IN THE SUPREME COURT OF NEW ZEALAND SC 53/2007

IN THE MATTER of a Criminal Appeal

BETWEEN **ALEX KWONG WONG**

Appellant

AND **THE QUEEN**

Respondent

Hearing 14 April 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel F Deliu and E Orlov for Appellant
A M Markham for Respondent

CRIMINAL APPEAL

10.05am

Deliu May it please the Court Mr Deliu along with my friend Mr Orlov for the Appellant.

Elias CJ Thank you Mr Deliu, Mr Orlov.

Markham May it please the Court Ms Markham for the respondent.

Elias CJ Thank you Ms Markham. Mr Deliu.

Deliu Good morning your Honours. Leave has been granted with respect to one ground but with the Court's leave I would like to address the Court on the primary submissions and then have my colleague handle the rebuttal submissions. Of course we are in the Court's hands.

Elias CJ Well it is unusual Mr Deliu.

Deliu Yes your Honour I accept that. But it would be my submission that it would bring two different perspectives on it.

Elias CJ Well we don't need two different perspectives, we need the perspective of the appellant and you are senior counsel for the appellant. I find it hard to believe that the reply submissions can be very different from the submissions you wish to advance in support of the single question for which leave has been granted.

Deliu Yes your Honour. It is not so much that the reply submissions will be different but in my submission the reply submissions could in this case in a way actually be even more important than the primary submissions. I know that is

Elias CJ Well then shall we hear from the Crown first and just simply hear Mr Orlov in reply, leaving the Crown to make any further response it wishes to make.

Deliu And under that proposal your Honour I would be heard as well or not?

Elias CJ No.

Deliu Then no your Honour I would like to proceed with me beginning.

Elias CJ Well then I will confer with my colleagues but I think you will have to take the burden of the reply as well.

Deliu Yes your Honour of course as the Court wishes ultimately.

Elias CJ Alright thank you. Carry on then.

Deliu Your Honours essentially there are four main points that I am wishing to advance. The first one is that the right to a trial by 12 jurors is a fundamental bedrock of the criminal justice system. Essentially the 12 is not an accidental number. Its value can be shown in nearly a millennium of history, similar common law jurisdictions, even to an extent European jurisdictions some of them use it as a baseline. There is replete recent studies on the topic showing it to be better than lower jury numbers.

Elias CJ Mr Deliu, don't we really have to start with the statutory provision? And can't all that preceded it be taken as read. We have read your submissions on this. Is there anything additional you want to say about the importance of trial by jury.

Deliu I guess your Honour there may be minor points that I would like to extrapolate on and I was hoping that the Bench would ask questions on the topic. Of course if the Court is satisfied with the idea that 12 is of constitutional significance, naturally I don't wish to burden the Court's time with that.

Elias CJ Well I don't think we are satisfied of that point. You will need to persuade us of that but don't we have to look at the statutory entitlement to 11 jurors except where there are exceptional circumstances, which is why the question upon which leave was given was related to the existence of exceptional circumstances. Is it necessary for you to go beyond that?

Deliu Yes your Honour I think it would be necessary for two points. Firstly, I was going to reach the statutory threshold and argue that the "must not" wording in the statute obviously gives it significance even locally but more to the point of that is that even if this Court finds that there was a breach of the rights naturally the next issue that has to be dealt with is whether there was a substantial miscarriage of justice. And so in my submission

Blanchard J Well if there was a breach of the rights there is a substantial miscarriage of justice. *Rajamani* establishes that. The question is whether there are exceptional circumstances. If there weren't, there is a substantial miscarriage of justice.

Deliu Yes yes but alternatively the argument that we are proposing again as an alternative argument is that even if there were exceptional circumstances, essentially the interests of justice also had to be weighed and they were not properly weighed. So if the appellant is boxed into only the narrow exceptional circumstances it actually devoids him of a collateral argument that he could advance.

Elias CJ Mr Deliu, why do you need the collateral argument. That is exactly what is being put to you by Justice Blanchard that if there were not exceptional circumstances *Rajamani* is authority for the fact that there is a miscarriage of justice, end of story. You win.

Deliu Yes your Honour I accept that but what I am saying your Honour is that on the other hand this Court of course can find that there were exceptional circumstances and then the secondary argument would be that it was not in the interests of justice to proceed. So notwithstanding the exceptional circumstances

Blanchard J But that is a discretion for the trial Judge once there are exceptional circumstances.

Deliu Yes your Honour and, with respect, I of course accept that was what *Rajamani* did to an extent hold but your Honour *Rajamani* was a slightly different case in the way that it was argued, in the sense that interests of justice appears not to have been really pursued as a separate prong in the statute. But I would submit your Honours that it is actually a separate prong and is not in the discretion of the Judge exclusively. If it were your Honours, if interests of justice were simply

Blanchard J Well that doesn't leave anything for the discretion of the Judge.

Deliu Well respectfully your Honour I would say that there are three tests that the Judge has to go through, the trial Judge. Firstly is that whether to discharge the juror or not. Again that is not in dispute here but it is a separate and distinct step. The second step then would be are there exceptional circumstances. Of course if the trial Judge finds that there are not exceptional circumstances clearly the trial ends. But the trial Judge, if they do find that there are exceptional circumstances, they then have to consider the interests of justice, because exceptional circumstances specifically relate to the trial. Interests of justice are matters that could relate outside the trial, ie the victim's point of view, society's interest in pursuing a case etc. So, in other words, if interests of justice is solely discretionary and only exceptional circumstances within the provenance of the trial Judge, I guess your Honours, for lack of a better word, the Court is boxing itself in to only trial related matters and not looking at the entire picture. And your Honour I submit that can not be the case.

Elias CJ Well I don't understand the argument I'm sorry.

Tipping J Why don't you just seek to persuade us as a first step that there were not exceptional circumstances. If we are with you on that, that will be the end of the case.

Deliu Certainly your Honour.

Tipping J It is really very simple.

Elias CJ We don't want more than that.

Deliu No no of course that's a satisfactory conclusion for the appellant.

Tipping J If you don't persuade us of course then we may have to engage on the interests of justice limb but let us take this a step at a time rather than on this rather rolled-up basis.

Deliu Certainly your Honour I am more than pleased to do that.

Tipping J So why were there not exceptional circumstances here, can you give us some sort of 1, 2, 3, 4, 5 sort of points.

