ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR PARTICULARS IDENTIFYING APPELLANT

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2004-404-515

S
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 19 October 2005
2 and 3 February 2006

Court: Baragwanath J
Heath J

Counsel: A L Pinnock for Appellant
E Finlayson-Davis for Respondent

Judgment: 14 March 2006

JUDGMENT OF THE COURT

Solicitors:
Crown Solicitor, Auckland

Counsel:
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Background

[1] In February 2004, S was 15 years of age and therefore a "young person" within the meaning of the Children, Young Persons and Their Families Act 1989 (the CYP Act), he being of or over the age of 14 years but under 17. On 25 February 2004, he was visited at home by Constable Dean for the purpose of discussing unresolved police enquiries. He was given the warning required by the CYP Act dealing, among other things, with his right to remain silent.

[2] After the advice had been given the constable invited S to accompany him and, in order to bring outstanding inquiries to conclusion, show him where various offences had been committed. The constable had no intention to charge S with any offences and so informed S.

[3] Unexpectedly (from the constable's perspective), during the course of their drive S disclosed that he had committed two aggravated robberies. One robbery had occurred on 8 November 2003, the other on 30 December 2003.

[4] Aggravated robberies were not the type of offences the constable had in mind when assuring S that he would not be charged. Constable Dean advised S again and arranged for him to be taken to the Avondale Police Station where a videotaped interview took place in accordance with s 221 of the Act ([35] below). During the

course of that interview, in the presence of a "nominated person" (s 222), S confessed to the aggravated robberies.

[5] S was charged with the two aggravated robberies. On his application, the two charges were severed.

[6] Following a preliminary hearing in respect of both charges in the Youth Court at Auckland on 10 June 2004, S was committed for trial on both. He elected Youth Court jurisdiction. One charge was dealt with by Judge Harvey in the Youth Court at Manukau, the other by Judge Callander in the Youth Court at Auckland.

[7] Challenges made to the admissibility of admissions made by S to the police took different forms before the respective Judges. The challenge made before Judge Harvey went to questions of voluntariness and fairness. The challenge before Judge Callander went to compliance with s 221 of the Act, namely whether the nominated person had adequately performed his duties under the Act. At neither hearing was it put squarely by the defence that the oral utterances made by S to the police constable were not "spontaneous" for the purposes of s 223.

[8] Judge Callander and Judge Harvey each ruled against the evidential challenges**,** holding that the oral utterances were made spontaneously. Evidence of the oral admission made during the course of the drive on 25 February 2004 and the subsequent videotaped interview was accordingly admitted.

[9] The evidential objection on the charge to be heard by Judge Harvey was dealt with in a pre-trial application on 3 August 2004 when he heard evidence and gave his ruling orally. The substantive hearing before Judge Harvey commenced on 19 August 2004 and was adjourned part heard.

[10] The charge before Judge Callander was heard on 29 and 30 September 2004. The Judge's ruling to admit the evidence was made on the second day. On the basis of that ruling S entered a guilty plea.

[11] The hearing before Judge Harvey resumed on 11 October 2004. At its conclusion in an oral decision the Judge found the charge proved.

[12] Each Judge convicted S and transferred him to the District Court for sentence. S was sentenced to concurrent terms of imprisonment of two years. That sentence has been served. The appeals are against the convictions only.

[13] The original notice of appeal challenged only Judge Harvey's decision. At a hearing before us on 19 October 2005 it became clear that issues raised before Judge Callander were relevant to Judge Harvey's decision. Ms Pinnock, for S, was invited to consider whether an application to appeal out of time should be made in respect of the conviction entered following the hearing before Judge Callander. Such application was later made and leave was granted for S to appeal out of time against that conviction.

[14] This judgment deals with both appeals, which were heard together before us.

[15] A Full Court was convened to hear the case as raising important questions about the circumstances in which admissions made by children and young persons should be admitted in criminal proceedings against them.

[16] There is little New Zealand authority on the various points raised. We have had the benefit of argument from Ms Pinnock and Ms Finlayson-Davis for the respondent, which has traversed overseas as well as New Zealand authority. We are grateful for the assistance we have received from both counsel.

The facts

[17] In the course of their various decisions, both Judge Callander and Judge Harvey preferred the evidence of Constable Dean to the evidence given by S. Accordingly, we base our summary of facts on the evidence of Constable Dean.

[18] At about 11.35am on 25 February 2004, Constable Dean went to an address in Glen Eden and spoke to S. In accordance with s 215 of the Act ([32] below), the

constable advised S that he was not obliged to make a statement and that any statement he did make could be used as evidence. He also told S that if he did consent to making a statement, that consent could be withdrawn at any time. The constable also told S of his right to consult and instruct a lawyer without delay and in private and that he was entitled to have any statement taken in the presence of a lawyer or any person nominated by him.

[19] Constable Dean deposed that he advised S of those rights in a manner that he could understand and that S responded that he understood what had been said to him.

[20] The type of criminal activity Constable Dean had in mind was restricted to car conversion and burglaries. The constable suggested that S accompany him for "a drive around to point out some locations" where that had occurred. The evidence does not establish precisely the extent of the immunity promised by Constable Dean to S. While Judge Harvey and Judge Callander each preferred the evidence of Constable Dean to that of S, the evidence of Constable Dean does not go so far as to prove that Constable Dean expressly limited the extent of the immunity to car conversion and burglary offences. Nor, after the immunity had been offered, was any qualification made to the "right to silence" caution previously administered by the constable. But of its nature the immunity qualified to some extent the caution previously given.

[21] Constable Dean's account was:

> I had decided in my mind that I did not intend charging him for any of the matters we were discussing and I explained this to S. I told him that I would tell the victims in the matters of that.

On that basis S agreed to accompany Constable Dean and Constable Wills. While Constable Wills drove, Constable Dean travelled in the back of the car with S.

[22] Over the next hour or so S pointed out a number of locations where car offences had occurred. However, just before 1 pm he mentioned some offences that were different in nature from the offences previously discussed. Constable Dean said:

> [S] stated that he had been involved in a street robbery. He did not give me any details of the robbery. This admission was made spontaneously and I did not ask him any questions that may have led to the admission.
>
> I told him to stop talking to me immediately.

