IN THE SUPREME COURT OF NEW ZEALAND SC 61/2008

SHANE EDWARD WILLIAMS

Appellant

v

THE QUEEN

Respondent

Hearing:	26 February 2009
Coram:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	L Cordwell for the Appellant B J Horsley with C J Curran for the Respondent

---

CRIMINAL APPEAL

MR CORDWELL:

May it please Your Honours, counsel's name is Cordwell, I appear for the appellant.

ELIAS CJ:

Thank you Mr Cordwell.

MR HORSLEY:

May it please Your Honours, counsel's name is Horsley and I appear with my learned friend Mr Curran for the Crown.

ELIAS CJ:

Thank you Mr Horsley, Mr Curran. Yes, Mr Cordwell.

MR CORDWELL:

Your Honours, this matter has had a long and protracted history and it's the history and its potential implications, in my submission, that lies at the heart of this appeal. The first ground relates directly to the length of that history and its implications.

Ma'am, Your Honours, I have made it very clear in my submissions that the delay between the appellant's arrest and the eventual trial in 2007 was clearly undue. Now, whether one uses, as the Crown describes, a global intuitive assessment of the delay, which I submit His Honour Justice Asher did not use, or a phased base analysis, the only conclusion is that there was a breach of 25(b).

I won't go through Justice Asher's decision or my submissions paragraph by paragraph, but suffice to say that Justice Asher's decision, in my submission, on the 12th of August correctly stated the law in relation to *Martin* and following the relevant factors in the case of *Morin* from Canada, and he set out quite correctly all the factors to be considered in assessing whether or not the delay was undue. He also, in paragraphs 20 to 23 of his decision recognised the reasons behind the right conferred by 25(b), and as my learned friends and I have both conceded, he accurately recounted the timeline of the proceedings, so that certainly isn't in dispute. Specifically too, he recognised that it was accepted that delay without any evidence of specific trial prejudice could still be undue and he quoted Your Honour Justice Blanchard in paragraph 31. You'll see that quote in his submissions.

TIPPING J:

That's not in dispute, is it?

MR CORDWELL:

Not at all. But Your Honours, I wish to make a number of points in respect of the reasons and causes of delay. This is something that Justice Asher did in his decision and he did not take the global approach that the Crown say he did. He went through all the considerations in *Martin* and *Morin* quite carefully before he found the delay was undue. In relation to the first ground, of course, it is submitted that in the circumstances, a five year delay was far too long and I reiterate what Justice Asher said, that the delay was extraordinary, and it, in fact, as he conceded, exceeded a delay in the nearest comparable case by a substantial margin. He mentions the case of *Daga*, which involved, as Your Honours are well aware, four fixtures that were adjourned. The Court held that it far exceeded an acceptable standard.

The closest in circumstances, because it was another drug case, Your Honours, was a case of the *The Crown and Harder* and that related to a drug operation called Operation Flower that had a not dissimilar checkered history in the Auckland High Court. The stay wasn't granted there, of course, because it was seen as, the delay was seen as partially being contributed to by the accused himself.

There's a reference also in Justice Asher's decision, quite correctly to the Auckland District Court and the Attorney General where 50 months had elapsed and the prosecution was seen as contributing to that delay by waiting six months before, in fact, they applied for the review.

TIPPING J:

Doesn't this focus on the, just the raw number tend to distract from the real enquiry?

MR CORDWELL:

Well that is certainly the main triggering point here Your Honour, the real enquiry is whether or not there is a risk that there would be an unfair trial as a result of this breach.

TIPPING J:

Well I'm not sure that that is the real enquiry is it, Mr Cordwell? The question is whether the delay, whatever its length, was undue.

MR CORDWELL:

Yes, and that is why the first triggering feature, Your Honour, has to be seen as the length of time –

TIPPING J:

Oh yes, of course.

MR CORDWELL:

And then go on to see what the –

TIPPING J:

But you can't just take much out of length alone, can you?

MR CORDWELL:

No, you couldn't because if it was effectively the appellant that had caused the delay through one reason or another, the length probably wouldn't matter too much, but certainly, he did go on to look at some of the causes and looked at other factors that were set out in *Martin* and *Morin*.

TIPPING J:

I would be prepared immediately to accept that 60 months, on its face, is pretty extreme in our system, but that's as far as you can really take it, isn't it, on its face, which doesn't take you very far?

MR CORDWELL:

Well we've got that factor, which seems to be extraordinary. My submission would be that the analysis of all the other factors would have to come up with something equally extraordinary on the other side of the ledger before effectively, the length of time was pushed off, as effectively almost a trump card, and –

McGRATH J:

Isn't it really, Mr Cordwell, not so much the length of time, but the – looking at the impact of the interests that the right in question protects? You've mentioned one, that as time goes on there's an erosion, this prejudice can arise, erosion of memories and that sort of thing, and there are other matters that are mentioned in the judgment, but in general, the sort of stress and anxiety and punitive effect of delay, particularly if someone's not on bail, but even if they are on bail, but don't we have to look really at the impact in this case on those interests to decide if it's undue, rather than to get too fixated by the length of time?

MR CORDWELL:

And Justice Asher did so, Sir, and we've obviously got the liberty aspects where the appellant was under stringent bail conditions for quite some time. He, after a while, of course, was incarcerated because he breached some of those conditions which, in my submission, was almost inevitable because of the time that was passing. Even once the decision of Justice Heath came out, there were still conditions imposed which restricted the liberty of all of the accused, of course, the appellant, and specifically then, the natural expectation of the appellant and the other accused, were that considering what Justice Heath had said in his decision, it was natural for that expectation to be that this trial is not going to proceed, even though they knew there was going to be an appeal.

So what happens is that there's, of course, the liberty issues, the security issues, the fair trial issues which Your Honour has mentioned, but we have the length of time, which causes concern, because obviously there's a

question of whether or not you're prepared to accept that, at one stage, there has to be an inferred prejudice. Justice Asher mentions the problems of such delay on memory in 61 and 62 of his judgment, paragraph 61 and 62, but interestingly enough, paragraph 61, he talks about the lack of specific prejudice can be explained by the fact, and he goes through the kind of evidence in a drug trial, you know, the intercepted conversations, et cetera.

Now, that seems to focus, with respect to Justice Asher, on the fact that there is no prejudice to the Crown, because the evidence is there. Paragraph 62 goes on, and he effectively accepts, in my submission, that there was general prejudice here, and he talks about the erosion of memory, he talks about doubtless that there's general prejudice, it's inevitable that the accused, in having to respond to events that took place so long ago will suffer some disadvantage. Now, considering that this trial was all about the evidence that was mentioned in paragraph 61, he then goes on to outline the problems that would be natural for these accused to have to answer that evidence, and it seems illogical that there couldn't be some prejudice when those natural problems are accepted by the High Court Judge and then he goes on later on, and I'm skipping obviously to the remedy to a certain degree now, to say that despite these problems, despite the general principle of prejudice that I've accepted, that the trial is going to go ahead. He has gone to some lengths to examine the delay and the causes for it. He does, in my submission and with respect to the learned Justice, make a number of quite vague points in relation to the reasons for the delay. One point he mentions –

ELIAS CJ:

Mr Cordwell, I know you're responding to questions about prejudice, but I hope you're going – you're now talking about the reasons for delay. At some stage, I hope you come back to Justice Tipping's question to you about what is undue.

MR CORDWELL:

I'll come back to it now, ma'am. The undue, it's excessive, and looking at all of the factors combined, which Justice Asher did, looking to see whether or

not there is clearly a breach of section 25(b), which – and that particular provision, in my submission, is an attempt by Parliament to minimise the possibility of an unfair trial.

ELIAS CJ:

But there is a distinct right to a fair trial. I would have thought that in terms of the threshold as to whether there is breach of the right to be tried without undue delay, your argument might rather have been that the legislature has made a judgment, it's not necessary to assess whether delay causes prejudice, you're entitled to be tried without undue delay, and that undue is more of a period focus and an explanation for delay focused enquiry.

MR CORDWELL:

Yes, and to a certain degree, that's what Justice Asher did and I accept what you're saying ma'am and indeed, those sentiments are effectively the basis for my submissions today, but we can't help accept, in my submission, that there is an overlapping between section 25(b) and section 25(a) because just about all the other provisions and rights secured by section 25 effectively try and assist the criminal justice process in bringing people to trial in a fair manner. But certainly, if we look at the length of delay and the causes, it's certainly quite open for Justice Asher and any other Court to find –

TIPPING J:

Isn't it simply a function of length as against reason? I think there's a risk of overcomplicating this. If it's a short delay but the reasons are absolutely outrageous, then you might say that that's undue. If it's a longer delay but there's good reason for it, then it's not undue.

MR CORDWELL:

And it may be that the former analogy that you used Your Honour is an example in *Martin*, that was, on today's standard when trials in the Auckland District Court and the High Court are being delayed more and more, it seems to be an acceptable premise and it's becoming almost the norm, that, you know, rape trials like the one that Mr Martin had to face of a three or four day

duration are being given firm fixtures in 18 months. That was, I think, a 17 month delay in the end, on its own, in relation to the length, that was of course not –

TIPPING J:

That might be a resourcing issue, who knows.

MR CORDWELL:

That's right.

TIPPING J:

But you've got to examine it to see what's the reason for the delay, or reasons, and then you simply say, don't you, is that acceptable in our society?

MR CORDWELL:

And they did that in *Martin* of course and the prosecutors actions were not seen as being 100 percent there, for want of a better term, and that seemed to be the tipping point for the delay there.

TIPPING J:

It's quite all right, Mr Cordwell.

MR CORDWELL:

I tried to use another word, but –

ELIAS CJ:

It's an old one.

TIPPING J:

I'm immune.

MR CORDWELL:

We've all read the book. But the situation here is that effectively the tipping point can be seen as not only the length of the delay, but the fact that over a

five year period, it is natural for memories to erode and that must be seen as there being some general prejudice, which seems to be accepted by Justice Asher, you know, the causes for the delay, if we're going to, and I think we must to a certain degree, look at them.

TIPPING J:

What if the prejudice is there but it doesn't prevent a fair trial? What's its operative function in the enquiry as to undueness?

MR CORDWELL:

You mean the unfairness? Well that would certainly, if there was specific prejudice there, for example, if witnesses had passed away, then certainly that would go to one of the factors in whether or not there was trial prejudice resulting from the length of the delay.

TIPPING J:

All right, thank you.

MR CORDWELL:

Certainly, the triggering point is the length and then the causes. In my submission, the High Court Judge Justice Asher, with respect to him, diluted some of the reasons and causes by mentioning them as the delay being, for example, as a result of unusual circumstances and at one point, with respect to His Honour, he uses the word "serendipity". Now, with respect, one can argue there's no such thing as an accident. There are time periods that seem to go by here almost unexplained and there seems to have been, I'm reluctant to talk about this, but a huge delay in the appeal process.

We all have to give regard to the workload of the Court of Appeal and that they often have to try cases which are particularly urgent and they need urgent hearings but with the greatest respect, there should have been greater urgency given, for example, in the appeal process considering the circumstances of the case, the nature of the appeal and because the nature of the appeal was to overturn a decision, that effectively said that the trial wasn't

going to go ahead. We can't forget, at that time, the natural heightened expectations of all the accused, that their liberty was no longer going to be interfered with, that they didn't have to face the continuing anxiety of a trial. First of all, the delay would have been helped had it been given an earlier date. There was an October filing and May fixture. Secondly –

McGRATH J:

Sorry, can you just be a bit more precise. There was an October filing of what?

MR CORDWELL:

Of the appeal against Justice Heath's decision to rule the bulk of the evidence inadmissible –

McGRATH J:

That's the 4th of October 2005?

MR CORDWELL:

That's right.

McGRATH J:

Yes. You're not complaining about delay in respect of that action, or are you?

MR CORDWELL:

No, I'm not Sir.

McGRATH J:

Okay.

MR CORDWELL:

To be frank, the Crown –

McGRATH J:

It's the fixture that was given?

MR CORDWELL:

Yes. The Crown had no option but to appeal that. It's perfectly understandable that they'd want to appeal that decision.

McGRATH J:

So, your complaint is the delay between the 4th of October 2005 and the 18th of May 2006 when there was a fixture?

MR CORDWELL:

Yes, that was how long it took to get the fixture, yes Sir.

BLANCHARD J:

Did either side seek an urgent fixture?

MR CORDWELL:

From the defence point of view, we accepted that fixture. I think on the knowledge usually, that it's very hard to get urgent fixtures in the Court of Appeal. Once again, Your Honour, it's all about almost the desensitisation, the normalcy that we in the District Court and the High Court have got in relation to the delays. We tell families of the accused and the accused, well, we're going to be getting a date in 2010 and that seems to be quite normal to us. Seeing the look on their faces, to think well, you know, a serious trial is not going ahead for a year or may be 18 months, indicates that it is not the norm out there. The reality is, if we keep on thinking that these delays are normal they are just going to get worse.

The next issue I have in relation to the cause of the delay –

ELIAS CJ:

Sorry, are you saying that in fact that delay was a normal delay?

MR CORDWELL:

And it shouldn't be.

ELIAS CJ:

That may be a different question though.

MR CORDWELL:

Yes ma'am.

ELIAS CJ:

Because I'm still puzzling about this word "undue" and whether that is measured against what is normal?

MR CORDWELL:

It shouldn't be. It should be looked at primarily as how it affects the accused.

ELIAS CJ:

Well it's, I don't know, I mean, what is your due? Your due is to be treated equally presumably with others in the criminal justice system, unless there is some absolute standard and you are inviting the Court to say any delay over a year or two years is "undue".

MR CORDWELL:

It's become undue because of the severe backlog that we're facing in the High Courts and I can only talk for Auckland and the District Courts. It's may be normal for us but, you know, I haven't got any evidence, I can't get the masses in here but it's certainly a surprise, with respect ma'am, to the general member of the public, when they are told that their son or their father's trial is going to be in 18 months time from callover, or two years from arrest which is not uncommon these days. I know it's not this Court's job to put a statutory limit in place but –

ELIAS CJ:

Well, we can't put a statutory limit in place.

MR CORDWELL:

No, no, yeah because that's Parliament job.

ELIAS CJ:

Yes.

MR CORDWELL:

We see all the problems that occurred in Canada after that *Askov* decision which supposed to be a guideline according to the Judge involved there –

TIPPING J:

Are you saying that we can't do it directly but we should do it indirectly by giving them a hurry up?

MR CORDWELL:

Yes, yes, I'll be frank.

TIPPING J:

Yes, that's what I thought you were saying.

MR CORDWELL:

Then we have – I think that the "undue" definition has to be looked at from own objective standard. We can't look at it subjectively.

ELIAS CJ:

No but do you look at it relatively?

MR CORDWELL:

No, ma'am because if we do that then that accepts that the delays in the District Court and High Courts are acceptable.

ELIAS CJ:

Or, that they need to be addressed in the political process?

MR CORDWELL:

They do have to be, yes ma'am.

TIPPING J:

What is acceptable is a much more refined issue that just simply judicial determination, isn't it, it has all sorts of resourcing and other political if you like, issues wound into it?

MR CORDWELL:

Of course, of course Sir. Perhaps acceptable can be substituted for reasonable, or unacceptable for unreasonable, in these circumstances. The Bill of Rights is all about ensuring that people are given a reasonable access to justice and their trials, if they have to go through trials, are conducted in a fair manner and that they are treated well and justly while they are waiting for trial.

TIPPING J:

You have identified one period that you say is undue, this is the 4th of October to the May date. Are you able to do that on a similar sort of basis for other discreet periods?

MR CORDWELL:

Yes I can Sir and once again –

McGRATH J:

Mr Cordwell, just before you leave the appeal period, I wonder if I might –

MR CORDWELL:

Oh no, I'm going – I'm staying on it.

McGRATH J:

You're coming back to that?

MR CORDWELL:

I'm staying on it.

McGRATH J:

You're staying on it?

MR CORDWELL:

I'm staying on it.

McGRATH J:

All right, so I won't interrupt then.

MR CORDWELL:

So, the appeal period to get the fixture, unreasonable. Then, Your Honours, I'll be frank, the period of time that it took for the Court of Appeal to frame and deliver it's decision was unreasonable. It was close to a six month period between May and November. One would have expected a decision, even though it created a real precedent which is used often by the Crown, sometimes by the defence –

TIPPING J:

Oh, this is that Williams case?