Deliu Yes, well firstly I guess the way to determine that is to look at what the trial Judge did find were exceptional circumstances and to determine whether there are or there aren't. The trial Judge essentially found two factors in support of exceptional circumstances. The first being that there were three weeks of evidence heard in the trial to that point. That is not exactly accurate because as your Honours saw in the original submissions on the 18th of March, appendix D, the calendar that I outlined actually shows that there was (1) a statutory holiday during that period; and (2) an Auckland power outage that obviously the trial did not proceed that day. So in fact there were only 14 days to that point, not even three weeks but, in any event, that is the first point that her Honour Winkelmann made.

The second one was essentially that the Crown had already closed that all that had had to happen was that the defendants would close, she would sum up and then the case could go before the jury. Essentially I think that point was that it's almost over no reason to stop now. So those were essentially the two factors found by the trial Judge in terms of exceptional circumstances. On the first point of the three weeks evidence having been heard, I guess the first submission that I would make on that would be that that's not all uncommon or unusual or out of the ordinary in serious criminal trials, serious drug trials and trial facing such a severe punishment. So it's the first submission that three weeks of evidence has been heard is not in and of itself exceptional and cannot be.

The second point relating in other words to the trial almost being over, if that were true that that should be the standard that is set well then Parliament could have simply put that into the statutory wording. When it did put into the statute the length of trial or expected length of trial, it simply could have put as another example if the trial were almost over or something to that extent. That is not anywhere that I am aware of in the Hansard Parliamentary history and it is not in the statutory wording. In other words, if Courts will say that on the basis of administrative inconvenience, well we are almost done why not wrap it up, that shouldn't be the test for exceptional circumstances.

There is further reasons that can be shown that three weeks in and of itself is not substantial. Firstly was the Hansard legislative history which

showed that the trials at the time of the amendment that were foreseen were of course *Rewa* going into the range of five months, which your Honours are well aware of, and then there were the other commercial fraud cases, one of which was 12 weeks expected to be, another few of which were expected to be 6 weeks. In fact out of all the cases cited in the legislative history they were all at least 4 weeks in length. So it is a submission that de minis, although it is not accepted, a trial of over a month should be exceptional. Again the primary submission is that a trial in the range of five months, as *Rewa* was contemplated to be, that clearly falls into exceptional, no argument there.

So essentially what this Court has to decide clearly is to decide if 100 days is exceptional and if 7 days in *Rajamani* is not exceptional where does *Wong* fit in. It is a submission your Honours that he can not fit into exceptional just on the basis of time alone. It is also important in *Rewa* to note at the time of the amendment being passed that it appeared to Parliament that *Rewa* was going to essentially possibly abuse the process. In other words, *Rewa* was representing himself, it was such a long trial involving so many victims, that he could almost try to use the law to ensure that he never gets convicted. In other words, he could have dragged his trial on so long and worn out just two jurors at a time and the state would have had to re-try him and re-try him until essentially the state could have just given up. It is important to note that in terms of the amendment that that was a collateral intent of the amendment. Whereas in the *Wong*, in this present case, clearly the appellant was not in any way attempting to abuse the system. It was a fluke circumstance that it even got down to 10 jurors when

Elias CJ Mr Deliu, the meaning of the provision may be wider than the circumstances that prompted it. Is the submission you are making about time that only a case of the order of *Rewa* with the numbers of complainants and the time falls within the category of exceptional circumstances or is it any case that is in some respect out of the ordinary?

Deliu Yes your Honour, two points on that. Of course (1) it is accepted that a case like *Rewa* would fall into the bounds of exceptional and of course on the flip side of that coin it is of course accepted that there can't be a bright line ruled, there can't be a set number of days one way or another. So no of course it falls on the individual aspects of a case. So, in other words, one two months case may be exceptional, one two month case may not be exceptional. So no I am not certainly not trying to impress upon the Court a certain timeline. But I am merely trying to address the trial Judge's factor, she addresses as a factor, so I think that it should be addressed.

Tipping J Would it be useful if you addressed some of the things that the Crown says, I know you will have a reply, but it might be useful if you were able

to tell us what in outline is your response to the Crown, because it is really the trial Judge said very little and that is not being critical. She was in the middle of a busy trial, but the Crown has sought to accumulate a number of things which they say are exceptional. So it may be that that is where your primary focus ought to lie rather than on the trial Judge who was just giving a very clipped assessment.

Deliu Yes yes your Honour. Essentially that was going to be saved for a rebuttal but in any event the way that I would essentially surmise the Crown's position is that, and I think put this under the catchline in both submissions, is that it is a matter of essentially administrative inconvenience. It is accepted that administrative inconvenience is a factor that has to be applied but it is at the same time submitted that, for lack of a better word, administrative inconvenience cannot in and of itself be enough to reach the level of exceptional circumstances because if it could then any trial Judge could find administrative inconvenience in basically any trial. Clearly to have to retry somebody will involve more costs, more time wasted etc. So if the standard will be set that low, then it gets into the area of the trial Judge's discretion which is not reviewable. So once the Judge has found that there is an administrative inconvenience issue that's it, it stops jurisdiction from appellate courts.

So I would submit firstly that no, administrative inconvenience alone cannot be. Money of course and time is an important factor but so is justice and so that can't be simply weighed against one another. Again alone. And I guess a related point to that would be that if Parliament really did think that administrative inconvenience was so important as to essentially trump any other issue, it could have simply put it in the statutory wording. It really didn't. So that alone shows that administrative inconvenience can't rise to that level.

Tipping J Well it is significant that Parliament has put in two tests, both of which must be satisfied, exceptional and interests of justice. And of course interests of justice can work both ways but exceptional is a fixed, albeit somewhat elusive, touchstone. So that does support your proposition that it is not just the interests of justice for the community looked at from the administrative or allied points of view but that point is well made. But what else do you discern the Crown is relying on?

Deliu Well again your Honour the Crown points to individual things but in substance, in the big picture, that is our submission that that is what it boils down to, is administrative inconvenience. Again that's a factor but it is submitted that in this case that factor alone cannot rise to the level of exceptional. Even in terms of society's interests in seeing cases finished. With the *Rewa* amendment, if I may briefly go off on that, what is important in that case as well in *Rewa* was that the victims, had there been

a retrial or a second retrial the victims, some of which were subjected to horrific crimes, may have had to have given evidence again and again and possibly again and so of course clearly that is not in society's interests to make victims suffer to that extent.

