those who thought the onus wasn't discharged and those who were simply uncertain.

France Yes, it doesn't make that clear, that either (b) or (c) on my analysis.

Blanchard J If that analysis is correct.

France That would be the only risk. The only risk on my (a), (b), (c) is that this direction meant that the jury thought that all of them had to be in (a) or (b) or (c) which, as Your Honour says, is very favourable. Because in fact if they're in (b) or (c), it doesn't matter at all.

Elias CJ Well it's why I think it's quite unhelpful to express it like this really because it's not the correct legal approach. I mean you're saying there's no harm in it.

France Yes, I am. But coming back to Your Honour Chief Justice's point raised earlier with my learned friend, it does in a sense refer to the discharge of onus because the third one, it says if that is so, then again, he has not rebutted the presumption. He has not discharged his onus. That's why I say it's about the three possibilities and not about unanimity at all. I don't disagree that, it's something that only comes up, in my submission, with a 50-50 onus. It doesn't really come up with the Crown position because you either have it out or you don't.

It's this option that you might be on the 50-50 line that is unique to the balance of probabilities.

Elias CJ But if you don't share the doubt, the same thing applies doesn't it? Because you don't get a verdict of acquittal from that.

France Mm. Yes, no. But in terms of the evidence may leave you in certain states of mind, beyond reasonable doubt only leaves you in two. You have a doubt or you don't. It's only where you have a 50-50, it's only with the balance of probabilities that can create the third.

Elias CJ Why then don't you take it back to the statutory presumption and say, are you more than 50% satisfied that's what's required. And then it embraces both.

France Yes, no I absolutely accept Your Honour. The query I raise, and Your Honour's more experienced than me, is whether there is a concern that that will leave the jury unaided on the question of 50-50. And do they need specific aiding on that point. Because that's all the third conclusion is about.

Elias CJ They do need aid on that because that's really what their task is. But I'm querying whether they're aided by being told that there are three options.

France Yes, I see the point absolutely. It just has to be said that the second option includes 50-50.

Keith J And your point is it would be useful to be explicit about that.

France Yes, absolutely. Because some cases can be closer than others obviously.

Blanchard J Well you get some jurors who are congenitally unable to make their minds up.

France Yes.

Tipping J I suppose your point that there is no risk of miscarriage here Mr France is captured is it by saying that the Judge didn't say that you cannot agree? He said you cannot decide whether.

France Mm. One way or the other whether. That's why my submission is absolutely dependent on reading paragraph 4 as being nothing to do with unanimity at all. And if one reads it that way, it creates no risk in relation to unanimity either.

Keith J Well it assumes unanimity.

France Yes it goes back to his primary direction, which is that verdict that you all 12 walk into Court and agree in Court to, must be unanimous.

Tipping J And the subject matter of the indecision whether the contention is more likely than not to be true reinforces that it's lack of ability to decide rather than lack of unanimity.

France Yes. That's right. It goes back to the first two as well, this way, that way or you can't decide either way.

Keith J And you in this case, meaning all 12 yous.

France Yeah, thinking about, and Your Honour's discussion with my learned friend, I have to be honest and say I think I was wrong on that. I think you is actually sensibly read as the singular in paragraph 4. But it doesn't matter.

Keith J But it has to mean each of them are on one side of the line or the other.

France Yes, but consistent with my proposition is it's not actually talking about a collective decision or unanimity at all. It's just talking about states of mind.

Keith J So the unanimity you say is laid down earlier in the directions and this is when they get to making the collective decision.

France Yes.

Blanchard J If it pre-supposes unanimity then you really are talking about the collective mind.

Keith J Well 12 individual minds saying the same thing.

France Yes although I don't, keeping with respect with Your Honour the Chief Justice, I'm pretty sure the third possible conclusion was never really designed to deal with the theoretical possibility that all 12 might be on the 50-50. I think it's more designed to deal with the three possible outcomes and just tell a jury in relation to each outcome what the proper verdict is without addressing how many of them might support one or the other.

Elias CJ It's an attempt to encapsulate the standard of proof.

France Yes. Other than that, I don't believe there are any. Oh, the new trial. I had indicated to my learned friend, I don't, the current sentence is served either way, so absolutely no suggestion from the Crown viewpoint that a new trial would be appropriate. He's still subject to the same sentence for cultivation.

Gault J Is it usual to charge both in respect of the same cannabis? I know it's common to charge for cultivation and then separately to charge for possession of perhaps harvested cannabis.