[23] Constable Dean said that he told S that he wished to discuss the robberies further but because they sounded more serious than the unrelated matters any information provided "from that point" might result in charges. The Constable told S that it was his choice to continue speaking. S told the Constable that he wanted to talk about the other incidents and to "clear them all up". He said that he understood that the robberies were more serious than the other matters being discussed.

[24] At the constable's request S agreed to go to with him to the Avondale Police Station. They arrived at about 1 pm.

[25] The constable's unchallenged account was that:

> I asked S "if he wanted to nominate anyone. I suggested to him that the woman who was his guardian, [SG], might be someone he wanted to consider. S… stated that he did not want to nominate [SG] or anyone else for that matter. I then asked him if he wanted me to arrange a person to come in from the list of the available people that was held at the police station. S… told me that he wanted me to arrange a person for him.

[26] The constable contacted Mr Carlyon, a person approved by Child, Youth and Family Services and advised him that he was speaking to S. He arrived at the station at about 1.45 pm and a form conveying information to a nominated person was provided to him. S was then introduced to Mr Carlyon as nominated person.

[27] S was reminded of his rights as previously advised to him. S and Mr Carlyon spoke in private for about ten minutes. S initially preferred that the interview be recorded in writing. Later S said he wished to have it videotaped. During the course of that interview he made admissions concerning the two aggravated robberies.

[28] This was the first occasion on which Mr Carlyon had been asked to act as "nominated person". It is clear from the videotape that he sat in the corner of the room, away from the young person, while the interview was conducted. No advice

of any type was offered by him to the young person during the course of the interview. Nor did he intervene at any stage of the questioning.

[29] Two months later on 25 April 2004, while at the police station in the presence of his guardian on an unrelated matter, S was asked further questions about the suspected aggravated robberies. After being advised of his rights, S elected not to make a statement. At that point S was arrested for the aggravated robbery offences.

The statutory scheme

[30] In *X v Police* (2005) 22 CRNZ 58 at 59-60, this Court, sitting as a full Court, explained the nature of the youth justice system as follows:

> [1] It is generally recognised that young offenders ought to be treated differently from adult offenders. It is the vulnerability of younger people and their (generally) more immature judgment that leads to that conclusion. Recognition of that principle has led to enactment of an alternative criminal justice regime to deal with young offenders. That regime is to be found in Parts 4 and 5 of the Children Young Persons and Their Families Act 1989 (the CYP Act). Primarily, young offenders are dealt with by the Youth Court established under that Act.
>
> [2] Ordinarily, when exercising jurisdiction under the CYP Act, the Youth Court will apply what are known as "youth justice principles". The difference in approach between the Youth Court system and the "adult" jurisdiction was described graphically by Williamson J (in *E v Police* (1995) 13 FRNZ 139 at 140) as requiring "concentration upon a restorative justice system rather than a retributive or deterrent system".

[31] The **"**youth justice**"** principles are set out in s 208 of the CYP Act. So far as material it provides:

> **208 Principles**
>
> …any Court which,... exercises any powers conferred by or under this Part … of this Act shall be guided by the following principles…
>
> > …
> >
> > (h) The principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

[32] A statutory scheme for the questioning of a child or young person is contained in s 215 and following of the Act. We emphasise below the six topics of which the interviewee must be informed and other passages of importance:

> **215 Child or young person to be informed of rights before questioned by enforcement officer**
>
> (1) …every enforcement officer shall, before questioning any child or young person whom there are reasonable grounds to suspect of having committed an offence, or before asking any child or young person any question intended to obtain an admission of an offence, explain to that child or young person—
>
> > (a) Subject to subsection (2) of this section, if the circumstances are such that the enforcement officer would have power to arrest the child or young person without warrant, **that the child or young person may be arrested if, by refusing to give his or her name and address to the enforcement officer, the child or young person cannot be served with a summons**; and
> >
> > (b) Subject to subsection (2) of this section, **that the child or young person is not obliged to accompany the enforcement officer to any place for the purpose of being questioned, and that if the child or young person consents to do so, that he or she may withdraw that consent at any time**; and
> >
> > (c) **That the child or young person is under no obligation to make or give any statement**; and
> >
> > (d) **That if the child or young person consents to make or give a statement, the child or young person may withdraw that consent at any time**; and
> >
> > (e) **That any statement made or given may be used in evidence in any proceedings**; and
> >
> > (f) **That the child or young person is entitled to consult with, and make or give any statement in the presence of, a barrister or solicitor and any person nominated by the child or young person in accordance with section 222** of this Act.
>
> (2) Nothing in paragraph (a) or paragraph (b) of subsection (1) of this section applies where the child or young person is under arrest.
>
> (3) Without limiting subsection (1) of this section, where, during the course of questioning a child or young person, an enforcement officer forms the view that there are reasonable grounds to suspect the child or young person of having committed an offence, the enforcement officer shall, before continuing the questioning, give the explanation required by that subsection.

[33] Sections 218 and 219 provide:

> **218 Explanations to be given in manner and language appropriate to age and level of understanding of child or young person**
>
> **Every explanation required to be given to a child or young person** pursuant to section 215 or section 215A or section 216 or section 217 of this Act **shall be given in a manner and in language that is appropriate to the age and level of understanding of the child or young person**. (our emphasis)
>
> **219 Explanations not required if child or young person already informed of rights**
>
> Nothing in section 215 or section 215A or section 216 or section 217 of this Act requires any explanation to be given to a child or young person if the same explanation has been given to the child or young person not earlier than 1 hour before the later explanation would, apart from this section, be required to be given.

[34] Section 220 provides:

> **220 Other enactments requiring information or particulars not affected**
>
> Nothing in section 215 or section 215A or section 216 or section 217 of this Act limits or affects any other enactment or rule of law that imposes a requirement on any person to supply any information or particulars to an enforcement officer.

[35] The circumstances in which a statement made by a child or a young person will be admissible in evidence are governed by ss 221, 222, 223 and 224:

> **221 Admissibility of statements made by children and young persons**
>
> (1) This section applies to—
>
> (a) Every child or young person who is being questioned by an enforcement officer in relation to the commission or possible commission of an offence by that child or young person:
>
> (b) Every child or young person—
>
> (i) Who has been arrested pursuant to section 214 of this Act; or
>
> (ii) Whom any enforcement officer has made up his or her mind to charge with the commission of an offence; or
>
> (iii) Who has been detained in the custody of an enforcement officer following arrest pursuant to section 214 of this Act.