In this case your Honours it is a drugs trial. There is no discernible victim, whether the police or the DHA courier have to give evidence two or three times, honestly is not that big a deal. The police give evidence all the time, they are accustomed to it. And again even third parties that may be foreign to the Court system, certainly will not suffer to the extent that one of Rewa's victims would have suffered in having to relive the horrific crimes.

Tipping J Were there any significant civilian witnesses in the case from the point of view of the burden of giving evidence again?

Deliu No your Honour in my submission there weren't. I am sure the Crown can point to it if it feels that there were ones but again even if this Court finds that there were significant civilian witnesses that would be burdened by having to give it again, it has to be weighed whether there was, I guess for want of a better word, a *Rewa* victim burden as opposed to again administrative inconvenience your Honours whilst of course not preferable and that is something that the Courts want to disregard, again have to be weighed with the punishment in this case that was given. It is submitted your Honours that the appellant would have gladly sat another three week trial to have gotten a verdict by 11 or 12 jurors.

Tipping J Well he would once he got convicted.

Deliu Parden me your Honour.

Tipping J He would once he got convicted.

Deliu Yes, even the convicted point though actually raises an interesting issue. He was also partially acquitted and this again goes to show that it is very possible that one additional juror could have made a difference between full acquittals across the board.

Tipping J That has really got nothing to do with it. I probably am just being naturally provocative Mr Deliu. Do you perceive the Crown's case as being simply administrative convenience which is not enough. Is that it in a nutshell?

Deliu Yes your Honour in a nutshell it is.

Tipping J Is there anything beyond that that you feel needs to be said to try and head the Crown off.

Deliu No no your Honour, that was my understanding of the Crown's arguments. I guess, even if I may briefly touch upon a couple of minor points relating to exceptional circumstances, whether they apply to administrative convenience or not, as the Court sees fit. The first thing is that it is submitted on behalf of the appellant that I guess a formula that could be applied in a case to determine exceptional circumstances would be that the trial Judge would consider is it wrong not to go on. So, in other words, not is it wrong to go on but is there an urgent, is there a pressing need to finish this case now and here. I guess for lack of a better word that that kind of instinct can take a Judge, once determining all the factors, whether there are exceptional circumstances. There is nothing in this case, whether it's administrative convenience or anything else, that can really be pointed to a saying that if this case was not then finished there would have been a problem on a retrial. There simply isn't one.

Again, the argument is premised on the basis that firstly ten is the exception rather than the rule. So any derogation from that rule must be considered heavily so that exceptional circumstances has to be a fairly high level. Related to that is that this very Court itself in *Rajamani* said that the standard should not be set too low. So it is not just a submission that is being made, it is a submission based on this Court's own doctrine of less than a year ago.

Again, if I may briefly get back to trials, even in terms of the length of trials, even in terms of when the amendment was passed the Ministry of Justice report, which is at tab W, actually says that the Auckland High Court has noted that it is not unusual for their registry to hold two or three week criminal trials. This was dating back ten years ago when trials were to an extent a simpler process, and not as time-consuming, and even back then the Ministry of Justice noted that it was not unusual to have a three week criminal trial. So, again, it is submitted that it is envisaged in the passage of the amendment that a three week trial cannot be unusual. That is the actual wording from the Ministry.

A related point on that would be that the other case that we have cited in terms of an analogous case with ten jurors, the *Beazley* case, that case was also a drugs trial and well into its seventh week in that case. Now of course the Court in that case did find that there were exceptional circumstances to go on but again it goes to show the nature of drug trials in Auckland, simply three weeks simply does not rise to exceptional.

And, as a final related point in terms of time, I cited the New South Wales provision that actually dealt with alternative jurors but they actually

defined what a long trial means. It is the only statute that I could find that actually defines long trial. And New South Wales defines a long trial as three months. So it is my submission that if New Zealand were to adopt even a similar line of reasoning there is no way that the appellant's case can rise to the level of long enough to rise to exceptional.

Those are essentially the submissions on exceptional circumstances.

Elias CJ Thank you Mr Deliu.

Deliu Thank you your Honour.

Elias CJ Ms Markham.

Markham Yes may it please the Court. The approved ground of appeal is a narrow point in the Crown's respectful submission and ultimately turns on two issues. The first being the interpretative issue of what is meant by exceptional circumstances relating to the trial, and the second whether it was open to the trial Judge to find that test satisfied on these facts.

Tipping J Is it a question of open to or is it whether we agree with it?

Markham Well that is an issue I deliberately left fairly cloudy in that introduction.

Tipping J Well I noticed your, oh I see, you are going to address that are you?

Markham Yes Sir that was my intention.

Elias CJ Well you are really asking us to review *Rajamani*.

Markham Well the Crown certainly accepts that in light of *Rajamani* that the question whether exceptional circumstances exist is not a matter of discretion and is therefore capable of review.

Elias CJ But you say it is a matter of judgment which shades into discretion.

Markham Well it is a matter of judgment where reasonable minds might differ in the application of that standard and that a degree of appellate restraint is called for. So, with respect, I am not seeking to re-argue

Elias CJ We have to decide that the determination that there were exceptional circumstances was wrong.

Markham Yes well that is the ultimate question on the appeal.

Elias CJ But is any more are you arguing for more deference than that.

Markham It depends on what the approach is to wrong. It is simply an appellate Court.

Elias CJ But we think it is wrong.

Markham Yes, if it is the appellate Court saying we would have exercised the power this way, my submission would be that the starting point has to be that you have a decision of the trial Judge that was made on the spot and in circumstances where the trial Judge was best placed to assess matters of scheduling and court administration and burdens on witnesses and those sorts of things. So ultimately yes the question is whether the decision was wrong but I suppose there is always a question of the degree of readiness to intervene in an appellate situation and the Crown submission would be, in light of the approach taken in Australia and England, albeit under different statutory formulations, that an approach of some deference is called for but that doesn't require

Tipping J If an issue arises where the trial Judge has a distinct advantage over an appellate Judge, then that might be right. But if it is simply an assessment of primary fact whether that leads to the conclusion suggested surely, we said in *Rajamani* ordinary appellate principles apply, that has been elaborated on in that *Austin Nicholls* case in the civil arena. Isn't that really all that we should bear in mind.

