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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 1994-012-217294

THE QUEEN

v

DAVID CULLEN BAIN

Hearing: 17-20 February 2009

Court: Randerson J, Chief High Court Judge
Panckhurst J

Counsel: K Raftery, C L Mander and R P Bates for Crown
M P Reed QC and P A Morten for Defence

Judgment: 2 March 2009

JUDGMENT OF THE COURT
RE STAY/SECTION 347 APPLICATION

Introduction

[1] By a second amended notice of application the accused seeks an order for his discharge prior to trial either pursuant to s347(1) of the Crimes Act 1961 or pursuant to the inherent jurisdiction of this Court to prevent an abuse of process. The application is based upon multiple grounds. These include:

- the emergence of additional evidence since the retrial was ordered;
- the emergence of additional evidence in the years prior to the order for a retrial;
- a contention that a fair trial is no longer attainable on account of the unavailability of exhibits and witnesses, through the impact of delay (both up to the order for retrial, and since) and on account of the effect of prejudicial pretrial publicity;
- a further contention is that a fair trial is imperilled because the Crown is running a "new case" (including calling numerous additional witnesses whose evidence has not been tested at a preliminary hearing) and because legislative changes (particularly the passing of the Evidence Act 2006) prejudicially affect the accused's trial rights; and
- a contention of improper conduct on the part of the Crown which will further prejudice the accused at trial, in that the intended Crown case is "selective" (in relation to the witnesses and evidence to be called), includes extracts from the accused's evidence at the first trial, does not include evidence which the Crown should properly call and on account of the non-availability of defence witnesses and the leading of evidence from the witnesses at the Victoria Forensic Science Centre (after the police "improperly approached and obtained information" from persons at the Centre).

[2] In further support of these grounds some more general considerations, including the probable duration and expense of a new trial, and the time already served by the accused measured against the likely sentence in the event of his reconviction, are also relied upon.

The background to the present application

The relevant chronology

[3] The five victims were killed on 20 June 1994. The first trial commenced on 8 May 1995 and culminated in guilty verdicts returned on 29 May 1995. The defence at trial was that the accused's father Robin Bain was responsible for all the killings, and his own by an act of suicide. That has remained the defence's contention throughout. The case has always turned on circumstantial evidence.

[4] An appeal against conviction was dismissed by the Court of Appeal on 19 December 1995: [1996] 1 NZLR 129 (CA). A petition for leave to appeal to the Privy Council was also dismissed, on 29 April 1996. Subsequently, there was a joint review of the case by the New Zealand Police and the then Police Complaints Authority.

[5] Later still in June 1998 the appellant applied to the Governor-General for the exercise of the Royal Prerogative of Mercy. The Governor-General sought the assistance of the Court of Appeal, initially in December 2000 by referring six questions to the Court for its consideration under s406(b) of the Crimes Act. Following a five day hearing in October 2002 the Court of Appeal answered the referred questions in a judgment dated 17 December 2002.

[6] In light of the answers, the Governor-General on 24 February 2003 referred the question of the accused's conviction upon five counts of murder to the Court of Appeal for its consideration under s406(a) of the Crimes Act. This was in effect a second appeal where the focus was not only upon the evidence from the first trial, but also upon evidence unearthed subsequent to the trial and evaluated particularly at the s406(b) hearing. Following a further five day hearing the appeal was dismissed: [2004] 1 NZLR 638 (CA).

[7] On 6 June 2006 the Privy Council granted leave to appeal against the judgment of the Court of Appeal by which the convictions were upheld. After a hearing occupying several days, the Privy Council allowed the appeal on 10 May 2007, quashed the convictions and ordered a retrial: [2007] 23 CRNZ 71 (PC).

[8] The focus of the decision was new evidence. Delivering the judgment of the Privy Council Lord Bingham of Cornhill said at paragraph 103:

> A substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it.

[9] And at paragraph 119, after observing that the final decision should be made in New Zealand as to whether a retrial would be in the public interest, the judgment ended on this note:

> In closing, the Board wishes to emphasise, as it hopes is clear, that its decision imports no view whatever on the proper outcome of a retrial. Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate courts. The Board has concluded that, in the very unusual circumstances of this case, a substantial miscarriage of justice has actually occurred. Therefore the proviso to section 385(1) [of the Crimes Act] cannot be applied, and the appeal must under the subsection be allowed. At any retrial it will be decided whether the appellant is guilty or not, and nothing in this judgment should influence the verdict in any way.