MR CORDWELL:

That Williams case, yes Sir.

McGRATH J:

At the moment, you're complaining about delay only to the point of a decision being given without reasons?

MR CORDWELL:

Yes because it was almost a six month – so, we've the time for fixture and then we have to wait six months. Now, we appreciate that the precedent was important and the issues were important but you would have expected a

decision much earlier than five and a half to six months after the appeal and I'll go so far to say that the accused deserves matter than that, considering their height and expectations after Justice Heath's decision and in fact, the whole system deserved better that because liberty was involved, security issues were involved, fair trial issues were involved –

McGRATH J:

Mr Cordwell, can I just come back. I take your point about the Court of Appeal's process but one of the things I don't quite understand which doesn't seem to have been focused on by Justice Asher, is the – why it was only in September 2005 that these admissibility issues were pursued. That is in the course of the third trial and after, if you look at it in terms of the April 2004 callover, well over a year after that. I mean that was a pretty bold thing really for the defendants to do, to decide into the third trial that they'd suddenly change – they'd suddenly take on these issues but there maybe some explanation for that. I'd be interested to hear it.

MR CORDWELL:

I'll give you my take on it if I can. It was the third trial. Mr Dale Williams had a third counsel, maybe a fourth counsel involved, a Ms Stroykoff and she took the appeal and Justice Heath gave her a little bit more latitude because she had accepted the brief at late notice and he gave her understandable more latitude in dealing with Mr Williams who wasn't the easiest client to deal with. that particular challenge related to the very first address and that related to, of course, Mr Dale Williams almost directly. Now it wasn't for the appellant Mr Shane Williams to have taken that appeal because it wasn't an address that he was associated with at all and even if the trial had gone ahead it was never going to be suggested that he'd lived there or had an association with that address. So it was a challenge by Mr Dale Williams so the appellant Mr Shane Williams would never have taken that challenge. However, what happened during the course of that challenge was that the officer in charge Detective Reardon gave evidence in the voir dire and we all thought this was going nowhere and all of a sudden there was a relatively simple question put to him, I can't remember whether it was the Crown or whether it was under

cross-examination. He answered in such a way that alerted everybody that there were other reasons for the warrant in the first place and that immediately got Justice Heath's attention and then it was all on, if I can use that expression. So that –

MCGRATH J:
What were the other reasons?

MR CORDWELL:
Sorry?

MCGRATH J:
What were the other reasons?

ELIAS CJ:
Do we need to get into that?

MCGRATH J:
It seems to me that in the end this appellate process thing was really started by the accused, they brought it on themselves to some extent and I just really would like – I think Mr Cordwell is explaining in a way that I can understand and perhaps put it to rest but I'd just like to have a general view of the other reasons.

MR CORDWELL:
The other reasons for what Sir?

MCGRATH J:
You said there were other reasons for the warrant Reardon, just in general terms.

MR CORDWELL:

I'll answer the question as simply as I can. The warrant was for stolen cars but then it was effectively accepted that the main reason for the interest in the property was drugs but that wasn't on the affidavit or in the warrant.

MCGRATH J:

Okay.

MR CORDWELL:

And so –

MCGRATH J:

An undisclosed reason was the true reason.

MR CORDWELL:

That's right, but then later on of course the Court of Appeal said that because it was effectively a peripheral reason, that doesn't meant that it was necessarily unlawful or unreasonable.

TIPPING J:

What I was interested in, I understood you to say that it wasn't the present appellant who raised this point –

MR CORDWELL:

No it wasn't.

TIPPING J:

- so late. It was the co-accused.

MR CORDWELL:

Yes it was Sir.

BLANCHARD J:

And presumably the co-accused were going to take this point and pursue it as far as they could, whatever your man's attitude was, so he just had to abide by it or join in.

MR CORDWELL:

Well it became relevant to him later on Sir because then there was, to use an old expression but an understandable one, the fruit of a poisonous tree argument in relation to all the other searches. So this particular property and the question mark over the reasonableness of the search, did effect, and once there was a decision that that was an unreasonable search and the evidence was inadmissible, that that was obtained as a result of that search, then the question mark was whether the rest of the evidence at the other properties, one of which related to Mr Shane Williams the appellant, whether or not that information would have been obtained but for the illegal search of the first property. And so that was the reason why there were two judgments by Justice Heath, first of all in relation to the Patiki Road address and then the second judgment in September related to whether or not all the other evidence could be kicked out.

TIPPING J:

What could the Crown do about it? I can understand it from your client's point of view.

MR CORDWELL:

Yes.

TIPPING J:

But what could the Crown do about it? What's undue about it from the point of view of the Crown?

MR CORDWELL:

I'm not criticising the Crown for taking the appeal. I'm criticising, if I can, the time it took to –

TIPPING J:

So it's a systemic problem? It's the problem within the Court of Appeal? Let's call –

MR CORDWELL:

Yes, yes. That's what I've –

TIPPING J:

You've got to be blunt about it.

MR CORDWELL:

- said. They took six months to come up with a decision.

BLANCHARD J:

It's a milder form of what occurred at the appellant level in the Privy Council appeal from Mauritius.

MR CORDWELL:

Yes.

BLANCHARD J:

That was, of course, much more –

MR CORDWELL:

Yes.

BLANCHARD J:

But I think you can also take a point here that you're saying first of all the Court of Appeal system was much too slow?

MR CORDWELL:

Yes.

BLANCHARD J:

But you could also pile on top of that the further argument that this was the very case in which slowness in the Court of Appeal should not have occurred because there had already been a three year delay?

MR CORDWELL:

Yes and that was the, thank you Sir, that was the logical conclusion of the argument is that delay was already in the headlights. Liberty issues were already in the headlights and if any case, warranted a two month, month and a half turn around it was this, but then to counsel's surprise, I don't mean to keep at them for too long, we get a one line decision with reasons to follow in March.

BLANCHARD J:

Did the absence in reasons impede progress?

MR CORDWELL:

No it didn't but it was seen as a surprise that after six months we didn't get the decision we got three months later.

ELIAS CJ:

So what was the reason then? I had assumed that you were waiting for the reasons but that's not the case?

MR CORDWELL:

No I think – in the February, which is probably the closest callover, this is before the reasons, a trial date was set so we get the reasons near the end of March but the trial date had been set.

ELIAS CJ:

The trial date wasn't set to allow a margin for delivery of the Court of Appeal reasons. It was –

MR CORDWELL:

No, no it wasn't.

ELIAS CJ:

- the first available trial date?

MR CORDWELL:

Yes. So the reasons came out about a month and a half after the trial date was set but certainly.

MCGRATH J:

And it was set for, the trial date was set in February for August, was it, or?

MR CORDWELL:

Yes.

BLANCHARD J:

And at that stage what length of trial was being estimated?

MR CORDWELL:

We were looking at between six or eight weeks but that was the first time the Crown had suggested a split or put before the Court a split in the accused and there were two trials. One was going to be a five week estimate, the other one was going to be a six to eight week estimate. As it turned out that was reasonably accurate.

TIPPING J:

And yours was in August?

MR CORDWELL:

That's right. that was going to be the Williams brothers plus two others. Niblett and McLaughlin. They were the subject of the stay though because of the reasons Justice Asher mentioned in the second part of –

TIPPING J:

So we have a delay approaching a year from the Court of Appeal's announcement of result to the trial?

MR CORDWELL:

The announcement of the result was November.

TIPPING J:

November to August?

MR CORDWELL:

We're talking 10 months. Ten months. Which on its own is inherent, inherent delay, systemic delay because that's the kind of backlog – that was no one's fault, that was the kind of backlog that they had but once again that's cold comfort for the appellant.

MCGRATH J:

I accept that but when you say that was the sort of backlog there was no thought that priority should be given to the trial, is that what you're saying? Or it just took its turn or?

MR CORDWELL:

Well once priority was given to it that the issue –

ELIAS CJ:

Wasn't given?

MR CORDWELL:

Was it – well I don't know whether it was given to it or not but I always assumed that that was the earliest available date for an eight week trial.

MCGRATH J:

Yes, given counsel's commitments as it was?

MR CORDWELL:

I don't think counsel's commitments was an issue then, because we all realised that Dale Williams was unrepresented so he was going to be there, he was on remand at that stage, of course, but certainly counsel's commitments weren't an issue, not in relation to the three person trial, not at all, but certainly I always assumed that because there were so many accused that the earliest trial date was going to be August or something like that.

TIPPING J:

Could one look at it this way, Mr Cordwell, that from the date when the Crown filed the notice of appeal to the Court of Appeal, 4 October `05, it was nearly two years from that date to the trial –

MR CORDWELL:

Absolutely.

TIPPING J:

After three trials already having collapsed?

MR CORDWELL:

Is that undue?

TIPPING J:

Well, that's the question, I'm just trying to isolate the sort of, your best scenario.

MR CORDWELL:

Yes, the appeal process before the decision was given, let alone the trial, was 14 months, and they are hanging in the wing at that time, because they, especially the kind of decision that Justice Heath came out with, they naturally thought that this was going to be all over.

McGRATH J:

Well that might have been their optimistic expectation Mr Cordwell, but you can push that point too hard, but I understand what you're saying.

MR CORDWELL:

I'm trying not to, but considering the nature of the decision, it wasn't an unreasonable expectation that there was a very, very good chance that this wasn't going to go to trial.

McGRATH J:

I think what you're really, you're accepting though, aren't you, I just really want to be clear on this, because I don't think you've ever said otherwise, that the delay was systemic, as opposed to anything generated by activity or the Crown or something, there's no malignant cause is there?

MR CORDWELL:

In retrospect, sorry –

McGRATH J:

So yes, the delay is systemic and you're also – aren't you in the position on Justice Asher's judgment of being unable to point to actually prejudice as a result of the delay and you're rather pointing to those aspects of anxiety and concern that result from being under accusation and having your movements limited on bail and the very real impacts, human impacts, on people's employment and just enjoyment of life that come from those? And that's really the impact we're looking at and we've got to measure undue against.

MR CORDWELL:

As well as the general prejudice recognised by Justice Asher, because –

McGRATH J:

Of fading memories, or?

MR CORDWELL:

Fading memories and importantly, he connects the type of responses from the accused to the kind of evidence that was available at trial. Given this case turns on interceptions of what the police observed, the ability of the accused to recall what actually happened, so as to adequately respond, will have unquestionably declined with the passage of time.

BLANCHARD J:

Now Justice Asher was having to assess the significance of that in advance of the trial, and he said that no one was pointing to any specific prejudice. Has anyone pointed to it since the trial?

MR CORDWELL:

Yes I have. I have, in the Court of Appeal, that was not accepted Sir. I said that there was specific prejudice during the course of the trial because the Crown did not call the officer in charge, Officer Reardon, who had responsibility for co-ordinating the investigation, making the key decisions about what should be listened to, what shouldn't be, who should do what. Now, at the trial, he was not there for reasons that you may or may not be aware of, and it was a decision by the Crown not to call him in the end.

BLANCHARD J:

Did that have anything to do with delay?

MR CORDWELL:

Well, if the case had got on first, second, or third attempt, he would have been there, because he was there at the third trial at the voir dire, so he certainly would have given evidence in the first three trials.

McGRATH J:

The Court of Appeal however thought that you managed to make plenty of hay out of his absence, didn't it? That was their take on that?

MR CORDWELL:

Once again, Sir, with respect to the Court of Appeal, that is speculation, because, of course, I did make a lot, and I addressed the jury for quite a while in relation to all the issues, but I did make a lot of him not being there.

BLANCHARD J:

But was Reardon not there because of delay or because the Crown simply decided that they weren't going to call him?

MR CORDWELL:

There was evidence by Inspector Goode right at the end of the Crown case to say that he was on sick leave and he had resigned. He resigned because of a – and they outlined the scandal involved. A scandal that occurred after the third, in another case, after the third trial would have taken place.

ELIAS CJ:

So it was, to use the word you used before, serendipitous –

MR CORDWELL:

I swore I'd never use that in Court, but had it –

BLANCHARD J:

Well you're saying it's the same as if Reardon had died at that point, he effectively became unavailable.

MR CORDWELL:

He – the Crown chose to proceed without him, and, of course, they could have summonsed him, but the reason given by Inspector Goode was, he resigned because of a scandal, I won't go into it now, and he was on sick leave.

TIPPING J:

Was there any request that he be required to attend?

MR CORDWELL:

No, no. I'll have to accept that now, but from time to time, Dale Williams made noises about that.

TIPPING J:

I bet he did. But they never actually exercised the power of requesting the Judge –

MR CORDWELL:

No they didn't, and I wonder whether Justice Asher would have required him to attend –

TIPPING J:

Well, we don't know.

MR CORDWELL:

No, we don't, and that's speculating as well.

TIPPING J:

It's a bit limited if you don't ask.

MR CORDWELL:

That's right, but certainly, the way the brief was framed by Inspector Goode was that scandal, unwell.

BLANCHARD J:

What difference would it have made if Reardon had given evidence?

MR CORDWELL:

Well, we'll never know. But I had certain questions that I would have put to him in relation to various different issues that I was able to put to other officers, but from time to time, the answers were, "I don't know that was Officer Reardon." And then, for example, I think it was the Margate property, but it may have been the second property, which Shane Williams was

connected to, that I questioned the credibility of the officer who gave evidence about that search, a Detective Senior Sergeant Brunton, and I spent a long time cross-examining him and in my closing address, questioning his credibility and the evidence that was found there. Now, a number of his answers related to jobsheets that were completed by Officer Reardon about that search a long time after the search was completed and so he could only give limited answers about what Officer Reardon had put in those jobsheets, and of course, he stood on the testimony that I don't know if I was leaning anywhere near the motives or the reasons why Detective Reardon would have completed, for example, the jobsheet so late in the piece, and that's just one example of the fact that Detective Reardon, not being there, could have – it could have swung it either way, he could have come along and given quite good evidence to the Crown, but then again, as he did in the voir dire, he may have said something in cross-examination that may very well have alerted the jury to something not being particularly well in the state of Denmark.

BLANCHARD J:

So you're not really able to point to specific prejudice, you're just saying there might have been specific prejudice but we can't say?

MR CORDWELL:

In a nutshell Sir, yes.

BLANCHARD J:

Thank you.

MR CORDWELL:

And – but the Crown in the Court of Appeal speculated and said that I got a lot of mileage out of it and I did, but who knows how it could have affected the defence case, if Detective Reardon had been there, because there was a lot of questions relating to the police investigation that I had for him but I couldn't ask.

TIPPING J:

I've always thought that the primary focus was on the character of the delay, what are the authorities that say that you bear in mind the consequences of delay in deciding whether it's undue? In other words, there's a kind of, almost a semi-merger here, of compromise to the trial being a fact, not to the point of it being a fair – unfair trial, but are you saying that you can have a, sort of a trial that's not unfair but is – you're prejudiced, and if that results in the delay, that is capable of influencing whether it is undue delay.

MR CORDWELL:

Yes Sir, because specific delay is evidence you can point to of course, someone dies, someone is not available, et cetera, someone has a stroke in the meantime and can't remember a great deal of what happened that day. On the other hand, as was mentioned by a Supreme Court Justice in *Barker v Wingo*, what is forgotten can very seldom be shown. How do we know what people have forgotten over that period of time? And that is what, I think, a general prejudice, or an inferred prejudice is all about.

ELIAS CJ:

But isn't that the reason for the legislative judgment that people are entitled to be tried without undue delay? Why is it necessary to trawl over the reasons behind that assessment, unless you're into the additional Bill of Rights breach of the right to a fair trial. In other words, why are we going in to all of these matters of prejudice as opposed to explanation for delay and whether it's undue?

MR CORDWELL:

I think it's because it's been something that has always been done, it was done in *Martin*, it was done in *Morin*, so therefore, it's expected that that's exactly what we do, but it comes back to what His Honour Justice Tipping was saying about whether or not, per se, the length of time is undue. If that's going to be the standard, well why are we looking at any other considerations?

TIPPING J:

Well I don't want to be misunderstood, I said it was a function of time and reasons.