Markham Well I certainly accept that if there were findings of fact and so on then that requires a different set of rules and so forth but

Tipping J Well there may be an assessment by a trial Judge that a particular witness found it hugely burdensome and it would be enormously onerous to put the witness through it again. Well that might be something you would tend to defer to but I can't see anything of that kind here Ms Markham.

Markham I would agree that there isn't anything of that kind here. My submission is, putting aside that principle of deference to factual findings, the very nature of the test is one in which reasonable minds can differ in the application and accordingly the approach of some degree of restraint is called for, it is not simply a question of the Court substituting its own views afresh. The starting point has to be the trial Judge's decision and whether that was wrong the burden is on the appellant to establish that. I don't suppose I can take the matter any further but I can certainly indicate that it is not the Crown's intention to re-litigate *Rajamani*. We lost that war.

Tipping J Well what you are saying is in *Rajamani* we said ordinary appellate principles apply. You are just having a little bit of a debate as to what they are in this context.

Markham Yes I suppose that is correct Sir and my submission would be that the terminology that is employed, discretions versus judgment, evaluation, the principles that are brought to bear, they are all tools ultimately that an appellate Court is able to draw upon and there is ultimately always degrees of readiness to intervene.

Tipping J But what really was exceptional here Ms Markham. I mean it's prima facie it looks fairly sort of routine.

Markham Well if I can approach that question your Honour by indicating at first what the Crown's position is in respect of the test itself and I don't intend to traverse any of the history of the 12 juror rule, which is in the materials. But in summary we do have decisions in both the High Court of Australia and the Supreme Court of the United States to the effect that the precise numerical composition of the jury is a matter of form essentially rather than substance and there is no reason in principle why the objectives of trial by jury can't be equally satisfied by a jury of a lesser number. It may become a matter of substance if the numbers are so reduced that the trial is no longer to be regarded by jury and in the United States we have got the unanimous jury of six as being the minimum. In Australia the point

Elias CJ Why do we need to go into this though?

Markham My point Ma'am simply, and I can finish

Elias CJ Because really section 374 is a direction that an accused has a right to be tried by at least 11 unless there are exceptional circumstances.

Markham Well the Crown's essential submission Ma'am if I can wrap it up with this is that the New Zealand legislation doesn't bring us to a point where the substance of the right to trial by jury is threatened so there is no reason to give that phrase "exceptional circumstances" relating to the trial anything other than a fair and purposive interpretation. And in terms of that purpose of interpretation the Crown would submit that although the *Rewa* case certainly may have been the catalyst for legislative change it doesn't follow that it provides the measuring stick. It was an extreme case, certainly more than exceptional, it was unique.

The Crown would also submit that the Select Committee materials suggest that trials of at least four weeks were at least

Elias CJ I am troubled about the use of this material. It really is going quite far beyond the sort of material that is generally looked at in terms of preparatory information.

Markham Your Honour I am referring to the Select Committee Report rather than the correspondence that my friend

Elias CJ Oh I see I thought you were talking about the Justice Department material and so on.

Markham No Ma'am my friend I think cited that. I was referring to the Select Committee Report itself which does refer to trials of at least four weeks as being at least potentially within the purview of the amendment. And it may be of some relevance I suppose to note that the Criminal Procedure Bill that is currently before Parliament allows for Judge-alone trials where the trial is likely to exceed four weeks.

So the length is a primary but not exclusive focus the Crown would accept and it is clear that Parliament was also concerned about the particular burdens placed on jurors by particular trials and although Parliament had in mind that the sexual violation trial in *Rewa*, the Crown would equally submit that complex trials involving a substantial volume of evidence and so forth would also be within the policy of the amendment.

And I think the final point in relation to the test is a response in part to one of my friend's submissions and that is that in the Crown's submission the concept of exceptional circumstances involves weighing of various factors against a notional norm. And the Crown's submission would be that in determining what that norm is the proper comparison is with criminal jury trials generally rather than Auckland High Court drugs trials, as my friend has suggested, because that would unduly narrow the application of the subsection.

So in terms of the facts of this case your Honours as I have set out the Crown's position in the submissions. The key features in my submission are that firstly this was effectively a four week trial. I think the jury returned its verdicts on the Friday of the fourth week. Now I am not suggesting that that is determinative in itself but it certainly in the ballpark in terms of what Parliament apparently contemplated.

Blanchard J But how unusual is that? Just from the newspapers one can see that quite a few trials are exceeding that sort of length or are three or four weeks. It seems to be happening all the time.

Markham Again I think that it depends on what you hold up as the norm. It is certainly in the High Court jurisdiction trials of increasing length are not

uncommon but looked at overall in terms of District Court jury trials my submission would still be that a four week trial was unusual. Now I am not suggesting that that is of itself enough to trigger the application of the subsection. It is in combination with the other features that the Crown has pointed to. And the most significant feature in the Crown's submission in that respect is that this was a two weeks trial, scheduled for two weeks, that ran over by two weeks effectively, doubling in length.

Elias CJ Well how why is that important?

Markham Well in terms of the policy that I underlies subsection 4(a), in the Crown's submission a trial that runs over to that extent is more significant than a trial that was always scheduled to last for four weeks.

Elias CJ Why?

Markham And that is well that is because first of all you have the flow-on effect for other litigants in the Court who have to have their cases re-scheduled.

Elias CJ So it is, it strikes me that the submission comes close to saying that it is a punishment. If you don't stick within your time you are going to be at more of risk.

Markham It is not a question Ma'am of apportioning blame. It is simply looking at the reality that this trial ran over by two weeks which in itself is unusual.

Tipping J Well the taking of four weeks is a given, it has happened. The re-trial, one would have thought with all these rulings given, here there and everywhere, they won't have to be replicated. There is only one accused. It is going to be much shorter.

Blanchard J I suppose one has to look at that as at the time the Judge is making the ruling as to whether there were exceptional circumstances then. And the Judge wouldn't know whether, which way the verdicts were going to be.

Tipping J But the point, perhaps the more important issue is to my mind is the fact that all these rulings that seem to all, interlocutory applications and so on, which seem to have intervened and lengthened it and so on, the Judge would know wouldn't she that they won't have to be revisited. They are effectively pre-trial rulings for the purposes of the next trial.

Markham Well I would accept that that is part of the equation Sir that you do look I suppose to the nature of any re-trial and the likely length of that but the other part of the equation, and that is sort of what my submission was addressing, is what is the time that has been wasted already and what

inconvenience has this jury already been put to, these witnesses have already been put to.