[10] The Privy Council judgment also contains a detailed evaluation of the evidence adduced at the reference hearings before the Court of Appeal, as well as the Board's evaluation of all the new evidence and whether it might reasonably prompt a jury to return different verdicts. It is neither necessary, nor appropriate, to repeat that discussion. Instead, this decision is to be read alongside the judgment of the Privy Council. We therefore proceed on the assumption that readers of this decision will be familiar with the factual detail contained in the 2007 judgment.

[11] On 15 May 2007 the accused was released on bail pending a final decision concerning a possible retrial. On 21 June 2007 the Solicitor-General announced the decision that there would be a retrial. At the second telephone conference of counsel and the trial Judge (Panckhurst J), a direction was made that evidence in support of

venue and stay applications should be filed promptly so that both matters could be heard "if at all possible" by December 2007. Following a subsequent telephone conference on 6 December a further direction was made that the applications seeking a stay and a change of venue be filed before the Christmas vacation (it being evident that a hearing before the end of the year could not eventuate). A draft stay application was filed on 21 December 2007. In fact it was a joint stay/s347 application, but for convenience we shall refer to it as the former.

[12] The venue application was heard in March and a decision was delivered in early May 2008. The stay application was scheduled to be heard in the week of 12 May 2007, but on 24 April defence counsel advised the trial judge of a potential application to recall the Privy Council judgment in so far as it contained an order for a retrial. A week (commencing 11 August 2008) then scheduled for the hearing of further pretrial applications, could not therefore be utilised in relation to the stay application.

[13] On 21 August 2008 defence counsel confirmed that the Privy Council initiative would proceed and that affidavits in support of the stay application would "not be filed in the meantime".

[14] A request had earlier been made that the stay application be heard by a Full Court because there is no right of appeal against the determination. On account of the pendency of the trial in early 2009, a hearing of the stay application was scheduled before a Full Court for the week commencing 1 December 2008. However, that hearing was adjourned because of the unavailability of counsel, who were travelling to London to be heard in support of the Privy Council recall application.

[15] On 8 December the Privy Council heard, and declined, a leave application seeking the recall of its 2007 judgment directing a retrial. This prompted the need for a further fixture for the hearing of the stay application in this Court. Another Full Court hearing was arranged for the week commencing 16 February 2009.

[16] In the meantime, a jury has been summonsed to enable the trial to commence on 2 March 2009, if required.

A matter which arose in the Privy Council

[17] In the course of argument counsel advised us that the leave application to the Privy Council in December culminated in exchanges concerning the breadth of the stay/s347 jurisdiction of this Court. Lord Hoffmann questioned whether all of the factors relied upon in support of the application to recall the retrial order could equally be considered by this Court in the exercise of its stay/s347 jurisdiction. In particular, issues affecting the accused (the ordeal of a retrial and the likely sentence in the event of reconviction, given time already served) and considerations pertaining to the retrial itself (including its likely duration and cost), were raised.

[18] In his submissions to us Mr Reed QC said that the Solicitor-General advised the Board that this Court in exercising the stay/s347 jurisdiction would be able to bring to account the same matters as inform a decision whether to make an order for a retrial. All counsel at the Privy Council hearing understood that the Board would deliver a brief judgment explaining the reasons for declining leave. This, it was envisaged, would record what Mr David Collins QC, the Solicitor-General, said with reference to the jurisdictional aspect. In the event there is no judgment of the Privy Council available to us.

Section 347/abuse of process – relevant principles

[19] The matter to which we have just referred can be conveniently considered under this heading.

[20] The arguments for the accused in support of the stay/s347 application called in aid a raft of factors bearing on both the adequacy of the evidence in support of the Crown case on the one hand, and fair trial/misconduct contentions on the other. As is often the case it was a "rolled up" argument, in that reliance was placed on both the inherent power and the statutory jurisdiction, as appropriate.

[21] Despite the rolled up nature of the submissions presented in this case, we nevertheless consider it is helpful to separately identify the principles relevant to the inherent power and the statutory jurisdiction. It is convenient to mention abuse of process first.

Abuse of process

[22] A leading decision in New Zealand is *Fox v Attorney-General* [2002] 3 NZLR 62 (CA). The case concerned charges which had been withdrawn by leave of the Court, but which were subsequently relaid. The issue was whether this savoured of an abuse. McGrath J, in delivering the decision of the Court, first considered the constitutional position. The discretion to prosecute on behalf of the state and, if so, the charges to be preferred, is a function of government. The decision involves the exercise of a discretionary public power. The function of the courts is to assume responsibility for the conduct of criminal trials. In light of this division or separation of powers, and because of the high content of judgement and discretion involved in prosecutorial decisions, there has long existed a judicial reluctance to interfere in relation to the initiation of prosecutions. This has been the case throughout the common law world.