MR CORDWELL:

Reasons for the time delay?

TIPPING J:

Yes, I don't think you can look at time in the abstract, it's a matter of assessing the length of time, well this is just tentative, it's very early days, but I, like the Chief Justice, am a little puzzled about, sort of, the enquiry into specific prejudice and general prejudice, general prejudice, as she says, the reason for the right that you're apt to suffer. Now if you've got specific prejudice, are you saying that that counts too? It's not enough to show unfair trial, but it counts too, and somehow or other infects the question of whether the delay is undue?

MR CORDWELL:

Well what I'm saying Sir is that general prejudice is enough, you don't need to look at specific prejudice.

TIPPING J:

But that's the rationale for the right.

MR CORDWELL:

Yes.

TIPPING J:

That's why you've got the right, surely you don't need to sort of say, right, well it's here because it's assumed, but the question surely is, as against the length of the delay, what are the reasons for it? That surely must be the principle question at least.

MR CORDWELL:

If I can try and either paraphrase to show that I understand what Your Honour is saying to me, that –

TIPPING J:

Well this is only me and it's only tentative.

MR CORDWELL:

Of course, and I'd like to explore that a little bit further if I may. We've got a, basically a five year delay, and because of the right, let's assume that there's general prejudice involved. Now, the length of the delay becomes important, because it's a very, very long length of delay and so it's easier to assume that there is general prejudice there, and the prejudice that the right has, is there to protect. Now, if we're looking at the other factors in relation to undue delay, surely there has to be an equally excessive or extraordinary reason for the delay –

TIPPING J:

You mean an excuse that outweighs, sort of –

MR CORDWELL:

Yes, that outweighs that presumption. Now, one excuse could be that the accused applied for adjournment after adjournment after adjournment for various different reasons that were uncalled for, looking back on it, and he was basically the architect of his own misfortune. I can see that a 60 month delay could easily be balanced out by that type of reason, but there is nothing like that here.

WILSON J:

Just on the facts, Mr Cordwell, and going back to a question of Justice McGrath's because I want to be clear as to your position, do you accept that there was no undue delay on the part of the Crown?

MR CORDWELL:

In retrospect, decisions could have been made that may have changed things, however, I have to accept that there is no prosecution delay here. I don't accept that there's no state delay, because of the Court of Appeal, but it's –

WILSON J:

No, I quite understand your argument about the Court delays, but I just want to clarify the prosecution position.

MR CORDWELL:

Yes, no there were certain decisions that could have been made better, but certainly I'm not promoting that the Crown is the reason for this, Sir.

WILSON J:

But it's not part of your case that there was undue delay on the part of the Crown?

MR CORDWELL:

But then again, I understand that the Crown are not pointing the finger at the defence either, because of what Justice Asher described as an unusual set of circumstances. Thank you.

ELIAS CJ:

Can I ask you in relation to the Court of Appeal procedure and springboarding off what you said about the way things are done, the Court of Appeal –

MR CORDWELL:

Done in relation to what, sorry?

ELIAS CJ:

Well the way we've always done things, the Court of Appeal has to give leave for these pre-trial appeals, and customarily that's been done at the time of the hearing. I'm just wondering whether the obligation to ensure that trials are dealt with without undue delay is something that might need to be assessed,

in the exercise of that determination, and that therefore, whether – everyone wanted this, I suppose, dealt with pre-trial did they?

MR CORDWELL:

Yes, this is pre the final trial?

ELIAS CJ:

Yes.

MR CORDWELL:

Yes.

TIPPING J:

The admissibility of this evidence was the fulcrum, without this evidence the Crown could not succeed.

MR CORDWELL:

That's right, absolutely.

ELIAS CJ:

But if the evidence had been, if the evidence had been admitted and on appeal, post-conviction, the Court of Appeal had said it should not have been, the appeal would have been allowed?

MR CORDWELL:

Yes, and the trial wouldn't have proceeded.

TIPPING J:

No, this is post-conviction, this is post-trial, the Chief Justice is putting to you, say they'd let the evidence -

MR CORDWELL:

This is post-trial, okay, yes. But these applications were more appropriate – they had to be done pre-trial.

TIPPING J:

The Court of Appeal have recently rather changed their practice, haven't they? Was this in the days when it was all done at the same time?

WILSON J:

The change was at the beginning of last year.

TIPPING J:

Was it?

MR CORDWELL:

I think in the circumstances Your Honour, because they were so significant and it could very well have led to the trial going ahead or not, that's why the challenges had to be taken.

McGRATH J:

Yes, the case wouldn't – the trial wouldn't have gone ahead unless the Crown had appealed?

MR CORDWELL:

That's right. It couldn't have.

McGRATH J:

So you didn't want the Crown to appeal, but if they were going to appeal, they had to do it there and then or the case collapsed?

MR CORDWELL:

That's right, and it was up to them to promote the prosecution and part of that was the appeal process, for them to make the appeal.

McGRATH J:

They had to get the evidence back in.

MR CORDWELL:

Yes they did, yes.

TIPPING J:

Because of the importance of the case as was evident from what I remember was a fairly massive judgment, this would be a case where leave to appeal would undoubtedly have been given if that had been dealt with as what you might call a discrete preliminary issue, there could be no doubt whatever about that.

MR CORDWELL:

Absolutely Sir. I think even in today's climate it would have been accepted, that's my assessment for what it's worth. But certainly, if I can just conclude in relation to there being an undue delay in this case. We have a situation where His Honour has made a ruling and I've submitted that in the Court of Appeal and I submit it now that the time period was undue and there's nothing to basically indicate that that shouldn't be, that the primary factor along with the general prejudice recognised by Justice Asher. I think we're on a slippery slope, if we allow a delay of this type, or relatively speaking in any other case, whether you look at it from a global basis, whether you look at it as a phase by phase analysis, if you state the right and then say, in this case, which was of moderate difficulty, and only moderate difficulty because of the quantity of the evidence, it was a pretty straightforward case compared to a lot of the fraud cases out there, and in fact, the evidence was largely gathered by the time of arrest.

TIPPING J:

Is it fair to put it to you this way, that your case is that the delay is undue on account of the combination of its length and in particular, this Court of Appeal factor?

MR CORDWELL:

Yes.

TIPPING J:

Because after it had misfired three times, if ever there was a case where expedition was required by the judicial process in the Court of Appeal, this was it. Is that the nub of your case?

MR CORDWELL:

Absolutely, in relation to the undue delay, and considering that even the delay up to then, the 21 months before the first trial, there was never a complaint.

TIPPING J:

Happily for you, you don't have to go there. You say that it was pretty bad up to that, it may not have been undue –

MR CORDWELL:

Yes that's right.

TIPPING J:

– but it became undue as a result of the combination of the length of time that had already elapsed plus this quite unjustified time in the Court of Appeal.

MR CORDWELL:

Absolutely Sir.

BLANCHARD J:

You may not want to go there Mr Cordwell but I do. I noticed that between November 2002 and September 2003, so that's a period of about 10 months, there were five adjournments at pre-depositions.

MR CORDWELL:

I wasn't counsel at that stage Sir but I know what happened. It was a simple case which in fact happens in every single large drug operation that I've ever been involved in, the transcripts weren't ready and there were three volumes of transcripts eventually given but certainly the pre-deps go and go and go in relation to – and this is what I'm talking about, almost the normalcy of it, the

desensitisation of all counsel, and oh yes of course the transcripts aren't going to be ready after a couple of months, we'll just get another adjournment. But certainly the evidence was all there bar the odd ESR analysis, which is understandable, at the point of arrest. We're not talking about further investigations after an awful murder somewhere, someone's arrested and then the investigation has to start then. It was fundamentally all there and we were waiting for transcripts and the like and finally we got it and then it could be set down.

BLANCHARD J:

So transcripts are a critical bottleneck in these drug cases?

MR CORDWELL:

Absolutely Sir, they always have been. Operation Flower, Operation Illusion, they always have are and to a certain degree we can understand it because there is one transcriber. There's been the odd suggestion throughout trials that I've been involved in that why wasn't there more than one transcriber but the police always say well it's this person has to know the voices, to relate things back to other conversations and it's almost impossible for two transcribers to do the job. But certainly for one man to be the transcriber is going to take a long time however, once again that's cold comfort to an accused who's waiting for trial and he's anxious about –

BLANCHARD J:

Yes but it may be an inherent problem –

MR CORDWELL:

Yes, it is.

BLANCHARD J:

– in the use of intercepts?

MR CORDWELL:

Yes and the other inherent problem is, or has been a problem in the past, is that the decision by the Crown to go along with trial, we set trials down with all the accused.

ELIAS CJ:

I was going to ask about that. I can't remember, were applications made for severance?

MR CORDWELL:

No, no they weren't.

TIPPING J:

How did it come about that there were ultimately two trials. Was that at the Crown's –

MR CORDWELL:

A Crown decision.

TIPPING J:

– instigation, they severed the indictment voluntarily did they?

MR CORDWELL:

Yes they did and there was no complaint about that.

ELIAS CJ:

There is a Court of Appeal some time ago isn't there on workability of trials –

MR CORDWELL:

Yes, in relation to indictments as well.

ELIAS CJ:

Yes some representative counts and, yes.

MR CORDWELL:

Yes but certainly, I digress slightly although it is on point, I'm involved in an operation called Operation Leo at the moment. There's 46 accused and the Crown straight away have divided that into five trials which is a sensible thing to do. It wasn't done here. In retrospect it should have been but I'm not complaining about the decision from the Crown not to do that. In retrospect it would have been a good idea.

TIPPING J:

There are inherent difficulties in voluntarily settling, aren't there, one's got to be realistic about this.

MR CORDWELL:

Yes and I think that was accepted by the Crown on the very first day of the very first trial because what happened was all the accused were there but Mr Dale Williams wasn't there and had he been there it may very well have been that that trial would have carried on and we wouldn't be here today.

TIPPING J:

Yes but there are also potential pitfalls for the Crown in carving various people off because you never quite know what these people are going to do.

MR CORDWELL:

That's right.

TIPPING J:

When they frame their defence.

MR CORDWELL:

They can put it onto others who can't answer –

TIPPING J:

Yes, right.

MR CORDWELL:

That's right. But certainly I know the Crown were determined if humanly possible for Dale Williams to joint the other accused and there was a matter of a two or three day adjournment in order for Dale Williams to attend Court and it was at that time that there weren't enough jurors. But certainly half of the accused, if the trial had been split straight away, would have been dealt with without Mr Williams but once again I'm not being critical of the Crown there but it's easy to be wise in hindsight.

BLANCHARD J:

So you're complaint is the overall period with particular reference to the appellate delay?

MR CORDWELL:

That really tips it over the edge and certainly three trials being set down in a year considering how difficult it is to put a trial like that on, that wasn't really that unreasonable. But once again that's cold comfort to the accused. Would you like me now to –

ELIAS CJ:

You mean it wasn't out of the ordinary?

MR CORDWELL:

It wasn't out of the ordinary but once again we're talking objective/subjective here. Subjectively we just accept it but objectively to the man on the street – we don't meant to use a size like this but there is a case going on at the moment relating to a broadcaster called Mr Veitch and you know his trial isn't going ahead until 2010. Now none of the barristers that I know are at all surprised that that trial is going to go ahead in 2010 but I wonder what the public would think of that.

TIPPING J:

Well what perhaps your best – better way of putting it is this, that we're not bound by the norm.

MR CORDWELL:

No.

TIPPING J:

We are entitled if we so choose to say that's not good enough.

MR CORDWELL:

Yes and hopefully throughout my submissions I've make that clear.

TIPPING J:

Well, that is really what you're asking for as I understand it?

MR CORDWELL:

Yes, that's right.

TIPPING J:

But the Crown may have a different perspective.

MR CORDWELL:

Of course.

TIPPING J:

But that's – yes.

MR CORDWELL:

Of course and that's exactly what I'm asking for. Would it now be appropriate for me to move onto the second ground?

ELIAS CJ:

Yes.

MR CORDWELL:

All along I've said that the appellant's right to be tried without undue delay was breached of course and the remedy should have been a stay along with eight of his co-accused. It's clear, one of the minimum standards of criminal procedure was found to have been breached and it's inclusion in numerous international human rights instruments et cetera reflect the significance of the right, not only to New Zealand but to the criminal justice systems around the world and in – I mention that because in determining a remedy for such a breach my submission in court must take into account, it isn't what we call a secondary right, if there is such a thing. It must take into account its position as one of the most significant rights that the accused can have and it stems back of course to the Magna Carta and can be seen as a fundamental human right.

Now at this stage I refer very briefly to section 5 of the Bill of Rights and where the Court must consider remedies subject to reasonable limitations prescribed by law as can be justified in free and democratic societies and certainly a stay is a remedy that is clearly available in most free and democratic societies as a result of such a breach.

BLANCHARD J:

But why wasn't the appropriate remedy, given there was no specific prejudice so that a fair trial could take place, why wasn't the appropriate remedy simply to order an early trial? Indeed it wouldn't have even been necessary to do that because there was already a fixture which was only a month or two after Justice Asher was hearing the application?

MR CORDWELL:

The trial couldn't have been ordered to be earlier than what it was so that was a remedy that of course is accepted over the course of the case as something that is available to the Courts but that would be a situation where say in *Martin* if they'd heard about this reason for the delay early, just to say no it's going to go ahead.

BLANCHARD J:

Well I'm – I should say, and perhaps I'm the wrong person to say it having been the Judge overturned in *Martin*, but I think *Martin* is now an out of date case. *Martin*, I'm not commenting on my own judgment, in the Court of Appeal judgment in terms of the approach to remedies because I think collectively the various jurisdictions have learned a bit since then and it had a little bit more experience with facing the consequences of sweeping decisions that simply say well, the remedy is a stay, that's it?

MR CORDWELL:

Yes Sir. Look, I accept that the response to a breach of the Bill of Rights has to be proportional.

McGRATH J:

Martin also, you can take a less radical view of *Martin* than my brother does, *Martin* was a case of prosecution, misconduct in a way and the Court then, the Appellate Court has to in those circumstances consider what is needed to bring home to the prosecution, proper conduct. Now, I don't think you can say that applies to the Court of Appeal?

BLANCHARD J:

If I may say so, I would have thought that the prosecution would have had their conduct brought home to them. If in *Martin* there had been an order for an early trial and if Mr Martin had been convicted at trial, there had been a reduction of some sort in his sentence and if he hadn't been convicted at trial, if he had had some compensation.

MR CORDWELL:

I see *Martin*, with respect Sir, as quite a different factual scenario from this.

McGRATH J:

I may be the wrong person to say this but I can assure you that the decision in *Martin* of the Court of Appeal to grant a stay, brought home in a very real way

to prosecution authorities and justice authorities, the need to do something about delays.

MR CORDWELL:

If I may be so bold that this Honourable Court can make a decision, a reasoned decision that would bring home the importance of getting things to trial early and decisions being made early because of the inherent problems with memory and the problem that, you know, all the problems that – a great deal of time passing between a rest and trial can bring.

McGRATH J:

Sure but just as long as you appreciate, it's one thing to address prosecution misconduct that causes delay and it's another matter to address when the system has problems in it's administration. In other words, systemic problems, albeit through particular decisions and particular cases.

MR CORDWELL:

Of course decisions such as Your Honours have to come to today, certainly send messages to the right people, that certain resources have to be allocated and certain things can be done more quickly. It's even accepted by Justice Asher that there were periods of time which were unusually long. So, you know, there are certain messages that I'm sure Your Honours are only fully aware of, that you can send through a reasoned and just decision. Certainly the balancing act that Justice Asher conducted after he found a breach, in my submission, was quite wrong. If you look at how important that breach was, we're not talking about one piece of evidence that was judged as improperly obtained and then ruled admissible as a result of the, inadmissible, as a result of the balancing that *Shaheed* in section 30 dictates.

BLANCHARD J:

Is there any advantage at all in describing it as a "balancing"? I don't really see *Shaheed* as particularly relevant.

MR CORDWELL:

Well, effectively, Justice –

BLANCHARD J:

It's a different context.

MR CORDWELL:

Justice Asher certainly used that to explain his balancing act in this case.

ELIAS CJ:

What para are you referring to in his judgment?

MR CORDWELL:

We're talking 357, or paragraph 81 is where *Shaheed* is mentioned first.