Tipping J Well the concept of wasted I think implies a value judgment Ms Markham which I don't think this Court could take on board. I know what you are saying but I don't think we can accept that.

Blanchard J Perhaps your better point would be that you might be more likely to start losing jurors when the jurors have understood from the beginning that it is a two week trial and it is doubled in length because then you start to run up against commitments that they didn't see as a blockage to being on the jury.

Markham Indeed Sir and that is my second submission in relation to the importance of a trial that runs over time, from the perspective of the policy that underlies the amendment. There is an added imposition on jurors and on witnesses in such a situation because all of their arrangements have been made on the basis of a trial that is scheduled to run for two weeks. So there is the flow-on effects.

Wilson But wouldn't that be a reason for not proceeding with the trial?

Markham But we are at a point where

Wilson Yes I can quite understand the centre point jurors are told when they are empanelled two week trial make arrangements accordingly. After three weeks some difficulties might be caused to the jurors but wouldn't that be a reason for terminating the trial rather than proceeding with ten?

Markham It might depend on when that risk arose I suppose and if it arose early in the piece then that might be the judgment call that the trial Judge makes. But here it was the eleventh hour essentially after the Crown had finished closing its case that this issue arose. And the Judge took the view that on balance it was better to proceed than not.

And to come back to the point earlier, and my reference to wastage which perhaps was not the terminology that I intended, the High Court of Australia in *Brownlee* looking at this issue accepted that flexibility in juror numbers is an important part of maintaining public confidence in the ongoing viability of the jury trial as an institution. And it would be contrary to that to needlessly abort trials at the last minute when you have

Elias CJ But then they are not dealing with a statutory provision like ours.

Markham No the statutory provision was slightly different in that it left it open, there is no exceptional circumstances test. Although the common law position

is one that requires I think evident necessity. And certainly the approach of the High Court of Australia was not to treat decisions to continue trials as the norm. They were very much the exception and there had to be positive reason why the Court wanted to continue the trial. But the principle I think is of general application and that is where you have a trial that has substantially run over time and the jurors are already inconvenienced to that extent, to pull the plug if you like at the eleventh hour may well be to undermine that public confidence in the jury system.

Tipping J Isn't that a product of the way the legislation is presently framed rather than an interpretation or application point more?

Markham I am not sure, with respect Sir, I can't follow

Tipping J Well I am just saying, there may be a case arguably to make it easier if you like to go on with less than ten, sorry with ten. But we have to apply the connotations of the present test don't we. We can't, as it were, re-jig the policy by way of interpreting the present test in a more liberal manner, if you like. I mean there has to be something exceptional, which I would have thought in this context had to mean at least well out of the ordinary.

Markham Well I would agree that we have to find something exceptional but equally I think that the policy of the legislation was very much directed at the balance of administrative convenience if you like, and I know that my friend has suggested that in a somewhat disparaging way but that is the policy behind the legislation. Parliament was concerned about the increasing length and complexity of trials and the effect that that has on the court system and Parliament was equally concerned about the added imposition on jurors and witnesses and indeed on accused that occur when a trial fails for whatever reason. So those reasons are all essentially reasons of convenience and although we do have a test that needs to be satisfied in my submission there is nothing, there is no strain to the language to hold that the circumstances of this case meet that test. And I think that the trial, a two week trial that runs over by two weeks, is in itself an exceptional circumstance in the Crown's respectful submission.

Blanchard J If we go along with your submission and hold this to be exceptional circumstances aren't we going to give trial Judges a terrible problem in determining what is an exceptional circumstance and what isn't. If we confine it to the very long very complicated trials like *Rewa* that problem will arise much less frequently and in most of those cases it will probably be fairly obvious what the result should be.

Markham Well Parliament considered a submission that would have had the phrase "exceptional circumstances" further refined to limit its application and Parliament deliberately chose not to go down that road. My submission

would be any statutory test of this nature carries with it difficulties in application but the Court shouldn't shirk from its responsibility to decide.

Tipping J I am influenced to some extent Ms Markham by the fact that they added to interests of justice this additional concept of exceptional. They didn't simply say if the Judge thinks it is in the interests of justice. Now that could have led to a jurisprudence at a lower level of out of the ordinariness. But they have got the two gateways and before you exercise the discretion. So I can understand the Crown's position but really I see you as trying to sort of lower the boom by interpretation.

Markham Well I certainly accept that there are two thresholds that need to be satisfied and that is more significant than one. But I suppose that my submission would be that we have the Select Committee Report referring to four week trials as at least potentially being within the ambit of the legislation. It is not a strain on the language to include the circumstances of this case when all of the features that the Crown has identified are taken into account.

McGrath J The Minister did say that he that the general position would be if the number of jurors dropped below 11 the trial could only consent if there was, it could only continue if there was consent didn't he?

Markham Yes and that follows from the nature of the statutory test. It recognises that it is an exception to the norm of 11. Um yes

Tipping J Yes exceptional of course is a word of potentially quite elastic meaning. It's popular meaning is probably not, is probably tougher than some legal meanings that have been given to it. But, even on that premise, I still have anxiety about allowing this one through. What really is it, is it that it is just going to be oppressive to have a new trial. It just shouldn't have been contemplated. Because you have got to weigh the, go on with ten or have a new trial. Those are the sort of alternatives obviously. Is there something about the concept of having a new trial here that, just means that the balance should have gone the other way. I just don't see it at the moment.

Markham Well of course the focus of the inquiry is the circumstances as they were known to the trial Judge at the time.

Tipping J She has got to decide do we abort and have a new trial or do we go on. Now part of the consideration surely must be the oppressive, if you like, of the new trial for the system as opposed to the accused's rights. But I just can't see what was going to be so terrible about having a new trial here.

Markham Well I certainly can't point to any particular feature that would mean that a re-trial was oppressive as your Honour suggests.

Tipping J Well that is probably too harsh a word but I just want your help in identifying why, if I had been sitting there, I should have favoured the going on.

Markham Well because it was a reasonably lengthy and complex trial involving multi accused, the use of interpreters, it required a special courtroom, there were a number of witnesses, some of whom were civilians but not many I would accept. For all of those reasons. And, when you add to that the fact that the trial had already progressed to the extent that it had when these problems arose, the Judge has to weigh up whether it is worth pulling the plug or pressing on. And in my submission the latter course was available to her Honour.