(2) Subject to sections 223 to 225 and sections 233 and 244 of this Act, **no oral or written statement made or given to any enforcement officer by a child or young person to whom this section applies is admissible in evidence in any proceedings against that child or young person for an offence unless—**

(a) **Before the statement was made or given, the enforcement officer has explained in a manner and in language that is appropriate to the age and level of understanding of the child or young person**,—

(i) Except where subsection (1)(b)(i) or (iii) of this section applies, **the matters specified in paragraphs (a) and (b) of section 215(1)** of this Act; and

(ii) **The matters specified in paragraphs (c) to (f) of section 215(1)** of this Act; and

(b) **Where the child or young person wishes to consult with a barrister or solicitor and any person nominated by that child or young person in accordance with section 222 of this Act, or either of those persons, before making or giving the statement, the child or young person consults with those persons or**, as the case requires, **that person**; and

(c) **The child or young person makes or gives the statement in the presence of** one or more of the following persons:

(i) A barrister or solicitor:

(ii) Any person nominated by the child or young person in accordance with section 222 of this Act:

(iii) Where the child or young person refuses or fails to nominate any person in accordance with section 222 of this Act,—

(A) Any person referred to in paragraph (a) or paragraph (b) of section 222(1) of this Act; or

(B) Any other adult (not being an enforcement officer).

222 Persons who may be nominated for the purposes of section 221(2)(b) or (c)

(1) Subject to subsection (2) of this section, a child or young person may nominate one of the following persons for the purposes of section 221(2)(b) or (c) of this Act:

(a) A parent or guardian of the child or young person:

(b) An adult member of the family, whanau, or family group of the child or young person:

(c) Any other adult selected by the child or young person:

(d) **If the child or young person refuses or fails to nominate any person referred to in any of paragraphs (a) to (c) of this subsection, any adult (not being an enforcement officer) nominated for the purpose by an enforcement officer**.

(2) Where an enforcement officer believes, on reasonable grounds, that any person nominated by a child or young person pursuant to subsection (1)(a) or (b) or (c) of this section,—

(a) If permitted to consult with the child or young person pursuant to section 221(2)(b) of this Act, would attempt, or would be likely to attempt, to pervert the course of justice; or

(b) Cannot with reasonable diligence be located, or will not be available within a period of time that is reasonable in the circumstances,—

that enforcement officer may refuse to allow the child or young person to consult with that person.

(3) Where, pursuant to subsection (2) of this section, a child or young person is not permitted to consult with a person nominated by that child or young person pursuant to subsection (1) of this section, that child or young person shall, subject to subsection (2) of this section, be permitted to consult with any other person nominated by that child or young person pursuant to subsection (1) of this section.

(4) **It is the *duty of any person nominated pursuant to subsection (1) of this section—***

(a) ***To take reasonable steps to ensure that the child or young person understands the matters explained to the child or young person under section 221(2)(a) of this Act*; and**

(b) ***To support* the child or young person—**

(i) ***Before and during* any questioning; and**

(ii) **If the child or young person agrees to make or give any statement, during the making or giving of the statement.**

223 Section 221 not to apply where statement made before requirements of that section can be met

Nothing in section 221 of this Act applies to an oral statement made by a child or young person spontaneously and before an enforcement officer has had a reasonable opportunity to comply with the requirements of that section.

> **224 Reasonable compliance sufficient**
>
> **No statement shall be inadmissible** pursuant to section 221 of this Act **on the grounds that any requirement** imposed by that section **has not been strictly complied with** or has not been complied with at all, **provided that there has been reasonable compliance** with the requirements imposed by that section. (our emphasis)

[36] By s 225, nothing in s 221 of the CYP Act limits or affects any other enactment or rule of law (not being an enactment or rule of law inconsistent with s 221) relating to the admissibility of statements and confessions or any other enactment or rule of law that imposes a requirement on any person to supply information or particulars to an enforcement officer. One of the effects of s 225 is to preserve the ability of the Court to determine whether an admission or a confession was given voluntarily in terms of s 20 of the Evidence Act 1908. Section 20 provides:

> **20 Confession after promise, threat, or other inducement**
>
> A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made.

[37] The operation of the statutory scheme was summarised by Fisher J in *R v Irwin* (1991) 8 FRNZ 487 at 491-492:

> The effect of s 221(2) is that as a general rule, no statement given to an enforcement officer by a youth is admissible in evidence in any proceedings unless three requirements have been satisfied. First, before the youth was questioned, the officer must have given the youth a series of explanations (ss 221(2)(a) and 215(1)). Secondly, before the statement was taken the youth must have had the opportunity for any consultation which he or she may have wanted with any lawyer and/or adult whom the youth (or in special circumstances the officer) had nominated following those explanations (ss 221(2)(b) and 222). Thirdly, the statement must have been taken in the presence of the nominated person or persons (s 221(2)(c)). With certain exceptions which have no application to this case, there must have been at least reasonable compliance with all three of those requirements before the statement can be admitted (s 224). In the absence of reasonable compliance the Court has no discretion: it must reject the statement. The object of that general framework is inferentially to satisfy the principle referred to in s 208(h) "that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that

> child or young person". That is the scheme which has been sanctioned by Parliament and of course it is the duty of the Courts to give effect to it.

[38] The Judge then considered the preconditions set out in ss 215(1) and (2) to the admission of a statement and continued at 492-493:

> For present purposes that elaborate series of required explanations can be conveniently divided into four categories. The first is the "name and address" explanation. Section 215(1)(a) requires that in a situation where the officer could arrest without warrant an explanation must be given to the youth that he or she could be arrested if the result of refusing to give a name and address might be that the youth could not be served with a summons. On a literal reading it could be argued that that explanation had to be given to the accused in this case despite the absence of any evidence that there had been a refusal to give his name and address or that such refusal might later cause problems over the service of a summons or that the officer was contemplating an arrest for that reason. I do not know why in its literal terms the section seems to require that the explanation be given in every case of possible arrest without warrant, whether or not the name and address had already been given and whether or not the officer intended to arrest anyway. I would have thought that at least the principal object of s 215(1)(a) was to cater for the situation in which the officer would have been content to deal with the matter by way of summons but because of the youth's refusal to give a name and address the officer feels that the only way of ensuring that the youth later appears in Court is to arrest under s 214(1)(a)(i). It is understandable that in that particular situation youths should understand that by their refusal they are risking an arrest which might otherwise be avoided. That rationale could have nothing to do with the present case and counsel have not suggested any other reason for the provision. Other than noting that there may have been a technical non-compliance with this provision, I am not inclined to place any further weight upon it.
>
> The second is the "accompany officer" explanation required by s 215(1)(b). Youths have to be told that unless they are arrested they do not have to accompany the officer and if they do so they may leave at any time. It is not suggested that any attempt was made to give the accompany officer explanation in the present case.
>
> Thirdly, there is the "statement" explanation required by s 215(1)(c), (d), and (e). Together those provisions are designed to ensure that the youth will understand the voluntariness and significance of a statement to the police. They broadly reflect the conventional adult caution given pursuant to the Judges' Rules with the additional explanation under s 215(1)(d) that during the interview youths may withdraw their consent at any time. It is that latter aspect which was not the subject of any explanation before or during the initial interview at the police station in the present case.
>
> Finally, there is the "consultation and presence" explanation required by s 215(1)(f). …there are two distinct matters involved here. One concerns the right to consult with a lawyer and/or another adult person nominated by the youth. Section 221(2)(b) makes it plain that this consultation must be open to the youth before the statement is taken. The other is the right to the presence of either or both of those two classes of adult during the interview. The

> classes eligible for nomination under s 222 consist of a range of independent adults whom the youth can be expected to trust, e.g., parents and adult members of the family.

[39] Thorp J in *R v Fitzgerald* (HC AK T183/90, 30 October 1990) also emphasised the importance of procedures set out under the CYP Act at p 4:

> The Act plainly sets out a code designed to meet the purposes specified in s 208(8)(h), that is the principles that the vulnerability of children and young persons entitles a child or young person to special protection during an investigation relating to the commission or possible commission of an offence by that child or young person. It does not remove any existing grounds for objection to admissibility of confessional statements (see s 225). On the other hand, the complexity of the new code and the extent of further obligations it places upon interrogators must mean that it will not often be the case that if compliance with the code is made out there will be room for an argument that the statement should nevertheless be inadmissible on the grounds of overall unfairness.

The pre-trial ruling of Judge Harvey

[40] Because of a failure of recording equipment Judge Harvey's pre-trial ruling to admit the evidence of S's admissions cannot be transcribed. But the Judge provided a memorandum to this Court setting out the essence of his judgment. Since he adopted and incorporated the note of his judgment taken contemporaneously by Ms Pinnock there is no dispute that it adequately captures the reasons given for his decision to admit the evidence.

[41] After expressing his preference for the evidence of Constable Dean's evidence Judge Harvey made the following findings:

a) The oral statement made by S during the course of the drive was made "spontaneously" for the purposes of s 223 of the CYP Act.

b) The recorded statements were not induced by any promise from the police officer and did not run counter to s 20 of the Evidence Act (*R v Potae* [2000] 3 NZLR 375 (CA) at 380 and *R v Kiu* [1990] 1 NZLR 340).

c) S's evidence that he gave a video interview because he believed that he would not be charged was not credible.

d) S went voluntarily to the police station where he was given his rights and a nominated person was provided. There was compliance or substantial compliance with s 221 of the CYP Act.

[42] For those reasons the statement recorded in the videotaped interview was admitted.

Decision of Judge Callander

[43] Judge Callander dealt with the question of compliance with the statutory code in the context of the videotaped interview.

[44] Judge Callander noted that he had heard evidence from Constable Dean and S. The Judge then referred to the factual background to which we have referred. He dealt with the admissibility point at paras [22]-[33] of his judgment:

> [22] It was the first time Mr Roderick Carlyon had acted as a nominated person. He was asked to do this by Constable Dean under s222(1)(d) because [S] had either failed or refused to nominate a family member or anyone else. Mr Carlyon, a Justice of the Peace, and Television New Zealand executive, had volunteered some 18 months earlier for this role. He had received a half day training programme at this court as to the role and responsibilities of a nominated person. This would have provided him with greater understanding of the relative statutory provisions than would be the case of a parent, guardian or other family member.
>
> [23] He also used a small information sheet provided by the Police as a check list of the responsibilities of a nominated person. The information sheet explains that the person will be told why the young person is at the police station, whether he/she has been arrested, and whether he/she has been asked to give a statement. It advises that the person may speak with the young person alone unless a guard is considered necessary. The sheet summarises the young person's right under s215 and then asks the nominated person to:
>
> (a) Support the child or young person before and during any questioning.
>
> (b) Make sure the child or young person knows what is happening. Be satisfied the rights have been explained and that he/she understands them.

(c) During the interview make sure the child or young person is treated in a fair way, and help if he/she does not understand the person asking the questions.

If you are not satisfied with the conduct of the interview:

(a) Tell the interviewer of your concerns.

(b) At the end of the interview, advise the police officer in charge of the station of your concerns.

[24] Mr Carlyon says he went through this check list for about 10 minutes with [S]. He checked his age. He satisfied himself that [S] was at the station willingly. He asked if he had been given the opportunity to see a lawyer and says [S] replied that he did not want one. He then asked where his parents were. [S] said they were not around. He asked if he had any other relations that should be there at the interview. [S] said, no he didn't. He said he was in care but did not want the caregiver there. [S] said he was happy to have Mr Carlyon as his nominated person and just wanted to clear things up with the Police.

[25] Mr Carlyon then testified about the procedure followed by Constable Dean. He then says that when the constable left the room to set up the video recording system he inquired of [S] whether he was happy to continue with the video statement. [S] says he was.

[26] Mr Carlyon found no problems with the conduct of the interview. He said no need to intervene at any point. He saw his role as being a stand in for [S's] parents, and to ensure that there was complete fairness, no duress, and a willingness by [S] to make a statement. He says he discussed with [S] each of the rights set out in s215. He confirms that [S] did ask him whether he was in serious trouble. His response was that, at that point, not having heard full details of the allegations, he did not know. He could not remember whether [S] asked him whether he would be charged. He did not see the need for a lawyer because it was clear that [S] wanted to make a clean breast of things. When cross-examined as to what he would have done if [S] had been his own son, Mr Carlyon said he would not have acted differently if it was clear that a full confession was being made. I accept the reliability of Mr Carlyon as a witness and prefer his testimony to that of [S].