TIPPING J:

Does your submission amount to the proposition that once you've found undue delay, you must stay?

MR CORDWELL:

That should be the primary remedy here, yes.

TIPPING J:

In what circumstances would you not stay? I understood you to be saying, in effect but once you've got undue delay, you've got a right not be tried, if you like.

MR CORDWELL:

That is my primary submission because the significance of the right and what the right is protecting, means if there is a decision that there is a breach that there's certainly general prejudice that's described by Justice Asher –

TIPPING J:

But this is this merger of this right and fair trial again. Everyone acknowledges that if you can't have a fair trial you get a stay but if it's short of that, I don't understand why it's mandatory to order a stay?

MR CORDWELL:

There seems to be an issue here Sir, that – even Justice Asher has accepted there are risk involved to a fair trial. I know you're talking about fair trial and not having any mergers there but when there is such, even a statement about general prejudice –

TIPPING J:

Either you can have a fair trial as you access it, or you can't. Now, let's assume the Judge is satisfied that you can have a fair trial but you say, nevertheless, following undue delay there must be a stay. I think you have to say that?

MR CORDWELL:

Yes and that's what I've said in my submissions and I say now. The reason I say that, to a certain degree, is that all the alternatives are so problematic. You know, the alternatives have in fact been spoken about in other cases well before that, even in *Martin* if I may mention that again.

Compensation and the reduction of sentence. Now, in relation to the compensation issue, we have an area of law of course which acknowledged by Justice Asher as being uncertain in relation to the damages issue, the award of damages and he's even said that there have been very few cases where meaningful damages have been awarded to someone who's been subject to a breach of the Bill of Rights. If I can just go through a number of reasons why compensation and damages as a remedy for this kind of breach is just too problematic. It gives the impression that you can in fact pay for a breach of someone's fundamental human rights. We're not a situation where, you know, there's been a civil case and the damages are compensating for a loss, the payment seems to be for a breach of someone's human rights. Now,

when it's becoming more and more difficult to teach young people that there is a difference between value and cost, why should a remedy such as this exist when there has been a breach of such a fundamental right?

TIPPING J:

It's not a bad remedy, is it Mr Cordwell, if you are found guilty to have a reduction in sentence and if you're found not guilty, as I think my brother Blanchard said, then there's no sentence to reduce so if appropriate, you get a sum of money to recognise that you've been put through more than you should have been before getting to the point of being acquitted. I can't see that as being all that problematical. Are you saying it's conceptually problematical or it's administratively problematical, or what?

MR CORDWELL:

I think there are many problems here. If the trial proceeds after the breach is found and someone is found guilty, it does seem in my submission odd to give a person a lump of money when they're to jail –

TIPPING J:

No, no, no. You don't give them a lump of money if they're found guilty, you knock something off the sentence. If they are acquitted, you give them a sum of money because they've been put through more than they should have been getting to the point of acquittal. They've been on bail for too long, or they've been in custody for too long, or whatever.

MR CORDWELL:

With respect Sir, why should a jury effectively decide that issue which is indeed what they are doing in deciding –

TIPPING J:

The jury is not going to decide that.

MR CORDWELL:

No, they won't decide the amount but they're deciding whether or – what type of compensation someone is going to get.

TIPPING J:

Juries have nothing to do with this.

MR CORDWELL:

By finding someone guilty or not guilty, that's effectively what they are doing because if –

TIPPING J:

I think you've been pretty good up until now but I think, with respect –

BLANCHARD J:

That argument isn't a flyer.

TIPPING J:

It's just a non-starter. I can be both polite and impolite, if I may.

MR CORDWELL:

Of course Sir and you're entitled to do that in your position, of course.

TIPPING J:

I've admired your submissions but I think you're on a complete loser saying it's the jury that's going to decide. The jury decides guilt or innocence. The consequences of that will be for a Judge.

MR CORDWELL:

Surely someone's guilt or innocence, for the want of a better term, should not be a point of distinction when deciding whether or not there is, what type of remedy –

BLANCHARD J:

Why ever not? There's an additional remedy available, if somebody is incarcerated, you can give them a remedy of reducing the period of incarceration. You don't have to go to damages. So, it's simply a case where there's an additional remedy because there has been a conviction and a prison sentence.

MR CORDWELL:

Well certainly Sir, obviously the public interest means that they have – society has an interest in seeing people accused of serious crimes being tried, but –

BLANCHARD J:

But they also have an interest in seeing the human rights respect, and the fact that that is being done, marked out.

MR CORDWELL:

Certainly Sir, but I wonder if the public interest is that this be answered by a sum of money.

TIPPING J:

Well you couldn't give any other relief if the person is acquitted, and what you're compensating for is the period of restraint or anxiety, or whatever, that's longer than it should have been.

BLANCHARD J:

I think that if Mr Martin had gone to trial and been acquitted, and had received some compensation because of the breach of his rights, the public would have accepted that a great deal more easily than they actually accepted the result in *Martin*.

MR CORDWELL:

But then I suppose the question is Sir, how much is going to be paid as a remedy? And in a case like this of Mr Williams, the Judge in the High Court has already said, no one's to blame. Now, I can hardly see someone putting

their hand up to pay compensation at the end of a trial where someone is found not guilty –

BLANCHARD J:

If there was an undue delay, the Crown would have to pay compensation.

MR CORDWELL:

But I can see a situation with respect Sir, that because the Crown, and it's been accepted by the defence all along, haven't been responsible for the delay, then they'll be reluctant.

BLANCHARD J:

No, no, no I mean the Crown in its broader sense, I don't mean that the prosecutors would have to pay the compensation, the – Her Majesty, through her government in New Zealand would have to pay.

MR CORDWELL:

I suppose there's also a problem of whether or not there's an automatic payment or whether or not the appellant or an accused in his situation would have to initiate proceedings.

BLANCHARD J:

Well there's no difference there between this breach and other breaches of human rights, somebody has to initiate a proceeding.

MR CORDWELL:

But, sorry Sir, with consideration of the nature of the breach that there has been delay in the proceedings, I can see a situation where a civil proceeding is initiated and it's not finalised, if at all, until four or five years down the track and that's almost adding insult to injury. Now that we've found a breach and you've been found not guilty, you can initiate civil proceedings and be tied up in the Court for four or five years, and that would mean an accused would be very reluctant, in my submission, to even seek the appropriate remedy, and –

BLANCHARD J:

Well he's not an accused at that point.

MR CORDWELL:

No.

BLANCHARD J:

He's a person who's been acquitted.

MR CORDWELL:

But certainly, you can see a point where they would say, "I have had enough of Courts and I am not going to go through the anxiety of whether or not I'm going to get compensation or not."

ELIAS CJ:

Well, Dr Harrison would say that there's no point anyway because the awards of damages are going to be so modest that they won't cover the fees.

MR CORDWELL:

If the cost of the criminal cases schedule is anything to go by, that would be quite right ma'am.

ELIAS CJ:

And also, of course, they may be stripped and diverted to victims.

BLANCHARD J:

Not if somebody's been acquitted.

TIPPING J:

There's no victim.

ELIAS CJ:

Oh yes, sorry, sorry.

TIPPING J:

But assuming we're against you on this point, are you attacking the length of the discount?

MR CORDWELL:

I don't really – I am, in fact, because – but if we've moved on from this point, I can move on –

TIPPING J:

No, I don't want to ride you off it, I just wanted to see the full –

MR CORDWELL:

But certainly, there's so many problems in relation to the compensation issue, and maybe the jury issue was a red herring, but certainly Sir, and Your Honours, there are so many problems in relation to the compensation, whether someone's found guilty or not guilty, that really isn't the answer to stay with the remedy that has been considered the primary remedy for a –

BLANCHARD J:

Not if it's a disproportionate remedy.

ELIAS CJ:

Well not if it's not an appropriate remedy.

MR CORDWELL:

Well in these circumstances, the delay seems to be the longest of its type in New Zealand.

BLANCHARD J:

Are we talking generally?

MR CORDWELL:

Yes. But certainly in relation to this case, it's accepted, I think, that this is the longest delay of its type in a drug matter which is moderately difficult, and

certainly, if there's not going to be a stay in this case, I just, you know, considering what Justice Asher said about all the other factors, other than length, I just wonder what case we would envisage there to be a stay in, apart from something that there is specific evidence that's pointed to –

McGRATH J:

Well indeed a case where there was some specific prejudice –

MR CORDWELL:

Yes, yes.

McGRATH J:

- would be a strong case for a stay. But we're dealing with a case here where there's a finding against you on that and you're not making any complaint about prosecution misconduct.

MR CORDWELL:

No I'm not, but with the length of delay and the kind of evidence that would have been required by the accused in this case to answer a conversation that occurred five years, the nuances of the conversation, what they meant, in the conversation, which was some of the primary evidence against them, sits with what Justice Asher says in, I think it was paragraph 62, about memories and it's particularly relevant here Sir, with respect.

TIPPING J:

Now, your client's been convicted, so in order to get his conviction quashed, he has to satisfy section 385 of the Crown's Act. The argument presumably is that because there should have been a stay, there's a miscarriage of justice?

MR CORDWELL:

Absolutely, yes.

TIPPING J:

Just to try and get it sort of tied in to the practicalities of the case.

MR CORDWELL:

Absolutely Sir. If I can move on, if I can, to what in fact Justice Asher did, the reduction of sentence, that as an alternative remedy, and there seems to be three alternative remedies that have been accepted by the Courts over the years, stay, the reduction of sentence, and the compensation, but stay always being the primary one. The proposal of a sentencing reduction once this right was established by Justice Asher, that seemed to be fraught with difficulty, because he acknowledged the difficulties himself and clearly, for example, the reduction may not adequately compensate an accused who's suffered a long delay like the appellant, now, the prospect of a theoretical reduction of penalty, once again, wouldn't be any comfort to an accused who was acquitted, and that was the point that His Honour Justice Blanchard was making as an alternative compensation for someone who was acquitted, but certainly, a reduction of sentence to Mr Williams would not have been particular comfort to him. In fact –

BLANCHARD J:

Well it would be a comfort to him now.

TIPPING J:

I was just going to say, does he want to cash it in?

BLANCHARD J:

It'd be a jolly good remedy now.

MR CORDWELL:

As an aside, his parole is happening – his parole hearing is happening at 1 o'clock today, which, you know, is a real coincidence of course, but certainly, that –

BLANCHARD J:

But that's presumably a parole hearing which takes into account the 18 month reduction?

MR CORDWELL:

Yes, the starting point was six months – sorry, six years. The starting point, and then reduction was taking place, but –

BLANCHARD J:

Perhaps if –

McGRATH J:

25 percent off.

MR CORDWELL:

Sorry?

McGRATH J:

He got 25 percent off.

MR CORDWELL:

Yes, he did. But interestingly enough, the starting point was six years, now had the first trial, and this is a calculation that Justice Asher did in his decision with everybody else, first of all, he looked at what everyone would have got and then he started doing the calculations about how long would they be out by the start of the final trial. Now, he put the three Williams brothers into the most serious category because they were charged with both conspiracy and manufacturing. There were three others that were charged with both conspiracy and manufacturing, that's Mr Cheeseman, Ms Niblett, and Mr McLaughlin. Mr Cheeseman pleaded guilty, McLaughlin and Niblett were going to go to trial. Now, they were seen as lesser lieutenants in the manufacturing and still, and in the conspiracy, so they were given, I think, a starting point of perhaps four years. This is what Justice Asher looked at, and they were seen as being on the margin, and so eventually they were subject to the stay as well.

TIPPING J:

Are you boiling up to say this wasn't enough? You don't say this was the right remedy, but if we find it was, that it wasn't –

MR CORDWELL:

No, no, the point I'm making is that, I'll go and make the point in relation to the factual scenario but the factual scenario really highlights the difficulty in using this kind of sentence reduction as a remedy, because what happened is that a starting point for Mr Williams, who was eventually found not guilty of the manufacturing but guilty of the conspiracy, the starting point was six years. Now, had there been the same result at the first trial, and he was given a six year sentence, and he wouldn't have got any, of course, mitigation as a result of delay then, he would have been eligible for parole after two years, and he would have been released over a year before the first trial.

BLANCHARD J:

But that's assuming that there was undue delay simply because of the delay after the first trial had to be aborted. I think that's a bit simplistic.

MR CORDWELL:

It all contributes to it. There were tipping points there, but certainly each phase contributed to it. Any phase on its own, the length wouldn't have been enough, but when you see them altogether –

ELIAS CJ:

It also assumes that imprisonment is equivalent to being on remand and while some acknowledgement of the restriction is appropriate, I'm not sure that you can really say they're exactly equivalent.

MR CORDWELL:

No, they're very different of course ma'am, but one of the differences of course is that when someone is incarcerated full time, but I've been trying to imagine what it would be like on remand for five years –

BLANCHARD J:

On bail.

MR CORDWELL:

On bail. Now, it would be almost impossible to try and plan your life, and at least in prison, if you were sentenced, you could start planning, you'd have a parole date –

ELIAS CJ:

You are deprived of course of the society of your family and so on, I think it's all getting a little bit speculative, but anyway, we'll take the morning adjournment now and we'll resume in 15 minutes.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.55 AM

MR CORDWELL:

Your Honours if I may continue with my analysis of the problems associated with a sentence reduction and the kind of calculations that Justice Asher made in coming to his decision. Well certainly as I mentioned Mr Williams would have, if he was given a six year sentence initially after the first trial, been released a year before the last trial took place and – so that's the kind of problem that that kind of crystal ball gazing would lead to.

The other risk of course and Justice Asher brought up this idea of remedy for undue delay prior to trial in Mr Williams' case and it was a problem in that Mr Williams was still presumed innocent at the time and it was a only a remedy at that time that he could take advantage of it if he was found guilty. The other issue to is that if Mr Williams has been found not guilty of the manufacturing and guilty of the conspiracy, there was certainly an argument, and it's difficult to make these type of retrospective arguments, but it highlights the problem in giving these type of reduction indications when Justice Asher did say and that is that we never know what's going to happen at trial. And

certainly I can submit that Mr Shane Williams the appellant came back, almost back into the pack. He came closer to McLaughlin and Niblett than he was initially. Although he perhaps couldn't be described as on the margins as Justice Asher described Ms Niblett and Mr McLaughlin, certainly he was facing one less charge than they were, namely he was found not guilty of manufacturing, they were facing conspiracy and manufacturing. So it may have been that had Justice Asher known what the result of the trial was going to be, he could have considered a stay for Mr Williams. I'm not saying that we can look at it retrospectively like that because we can't but it just highlights the problem of giving that kind of indication prior to trial.

The other issue to in relation to the sentencing reduction is that if a breach of a Bill of Rights for undue delay is found, as was the case here, and some of the remarks and some of the issues were live that Justice Asher raised, then bringing up the issue of whether there was a fair trial or not, it could be that someone has gone through a trial process, having gone through this delay, and it could very well be that the conviction wasn't safe for the reasons that Justice Asher mentions in section 62 – sorry, paragraph 62 when he talks about the memory issues. "The ability of the accused to recall what actually happened so as to adequately respond." Now we'll have unquestionably –

BLANCHARD J:

But if that manifests itself at trial there will have been an unfair trial and the conviction will get set aside for that reason?

MR CORDWELL:

Sir, I think that if there was a specific point I could raise in relation to the trial I would but I go back to the remarks in *Barker v Wingo* it would be almost impossible to pinpoint what someone has forgotten over a period of five years and that's why this concept of general prejudice, if accepted, which I urge Your Honours to accept in this case, was important at trial and the conviction could very well be seen as unsafe as a result of some of the issues that Justice Asher identified prior to trial.

So giving someone a sentence reduction after they have been convicted in an unsafe manner, once again is – seems to give the Bill of Rights force for it to be questionable because if what Justice Asher was saying is correct, and I submit that it was in paragraph 62, there was a risk that there the result was unsafe.

BLANCHARD J:

If you're right about that, all these historic sex cases go out the window simply on the basis of the delay, Bill of Rights guarantee or no, because your argument is it's not a fair trial because of the delay and the general prejudice that will have effected the trial.