Tipping J There was no particular witness factor here like there was said to be in *Rajamani*.

Markham There was a witness your Honour who gave evidence via video-link from the United Kingdom.

Tipping J And was cross-examined on that, by that means?

Markham Yes. And I don't have any information as to whether he is still resident in the UK or what the story is but I suppose in terms of *Rajamani* he wasn't compellable. He was a former police officer so there is no reason to expect that he would be not co-operative.

Tipping J Yes thank you.

Elias CJ Your emphasis on *Brownlee*, which of course is, the High Court wasn't concerned with the reasons for discharge which is the case here. It was simply concerned with whether the provision of the New South Wales I think it was legislation conformed with section 80 of the Constitution and the right to trial by jury and it said that no, trial by jury has changed and that's fine. But there was no discussion of whether the circumstances came within the statutory ability to proceed with less than 12 jurors. And that is the area that we are in.

Markham Yes the reason that was cited was really in answer to my friend's submission that this was a BoRA interpretation exercise.

Elias CJ Yes I understood that but I understand you a moment ago to be invoking *Brownlee* in aid of the submission that you are putting to us on exceptional circumstances and I am simply raising with you my perception it has

nothing to do with whether in that case the conduct of the trial came within the provisions of the legislation.

Markham Your Honour is quite right. There wasn't any particular discussion about the facts of that case and whether it met the statutory requirements. However, there was a general discussion about the sorts of policy imperatives that underlie the statutory modification of the 12 juror rule. And I think it was Justice Kirby that talked about the importance of maintaining public confidence in the jury trial system and the need for flexibility in juror composition, in order to reflect the realities of modern trial conditions. So it was

Elias CJ Is he the only Judge referred to that. Because I would like to be taken to what he said, if it is a consideration you say is a general one to be taken into account.

Markham Yes Ma'am I'll just find the reference.

Elias CJ Is it in your written submissions your reference.

Markham It possibly is Ma'am yes. At paragraph 26 of the respondent's written submissions there is reference there to the passages in *Brownlee* and the quoted passage is that of Justice Kirby.

Tipping J "It is designed to meet exigencies which exceptionally, but occasionally, arise." So he is analogising "exceptional" with "occasional". Which I think probably does capture it to a substantial extent.

Markham Yes I mean there is a danger of reading exceptional in too narrow a way as though it was very exceptional or highly exceptional.

Tipping J Yes quite.

Markham So unless the Court has any questions.

McGrath J Ms Markham the one factor you do identify as unusual was the circumstances in which the second juror was excused. The incident that the Judge was satisfied it intimidated her. That doesn't seem to be a matter that you wish to advance as an exceptional circumstance and I can see there might be a reason for that. But did you consider that.

Markham Yes I think it was included in the original leave submissions as one of the factors but, on reflection, the Crown took the view that the exceptionality of the reasons for discharging the juror is a separate question to the exceptional circumstances relating to the trial. So, for example, a juror

might have a rare tropical illness or something of that nature which would certainly be exceptional in itself but

McGrath J But it is not an exceptional circumstance relating to the trial in the words of the statute, in other words.

Markham Indeed Sir. Having said that there may be some situations where the circumstances surrounding the discharge of the juror will be relevant and I had in mind in particular the case where the accused is actually implicated in the witness, in the juror intimidation. So if there is an actual attempt to subvert the process by the accused then that may, in my submission, be relevant.

McGrath J So this case, although the juror was intimidated, couldn't continue to serve in the trial because of that, the fact that the incident generating the intimidation was unconnected with this particular trial, although it took place at the courthouse, is the fact that it lead the Crown not to advance this as an exceptional circumstance.

Markham That is correct Sir. The trial Judge was satisfied that it was entirely unrelated and that the offender had no knowledge that this woman was even a juror.

Tipping J Logically it is just the same as if the juror dropped dead I would have thought.

Markham Yes. Yes there may be cases that are less clear cut than this one in terms of the level of the accused's involvement in the intimidation.

Elias CJ Although that would almost certainly be grounds for discharge of the jury on other, on another basis.

Markham It may well give rise to issues of contamination and so on Ma'am yes.

McGrath J I mean the words relating to the trial obviously require an appropriate form of connection which the death of a juror couldn't come near. But I can see that there would certainly be circumstances which the intimidation of a witness might be seen as relating to the trial.

Markham Yes.

McGrath J But anyway the Crown doesn't want to put that up in this case.

Markham That is not advanced in this case Sir no.

Elias CJ Well thank you Ms Markham.

Mr Deliu, do you want to be heard in reply?

Deliu Yes, I would actually ask the Court if it is possible that my colleague be heard in terms of whether he can address the Court or not.

Elias CJ No there is no need, you have the conduct of the argument, you have heard the submissions made, you are invited to respond on behalf of the appellant.

Deliu Certainly your Honour, as the Court wishes. I would just like to preface my comment and they are relevant in the sense of the interests of justice or a miscarriage of justice, either way, in the sense that the right involved here is a substantial right. And that alone should have been a factor that the Judge considered. In other words, I guess in light of sections 6, 24 and 25 and 27 of BoRA, the jury trial is, in the appellant's submission, the most fundamental

Elias CJ How does this arise out of the submissions made by the Crown?

Deliu It goes to the issue your Honour of the Judge, the trial Judge, in making a balancing test in determining whether something is or isn't an exceptional circumstance, should have regard to all relevant factors. And it is the appellant's submission that this a highly relevant factor. In other words the right that has been lost potentially is more serious than other more minor breaches in that sense.

Tipping J Are you saying that the word "exceptional" in this context should be interpreted having in mind the importance of the right which it is apt to override. It is no more and no less than that, as I understand it. It is a context, it's a contextual point as to how to interpret the word "exceptional".

Deliu Yes yes your Honour. But at the same time the context can't be looked at in a vacuum, it must be looked at in the wider frame.

Tipping J I am trying to help you Mr Deliu.

Deliu Yes your Honour. I am just trying to advance it even a step further but I am willing to leave it at that.

Elias CJ Well then you run straight in to the sort of discussion in *Brownlee*, because if you are saying the right is a substantial right by reference to the New Zealand Bill of Rights Act reference to trial by jury, then you are into the discussion that the High Court had saying that it is quite sensible for legislatures to limit that right and they do so in all jurisdictions.