France Yes.

Gault J But in this case, is it the situation that they were charged with possession in respect of the growing of cannabis?

France Yes.

Gault J Is that usual?

France Practices vary, I think is the answer and I know of. It's interesting because I do know that there is a practice for example down south where some judges are refusing to allow that to continue as it were.

Gault J I hope so.

France Saying it's duplicitous basically.

Gault J It seems to be putting the jury to an extra task that they don't need to address.

Tipping J If the sentence is going to be the same.

France It's very interesting though because the presumption applies in one and not the other.

Tipping J There's no presumption, no.

France So there's no issue in the cultivation but then one has the same argument that comes up. If one just charges cultivation, one then gets a sentencing dispute hearing as to the purpose of the cultivation, whether it was for commercial purposes or not, and in that sentencing dispute hearing, the Crown has the burden beyond reasonable doubt. Now I'm not saying what's right or wrong on it. But that is the difference, that if you just charge cultivation you end up with a sentencing fact hearing with a different burden from if you charge possession for supply. I mean the answer may be not to charge the cultivation. But that's what's happening, is that you get an immediate plea to cultivation and then a disputed facts hearing as to the purpose. So that's just something that does need resolving, but I certainly take Your Honour's concern over the other situation. Thank you.

Elias CJ Thank you Mr France.

12.29 PM

Elias CJ Do you want to be heard in reply Mr Lithgow?

Lithgow There is another argument for another day as to whether it's duplicitous and also whether or not you could be deemed, you could have a deeming provision for conviction but whether you could then dispute that in the disputed fact hearing, bearing in mind the Crown then have to prove it beyond reasonable doubt. But we won't start that.

The Court of Appeal did consider that the jury question shows that it is less than clear. The Crown, if I understand it, have moved variously as to whether in the direction "you" is intended to be individual or collective. And I think that rather just emphasises the problem. That even those of us who have heard it and read it many many times, if you are put on the spot, it's a bit hard to be absolutely sure as to what the Judge is intending. He's looking at the whole jury when he's directing them. Directing the whole jury. But unless the Judge says or makes a distinction between the individual and the collective decision, then it must be asked, third conclusion coupled with what I have attempted to persuade you as the effect of a repetition of the proposition that there's some kind of default conviction or some sort of conviction weigh-point which is just sitting there hanging, or sitting there or hanging there like the sword of Damocles, and that it is somehow for the accused to rebut. All that language has got the matter wrongly skewed if you stuck to the propositions in the Misuse of Drugs Act and stuck to that in the context of it being exactly the same mode of going about decision making for the Crown obligations to prove and for the other obligations to prove, the other matters where the proof needs to come from, a certain type of evidence, then you don't get into that tangle. What makes it safe then would be at that stage an unambiguous proposition that everyone has to, just like for the Crown decision in the ordinary case, everybody has to agree on the decisions that allow the jury to reach a verdict.

Tipping J How might Mr France's juror who wanted to vote for not guilty have been misled into thinking that they had to vote for guilty by this threesome presentation?

Lithgow Someone puts up their hand on his behalf and says, what if us lot can't decide. The Judge says, if you cannot decide one way or the other whether the defence contention is more likely than not to be true, then the accused hasn't rebutted the presumption and he should be found guilty. And then as Your Honour says, the juror who didn't agree with the others on episode two, as it's been characterised, believes that there is a default position. A default guilt that's already in place. And that is exactly the problem that the Americans recognised and decided to confront head on. It's not a perfect outcome in terms of.

Tipping J The direction doesn't say if you cannot agree among yourselves or something like that. It says if you cannot decide whether the defence's argument or contention is more likely than not to be true.

Lithgow So if you can't make up your mind about that episode two bit, it doesn't say who you is, that's the problem. Doesn't know whether he's addressing each individual juror or the lot.

Blanchard J The crucial thing is the impression that this would give the jury. Isn't it surprising that over the years with this type of direction being repeated many times, that no defence counsel seems to have heard the direction as the judge telling the jury the accused is guilty if they're not agreed.

Lithgow Even though the Court of Appeal says that is the legal position. And even though in many American courts prior, they could have said the same thing in 1959. How come this hasn't been confronted before? We've had the constitution for 100 years. That's interesting but in the end it can't.

Tipping J Are you saying counsel may have heard it in that sense but thought, well I can't do anything about it because that's the law.