…

[30] I am satisfied that Mr Carlyon ensured that [S] understood his legal rights, and supported him properly. Support, in this context means to assist the young person in the way the statute requires, and provide positive adult back-up.

[31] No issue of "reasonable compliance" under s224 arises.

[32] The "vulnerability of young persons" principle (s208) has not been breached.

[33] I am satisfied that there has been compliance with s221 and that the video statement is admissible.

The issues

[45] The following issues were argued on the appeal:

a) Was the information volunteered orally by the young person to the constable that he was involved in more serious offending, "spontaneous" for the purpose of s 223 of the Children Young Persons and Their Families Act 1989 (the Act) ([35] above) which provides exemption from the conditions imposed by the Act on the admissibility of statements by young persons?

b) If not, is any evidence gathered in the course of the videotaped interview tainted and inadmissible?

c) Was the nominated person who attended the videotaped interview properly appointed?

d) Did the nominated person perform lawfully the duties cast upon him by the Act?

e) Ought the admissions to be ruled inadmissible because of unfair conduct on the part of the police?

f) Were the convictions against the weight of evidence?

The standard and burden of proof

[46] Where the voluntariness of a confessional statement is challenged the Crown must satisfy the judge of that beyond reasonable doubt: *R v McCuin* [1982] 1 NZLR 13 (Full Court of Appeal).

[47] Conversely, where there was an issue of compliance with s 221, it is enough for the Crown to satisfy the court on the balance of probabilities that the statement is admissible under s 221(2): see *R v S* (1997) 16 FRNZ 102 where the full Court of

Appeal rejected the “beyond reasonable doubt” test with respect to compliance with s 221, reversing Thorp J in *R v Fitzgerald* in that respect.

[48] Our conclusion that to secure the admission of confessions the Crown must prove beyond a reasonable doubt that there was no oppression, and that in other cases it is enough for the Crown to show that on the balance of probabilities there was substantial compliance, conforms with clauses 24-26 of the Evidence Bill now before Parliament.

(1) Was the oral utterance “spontaneous”?

[49] The issue is whether an utterance made in reliance on an assurance of immunity can properly be said to be “spontaneous”.

[50] Ms Pinnock cited *R v W (J)* (1996) 2 C.R. (5th) 233 which concerned the construction of a provision worded similarly to s 223. Carthy JA, delivering he majority judgment of the Ontario Court of Appeal, cited the Shorter Oxford’s definition “Arising, proceeding, or acting entirely from natural impulse, without any external impetus or constraint”. He stated:

> This seems very apt in the context of the [Young Offenders Act]. An external stimulus need not be a question or directive from a person in authority. The mere presence of that authority in certain circumstances could be considered a stimulus giving rise to an unnatural response or reaction. On the other hand, the mere presence of a person in authority cannot, in and of itself, be considered as defeating spontaneity.
>
> P 237 para 8.

He continued:

> It is my opinion that the circumstances of this encounter between the police and these fourteen-year-olds leads to the conclusion that all statements were induced in part by external stimula and were therefore not spontaneous… As suggested by Corry J., [in *R v J (JT)* (1990) 59 CCC (3d) 1 27] one of the purposes of [the Canadian legislation] is to afford protection to adolescents in recognition of their immature power of judgment. In keeping with that purpose, any doubt as to whether the statement is spontaneous should be resolved in favour of the young person.
>
> P 238 para 10

[51] The court must determine whether the statement itself was in fact spontaneous before making an inquiry as to the statement's admissibility. It is a question of fact whether in a particular case an utterance is to be construed as "spontaneous" as arising entirely without external stimulus or constraint. Whether the simple presence of a police officer would have that effect will depend on the particular circumstances. Without the initial advice of the constable that he did not intend charging S "for any of the matters we were discussing", meaning matters to be discussed, the inference could be very different. But it is plain that the whole basis for the arrangement between the officer and S was that S would not be charged with any of the matters to be discussed. While there is no reason to doubt the officer's assumption that he believed the subject matter would be confined to conversion and burglary of cars, it is impossible to assume that the statement was not acting on the mind of S at the time he spoke of the aggravated robberies.

[52] Since neither District Court Judge made any finding on that important topic it is necessary for us to make our own findings. We are satisfied that the officer's undertaking continued to play an effective part in S's decision to make the admissions. The offer of immunity plainly influenced S's decision to point out and explain where the aggravated robberies occurred. In that sense, S's utterances were not made spontaneously. They were deliberate utterances made in response to the original offer of immunity. Those utterances cannot, therefore, be construed as spontaneous and we respectfully disagree with the decisions of the District Court in that regard.

[53] It follows that s 223 affords no exemption from the conditions of admissibility stipulated by s 221(2).

(2) Is the evidence of admissions made in the course of the videotaped interview tainted and inadmissible as a result?

[54] The appellant's argument is that non-spontaneous admissions of aggravated robbery were the effective cause of the constable's continuing the interview and particularly the part that occurred at the police station when formal admissions to the aggravated robberies were videotaped.

[55] The Crown submitted, citing *R v Shaheed* [2002] 2 NZLR 377, that the caution given by the constable prior to the video interview "would stem the flow of any earlier breach".

[56] It is necessary for us to determine this question for ourselves. While we do not doubt that but for the non-spontaneous utterance the interview would not have been continued and in that sense it was a cause of the admissions then made, the "but for" test of causation has proved simplistic and inadequate in many contexts. Hart and Honoré *Causation in the Law* (2nd ed) state at p 69:

> …if we look into the past of any given event, there is an infinite number of events, each of which is a necessary condition of the given event and so, as much as any other, is its cause.

[57] As Hart and Honoré observe at p 103:

> [the answer to the question whether there is] liability is to be found by asking what the purpose or scope of the statute is.

And at p 110:

> [A] major advance secured by modern criticism we shall call the bifurcation of causal questions. The single question typically confronted by courts: 'Was this harm (Y) the consequence of this act or omission (X)?': is divided into two questions. *First*: 'Would Y have occurred if X had not occurred?' *Second*: 'Is there any principle which precludes the treatment of Y as the consequence of X for legal purposes?' The utility and clarifying force of this bifurcation of causal questions also has its limitations…, but, in a wide range of cases, it has solid merits.

[58] It was argued for the police that the warning preceding the videotaped interview superseded the initial causation. The question for us is whether it did.