[23] It was formerly questioned whether there was jurisdiction at all to intervene and stay a criminal prosecution as an abuse of process. Then, in *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL), a residual discretion to stay criminal proceedings was recognised.

[24] In this country that discretion was reaffirmed in the influential decision in *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA). Richardson J said this at 482:

> The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation

> and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.

Richmond P in the same case observed at 470-471:

> It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of.

[25] After reference to *Moevao*, and also to cases decided in England, Canada and Australia, McGrath J in *Fox* summarised matters in these terms:

> [37] These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a court to proceed with the prosecution on its merits would tarnish the court's own integrity or offend the court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[26] As recognised in the second sentence of the above passage an abuse of process may also be founded on the inability of the court to ensure a fair trial. Section 25(a) of the New Zealand Bill of Rights Act 1990 provides statutory recognition of:

> the right to a fair and public hearing by an independent and impartial court,

as one facet of the minimum standards of criminal procedure. In practice most stay applications are directed to this fundamental requirement and, commonly, the inquiry is whether a fair trial remains attainable, perhaps in the face of long delay and associated problems caused by the passage of time.

[27] Here, it is contended that the proceeding is one where the two aspects of the inherent power are engaged, because there is both a real risk that a fair trial is no longer attainable and because the case is afflicted by conduct on the part of the police or the prosecution which so offends the court's sense of justice and propriety as to warrant a stay to prevent an abuse of its processes.

Section 347(1) of the Crimes Act

[28] Section 347(1) provides:

> (1) Where any person is committed for trial, the Judge may, in his discretion -
>
> (a) Of his own motion or on the application of the prosecutor or the accused; and
>
> (b) After giving both the prosecutor and the accused reasonable opportunity to be heard on the matter; and
>
> (c) After perusal of the depositions and consideration of such other evidence and other matters as are submitted for his consideration by the prosecutor or the accused –
>
> direct that no indictment shall be [filed], or, if an indictment has been [filed], direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.

On its face the statutory provision is unfettered. This prompted observations from Mr D Paciocco in an article entitled "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abusive Process Concept" (1991) 15 CrimLJ 315 that s347 is unique to New Zealand in that it empowers a judge to discharge an accused before trial, and even after a guilty verdict, on what he termed a discretionary basis.

[29] While we do not disagree with these comments, it is not to be thought that the statutory power conferred by s347 is open ended. The position was summarised in *R v Flyger* [2001] 2 NZLR 721 (CA) as follows:

> [13] The power to discharge an accused, accorded by s 347(3) of the Crimes Act, is not expressed to be subject to any statutory limitation. Yet it is not an unqualified power susceptible of arbitrary exercise. It must be taken to be a power exercisable in the interests of justice. The nature and circumstances of a case will inform the interests of justice. In a trial before a Judge and jury a Judge must respect the jury's responsibility to decide the facts. Accordingly a Judge should not normally make an order for discharge pursuant to s 347(3) where there is before the Court evidence which, if accepted, would as a matter of law be sufficient to prove the case. The Judge's function in these circumstances is not to attempt to predict the

> outcome but to examine the evidence in terms of adequacy of proof, if accepted.

See also *Paris v Attorney-General* [2004] 1 NZLR 519 (CA) in which aspects of the discussion in *Flyger* were explained, and then affirmed.

[30] The observations in both these cases were essentially directed to s347 applications based on sufficiency of evidence. The jurisdiction to order a discharge is also properly available in other circumstances. These include where no useful purpose would be served by the continuation of the proceeding, perhaps because only nominal punishment would be warranted or where a verdict in an associated case renders it necessary to intervene with reference to the instant proceeding. Examples of cases where judges have intervened on these and related grounds are given in *Adams on Criminal Law* at para CA347.01.

[31] Further, it is recognised that the statutory power may be exercised on the basis of unconscionable conduct by the prosecution – an area where there is scope for overlap between the s347 power and the abuse of process inherent jurisdiction. The latter is circumscribed in the manner previously discussed (see paras [19]-[27]), whereas investigative or prosecution conduct which is unfair or unconscionable may arguably warrant a response pursuant to s347 where it would not under the inherent jurisdiction, depending on all the circumstances of the case.

[32] With these principles in mind we can now turn to an evaluation of the arguments. We shall do so by first considering the submissions generally relevant to the sufficiency of evidence.