Lithgow It becomes, so many of these things, well I've said this I think to some members of the Court before, it's like a catechism and I sometimes wonder if you said anything in the same rhythm whether defence counsel would even pick it. It's like school prayers. You hear them enough times, it's very hard to see the nuances until somebody confronts it. And so this jury wanted it repeated so that was a warning sign that they didn't quite see what the variations were. This was a defence which related to hip hop music where cannabis was said to be part of the scene and therefore as unremarkable I guess as handing out bottles of wine at the end of a Law Society function or handing out other items at the end of filming and some of the jury would have understood that and some would have thought that it was untenable. And so it had to be got clear. So the issue's been forced, that's going to be the proposition with just about every case in the criminal law that comes to you. There won't be a sufficient supply of new legislative ambiguities. Some old legislative ambiguities are going to be confronted. But the reverse onuses are ones that are coming under the spotlight because of their inherent conflict with the presumption of innocence. And so people are looking at them more closely. Now I haven't got the skills to take on the whole of the constitutional argument on reverse onuses, but if we're going to have reverse onuses, we should at least make sure the juries understand them in ordinary language as to how they're supposed to work them through. That they're nothing special. That nobody's presumed to be guilty as a result of them. It's not a verdict until all the conclusions are accumulated and ticked off.

Elias CJ Is it failure to direct in terms of the verdict that you are actually complaining about, because I must say I hadn't really appreciated the strength of this submission from your earlier submissions until now. Is it that the jury should have been directed that if one of them, or that

they should have been directed as you, not yous, and they should have been told, if your conclusion is either that the Crown hasn't discharged the onus or that the defence has, your verdict is not guilty.

Lithgow Yes, that's correct. But that they.

Elias CJ And if there's disagreement, it's a hung jury. In other words it's not a two-stage process, that's really what you've said at the outset.

Lithgow Yes, that what's become planted in these cases possibly by development, because apart from insanity there wasn't a widespread use of reverse onuses, it's somehow been implanted in the language of all this that it's sort of a two-stage thing instead of a whole case thing that you get to a certain point, the jury go out on the first night, and they go away saying, well he's guilty at the moment, we'll have to come back and see how well he does in the morning. And that just leads to the faulty reasoning process that if you can't tick off the second set of propositions, then there's a default position. Now that's just wrong. That's what the Americans confronted in '59 with the **Andres** case.

Elias CJ Is it really.

Blanchard J '48 or '49 I think.

Lithgow '49 was it.

Elias CJ Is it really then that the jury has to be directed in terms of a cumulative path to guilt that each of them must affirmatively be satisfied that the Crown burden's been discharged and that the defence burden hasn't been.

Lithgow Yes. The normal direction that you don't reach a conclusion either in the case or by the reasoning process until you've followed it right through to the end, which is consistent with the words, the right to be presumed innocent until proved guilty according to law, that that is an example of what that forgotten or kind of overlooked phrase means, which appears, it's appeared in the history of the English law, that that can then be made consistent with different onuses coming from different angles and of different levels, that if you wait 'til the end of all the evidential assessment to reach a verdict, you can't make a decision on one of those links in the chain, then it'll just have to come again. It's a hung jury. And that's a good idea. That's what due process is. That's the whole business of not having prejudgement, not leaping to conclusions. Because unlike the example in the Frankfurter decision with the murder variation where my learned friend invites you to substitute the Misuse of Drugs variation, in the murder variation he is unambiguously guilty of murder. All the ingredients of murder are there and nothing that happens thereafter changes that. All that changes is whether or not the jury thinks it should be a death penalty.

In relation to the Misuse of Drugs Act, it is a deeming of a fact which in reality may be completely untrue. It may be completely literally beyond reasonable doubt untrue that the drugs were for the purpose of supply. But in a pragmatic decision, Parliament has said well that's sometimes uniquely within the knowledge of the defendant or the Crown need assistance on that matter because it's proved difficult before. So you have a presumption of a fact, the deeming of a fact that may or may not be true, but you have the opportunity to point to evidence that goes the other way. So it's not like the murder, the Frankfurter murder analysis at all in that sense. Because possession of drugs in New Zealand is not a crime. Or Class C drugs, the possession of Class C drugs in New Zealand is not a crime. It's a summary offence.

If there's any other matter, otherwise thank you.

Elias CJ Yes we'll take time to consider our decision in this matter. Thank you Counsel for your assistance.

Court adjourns 12.44 PM