[59] The "non-spontaneous" admissions being inadmissible in evidence (s 221(2)) Parliament has made no explicit statement as to whether they can be put to other use. We offer no comment as to that point, which was not argued. But in terms of the test adopted by the full Court in *R v Te Kira* [1993] 3 NZLR 257 and by the Chief Justice in *Shaheed* at [10] there was in our opinion a "real and substantial" connection between the non-spontaneous statement and the subsequent videotaped statement. Parliament's focus in s 221 is upon statements. In *Shaheed* terms, the degree of connection between the breach and the impugned evidence was not too remote; nor

was it capable of being obtained through independent means at that time: cf *R v Williams* (High Court, Auckland, CRI-2004-404-3697, 28 September 2005) at para [41]. We do not consider that use of an inadmissible statement for the purpose of securing a subsequent statement is consistent with the policy of the legislation.

[60] It was after S had mentioned robbery that the constable told him he wanted to discuss those matters further and suggested that this should take place at the police station. At p 4 of the transcript the officer said:

> We have decided to do a video interview after… we were having a conversation initially in the car about some vehicles that had been stolen. We got back to the station we started talking about some other matters.

[61] Following a caution the officer said:

> A few minutes ago we were talking about… an incident that you were involved in… some time in the last six months on Ash St in New Lynn… You said that… you approached them on foot, it was during early early evening and that… the victim, do you just want to tell me what happened when you approached the victim?

[62] Alluding to an earlier stage of the interview before the video recording began the officer said:

> I… just made some notes about some of the things you said. You said that you approached people on heaps of occasions, you couldn't remember how many times, cos you had lost count. You said you'd hit them three times in the chin to knock them out to take their money.

The appellant nodded and was asked:

> And you said… it didn't happen anywhere in particular, it happened… when they were going your way and you ran out of money, you said it mostly happened in the west here when you were drunk… and when you'd run out of alcohol and needed to buy some more.

[63] At p 5 the appellant was asked "So you told me about the one incident can you tell me about any other?" and at p 10 "You told me about some other guy called Sly." We accept Ms Pinnock's submission that the appellant was being asked to elaborate on details of incidents previously mentioned by him.

[64] In *R v R (M.L)* (2002) Carswell Ont. 2485 Pardu J of the Ontario Superior Court of Justice cited the statement of Sopinka J for the Supreme Court of Canada in *R v I (LR)* [1993] 4 SCR 504, 528:

> [28]…A previous statement may operate to compel a further statement notwithstanding explanations and advice belatedly proffered. If, therefore, the successor statement is simply a continuation of the first, or if the first statement is a substantial factor contributing to the making of the second, the condition envisaged by [the Young Offenders Act 1985] has not been attained and the statement is admissible.

[65] Pardu J found that the statement in question:

> [29] …was a continuation and clarification of the first statement and that the first statement was a substantial fact contributing to the making of the second. Accordingly, that statement is inadmissible.

[66] *R v F (D)* (2002) 8 CR (6th) 156 (Manitoba Court of Appeal) per Twaddle J at 166 line 38 is to similar effect.

[67] We consider that the test adopted in Canada accords with the policy of our s 208 and should be adopted to give effect to the New Zealand Act. The non-spontaneous evidence was the effective cause of the officer's questions at the police station and thus of S's responses. We are satisfied that the evidence of both must be excluded.

[68] There being no other evidence to support either conviction it follows that each must be set aside.

[69] While that disposes of the appeal we will comment on certain other issues that were fully argued.

(3) Was the nominated person properly appointed?

[70] Ms Pinnock submitted that Mr Carlyon had not been properly appointed as "nominated person" because the conditions of s 222(1)(d) had not been satisfied.

[71] We repeat the subsection:

> (1) Subject to subsection (2) of this section, a child or young person may nominate one of the following persons for the purposes of section 221(2)(b) or (c) of this Act:
>
> > (a) A parent or guardian of the child or young person:
> >
> > (b) An adult member of the family, whanau, or family group of the child or young person:
> >
> > (c) Any other adult selected by the child or young person:
> >
> > (d) **If the child or young person refuses or fails to nominate any person referred to in any of paragraphs (a) to (c) of this subsection, any adult (not being an enforcement officer) nominated for the purpose by an enforcement officer**. (our emphasis)

[72] Ms Pinnock's submission is that because the constable did not take S through the list of potential persons so that he was aware of the range of options available to him. So his statement ([25] above) that he did not want to nominate anyone to sit in on the interview was made in ignorance of his rights and should not be treated as a refusal or failure by S to nominate a person referred to in paragraphs (a) to (c). Accordingly the constable had no authority to appoint Mr Carlyon.

[73] Ms Finlayson-Davis's response is sufficiently covered in the following discussion.

[74] The ordinary presumption of knowledge of the law cannot be extended to the young persons whose vulnerability entitling them to special protection is emphasised by s 208(h). So while s 222 does not expressly require the enforcement officer to inform the young person of the range of options available for nomination, since there is no other way for knowledge of the rights to be imparted we consider that such obligation must be implicit.

[75] That conclusion receives emphasis from the statutory statement of the function of the nominated person in s 222(4):

> (4) **It is the** ***duty of any person nominated pursuant to subsection (1) of this section—***
>
> > **(a)** ***To take reasonable steps to ensure that the child or young person understands the matters explained to the child or young person under section 221(2)(a) of this Act*****; and**
> >
> > **(b)** ***To support*** **the child or young person—**
> >
> > > **(i)** ***Before and during*** **any questioning; and**
> > >
> > > (iii) If the child or young person agrees to make or give any statement, during the making or giving of the statement. (our emphasis)

[76] The appointment of a nominated person is no mere formality. To give effect to the policy of s 208(h) expressing:

> …the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation

into the commission of an offence, Parliament has stipulated the support to which they are entitled. While by s 224 "reasonable compliance" is sufficient, to be reasonable there must be substantial compliance or the effects of the breach must be inconsequential: *R v Kurariki* (2002) 22 FRNZ 319, 330.

[77] The scheme of s 222 (1) is to afford a degree of autonomy to the young person. Within the limits of s 222(2) (risk of perversion of the course of justice and not reasonably available), he or she is entitled both to understand what is the role of the nominated person and to be the judge of who would best perform that function.