MR CORDWELL:

Certainly Sir I understand the point you're making. In relation to the comparison there, with sex trials that have been delayed because of post – sorry, pre-arrest delay because of the complaint being made later on, more often than not the defence is that it didn't happen. There's a general it didn't happen or –

BLANCHARD J:

Well it wasn't the defence here that it didn't happen?

MR CORDWELL:

Well the defence that was run by myself was that the transcripts could easily have shown that he was conspiring to make pseudoephedrine rather than –

BLANCHARD J:

Well that's a, it didn't happen, something else happened defence?

MR CORDWELL:

That's right - but certainly it's counsel's interpretation but certainly when there is a delay of this nature it's important for memories to be as clear as they can be considering there are obviously, obvious delays in the court process that none of us can do anything about. But these issues relate specifically to this

type of trial because there are telephone calls and specific lines amount to a significant part of the Crown case. And certainly the erosion of memory affects, whether or not someone can say yes that was me on the phone, whether they can confirm that transcript is accurate, whether or not they can say that anything is meant by a particular phrase. So certainly the issues raised by Justice Asher are particularly pertinent here.

Now in consideration of the remedy, if a Court thinks that Justice Asher has a point in relation to the general prejudice, the question should be why should the trial have been allowed to have gone ahead because the argument could be that by allowing the trial to go ahead, and for there to be a risk that memories would have effected the way the defence was conducted, the breach was in fact completed and with respect to Justice Hardie Boys when he said, again I think it was in *Martin*, he said, "this particular right was not a right not to be tried without undue delay." Of course that goes against what Lord Hope said in the Attorney General's Ref (No. 2 of 2001) [2004] 2AC, that it was the State's decision to continue the hearing after the undue period had elapsed which -

BLANCHARD J:
Was he dissenting?

MR CORDWELL:
I suspect he was Sir, yes.

TIPPING J:
Yes he was.

MR CORDWELL:
But certainly it's an important comment, what is in fact the breach here. Is it to allow the trial to go ahead and then effectively risk an unfair trial because of the erosion of memories. So that's why looking at a sentence reduction it could be that the Court takes the view that whatever the sentencing reduction, whatever calculation is used, may not be an effective remedy, a proportionate

remedy, because it could very well be because of the general prejudice that the conviction is unsafe and so any reduction in sentence is going to be inappropriate.

So we've got the problems in my submission of the compensation issues and we've got the problems that we have in relation to the sentencing reduction which means that we can go back to say how can these be avoided and if we see it, that the stay is a minimum remedy for this type of breach, then Justice Asher's decision in relation to the Wiliams brothers was in fact wrong.

An aside to is that for a breach to have been decided upon by Justice Asher, against everybody, the argument that I'll make is why did it not apply to the Williams brothers and specifically the appellant? Because they were all as innocent as one another and it could very well be that the decision for the Williams brothers to go to trial maybe interpreted by not only the public but also members of the legal fraternity as being one that means that they were seen as less innocent than the other eight.

BLANCHARD J:

Or possibly guilty of more serious crimes?

MR CORDWELL:

Yes –

BLANCHARD J:

Possibly guilty of more serious crimes.

MR CORDWELL:

Yes, yes, but certainly they were presumed innocent at the time as well as the other eight and certainly they were in the same position.

WILSON J:

I must say Mr Cordwell that it's not apparent to me why the seriousness of the offence should be relevant to the question of stay or no stay?

MR CORDWELL:

That's certainly a point that I wish to explore a bit further Sir because it appears that that was the only factor weighing against it not being a stay and certainly Justice Asher did a balancing act and I call it a *Shaheed* type balancing act which I thought was inappropriate in the circumstances. But in doing that balancing act he seemed to be double dipping in relation to the factors that he used for the determination of the breach. So what happens is that Justice Asher uses the same factors, which amounted to the breach according to him, and therefore they were compared and balanced against the seriousness of the crime. So what effectively he was doing, in my submission, was balancing the seriousness of the alleged offences with the breach, with the actual right itself. And that begs the question, can someone accused of a serious crime really point to protection from the Bill of Rights if that is seen as the dominant factor? Because that is the only factor that Justice Asher seemed to take into consideration.

He seemed to be looking at the public interest of people going to trial on serious allegations. Well certainly I think the public should be given far more credit because of course the consequences to someone who is charged with a serious crime is far more potentially than others who were charged with lesser crimes, but certainly people who are charged with serious crimes need to be able to avail themselves of the protection of the Bill of Rights.

Now more and more often in the High Court when the *Shaheed* balancing test comes into play for methamphetamine as a Class A drug, if it's been found in the boot of a car, that seems to be the determining factor as to whether it stays in or not. I am concerned, as are many other counsel, that the seriousness of the allegation outweighs almost every other consideration. It's only one factor but certainly it's almost been used as the predominant factor in *Shaheed* type balancing exercises and I see that very clearly in Justice Asher's decision he uses the public interest and especially the argument that the Crown have mounted is that we don't want the public to lose confidence in the justice system because someone like Mr Williams

who's accused of a serious crime, doesn't go to trial because of this type of breach. Well, shouldn't they lose confidence in the justice system where someone is not tried for five years? Shouldn't that lack of confidence urge parliamentarians to perhaps put a line in the sand like some other jurisdictions have. It's not the end of the world for the public to lose confidence in certain institutions. Sometimes they have to lose confidence in a particular institution or the way it works in particular ways, for there to be action, so certainly just because the public would lose confidence here, that doesn't necessarily mean that a High Court Judge should not make a difficult and unpopular decision. But certainly it seems to be that the seriousness of the offence here seems to have outweighed everything else and that, once again, highlights in my submission the difficulty in making or using a balancing test when such a fundamental right is breached.

TIPPING J:

On this whole topic Mr Cordwell I wonder if you could help me with paragraph 80 of His Honour's judgment which is on page 356. The bottom of paragraph 80 on the first page onto the top of 357 where Justice Asher refers to the majority of the House of Lords in Attorney General's Reference, tells that for a stay to be granted to delay trial prejudice would be required. That position has recently been restated by the English Court of Appeal in *Queen v SI* where it held that no stay should be granted in the absence of serious prejudice to the defence such that no fair trial can be held. Those are different propositions and –

MR CORDWELL:

I'm sorry Sir.

TIPPING J:

Do you understand what I mean?

MR CORDWELL:

Yes, Sir – yes.

TIPPING J:

The English Court of Appeal has recently held, apparently I haven't read the case but according to this, that you don’t get a stay unless you can't have a fair trial.

MR CORDWELL:

Well certainly Sir the UK position and ours are quite different because the UK position as Justice Asher goes on to say, the right is a combination of our section 25(a) and section 25(b).

TIPPING J:

Yes it’s a composite.

MR CORDWELL:

Yes it is.

TIPPING J:

Which doesn’t really help you.

MR CORDWELL:

But it –

TIPPING J:

Because ours is distinct.

MR CORDWELL:

Indeed Sir but certainly they have to look at the issue of fair trial and the issue of delay as well so they are almost obliged, they are obliged to look at both issues.

TIPPING J:

I fundamentally cannot understand that your – or I’m having difficulty with, I do understand the submission, is that there should be a stay despite the fact that a fair trial can still be held.

MR CORDWELL:

If there is no specific prejudice and no general prejudice ascertained, then there may be room for other remedies. But if there is a general prejudice and a specific prejudice that can be a – either one can be identified, a stay is the only remedy that is connectable to the breach.

TIPPING J:

If the prejudice comes to the level of unable to have a fair trial, I would agree with you. But it's where it falls short of that level that I find difficulty with this proposition that it must be a stay.

MR CORDWELL:

Well certainly Sir I would conceive that if there cannot be a finding of general prejudice or specific prejudice, which to a certain degree occurred in *Martin*, then there are alternative remedies. However, if there is an issue of general or specific prejudice, and I say there's a general prejudice in this case as identified by Justice Asher, then the remedy is a stay because otherwise you're not recognising that there was a potential for an unfair trial. But certainly the way in which Justice Asher has done so in relation to the balancing act, in my submission, it was not an appropriate way to organise a remedy.

BLANCHARD J:

How did the Court of Appeal here deal with the question of general prejudice?

MR CORDWELL:

They were more interested in specific prejudice Sir.

TIPPING J:

Would you accept this proposition as being – encapsulating your submission that if there is general prejudice raising a real risk of an unfair trial, there should be a stay?

MR CORDWELL:

Well it depends on what you mean by a real risk. I think that Justice Asher –

TIPPING J:

Well not just a speculative risk.

MR CORDWELL:

I think, well Sir, isn't that with respect another way of saying you have to point to a specific prejudice?

TIPPING J:

No.

MR CORDWELL:

Because the real risk in this particular case was identified, in my submission –

TIPPING J:

I'm just trying to encapsulate your submission in a way that adequately covers what you're endeavouring to put to it.

MR CORDWELL:

I would take it a bit further though Sir. I would –

TIPPING J:

Can you –

MR CORDWELL:

I would say there should be a concept accepted of presumptive prejudice. Once a breach has been determined and looking then at the length of delay and the causes for the delay and if –

TIPPING J:

Well that's back to saying that if there is undue delay there should be a stay. Full stop. Because of the presumptive prejudice that –

MR CORDWELL:

Well for example, I compare it once again the *Martin* fact scenario with Mr Williams fact scenario. There was no general or presumptive prejudice, sorry, or specific prejudice in the *Martin* case. The trial could have still gone ahead fairly, I think everyone accepts that. Now in that case I can see the argument for an alternative remedy. The real risk of an unfair trial is almost a loaded term because who's going to determine whether there was a real risk or not? Justice Asher has gone, I think in my submission, as far as he could go to say that there was a risk of an unfair trial without actually saying so. He looks at the evidence that was going to be relied upon by the Crown in section 61 and then –

TIPPING J:

I think you're not really helping me.

MR CORDWELL:

Sorry.

TIPPING J:

I'm thinking at a conceptual level. I'm not thinking about the facts of this case at the moment. I'm trying to find for myself a satisfactory way of writing down what your submission actually is?

MR CORDWELL:

If the real risk means a general – includes a general prejudice or a specific prejudice, yes, I agree with you.

TIPPING J:

If there is general prejudice raising a real risk of an unfair trial, there should be a stay. In other words there's got to be general prejudice, whether it be actual or presumptive as you would put it, but it's got to raise a real risk of an unfair trial before there's a stay. Now I'm not trying to capture the ground, I just want to know whether that captures what you –

MR CORDWELL:

In my submission Sir it almost – that particular proposition almost gets there. The general prejudice, however, if a set of facts are declared to have a general prejudice involved in them after a delay, then doesn't that presume that there is a prejudice to the trial anyway, so how can we say that the general prejudice could lead to a real risk of an unfair trial? And general prejudice assumes that there is a risk to an unfair trial.

TIPPING J:

Thank you, well I don't want to be thought necessarily to take the view that prejudice has got much to do with it actually, but I was just following your line of thought and trying to articulate it.

MR CORDWELL:

I understand.

BLANCHARD J:

Justice Asher is using general prejudice as a way of describing the fact that there will be some disadvantage, inevitably, from erosion of memory. I think you're probably putting too much weight on his use of that expression which is perhaps not a happy expression.

MR CORDWELL:

It's the – in my submission Sir, it's the only interpretation that can be seen from the way he has structured the two paragraphs under the heading, because he has first of all looked at the evidence that the Crown would call, and then, he then looks at the defence side of things in paragraph 62 and then saying, well, look it's inevitable that they will suffer some disadvantage. Are we prepared for them to suffer that disadvantage at trial? Are we prepared for that trial to go ahead knowing that there's been a decision that they will suffer some disadvantage, and then he goes on, given that this case turns on the evidence that he describes, he is quite specific, "The ability of the accused to recall what actually happened, so as to adequately respond will

have unquestionably declined with the passage of time." Now, the passage of time we know is five years, are we prepared to accept that that trial can go ahead after that kind of statement? Because they cannot adequately respond to the evidence that's been called by the Crown.

McGRATH J:

Is your position really that if the defence is disadvantaged in any way from the delay, then the stay should follow?

MR CORDWELL:

Yes.

McGRATH J:

So it's not that you're looking for a lower threshold than the inability to have a fair trial, you're looking for a threshold that's more concerned with some impediment to the defendant's conduct of the defence?

MR CORDWELL:

Yes, and that's the kind of thing that Justice Asher has, in my submission, correctly identified in this particular case. That wasn't the case in *Martin* and there'll be lots of cases where of course a stay may be considered as a reaction to decisions by the prosecution or the state. But certainly, if it wasn't for the prosecutions actions in *Martin* that trial would have gone ahead and no one, by the reading of it, would have looked as if they would have complained that it would have been unfair, but certainly here, there is an acknowledgement that that is a real risk. Now, whether that was the case or not, may be a secondary point. It's important that when someone is tried for a serious or even minor offence, that there is an appearance that there is a fair trial. Isn't the perception in our system as important as the reality?

McGRATH J:

You can't have a fair trial, you say, if there's any disadvantage caused by delay?

MR CORDWELL:

If that – yes.

McGRATH J:

I think your proposition, as Justice Blanchard put to you a little while ago, is going to rule out all historic offending cases. That may be, you say, the principle, but it is a pretty extreme proposition.

MR CORDWELL:

Well what has to happen is that particular prejudice has to be identified. Now this was very specific evidence that –

McGRATH J:

As far as you're concerned, the prejudice can be any disadvantage? I mean, I'm not –

MR CORDWELL:

Well a disadvantage of the type that Justice Blanchard explains the erosion of memory and the disadvantage has to be connected with the type of evidence that the Crown are going to call, and this case was all about remembering the type of texts and the nature of the texts and the type of phone calls and what, a yes, no, maybe or a particular reference to golf related to.

McGRATH J:

But we're trying to get a concept here –

MR CORDWELL:

Of course.

McGRATH J:

- as Justice Tipping says, and you're not prepared to accept, I gather, substantial disadvantage or significant disadvantage, you're in the camp of any disadvantage, aren't you? So you're going for a low threshold.

MR CORDWELL:

Well, I would be going for as low as possible although I do have to accept that there has to be some connection between the evidence and the erosion of memory, which is accepted by Justice Asher here.

McGRATH J:

Yes.

MR CORDWELL:

But I've covered the balancing test, I think it was, with respect of Justice Asher inappropriate for him to use considerations he used in determining the breach to balance whether there was a remedy. I'm reluctant to use analogies, but it would be almost the same as using, as an aggravating feature in an assault with a weapon sentencing, that a weapon was actually used, and so the public interest factors in relation to this can only be used so far and it goes back to the comment about the seriousness of the offending being predominantly what Justice Asher has done to actually keep this trial on track.

Your Honours, unless you wish to hear from me any further, I hope I've been of help to you today.

BLANCHARD J:

You're not seeking any remedy other than a quashing of the conviction? If the conviction stands, you accept that the 18 months was a reasonable compensation?

MR CORDWELL:

No I don't, and I'm not –

BLANCHARD J:

You're not asking us to reduce the sentence further?

MR CORDWELL:

I'm not going to ask you to reduce the sentence.

BLANCHARD J:

Which might just encourage the Crown to ask for –

ELIAS CJ:

Well we don't have an appeal against sentence in front of us.

MR CORDWELL:

No, this was about whether or not the trial should have gone ahead or not, I'm clearly saying it shouldn't have because of certain things that Justice Asher acknowledged, and certainly general prejudice was alive and well here, thank you.

ELIAS CJ:

Thank you. Yes, Mr Horsley.

MR HORSLEY:

Thank you, Your Honours. I suspect Your Honours that my argument today is going to be somewhat directed by where Your Honours would like to take the Crown's response to my learned friend's submissions, but the propositions that the Crown advance, in general terms at least, are that Justice Asher, despite conducting a very thorough review of the authorities and with the greatest of respect, largely getting those right, was incorrect to hold that this was a case where undue delay could be found, and that the global approach to delay, which it's submitted Justice Asher did apply, was where this judgment of his went astray in finding undue delay. I say that with a recognition that in the Court of Appeal, of course, the Crown did not argue that in fact Justice Asher had got the issue of undue delay wrong, the argument –

ELIAS CJ:

Why have you changed your mind then?

MR HORSLEY:

Sorry, Your Honour?

ELIAS CJ:

Why are you shifting position?