Deliu Yes your Honour, two points on that. Firstly, not all jurisdictions and it is in response to the Crown. In the United States Federal jurisdiction 12 stands to date. Another example that I, the Federal jurisdiction, another example that was in my written submissions was in New York State, one of the biggest jurisdictions in America. Again 12 stands, absent the defendant of course, waiving it as rights can always be waived. In fact even in the New York case that I gave, when the number was to drop below 12 it was in fact not the defence that objected, it was the people that objected. So (a) that shows the importance, at least in that jurisdiction, and even the states, at least 21 states that I could research and point the Court to, still hold 12 to be important. So I don't even want to go down that slope quite.

Elias CJ Well it is probably not necessary for you to do so in the sense that the very fact that there is a reference in the Bill of Rights Act to trial by jury, the fact that this legislation maintains the right to not go below 11 unless there are exceptional circumstances all indicate a legislative view that trial by jury is very important. That is really the submission you are making.

Deliu Yes and also related to that, because your Honour raised it and I do wish to address it in the sense of legislatures derogating the number down, clearly that has happened in this case but the fall-back position goes to section 6 of BoRA where a statute must be read, must be given the preferred meaning where at all possible. So, even if the legislature has derogated to whatever extent possible, this Court has itself in *Rajamani*, I forgot the paragraph number, said that there is a right to trial by 11. So this Court's own decision actually in a way draws the bright line, even though Parliament has derogated, this Court has decided to put in its own judgment as to I guess how far or how little the derogation should be. Again the standard should not be too low. That is this Court's own reasoning.

Now in terms of the factors, again it is the appellant's submission that the trial Judge simply did not put her mind (a) to all the relevant factors. I can address the Crown's points that it did raise as being exceptional. The first being that the length of time is not unusual in the District Court jurisdiction. Firstly your Honours I could not actually find statistical data to actually show what an average trial is. It is unfortunate that I couldn't present the Court with such evidence. But it is not really relevant in this point, in this sense, because this was a High Court trial (a) and this was a very serious trial with a potential for life imprisonment. So even the Crown's own submissions concedes that in the United States, in a death penalty case, the right to trial by 12 stands. So I would make the analogous submission that somebody face life imprisonment in New Zealand, the harsher sanction possible, this case rises to the highest level.

Blanchard J Are you suggesting that the balance should be struck differently depending upon the seriousness of the consequences of being convicted?

Deliu I need to tread a fine line there because I don't want to say that rights aren't important, if you are facing one year or two years or five years imprisonment. But a factor that the Judge has to, so in other words it is not a bright line rule but a factor that the Judge must take into a consideration is the potential for punishment. Again it goes back to the administration convenience argument.

Blanchard J It is going to make life even harder for Judges if they have to factor that in as well. I would have thought that there really is only the one test of exceptional circumstances and it applies the same no matter what the seriousness is. You might then say well in that case it should be pitched at the higher end.

Deliu Yes your Honour. Then I guess I would make that submission. I guess what I am saying your Honour is the appellant concedes that there is a line that applies across the board to all criminal cases where there is a right to a trial by jury. So in other words there can be a minimum standard that the Judge will afford a defendant. But that doesn't mean that a Judge can't afford additional protections if the case requires. Again the statute's own wording uses interests of justice. So we have to look at it in the entire picture of the individual case. That is why there is some flexibility in the statute.

Now the second point that the Crown, so again relating to length of time this was a High Court case, it was a life imprisonment case, it is of the highest and most serious level possible, and that is simply shown by the sentence that was eventually given. In fact to an extent the sentence level and the mandatory minimum is quite in line with *Rajamani*, even though obviously *Rajamani* was a murder case.

The second point that the Crown raised was essentially that the case ran over and that was somehow weighed against the defendant. Firstly, and this was put in the written submissions, a defendant asserting his rights, whether they are by applications done during trial or however, whatever else comes up in a trial, that can't be held against the defendant at a later date. In other words, just because he or she could have tactically chosen to make applications at certain points in time cannot later be held against them because that in my submission would itself be a violation of BoRA. If defendants are to be put on notice that they had better make their applications at the right time, whatever the right time is, or else the Court will just proceed with ten jurors, that is essentially punishing the

defendants for essentially asserting their rights. They have right to make applications during a trial or before a trial.

Secondly, in terms of the retrial, your Honours were quite right in saying that any second trial would be shorter than the original trial. There would be less evidence as against the three co-accused that were acquitted. As your Honours have said, the applications have essentially been decided. So even though clearly her Honour the trial Judge didn't know at the time how long an eventual retrial would take, she still would have had to have considered that it would be shorter. So that diminishes the administrative convenience argument in any event, whatever weight that is given.

The third point that the Crown made was that essentially that it is not, that the flow-on effects for others and it would take their time. Again this in a way dovetails back to the defendant asserting his rights. Yes there are flow-on effects that happened in cases when they are heard but defendants, especially criminal defendants, should not constrained in their rights merely on those flow-on effects. There are delays; people have to wait for criminal trials to happen. That is the system. Everyone understands that and accepts that. A particular defendant should not be punished for that. If the flow-on effect is bothersome and if the system gets too bogged down, it can simply hire more Judges, it can impose some mechanism to remedy that but punishing the defendant is not the remedy for a flow-on effect.

There are also some other issues that essentially were not addressed by the trial Judge. The first one is essentially that the evidence was weak. The evidence was clearly fairly weak against the appellant.

Elias CJ But how does this arise out of the submissions we have heard from the Crown. You are speaking in reply.

Deliu Yes your Honour. It arises I guess in the sense that for two reasons. Again I am mindful and wary of the proviso.

Blanchard J The Crown wasn't relying on this being a strong case. So you are making a point in rebuttal of something that has never been put up and that you are not permitted to do.

Deliu Yes your Honour. The reason that I am trying to address it, is firstly that the Crown by implication I think in its submissions, in other words would have made an implied submission that the proviso can apply in this case, notwithstanding any other issues. So I am

Blanchard J Well I thought we had made it abundantly clear in *Rajamani* that the proviso can't apply.

Deliu Yes your Honour you did. My reading of that was on the facts but if not I can move on from this.

Tipping J I don't think you need to address the proviso.