[78] There was debate as to how far the role of the nominated person extends. We are satisfied that the purpose is two-fold:

a) to ensure performance of the duty of the enforcement officer to explain the s 215 rights (imported into s 221(2)(a)) in a way that the young person understands;

b) to give the young person the sense of security of having someone looking after his or her interests both prior to the decision to answer

questions and during the questioning process and the making of any statement.

[79] To achieve those purposes it is clearly important for the nominated person to be someone in whom the young person has confidence. The best way of ensuring such result is for him or her to be free to make an informed choice.

[80] The constable's suggestion that S nominate his caregiver was sensible and appropriate. While he ought both to have explained simply to S the nature of the nominated person's role and have taken S through the categories in s 222(1)(a) to (c) there is no reason to believe that the result might reasonably have been any different.

[81] We are therefore satisfied that there was reasonable compliance in terms of s 224.

(4) Did the nominated person fulfil his statutory duties?

[82] We have recorded at [75] the nature of Mr Carlyon's duties. The constable said that he told Mr Carlyon that S had admitted breaking into cars and had started to make admissions of a far more serious nature. He said that at that stage he had no details of them and referred to them in a vague manner. He then introduced Mr Carlyon to S and gave Mr Carlyon the brochure advising nominated people of their rights and responsibilities. It was in the following form:

NOMINATED ADULT

A police officer wants to ask

[S] ____________________ [S] ____________________

(First name) (Last name)

some questions.

[S] ____________________ (First name) is under 17, and can ask for an adult person to talk to first and have present when the questions are being asked.

YOU HAVE BEEN ASKED TO BE THAT PERSON

YOU WILL BE TOLD:

A) Why the child or young person is at the police station.

If the child or young person is under arrest.

If so, whether the child or young person is being asked to give a statement about the offence.

B) You can speak with the child or young person.

C) You can talk with the child or young person alone, but the police officer who is guarding the child or young person may remain if the police consider it necessary.

THE RIGHTS OF THE CHILD OR YOUNG PERSON:

When you arrive at the police station the police officer will explain to you so you can understand that:

A) A statement will only be taken if the child or young person wants to make one.

B) If the child or young person wants to make a statement, he/she can stop at any time.

C) Any statement the child or young person makes can be used as evidence.

D) The child or young person is allowed to talk to a barrister or solicitor, and yourself, and make a statement with the barrister or solicitor, and you, present.

YOU ARE ASKED TO:

A) Support the child or young person before and during any questioning.

B) Make sure the child or young person knows what is happening. Be satisfied the rights have been explained and that he/she understands them.

C) During the interview make sure the child or young person is treated in a fair way, and help if he/she does not understand the person asking the questions.

If you are not satisfied with the conduct of the interview:

A) Tell the interviewer of your concerns.

B) At the end of the interview, advise the police officer in charge of the station of your concerns.

DETAILS OF NOMINATED PERSON

NAME____
ADDRESS_______________________________________
Ph:H ___________________ Ph: B __________________

[83] The constable again advised S of his rights in terms of s 215(1)(b)-(f).

[84] Mr Carlyon is a Justice of the Peace and an executive of Television New Zealand. He volunteered to be listed as a nominated person under the Act and some 18 months previously had undergone a Saturday morning course as to the nominated person's role.

[85] He thought he was about ten minutes alone with S. Mr Carlyon asked S whether he knew why he was at the station. He said he was going to clear up some things with the police. Asked if he was there willingly he said yes. Asked if he had been offered the opportunity of talking to a lawyer he said he had but he did not want one. Asked where his parents were he said they were not around. Asked whether he had any other relations who should perhaps be at the station during the interview he said no. He indicated that he was in care but did not want his caregiver at the police station during the interview.

[86] Mr Carlyon said that he had exhausted most of the likely possibilities of people who perhaps should have been there instead of him so he was content to continue as the nominated witness. He explained why he was there and asked S if he understood that. Asked whether he minded Mr Carlyon being the nominated witness he said no, and said that he just wanted to clear this up with the police. Mr Carlyon explained that his principal role was to listen, not to interfere or intervene and just support him and make sure the police did not go overboard while they were interviewing him. S was initially reluctant to be videotaped so it was agreed the interview would proceed with the constable asking questions and recording questions and answers in his notebook. After some time S enquired how much longer the process would take and at that stage agreed that the interview should be videotaped.

[87] Asked as to his understanding of his role, Mr Carlyon said it was to make sure that the interviewee was not in the situation against his will, to support him as a locum for his parents or his caregiver and to make sure that the interview was conducted in a fair way without duress. He said he saw his role as a father figure. He did not intervene and did not believe it was his job except to stop the interview

becoming overbearing or overpowering. Mr Carlyon had no idea of what evidence the police already had about either the motor vehicle charges or the more serious ones. He confirmed that before the interview began S asked "Will I get charged?" Mr Carlyon replied "I can't tell you it depends very much on the course of the interview." S asked "Am I in trouble?" Mr Carlyon responded he could not tell him. S asked "Does this mean I get arrested?" Mr Carlyon responded he could not tell him. S asked "Is this serious?" Mr Carlyon again replied that he could not tell him. Once the conversation turned to the serious matters of aggravated robbery Mr Carlyon made no assessment whether it would have been useful for S to have had legal advice at that point. At the beginning of the interview S had said that he wanted to make a clean breast of these things and Mr Carlyon assumed S knew what was coming.

[88] The videotape of the bulk of S's evidence is missing. Since the appeal must be allowed for other reasons it is unnecessary to consider whether this by itself would make the convictions unsafe: cf *R v Hooker* [1998] 3 NZLR 562 which may be contrasted with *R v Taito* [2005] NZSC 36 and *R v Taito* CA4/96 1 March 2005. Ms Pinnock relied on S's affidavit sworn in support of an application for extension of time to file notice of appeal:

> When I gave evidence before Judge Callander I told him that before the formal interview started, just after Mr Carlyon came into the room and Constable Dean had left us alone, I remember having asked him four questions. Those were:
>
> 1. Will I get charged?
>
> 2. Am I in trouble?
>
> 3. Does this mean I get arrested? and
>
> 4. Is this serious?

And that he had answered "I can't tell you" to each one of them.

[89] In para [15] of his affidavit S said that he could not recall having asked Mr Carlyon anything else in the course of the interview.