MR HORSLEY:

I'm not shifting position Your Honour –

ELIAS CJ:

Oh, I'm sorry.

MR HORSLEY:

The focus in the Court of Appeal was very much on whether in fact the remedy was the correct remedy for a finding of undue delay and so the Crown simply addressed that issue, it did not address the issue of undue delay at that stage.

ELIAS CJ:

Well was there no appeal – oh, I see, of course, there was – yeah.

MR HORSLEY:

The trial simply proceeded Your Honour and there was no ability for us to appeal Justice Asher's ruling in any event.

ELIAS CJ:

Yes.

MR HORSLEY:

So, to a certain extent, the reason why there has been a challenge to this by the Crown today is almost at the behest of this Court because of course the two questions that were posed, were –

ELIAS CJ:

Yes, I'm just really, just getting my head around this, it's a rather odd position, we don't have a determination from the Court of Appeal on this issue.

MR HORSLEY:

No you don't, Your Honour.

ELIAS CJ:

So we might have actually made an error in the questions posed?

MR HORSLEY:

I would say that you did not, Your Honour, I'd be loathe to say that you ever make an error on the questions posed.

ELIAS CJ:

Your submissions say that all the way through, Mr Horsley.

MR HORSLEY:

But in this case Your Honour, I think that the point is that the Court has decided to look at this issue of undue delay and remedy for undue delay, I think it would be important for this Court to give some guidance, even on the issue of when one appropriately comes to undue delay, and for that reason alone, the question is properly posed.

On the second issue, obviously, the Crown's submission is that in the particular case, if one accepts that an undue delay finding was appropriate, then equally the response to that is to look for a proportionate remedy to the breach, one which takes into account the need for an effective and credible system of justice and that, in this particular case, the remedy of an 18 month reduction in sentence directly reflected the liberty concerns and security interests of the fact that, according to Justice Asher's findings, this man had spent too long in a period of bail and insecurity pending trial. And with respect to my learned friend's final submission, which he doesn't clearly push too hard, the Crown's submission is very much that the 18 month reduction is sentence was a generous remedy in the circumstances.

The final submission, of course, is that it is not the law in New Zealand nor in most comparable overseas jurisdictions that a stay is a mandatory remedy for a finding of undue delay and in fact, that it should only be in rare circumstances that resort is had to that remedy.

TIPPING J:

Well curiously, under the heading “Conclusion on Remedy, the Williams brothers”, 365, His Honour himself says a stay of criminal proceedings is an extreme remedy to be granted rarely. So you wouldn't have any quarrel with that,

MR HORSLEY:

I don’t have any trouble with that at all, Sir.

TIPPING J:

Possibly that even may put it perhaps a little bit too high the other way?

MR HORSLEY:

I’m just trying to find that paragraph sorry, Sir.

TIPPING J:

Paragraph 111.

MR HORSLEY:

No Sir, I would accept that that’s an accurate statement of the current jurisprudence.

McGRATH J:

As a matter of interest, would you say that it wasn’t borne in mind when he got to Mr McLaughlin and Ms Niblett?

MR HORSLEY:

Yes Sir, that raises a whole new kettle of fish, and of course the Crown submission is that, in this particular case, there was no undue delay, that would have actually applied to the accused across the board, and in fact, if the Crown's analysis is right, subject to some riders I might put on that, then those lieutenants, for want of a better description, also should not have had their prosecutions stayed.

McGRATH J:

You'd prefer to answer it by reference of the first issue?

MR HORSLEY:

Yes I do, Your Honour.

ELIAS CJ:

But Asher J determines it on the basis of the different seriousness in the offending and therefore that proportionality in response.

MR HORSLEY:

Yes, there's an overlap there and I think Your Honour Justice Wilson picked up on that, and that is that he also analyses the effect that it's had on the lieutenants in –

BLANCHARD J:

Are they Americans?

MR HORSLEY:

Lieutenants, I apologise Your Honour, having never gone through the finer points of the cadet training schools and the like Your Honour, I slip into that Americanism, I'm sorry.

The – perhaps I should just simply call them the sergeants, we might demote them, the difficulty is, is that in Justice Asher's decision when he is finding in fact that there was undue delay, of course, with respect to those bit-players in the process, he has said that for them, the effect was more traumatic, in

essence, in reflection or in comparison to the charges that they were facing, so he uses the charges that they were facing as some assistance in determining whether there has been an undue effect on those particular participants to the conspiracy. Then, when looking at remedy, there is the double counting again, because, of course, that's when, the Crown would suggest to you, that you truly look at the seriousness of the offending in determining what is the proportion it responds and of course, for those lower down in the order of seriousness, then a proportionate response may well be a stay, but for those higher up, faced with very serious drug offending, then that is not a proportionate remedy.

WILSON J:

Mr Horsley, at least arguably, couldn't the argument go the other way in that the more serious the offending, the more serious the likely consequences and therefore the greater the justification for the protection of the stay?

MR HORSLEY:

The difficulty with that analysis Your Honour is that these are proper consequences that are imposed upon people who have committed serious offending, so unlike the consequences, for instance, of going through an unfair trial and facing the prospect of a lengthy term of imprisonment, we're not concerned about the fairness of trial here, everybody accepts and I'll come back to perhaps my learned friend's submission on this, that these men went through a fair trial, they've been properly convicted of very serious offending, and the proportionate response is that people convicted of very serious offending and properly convicted, Your Honour, should face that consequence and it's not an unjust or inappropriate finding that they should face that consequence of it. The remedy is related to the fact that they have spent too long in getting to the appropriate state of conviction, in this case, and can that be remedied by way of, and as a result they have spent times on restrictive bail conditions, Justice Asher refers of course to the fact that they also spent time in custody for breaching their bail conditions, I have some more difficulty with that because of course that time spent in remand in custody will come off their sentence in any event, but the 18 months reduction in sentence was a

direct compensation for the fact that it took them too long to get to the state of conviction and be sentenced. So it does remedy the delay, it's a direct remedy for delay. It couldn't be a remedy for an unfair trial.

TIPPING J:

Does that mean it could matter whether you attack the delay after conviction or before trial?

MR HORSLEY:

I certainly think it does have an effect Your Honour, because the authorities would suggest that the status of a person when you're analysing such an argument will have an effect faced with somebody who no longer has the presumption of innocence, faced –

TIPPING J:

Is that logical? As to make it, or something turn on whether you get there sooner rather than later?

MR HORSLEY:

Well it's logical in the sense Sir that by then, if you're looking at a remedy, what we have is a convicted person, and what remedy do you give? Do you now say, irrespective of a fact that a jury has actually heard this man's case, determined his guilt, we are now going to quash –

TIPPING J:

But wouldn't it be fairer and more appropriate to say what would the Court, or should the Court have done had it been asked to stay before trial? I don't see how you can be worse off.

ELIAS CJ:

I suppose it's much more complex before trial because you might, the Court might take the view that it must make enquiry as to when a trial can be heard and a stay may be indicated if a trial can't be arranged within a short period of time.

MR HORSLEY:

That's certainly a factor Your Honour.

ELIAS CJ:

But that does mean that there's a difference in result for those whose complaint isn't heard until after their conviction.

TIPPING J:

That's why I'm interested in the point, if it would lead to that consequence it seems possibly a little difficult.

MR HORSLEY:

By analogy perhaps Sir, take the example of somebody challenging the admissibility of evidence pre-trial and say that evidence is excluded and the person goes through the trial and is convicted, then you can also challenge that evidence post-trial, you could let the evidence go in and then the considerations become different. When the Court was looking at the evidence and it's admissibility pre-trial, they were looking at the risk that it might lead to an unfair trial and the Court will assess that risk faced with the evidence that they have before it at that time. By the time you are looking at it in the confines of a conviction appeal, then you are looking at whether in actual fact a miscarriage of justice has occurred and that may bear into – have many factors that bear on that consideration, including of course application of the proviso, even if you do determine that the evidence was improperly admitted, in breach of a Bill of Rights Act, then that's not necessarily the end of the matter. So, somebody who goes for their pre-trial remedies may have seen that evidence excluded, somebody who goes for their remedies post-conviction may have a finding against them that in actual fact the evidence had no bearing on the trial but yes, it was in there for the purposes of your trial. So, I think to that extent we do recognise that there are different considerations that come in to play pre- and post-conviction and certainly the status of the person as no longer being presumed innocent is an important one when looking at remedy Your Honour, in the Crown's submission.

TIPPING J:

But that really does sharpen the point, that the Crown is in a better position if the point is raised after trial than before because you can now say well look, this fellow has been convicted, the fact he shouldn't have been put on trial at all, forget that, he's been convicted.

MR HORSLEY:

And that's probably consistent Your Honour, with the right that this is endeavouring, or the harm that this is endeavouring to remedy.

BLANCHARD J:

Where I disagree with my brother Justice Tipping, is the statement he shouldn't have been put on trial at all. If the trial could be a fair one, why shouldn't he be put on trial?

TIPPING J:

We don't disagree on that but I'm presuming that he would have been granted a stay before trial but some how or other now that there's been a trial, you seem to be suggesting that he won't get his conviction quashed.

BLANCHARD J:

Well, why would he have got a stay?

ELIAS CJ:

Because the system can't provide a trial within a reasonable time.

TIPPING J:

I can't see how he can be worse, having gone through – I'm concentrating more on the systemic problem because this seems to be at the heart of the present case. I don't disagree with my brother Blanchard that if he has been put on trial and there's nothing unfair with the trial, you can't say he gets his conviction quashed on account of fair trial consideration but may be systemic

reasons he shouldn't have been put on trial at all. I'm just exploring this with you.

MR HORSLEY:

Yes Your Honour and I suppose the difficulty is, is that the hypothetical raises so many different factual circumstances that would have had to have been present for you to make a finding that he should never have been put on trial in the first place but it's difficult to answer. The problem with it, it seems Your Honour, is that this is a remedy that's not about fairness of trial, it's a remedy about delay and pre-trial, if you have got to the stage where you think it should have been a proportionate response to stay the trial, then so be it but post-trial you have had the trial and that remedy, in the Crown's submission, is no longer available. Effectively, what you are looking at is a properly convicted person and it would seem Your Honour, I can't imagine the circumstances where you would think that that conviction should be quashed.

ELIAS CJ:

It will always be a disproportionate response?

MR HORSLEY:

Yes, Your Honour. I don't know, perhaps we can think of a hypothetical – certainly I don't think that this one comes close to that Your Honours.

ELIAS CJ:

Isn't really, this question of disproportionality and seriousness of offending and so on, inappropriate in these circumstances? What you're after is, what is the appropriate remedy in the particular circumstances of the case.

MR HORSLEY:

Yes and I don't think that that changes the analysis at all though Your Honour. Ultimately, when you focus on what's the appropriate remedy, it will take into account -

ELIAS CJ:

Well, I'm just really talking about your trumpeting about *Shaheed* ushering in a new era of proportionality.

MR HORSLEY:

I don't think I did Your Honour.

ELIAS CJ:

Does that mean that previous generations of Judges have dealt with matters on a disproportionate basis?

MR HORSLEY:

No, Your Honour and in fact –

ELIAS CJ:

It's only, what is the appropriate response that the Court is looking at.

MR HORSLEY:

Yes, yes.

ELIAS CJ:

What we're trying to feel for is, in what circumstances is it appropriate to stay a prosecution and what's being put to you is, is there a problem according to the accident of whether matters get scrutinise pre-trial or post-conviction?

MR HORSLEY:

The difficulty with that Your Honour is, it is no accident. They get scrutinise pre-trial because the defendant raises an objective to how long it has taken him to be tried.

ELIAS CJ:

If he can get funding through legal aid to take it I suppose.

MR HORSLEY:

I couldn't imagine the circumstances which would see somebody who has trial counsel not being granted legal aid to bring a perfectly proper pre-trial application.

ELIAS CJ:

So then, that's an own desserts response really, that if the – I'm not being pejorative in this response but that the accused must make application pre-trial to have his best crack?

MR HORSLEY:

It's like any right Your Honour. It's a right of the individual that the individual asserts. Now, if someone elects not to challenge the fact that their search of their person was unreasonable and in breach of the Bill of Rights Act, then the prosecution proceeds as if everything was lawful and in the same circumstances, there may be many reasons why an accused person may wish to see a trial delayed, the prosecution can't anticipate that. Assuming they are proceeding as fast as they can and not acting to interfere with that process, then it would appear that it is appropriate to give some weight to the fact that there has been no objection by the defendant to the process occurring and to the trial running it's course.

McGRATH J:

The weight is, that the presumption of innocence is now gone.

MR HORSLEY:

Yes, yes.

TIPPING J:

In fact, that's the gravamen of it.

MR HORSLEY:

Yes, Your Honour.

TIPPING J:

And you say well, you've got to be a bit suspicious about this application to stay because he's obviously a nasty drug dealer, rather than an alleged drug dealer.

MR HORSLEY:

That's exactly right Your Honour.

TIPPING J:

Calling a spade a spade Mr Horsley, is that really what's being said?

MR HORSLEY:

Yes, it is and in fact, as I say, that's consistent with the authorities too, that the status does make a difference, the change from being a convicted person to a person presumed innocence will make a difference.

TIPPING J:

Still feels a bit odd to me Mr Horsley but I'll keep my counsel on the matter.

MR HORSLEY:

I'm prepared to accept a little bit odd Sir as long as you agreed with me. So, Your Honours perhaps just to pick up on Your Honour the Chief Justice's point. Where we are talking about a proportionate response or an appropriate response what the Crown is simply saying is that when you analyse issues of delay you have a trigger point probably which is something which will give rise to the enquiry and obviously that will usually be the fact that something, at least on its face, seems to have taken a long time to get to trial. And then as Your Honour Justice Tipping said right at the commencement of my learned friend's submissions, you then look at, right, that's triggered it, now let's look at why it got there. Let's look at the circumstances and so the Crown is simply saying that at least in analysing undue delay we then run through the well accepted *Morin* factors that will enable us to analyse whether in fact it is undue in the particular circumstances, bearing in mind, as was said in *Morin*, that the right itself is designed to protect three defined interests. The fair trial interests, simply because as we all know justice delayed can be justice denied

and that is because there is a dimming of witnesses, other evidence might be unavailable, so we assess whether in fact that has happened.

BLANCHARD J:

But those interests however would be protected even if there were no guarantee of a trial without undue delay.

MR HORSLEY:

They'd be protected, that particular interest is protected by section 25(a) as well Your Honour. That's true. There is a modicum of overlap but certainly the fair trial right itself remains protected obviously under 25(a). And of course the second interest that it protects, and probably it's the primary interest in a way, are the liberty interests and certainly we've seen in overseas jurisdictions that one remedy to undue delay particularly for persons that have been remanded in custody, is to actually release those people from custody pending their trial. And the third aspect that's been identified in *Morin* and picked up in many of the subsequent authorities, are simply the security interests of the accused person, the right is intended to minimise the anxiety, exposure to stigma and disruption to life plans that come from the unresolved criminal process.

ELIAS CJ:

Are you able to take us to any commentary on the ICCPR on undue delay because of course that's where the language comes from?

MR HORSLEY:

Yes, you're correct Your Honour, it originally does come from that directly.

ELIAS CJ:

And it's different from the European Convention. Is it different from the Canadian Charter, I can't remember?

MR HORSLEY:

In essence we submit Your Honour that it's all essentially the same –

ELIAS CJ:

Yes I can understand that submission.

MR HORSLEY:

The Canadians for instance use the words unreasonable I think.

ELIAS CJ:

Yes that's right.

MR HORSLEY:

We use the words undue.

ELIAS CJ:

Yes. But I just wondered if there was any commentary by the Human Rights Committee on undue delay?

MR HORSLEY:

There is and we have put a number of the cases in there. Your Honours my learned friend has just referred me to and I do apologise for both the pastel coloured bundles and the fact that we have provided so many authorities but at –

ELIAS CJ:

Is it this case that has provoked the Crown into suggesting we have double sided photocopy?

MR HORSLEY:

I think there may have been a suggestion Your Honour from certain of the legal executives that were putting this bundle together. In fact I think they may have contacted the court direct without anybody else speaking to them but Your Honours at tab –

ELIAS CJ:

What volume?