Deliu The next issue that the Crown did address was essentially the arrangements. Again the points that the Crown made, if I can briefly go through them, the first one was that this was a complex trial. With respect your Honours it wasn't at all complex for a drugs trial. There were four co-accused, there was at least a hierarchy that was alleged, the charges were simply importation, distribution and of course there is the money laundering trial. There is nothing in and of itself that makes it complex, certainly not to rise to the level of exceptional. It is submitted that cases like this happen in the High Courts on a regular basis and cannot be complex.

The second point that the Crown raised was that there were multiple accused. Again, just as an example, in *Beazley* there were seven accused. So clearly four accused doesn't, isn't so unique in and of itself. In fact I don't think that was even a factor that was raised in *Beazley*.

The third point was essentially dealing with the special facilities that had to be made to accommodate any eventual re-trial, ie. the video-link evidence that was given. Again firstly, even that in and of itself isn't that unique. The video-conferencing facility is there for a reason to be used. It is not this

Elias CJ I don't think you need worry about this. And we do usually expect that people will address in their opening the matters that are traversed in their opponent's written submissions. That is why we have this exchange of written submissions. But if there is anything that you feel you didn't get an opportunity to put, we will hear you on it. But for the future we would expect you to address those matters in your opening but certainly nothing was developed by the Crown on that point.

Deliu On the video-link point?

Elias CJ Yes.

Delui Yes, yes the reason I didn't go on in my opening submissions as much as I certainly would have liked to is that I was waiting on the Court's guidance that if the Court felt that we needed to go past exceptional the Court would intimate that. I didn't

Tipping J We are talking about exceptional only now. You are trying to go wider and you don't need to at the moment. Because if we are with you on exceptional that will conclude it. If we are not, we may have to revisit.

Deliu Yes yes your Honour I accept that. Well then I guess I would just like to briefly, if I may, this does go to the heart of essentially drawing whether there is a distinction or not between *Rajamani* the points that I did make even in the written submissions are

Tipping J The Crown didn't suggest that there was anything to be derived from the facts of *Rajamani* to assist here. You are out of order. Unless other members of the Court feel that I am going, you are, the Crown did not rely on *Rajamani*'s facts and that would be ridiculous reasoning anyway.

Deliu There is one thing that the Crown did point to again and I am bringing it up by analogy, is the number of witnesses. I am trying to make the analogy that the number of witnesses in this case was not at all exceptional in and of itself, as shown by *Rajamani*. So, in other words, this Court found or held in *Rajamani* that there were not exceptional circumstances and essentially the points that were argued in *Rajamani* were the length of the trial, the number of the witnesses and the third point was the Australian witness' compellability. So the Crown did raise a number of witnesses and the Crown did raise length of trial. And in a way the video-conferencing and the Australian witness, while not directly on point, are somewhat related. So I am merely just trying to

Elias CJ Well, speaking for myself, I can't see the use of video technology is going to matter at all in the considerations that we have to weigh here.

Tipping J What the Crown did say, much more significantly perhaps, I don't know, was that you know this need to organise a special courtroom and interpreters and so on. Now that is a genuine reply point, if you have something you want to say on that.

Deliu Yes I would your Honour. The first point I would make on that is the arrangement of an interpreter isn't in and of itself in the Courts unique, especially in the present day. New Zealand is becoming much more of a migrant society which by implication means that there will be more foreigners unfortunately tried in the criminal courts and they will have to be given access to an interpreter. The second point on that would be even the language itself is one of the most common, if not the most common, of the migrant languages that are present in New Zealand. So I guess it were possible if there were an unusual or odd dialect that would be difficult to bring in such an interpreter, that might be a factor. But it is simply not present in this case. The right to an interpreter is the right to understand a trial. It relates directly to the right to present a defence. So, with respect

your Honour, I would submit that the interpreter issue alone is not at all exceptional.

Another point that the Crown did address was that the trial had already progressed to a stage where essentially it should have just been wrapped up. Again the rebuttal I would make on that is the point that I even made in the opening. I think that the test that should be, not the test, but the way that the Court should look at it is, is there a compelling reason, exceptional circumstance, to use the statutory wording to go on. If there isn't an exceptional reason to go on, I submit that it doesn't matter if it's the first day of trial, the fifth or the last. Either there is an exceptional circumstance to go regardless of when that time is

Blanchard J But that is just repeating an argument you have made already.

Deliu Yes but I am simply trying to elaborate that the appellant submits that it doesn't matter that it was the last day. It simply is not, will never rise to an exceptional circumstance, again alone.

Another point that the Crown did raise is that there should be flexibility in jury numbers. A submission I would like to make in that regard is relating to other jurisdictions and I have given the example of Australia. New Zealand is a smaller country with obviously less of a jury pool. So it is my submission that what Parliament has done by going from 11 to 10 in exceptional circumstances is attempting to firstly still maintain the bedrock right to a jury. So Parliament, by the wording, must not, which we have already gone into, has made that a very important right. In terms of having flexibility in jury numbers, other jurisdictions like the United States and Australia provide for alternatives. Again they are more populist jurisdictions; they just have bigger jury pools.

Elias CJ But what is the submission directed at, that we can do anything about.

Deliu Again it goes back to section 6 of BoRA and it is that New Zealand by virtue of being a small country and a smaller jury pool essentially the only safety net to preserve somebody's right is the trial Judge and is the trial Judge properly weighing the exceptional circumstances. If a trial Judge doesn't do that your Honour, there is no safety net, as in Australia or the United States where it might not come to this. Where alternatives can simply resolve the problem and trials will never or even far rarer get down to 10. It also goes to the heart of administrative convenience in terms of discussing whether there should be a re-trial with obviously the effects it has on jury pool usage. Essentially it was one of the Crown's points that it has a flow-on effect. Of course if jurors from this case are not used to their end, jurors from another case will essentially have to be used. Um again that is my point on that is that Parliament's very use of "must not"

and this Court's very own decision of keeping it 11, shows that flexibility in jury numbers is not that important a factor. It simply isn't.

If your Honours have no further questions relating to exceptional circumstances, or anything else, that would be the appellant's rebuttal.

Elias CJ No further questions thank you Mr Deliu. We will take a short adjournment and consider how we will proceed in this matter.

Court adjourns 11:21am

Court resumes 11:39am

Elias CJ For reasons to be given in writing later, the appeal is allowed, the conviction is set aside, an order for re-trial is made. Any application for bail must be made to the High Court.

Thank you counsel for your assistance.

Court ends: 11:40am