[90] Judge Callander recorded the arguments:

> [20] Ms Pinnock also submits that Mr Carlyon (the nominated person) failed to support [S] during the taking of the statement. Her point is that support requires Mr Carlyon to assess the seriousness of the charges faced by S and to carefully discuss with him the benefits of first consulting with the lawyer before making the confessional statement.
>
> [21] S testified that during the ten minutes he had with Mr Carlyon before the video interview he received little help. He says he asked if he would be charged and if he was in serious trouble. He says Mr Carlyon replied by saying that he did not know. S says Mr Carlyon just sat there silently. He didn't know anything about not having to make a statement that could later be used against him in court. He said nothing about consulting a lawyer. He did acknowledge however that Constable Dean read him his rights "quite a few times".

[91] As to Mr Carlyon's understanding of his role the Judge found:

> [26] He saw his role as being a stand-in for [S]'s parents and to ensure that there was complete fairness, no duress and a willingness by S to make a statement. He says he discussed with S each of the rights set out in s215. He confirms that S did ask him whether he was in serious trouble. His response was that at that point not having heard full details of the allegations he did not know. He could not remember whether S asked him whether he would be charged. He did not see the need for a lawyer because it was clear that S wanted to make a clean breast of things. When cross-examined as to what he would have done if S had been his own son Mr Carlyon said he would not have acted differently if it was clear that a full confession was being made. I accept the reliability of Mr Carlyon as a witness and prefer his testimony to that of S.

[92] The Judge adopted the principle stated by Miller J in *R v A* HC AK CRI-2003-292-1224 23 June 2004:

> The role of a support person is to place the child or young person in a position where mature judgment can be brought to bear, and to provide support. It is not to act as a legal advisor. Parents head the list of those who may serve as nominated persons. The legislature must have recognised that parents may lack the ability to appreciate the nature of the legal risks faced by the child or young person. A parent may discourage the young person from taking legal advice… or… may well advise a child to tell the truth in circumstances where a lawyer's advice, and the child's preference, would be to say nothing;…

[93] In response to a submission that the accused made a statement when he would have been better advised to remain silent Miller J said:

> [41] An application such as this is motivated by legal advice, given after the fact, that the accused would be better placed at his trial had he remained silent. But the Act does not require that the young person be given legal advice, merely that the decision whether to take advice or not must be clearly imposed on him in circumstances where he has a nominated adult to advise him. Accordingly, there is no presumption that police or the nominated person have failed a child or young person who elects not to take legal advice and chooses to make a statement… The legislation does not envisage a judicial inquiry into the nature and quality of the support given in any particular case; *R v S* (1997) 15 CRNZ 214. Rather, it aims to place the child or young person in the position of an adult, who may choose to make a statement in circumstances where a lawyer would counsel against it.

The Judge referred also to *R v K* (2002) 22 FRNZ 319 (CA).

[94] The Judge was satisfied that Mr Carlyon ensured that S understood his legal rights and was cautioned properly. He held that support in this context means to assist the young person on the way the statute requires and provide positive adult back-up. He was satisfied that the principle of s 208(h) had not been breached and that there had been compliance with s 221. He therefore admitted the evidence of the interview.

[95] Ms Pinnock submitted that a young person has two rights: first a substantive right to performance of the rights under s 215; by s 221(2) non-compliance makes the statement inadmissible unless there is reasonable compliance (s 224). She submitted that the young person has in addition the right to performance via the nominated person of his or her obligations under s 222(4) comprising not only the obligation to support (subclause (b)) but in addition the obligation to take reasonable steps to ensure that the child or young person understands the s 215 matters. She submitted that unless such reasonable steps are taken the statement must be excluded even though the enforcement officer has explained the s 215 rights and the young person has understood them.

[96] We respectfully disagree with the final step in Ms Pinnock's argument.

[97] Section 215 speaks of explanation by the enforcement officer. Given the policy of s 208(h) implicit in the obligation under s 215 to explain is that the explanation must, as s 221(2)(b) later makes clear, that the explanation is be performed:

> in a manner and in language that is appropriate to the age and level of understanding of the child or young person.

[98] We are satisfied that for the Crown to secure the admission of the statement it must establish that the s 215 explanations have been understood. That does not impose an undue burden upon the Crown. If the explanations were made in the manner required by s 221(2)(a) the Crown would probably have discharged on the balance of probabilities the condition for securing admission of the statement.

[99] Section 222(4), added by the 1994 amendment, provides a degree of procedural assurance that the child or young person understands the s 215 matters. If the nominated person fails to take reasonable steps to ensure understanding it may well make it difficult for the Crown to satisfy the Court that the young person has in fact understood the enforcement officer's explanation under s 215. The intervention of the nominated person to ensure understanding is likely to inject an element of rapport that will facilitate understanding by a young person who might otherwise be daunted. But we have concluded that if the Crown can nevertheless establish understanding of what the enforcement officer has said, breach by the nominated person of the s 222(4) duty could well be excused under s 224.

[100] In this case Mr Carlyon deposed to explaining the s 215 rights to S. Subclause (a) of s 222(4) is plainly satisfied. As to subclause (b), for the reasons just stated we do not accept Ms Pinnock's submission that in the circumstances Mr Carlyon was required to intervene as a lawyer might well have done when the attention turned to the aggravated robberies. The s 215 rights include the right to an explanation that there is no obligation to make or give a statement and that any statement may be used in evidence. Parliament has stopped short of according a right for the young person to be told that the consequence of the statements being used in evidence may well be that the prosecution is able as a result to establish its case.

[101] It follows that we are satisfied that Mr Carlyon fulfilled his statutory duties.

[102] We have found that the statement is inadmissible because the original admissions were not spontaneous and the subsequent questions were a direct

consequence of that evidence. It is unnecessary for us to consider the appellant's further argument that the use of the inadmissible evidence was unfair.

[103] For similar reasons it is unnecessary for us to consider the appellant's submission that in the light of the expert evidence of Dr Moir, psychiatrist, diagnosing attention deficit hyperactivity disorder (ADHD) and expressing the opinion that S's admissions displayed the tendency to fantasise and to give an exaggerated or fabricated account of his conduct, the convictions are unsafe. It is sufficient to record that there is force in Ms Finlayson-Davis' argument that the assessment of that issue was very much a factual matter for the determination of the District Court.

Result

[104] The appeal is allowed and the convictions are set aside.

____________________________ ____________________________
W D Baragwanath J P R Heath J

Delivered at ____ am/pm ____ 2006