MR HORSLEY:

Tab 77 of volume 2. Oh sorry. I'm on my wrong pastel Your Honours. It's actually volume 5, the blue bundle. Tab 77 provides the general comments –

ELIAS CJ:

Yes.

MR HORSLEY:

On the ICCPR and at paragraph 35 which is page 10 of that discussion, or that document sorry Your Honours, there's the general discussion as to the purpose of article 14 which is the relevant, paragraph 3C, which is the relevant article.

TIPPING J:

Interestingly they quote it as "undue delay" at 35 the first line and then the last line on that page, "what is reasonable needs to be assessed."

MR HORSLEY:

Yes.

TIPPING J:

So they've substituted reasonable for undue delay – for undue, rather.

MR HORSLEY:

Yes, yes Your Honour which of course probably reflects the fact that that's what's happened throughout the world, that unreasonable and undue have been seen as interchangeable.

BLANCHARD J:

It doesn't have anything about fair trial.

MR HORSLEY:

Yes Your Honour. That's covered under the last sentence there where it is designed to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of a specific case but also to serve the interests of justice and that's been held to apply to the fair trial interests there.

ELIAS CJ:

I see that in the footnote, footnote 72 it is justification that they zero in on in the cases**.** I see the time until final judgment on appeal too, sharpens the tension, yes. Yes thank you.

MR HORSLEY:

The submissions themselves Your Honour – sorry Your Honours. In the submissions Your Honour we have footnoted reasonably extensively from the European cases as well and –

ELIAS CJ:

Yes I just wondered if there was any distinction drawn in the commentary but that helps because it brings the two together as one would have expected.

MR HORSLEY:

Yes, yes, thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Yes Mr Horsley.

MR HORSLEY:

Your Honour I think that the natural progression of this submission is to really to deal with some of the specifics about submissions that in fact there was no undue delay here and in particular there are three aspects. The first is a

submission that in fact disputes the analysis and the findings that there were no undue delay at any given period throughout these proceedings. Justice Asher was wrong to then apply what the Crown says was effectively a global approach by simply saying that in the event the period that had elapsed was just too much.

BLANCHARD J:

Perhaps Justice Asher was inhibited in addressing appellate delay?

MR HORSLEY:

Yes Sir well that's probably a very good prompt for what the second point was, that I should address you on, which was the issue which seems to have demanded a bit of focus today which is the issue of appellate delay. And so that was the second point to this part of the submissions. And the third point was to deal with the specific general prejudice submissions that my learned friend has been making. The global approach that Justice Asher took I think is largely accepted it would appear by my learned friend. That is that despite the fact that Justice Asher recognised that there was a need to go through the separate considerations that one would see in a standard assessment of undue delay through the *Martin* and *Morin* factors, he did hold that effectively at no stage was there anything other than what he perceived to be a normal delay and I use the words normal advisedly. They are the words that have been used today. He doesn't say normal but certainly he seems to think that all of the stages of the process were standard and really did not require additional comment or sanction by the Court.

That leaves one with the only conclusion that in fact in finding undue delay Justice Asher has really taken the cumulative effect of what is in essence a large period of time to get to a trial and said that is just too much. My submission on that is that that fails to take into account the fact that this is a case which one could describe as – or fairly describe as unique. It's a word that gets bandied around a lot I think and often inappropriately but this case is unique. It doesn't fit with any of the appendices, the cases cited in the appendix to His Honour's judgment.

ELIAS CJ:

Does that mean the Court should be more or less prepared to grant a stay, if it's unique?

MR HORSLEY:

I think –

ELIAS CJ:

It's out of the ordinary.

MR HORSLEY:

Yes and I think neither. But basically what it means is that the uniqueness of this case does give rise to some rationale for why it did in fact take the 58 months, which it eventually took, to finish this trial. And so when we are looking at delay we are looking at the circumstances that surround delay and the uniqueness goes to two things perhaps. The first is the examination of what did happen in this trial. The second is that it takes away, in my submission, the effect that my learned friend would have you believe that it would have and that is that a judgment here saying this is just too long, 50 months, would be of some precedent value in terms of we shouldn't have trials that are 50 months long and I'm just using 50 months as the standard time. And I say that because you can only assess that against these circumstances that arose here and in the Crown's submission we're unlikely to see circumstances like this arise on an every day basis if again at all.

ELIAS CJ:

I don't understand the submission I'm sorry. What's it directed at?

MR HORSLEY:

The second part of that submission is directed towards my learned friend's submission that this is a good opportunity for this Court to say that there is presumptive delay, effectively, after a given amount of time. My submission on that is that because this case is unique, it's not simply a case of a trial

running through a deposition hearing then taking a further 40 months before the trial actually happens. There is no real value in a statement that 50 months is too long. Everybody can accept that 50 months is to long until you look at the circumstances that surround that delay. I'm sorry if that was somewhat inelegantly at first Your Honour but in essence it comes down to the fact that the circumstances surrounding each case have to be looked at carefully and this case is really one out of the blue.

ELIAS CJ:

Does that mean 50 months is too long, everyone can accept it? The question is what's the justification, what's the reason?

MR HORSLEY:

No Your Honour. I would say 50 months triggers that alert that things may have taken too long.

BLANCHARD J:

Well surely it's triggered a bit lower than that?

MR HORSLEY:

It probably is Your Honour but using this figure it certainly triggers that point and then we get into analysing the circumstances around that delay. But I don't think we're well served by picking some arbitrary time frame for which delay warrants further examination. In my submission it will depend upon obviously the background circumstances to the case which is why we go through the complexity and what did happen in this particular trial.

MCGRATH J:

But I understand you to be suggesting that because it was unique in terms of the duration, it's length, that this Court classifying it as undue delay won't have a corrective value?

MR HORSLEY:

It will for the particular case Your Honour but I'm not sure as to what precedent value it will have.

MCGRATH J:

Well it might just have a precedent value if for example it was to indicate to the Court of Appeal that when they decide to take on a case and deal with it as a major case for a major judgment, they have a good look to make sure that it's not one that's already at high risk of getting into unacceptable delay?

MR HORSLEY:

Yes Sir and perhaps that's where I should deal with the piece – or the portion of this trial process which seems to have been, now anyway, the focus of what is in fact the undue delay. It has been submitted today that the delay between the filing of the notice of appeal by the Solicitor-General and the setting down of the Court of Appeal fixture was too long. It's also been suggested that the six months post the fixture before the Court of Appeal issued its judgment was too long and the combination perhaps of those two aspects of time are in fact where undue delay arises in this case. As I understand my learned friend he doesn't challenge any other portion of the trial process that took place as giving rise to anything other than normal systemic –

ELIAS CJ:

Delay.

MR HORSLEY:

- time constraints.

TIPPING J:

Well he does rely on that as being – the background against which these later periods must be assessed –

MR HORSLEY:

Yes, yes.

TIPPING J:

We'll have to bear that in mind.

MR HORSLEY:

Yes he does Your Honour and there's a number of things that I would like to say about that. The first of course is that this is the first time that this has been directly challenged in such a way. Justice Asher –

TIPPING J:

But it's only because we're a bit more analytical in this court than perhaps some other places.

MR HORSLEY:

To be fair to Justice Asher Sir I think he was fairly analytical about the process that he went through and he was satisfied that in fact the time period that it took the Court of Appeal to reach its decision or even to set it down was perfectly satisfactory. Now that has to be put into the context that for a start it was a Solicitor-General appeal. It was filed in October I think. We had the summer adjournment for want of a better description where the Court was obviously not sitting. We had some eight counsel that still needed to be provided for in terms of setting down a proper fixture date for this appeal and it was clearly a very important appeal. No complaint was made about the time in which it took to have that appeal set down. No evidential foundation is before this Court that any of the appellants involved were concerned about the setting down of this fixture for a May fixture.

ELIAS CJ:

Is that necessary though. I mean under the Bill of Rights Act everyone involved in the criminal justice system was obliged to give effect to the right to fair trial.

MR HORSLEY:

This is – yes that's correct Your Honour and I think no one would suggest you can waive your right to a fair trial. You can certainly waive your right to counsel.

ELIAS CJ:

Sorry, I should have said to trial without delay.

MR HORSLEY:

Well again Your Honour I would submit that in fact you can waive your right to trial without delay because in fact in many cases the Crown is prepared to go ahead and yet for some reason the defence may wish to have –

TIPPING J:

You can hardly do it by nothing, by doing nothing though?

MR HORSLEY:

Well –

TIPPING J:

That may be a factor in the overall assessment –

MR HORSLEY:

I think that's right, that it's a factor in the overall assessment as to whether it's been undue delay but certainly when one accepts a fixture that has been set down without protest and is going with the normal process, then in the absence of protest, is it a strong factor to say that the delay here has not been undue. Now, this is where the new submission, if I might call it that, that this is the critical delay period because it was never the focus of critical delay earlier on, is very difficult for the Court now to grapple with particularly for the Crown to answer because in actual fact, we know that the Court of Appeal had to accommodate a large number of defence counsel, at the risk of making a submission from the bar the Solicitor-General always endeavours to prosecute his appeals in a timely fashion and there's no suggestion that the

Solicitor-General was trying to delay the hearing of this appeal and so, for all we know, that May fixture date was one that met with the convenience of all counsel involved on the defence side and was the first available date to accommodate that many counsel. Your Honours, in the absence of any evidential foundation to suggest otherwise, it is my submission that in fact we can't be saying that this was anything other than a normal step in the process. Now, I recognise Your Honours perhaps concern, that the Court of Appeal didn't recognise this as something that had been in the system for too long. I think, again to be fair to the Court of Appeal, at least at first when this appeal was filed, all they would have been aware of was that it was a Solicitor-General's appeal against a pre-trial ruling excluding evidence and it was probably not until some time down the track that they realised, that they would have been aware of the actual timeframes involved in that.

From that point of view, I think the submission can be properly made that at least the Court of Appeal, in the absence of being informed by counsel from either the Crown or the defence, this one needed to be heard urgently and we don't have any evidence on that, the May date was probably the first available date and there can't be any criticism of that period.

ELIAS CJ:

It may be relevant whether people are to blame or should have appreciated, or something like that but at the end of the day, don't you have to look at what happened and assess it overall?

MR HORSLEY:

Yes, Your Honour you do, the problem with that is that there's no suggestion that the length of time that it took to get to a fixture was anything outside of the normal time that a fixture such as this would take to get in to the Court of Appeal. Now, it's only given some added importance because it's now suggested that this was a period of undue delay. It's not suggested that it wasn't a normal timeframe in the ordinary course of events, it's now suggested that it's undue because of the background circumstances. Well, in my submission, it behove upon the appellants in this case to actually show

that there is some delay there that could have been remedied, or that there could have been a quicker fixture date and that this was something outside of the normal. We just don't have that evidence before us and in fact Justice Asher found that it was a perfectly normal period.

ELIAS CJ:

The seven months?

MR HORSLEY:

Yes, Your Honour.

ELIAS CJ:

What paragraph was that?

MR HORSLEY:

Fifty one Your Honour, of –

ELIAS CJ:

Thank you, that's fine.

BLANCHARD J:

I would have said that it was a pretty long period for a fixture for a pre-trial matter, though I would have to confess that I think the period in *Shaheed* was longer but that was because it went off to CAD and then was sent back but *Shaheed* was not being dealt with by the Court of Appeal against the sort of background of various delays that had already occurred here.

MR HORSLEY:

No and I certainly accept that Your Honour and one might have hoped that this would be picked up by the system but then again *Shaheed* didn't involve the complexity of having to arrange for a fixture date which suited eight defence counsel and that is a problem –

BLANCHARD J:

It involved getting seven Judges together.

MR HORSLEY:

You're correct Sir and that's probably a more difficult exercise I'd have to say.

BLANCHARD J:

I recall that it was quite difficult to organise the Judges and counsel.

MR HORSLEY:

Yes, yes, I have no doubt about that and there are cases which do take a long time to schedule. This wasn't necessarily one of them, we've got no evidence before this Court that that was a particularly long time to actually schedule a fixture and in fact, again at the risk of giving evidence from the bar, I think that it was in 2008 that the Court of Appeal did a blitz on appeals in the early part of that year because their backlog had got over the 400 mark. So, we know that that is a Court with a heavy workload and, in my submission, there's nothing unusual about this fixture date.

The second aspect of the delay focuses upon the time it took in which to issue a decision. To be fair again to the Court of Appeal, this was a big decision. There was a separate judgment delivered by Justice Hammond, it's provided the guideline judgment on search warrants and involved a great deal of work. Equally, the issues of whether in fact all of the evidence would be inadmissible, some of it and the causation type links between this, as my learned friend put it, the fruit of the poison tree, were not easy arguments to grapple with and in those circumstances one can well imagine the situation where it took that long for the Judges to at least agree where they were in terms of the admissibility of that evidence even if they couldn't quite, in December of that year, provide the written reasons behind that. I think this Court has had it's own difficulties with putting out decisions when they are very complex issues and big judgments, in matters of weeks or months even and I mean no disrespect to this Court.

TIPPING J:

Would it be relevant Mr Horsley to say that and I think I should put this to you, that I, in the whole of my practising career, never encountered a case where it has taken over six months to actually announce the result and a further, however long, to give the reason. It's the time that it took to announce the result that is so startling.

MR HORSLEY:
Yes.

BLANCHARD J:
Is that attributable to the fact that there were a number of people whose actions had to be analysed and you had to work out the legal framework first before you could do that, it wasn't just focusing on one chap?

MR HORSLEY:
No, it wasn't and I think that's a fair observation Your Honour and in fact of course you see from the judgment that in fact the very first search in fact did still remain inadmissible but it was the subsequent searches that were held to be admissible.

TIPPING J:
Granted that there were substantial complexities and multi-parties and different searches and a variety of issues – well, I'll say no more.

MR HORSLEY:
No Sir and look, the Crown fully accepts that this does appear to be a long time. Is it undue? No. We are talking about again, a lack of evidential foundation as to what occurred then. Were people pushing for this to come out? No, it would appear not. Equally, there's no statistical analysis of how long it has been taking Judges to get these judgments out. We don't have even an assessment of just how busy that Court was at the time. I can well understand a gut feeling from this side of the bench as to how long such a judgment should take and probably a very good –

TIPPING J:

It's not – it's the reasons coming from, but it's, what I find strange in this case is that it took so long to announce the result. I mean, writing up the reasons is a wholly different question.

MR HORSLEY:

Yes, Your Honour and I think that's probably, to pick up on Your Honour Justice Blanchard's point, that really it required agreement on the law before they could actually make that decision and that was the difficulty, that the law here was something that they were proposing to radically review, whether the review was so radical in the end I'm not so sure but certainly it was a very close look at it.

TIPPING J:

It was a hugely problematical call to make this the sort of big case when it had already been about four years in the pipeline.

MR HORSLEY:

Yes Sir although the difficulty with that of course was that it unfortunately happened to be the right case to do it in, because it was one that raised these issues of the particular search warrant in question being, whether it was properly drafted –

TIPPING J:

Well ones got to be understanding and flexible about the difficulties there are in these complicated cases.

MCGRATH J:

But Mr Horsley the long term you can see that it might be rationalised on the basis that the issues were substantial but it was important that the Court have the opportunity to do so, address them in a substantial way and that the position for future trials and future investigation be a lot clearer. But I'm just wondering if really you're not equating undue delay to a concept of being delay without fault being attributable. In the end shouldn't one be looking at

this rather from the point of view of impact on the accused. I mean after all it's the accused's right as a person charged and we're focusing here on that aspect of damage that comes from breach of the right that's concerned with anxiety and uncertainty while you're charged. From the point of view of an accused who's suffering under those stresses of life, it's not a debate over whether the Court of Appeal was right or wrong to this case and to make it the key case at Court of Appeal level on the subject isn't going to be particularly germane, it's just a long period, and so I'm going on a bit but I'm really suggesting that perhaps the flaw in this approach that you're taking is that you do equate fault and you can really say no fault not undue when that's not really the real issue in the end.

MR HORSLEY:

No I accept that but it's part of the issue because where we have gone today is that there has not been an acceptance by my learned friend of the fact that all of the steps in this process were in fact normal for want of a better description. Your point Your Honour I think quite rightly says irrespective of whether all of the steps in the process were normal, has their been specific prejudice touching upon those rights that the undue delay right is trying to protect –

MCGRATH J:

It's not prejudice so much, it's an impact.

MR HORSLEY:

Well the impact, yes, yes, on the right to liberty. Has it been such that in fact, irrespective of the reasons for delay, where at such a stage that we must call this undue. It has been oppressive and from that point of view Your Honour the discussion changes a little bit and it becomes far more focused upon the individual in my submission and perhaps that's again somewhat of a justification for the findings that Justice Asher made in the sense that he was able to distinguish between the various participants in this. You'll see from his judgment that only three of the applicants for stay actually provided any affidavit evidence in support of their applications. Those three applicants,

variously described hardship tot heir family, hardship in the sense of not being able to work and various other factors that had impinged upon them over that period. They were also three people who could have expected that actually they would have put this thing behind them by the time that the 50 months or so was up and with respect they can be distinguished from Mr Williams. Mr Williams provided no affidavit evidence to suggest that he even wanted this trial to come on early. He didn't say that he had been affected by it. He wasn't somebody for instance who had never been in trouble with the law before and was deeply traumatised or that his reputation had been damaged by these ongoing proceedings. And that in my submission is again where Justice Asher was not entitled to, after saying as Your Honour has said, look, let's not apportion blame here. We've got 57 months of delay and the – that is a long time. Now I'm going to look at what specifically has affected you. He didn't. He looked at this as saying there are three people here who have provided me evidence as to their effects and I'm just going to assume that those same effects carried on for the other participants in this trial and with respect to Justice Asher that was an assumption that he was not entitled to make. And on that basis absent finding a portion of this proceeding that had been outside of the normal and undue, then he was not entitled to find that Shane Williams had in fact been subjected to an impingement or infringement upon his right to liberty to an extent that it required a finding of undue delay.

I have some sympathy for Justice Asher because of course he was dealing with this as a massive conspiracy obviously involving all of the participants but in the Crown's submission it was at that stage that he needed to distinguish between the participants.

MCGRATH J:

What you're really saying is that before anyone can raise anxiety aspects and uncertainty issues, they've got to give evidence specifically of the impact on them otherwise it can't be considered. Is that what you're saying?

MR HORSLEY:

Yes I am in a way Sir because I'm saying that they must assert that that is the case because we've seen in some of the US authorities that have been cited I think situations where there are certain accused who are quite content with delay. They're comfortable with the fact that they're undercharged, they have no difficulty with that. In fact what they're hoping for is that witnesses will lose their memory. Is that over the period of time it will become more difficult for the prosecution to prove its case, and that is often the case. That often delay –

MCGRATH J:

It's not a right to be tried with undue delay if you demand an early trial, is it? I mean there's no conditions attached to this right?

MR HORSLEY:

No, no Your Honour but equally Mr Williams never said that he wanted to be tried in a timely fashion. He did not make an application for stay or severance even or anything of that nature until some two months I think it was before the end date of it. So some 55 months into the process Mr Williams tags on to an application that was actually made by other accused at that stage to stay the proceedings.

MCGRATH J:

Are you saying he should have done it earlier though, is that your –

MR HORSLEY:

What I'm saying –

MCGRATH J:

Because I find it all a bit unrealistic and I just think it is an attempt to qualify the rights to be tried with undue delay for the Crown to be saying, as you've said more than once today, Mr Williams didn't protest.

MR HORSLEY:

Certainly that's a consistent approach with jurisdictions from around the world Your Honour. That the lack of protest, in fact acquiescence, in a trial taking a long time, is a factor that's entitled to be taken into account, that you are entitled to take into account when assessing whether it is undue –

MCGRATH J:

It's been criticised also, hasn't it? Professor Amsterdam for example?

MR HORSLEY:

Yes, yes, that's true Sir but you can understand that the logic behind it, particularly when faced with someone who is not asserting even at the time that they make the application that they have been under undue hardship over that period, makes it difficult to feel overly sympathetic to that argument that my right to liberty for instance has been unduly impinged upon. Now we don't know Mr Williams' motivation behind waiting – or not making his applications. But equally we do know that he hasn't asserted that he has been prejudiced by it in that sense.

TIPPING J:

Surely the obligation to bring someone to trial without undue delay is an obligation of the Crown? And the fact that the accused doesn't protest, I would have thought, was conceptually rather elusive as to its relevance.

MR HORSLEY:

It is elusive, Your Honour, except that that's why I say that this is a unique situation because the Crown was complying with its obligations to bring this thing on as fast as possible, there's no suggestion that they were delaying this process, and so what we're faced with is a proceeding which took normal time periods all throughout the proceeding, but it failed at various stages.

TIPPING J:

I'm not wanting you to rehearse all that, I'm just taking mild issue with the proposition that it's a significant factor when the accused doesn't protest.

MR HORSLEY:

I'm saying that Sir in the context of this case particularly because the Crown hasn't sought to take advantage of the accused by not protesting, for instance, it would not be right for the Crown to say "We've got other trials that we'd like to get on before yours, this guy's somebody who doesn't seem to mind too much whether his trial gets on, so we'll just bump it out to whenever we feel like getting on to it", they didn't do that. So they haven't taken advantage of a person who is either silent as to his rights and then putting it out to an unduly long period, they've actually proceeded Sir, with all due haste and in those circumstances, the Crown, justifiably, was not aware of the fact that there was even any suggestion that these people had or were undergoing personal impingements upon their liberty to an extent that they were concerned about that to a degree that they thought the trial either had to happen immediately or be stayed. And of course, the Crown weren't even put on notice of that until they actually brought their applications some seven months, I think, after the Court of Appeal decision was actually issued, in May 2007.

So I suppose Sir, just to answer that perhaps, how could the Crown assess that it needed to do something more than it did in the absence of evidence or some raising of the issue of delay coming from the appellants? And in essence, the Crown couldn't do anything, they were proceeding as quickly as they could.

BLANCHARD J:

If the Crown was keeping records of how long trials were taking, and the Court system certainly does that, this one would have stuck out as being a problem.

MR HORSLEY:

It did Sir, and the Crown were conscious of that but they really couldn't do anything more. They had a first trial which couldn't get off the ground, the second trial actually ran for, I think, seven weeks before it was aborted, the third trial was two weeks into it before an application which, with all due respect to my learned friend's submission, should have been made right at the

start of the first trial, if not before it, was made by way of voir dire. The Crown really was as much a victim of the circumstances as anybody else.

McGRATH J:

I suppose Mr Horsley, I'm not trying to be flippant here, but I can see the Crown might have had other priorities, it might have wanted a considered appellate view of Justice Heath's reasons and it may well have been that the outcome of this particular trial would be something they'd cope with later, if necessary.

MR HORSLEY:

Yes –

McGRATH J:

As I say, I'm not being flippant, but I think in the end, decisions of this kind have consequences and we have to look at the consequences in terms of what they were and in relation to Mr Williams' rights.

MR HORSLEY:

Yes Sir. Without being flippant back, to be fair I think the Crown would have been just as happy with a ruling that Justice Heath was wrong delivered on the day, but unfortunately that was a very difficult ruling to make.

ELIAS CJ:

I wonder Mr Horsley, whether we've really done this to death, the first question, which I must say I have misgivings about, if the Crown didn't have a right of appeal, it seems a bit odd that we should be wrestling with this point, and I think perhaps it might be useful to us if you were to move on to the second point, unless there's anything you particularly want to add to what you've said.

MR HORSLEY:

No, no, and I sympathise with the done to death approach, sorry Your Honour.

On the second point, Your Honours, I have already, in the written submissions, set out the Crown's position with respect to remedy and the question as posed was effectively whether it would be a standard remedy of stay after a finding of undue delay and the Crown's response to that is that consistent with the existing New Zealand authority and overseas authority as cited, no it shouldn't be. The primary remedy will be one that is a proportionate response to the breach and in this case in particular, Justice Asher was correct to say that the offending was so serious and there were no grounds to think that these men could not get a fair trial, such that it was appropriate for the trial to proceed with the issue of remedy looked at by way of either sentence reduction or some other such remedy should they eventually be proven to be found innocent, found not guilty, more to the point I suppose.

That's a fairly orthodox approach, in the Crown's submission, and again in the Crown's submission, the approach which must be the approach taken by the appellant here, that stay should be mandatory remedy is one that has caused enormous problems for those jurisdictions that have adopted it. It doesn't recognise the difficulty in distinguishing between mere technical breaches of the right versus more fundamental breaches.

ELIAS CJ:

What's technical breach of the right, if it's delay? How can it – undue delay?

MR HORSLEY:

You're right, there is a finding of undue delay, some undue delay will be much worse than others, for instance where there's prosecutorial misconduct or something else. This one, in my submission, is, and perhaps technical is not the right word, but it's certainly at the lower end of the scale in terms of a finding of undue delay and in fact, as the Crown has argued today, it's marginal as to whether in fact it is undue, there will be much clearer cut cases, where the breach is worse. The automatic remedy of stay also fails to take into account the public interest in prosecuting very serious crime. It would seem strange that, for instance, a breach of a fair trial right on a conviction

appeal is usually met by the remedy of a re-trial, yet if it took you too long to get to trial, your prosecution is permanently stayed.

TIPPING J:

Well that's a very strong point, I mean that's completely inconsistent and illogical if one were to reach that position.

MR HORSLEY:

Yes Your Honour, and of course, that's the effect that a mandatory remedy of stay would have.

TIPPING J:

I'm not aware in any human rights jurisprudence where anyone has set up a mandatory form of relief following a breach, it would be a pretty strong step to take to say you must give a stay once you've found, and I don't know whether there is any such example but it seems pretty unlikely that the Courts would tie their hands in that way.

MR HORSLEY:

Sorry Your Honour, I was just confirming that I had made the inaccurate submission, but yes, both Canada and the United States, if you got to the point where you've held that there is undue delay, the remedy is stay.

TIPPING J:

That's it, is it?

McGRATH J:

So they struggle not to get to that point?

MR HORSLEY:

Yes, they do.

TIPPING J:

Well that tends to distort, that was part of the rationale, pace other views, for the *Shaheed.*

MR HORSLEY:

Exactly Your Honour and that is why. It distorts and then does effectively you have a massive judicial effort to avoid that consequence and so you don't end up giving effect to the right because moderate breaches of the right will be found not to be in breach because of the completely disproportionate response that it's met with. Again that's set out more fully in my submissions Your Honour with the relevant authorities on that.

Beyond that broad submission Your Honours on the issue of remedy I'm probably largely in your hands as to whether there were particular aspects of my learned friend's submissions or even our submissions that you would like me to address.

ELIAS CJ:

No, thank you.

MR HORSLEY:

Thank you Your Honours. Those are my submissions.

ELIAS CJ:

Thank you. Yes.

MR CORDWELL:

Thank you ma'am, my reply hopefully will be short and succinct to a number of my learned friend's submissions. First of all a submission was made that's accepted that he went through a fair trial. I don't accept that on behalf of Mr Williams considering the general prejudice that I say existed and was described by Justice Asher before the trial.

Another submission my learned friend made was that he was properly convicted. Now my reply to that would be that although the process of the trial

at the time appeared to be fair and the jury spent some time deliberating, we cannot say that he was properly convicted because of the general prejudice that existed and it was identified by Justice Asher. That would be going, in my submission, too far.

BLANCHARD J:
But that's going to be true of any case where there's a lapse of time from the commission of the crime to the trial of five years.

MR CORDWELL:
Considering the type of evidence in this case Sir –

BLANCHARD J:
Well it's not that special.

MR CORDWELL:
It isn't.

BLANCHARD J:
I can see you doing a much more effective job on the facts of some other type of case in making the same sort of argument.

MR CORDWELL:
Well there were three volumes of telephone conversations. Hundreds and hundreds and hundreds of text messages and with respect there was –

BLANCHARD J:
But what about the –

MR CORDWELL:
- specific memory needed to – sorry Sir, to answer those.

BLANCHARD J:

What about armed robbery with lots of witnesses all of whom have different ideas about the identification of the robbers?

MR CORDWELL:

Well Sir in that type of case defence counsel can cross-examine as to perception, as to credibility and reliability on the very simple instruction that either it wasn't me or I didn't play the part that the Crown said that I played in that. However, when the Crown are relying upon not just it was him that had the balaclava on or him that did this or him that did that, they're now relying upon the nature of the words, the definition of the words, and whether or not it amounted to an agreement to manufacture methamphetamine. A better memory is required than one that is called upon after five years. Your brother Judge raised also the issue earlier on about the pre-trial delay issue. Having thought about that, there is quite a difference, because in this particular case, upon arrest, effectively, you know, there was an inference that "Yes, we have gathered enough information –", this is of the police, the Crown, "– to take this to trial, and it is now just a matter of going through the process of the criminal justice system and having the trial set down in due course, after all other considerations are taken into account, and apart from the odd bit of ESR analysis, we're ready to go", whereas that is not necessarily the case. With pre-trial delay, when there is a complainant that makes the complaint, there's an arrest, then often there's quite a bit of investigation afterwards as well. But certainly the Crown are basically saying upon the rest of, I think there was 13 initially, that we are effectively ready to go once it can be set down properly.

TIPPING J:

There's a point that's just struck me Mr Cordwell, if you will allow me to interrupt and I'll put it to you –

MR CORDWELL:

Of course.

TIPPING J:

The fact that there is no statute of limitations for serious crime, does that not suggest that the undue delay feature, which is triggered by arrest, if you like, is rarely focused on these anxiety and restrictions of liberty features because there is no inherent vice, if you like, according to the absence of a statute of limitations, in trying cases quite long after the event, so that is consistent with the primary, at least, if not the sole focus of this right, being once you've got them, you've got to deal with them promptly, because of the anxiety and inherent restriction factor.

MR CORDWELL:

I accept what Your Honour is saying, but there is another interest that the right protects and it's accepted in *Martin* and accepted in *Morin* that it's not only security and liberty issues, but it's also the fair trial issues as well.

TIPPING J:

Well that's where start to perhaps part company, because that's a separate rut.

MR CORDWELL:

If I could say though, would you say that there's some overlapping?

TIPPING J:

I'm not sure that I'm willing to be drawn on that at the moment, but I appreciate that some of the precedents suggest overlapping, but I'm just trying to rationalise what the essential purpose of this particular right is, that your client is relying on.

MR CORDWELL:

I suppose we go back to one of the oldest principles, and that is justice delayed is justice denied, and that's where all of this comes from and there are certain assumptions are made –

TIPPING J:

But if you're not charged for 20 years, you can't invoke the justice – unless it's a most extreme case, in my experience, that you'd get a stay on account of pure delay in bringing you to trial. So I think all these factors have got to be borne in mind and each of these rights has a particular role to play, and I'm not attracted much to this overlapping business.

MR CORDWELL:

That has traditionally been one of the features of course that, it's been one of the three features that has been seen to attract this type of right, the security, the liberty, and the fair trial issue, but certainly –

TIPPING J:

But anyway, I thought in fairness, I should put to you this –

MR CORDWELL:

But as Your Honour knows, in many states of America in my reading of the materials, in Scotland, for example, there are limitations about when you are brought to the Court for the first time, there has to be a trial within a certain period of time. In Scotland, it's a year.

TIPPING J:

Well it may be so, but we don't have that.

MR CORDWELL:

We don't have it, but it's just perhaps a recognition that there are some jurisdictions out there that are saying that after a certain period of time, perhaps it's unsafe to continue with the trial process, because of some of these basic principles. It's – one can see this as almost a constitutional right if we had a constitution.

TIPPING J:

That would be an argument to have a statute of limitation – that would be an argument for a state of limitation.

MR CORDWELL:

Yes, but it's –

TIPPING J:

Which has never been. But anyway, I'm sorry, I diverted you.

MR CORDWELL:

No, no, I understand of course what you are saying Sir but certainly, it is a matter that has been grappled with by many jurisdictions in the States and other places and some of which have actually put such a limitation on because, you know, there is always a risk that if a trial is not set down in a reasonable period of time, that memories fade and there is a real risk of an unfair trial. That's all I'd like to say at this stage, thank you.

ELIAS CJ:

Thank you. All right, we'll take time to consider our decision, hopefully not six months. Thank you counsel for your help.

COURT ADJOURNS: 3.10 PM