Sufficiency of the evidence: a case to be left to the jury?

The required approach

[33] Mr Reed in advancing this aspect of the case made very detailed factual submissions directed to new evidence, or shifts in the evidence, since the first trial. We shall refer to some of these matters shortly. However, before we do so it is as well to consider the required approach. This is described in *Flyger* (see para [30]).

In considering the sufficiency of evidence a Judge must respect the jury's responsibility to decide the facts. Questions of credibility and weight are, therefore, jury issues. Accordingly an order for discharge is not appropriate where there is evidence which, if accepted by the jury, would be legally sufficient to prove the case.

[34] In our view much of the argument which was advanced as to the insufficiency of the Crown case minimised the effect of these requirements. In relation to a number of factual issues we were effectively implored to assume the role of the jury, assess the worth of disputed evidence and arrive at factual conclusions favourable to the accused. To do so would be to usurp the function of the jury, which we may not do. These concerns will become more apparent when we turn to the factual contentions shortly.

[35] On the other hand, Mr Raftery urged us to the view that the sufficiency of the Crown case need only be assessed with reference to evidentiary developments since the 2007 Privy Council hearing. The gist of the argument was that since the Privy Council had made an order for a retrial, the Crown case at that time was viewed as sufficient to be left to a jury. While there is some merit in this proposition, we do not propose to adopt it.

[36] In the first place the Privy Council did not discuss the adequacy of the evidence and make an express finding as to its sufficiency. Its focus was upon whether the fresh evidence, taken together, might have led a jury, acting reasonably, to reach different verdicts. That said, the making of an order for a retrial did implicitly recognise the adequacy of the case for a retrial. But as already noted Lord Bingham said at paragraph 119 of the judgment that any final decision concerning whether a retrial would be in the public interest should be made in New Zealand. This was to leave the door ajar, at least in relation to the exercise of the Solicitor-General's discretion as to whether a second trial was warranted.

[37] We do not view the Privy Council's decision as precluding this Court from exercising its discretion under s347 or the inherent power to prevent an abuse of process if appropriate. We are satisfied that the only appropriate course is to consider the sufficiency of the evidence in the round. In addition to the evidentiary

developments up to the time of the Privy Council hearing, there have been developments since then as well. In these circumstances the better course is to consider all of the matters raised for our consideration.

Luminol sock prints : skin fragment from Stephen's bedroom

[38] In relation to these aspects of the case there is additional evidence (obtained since the Privy Council judgment) which the Crown intends to adduce at trial. Accordingly we shall consider these two aspects together.

[39] The evidence of luminol sock prints is detailed at paragraphs 53-62 of the Privy Council judgment. We adopt that discussion for present purposes.

[40] In June 2008 Mr Kevan Walsh of the Institute of Environmental Science and Research Limited (ESR) conducted various sock print tests. A colleague who has a foot length comparable to that of Robin Bain (270 mm long) made bloodied sock prints on a number of surfaces, including carpet. Wearing a sports sock the subject placed his foot in a tray containing pig's blood to a depth of a few millimetres. The subject then walked on cardboard and on cut pile carpet. The resulting prints on both surfaces were measured using the naked eye and following the application of luminol. The prints on carpet were generally shorter than the prints made on cardboard. The extent to which the sock was bloodied affected the length of the visible print. After spraying with luminol, prints made by walking on carpet varied from 273 to 292 mm, with an average length of approximately 282 mm. By way of conclusion Mr Walsh stated:

> The experiments conducted have shown that a person with a foot length of about 270 mm and wearing a sock that has the sole completely bloodied, can make sock prints on carpet that, when enhanced using luminol reagent, are about 280 mm long.

[41] Mr Reed submitted that this further evidence "completely blows the Crown case out of the water". The argument continued that the evidence proved that Robin Bain walked in the bedroom areas where the original footprints were found, established that he must have changed out of his blood-stained socks and, therefore, provided "a very strong foundation" for the conclusion that he also changed out of

other blood-stained clothing. Presumably the socks and clothing were then washed in the family washing machine.

[42] The Crown does not subscribe to these conclusions. Counsel pointed to a number of issues. Mr Hentschel measured the length of the best print, "which was a complete footprint" and found it measured about 280 mm "from heel to toe". In anticipation of the 2007 Privy Council hearing he deposed that the word "complete" was used by him in contradistinction to other references to "partial" prints. The measurement of luminol footprints on carpet is subject to a margin of error of about plus or minus 5 mm. Mr Walsh considers that a person with a foot of similar size to the accused (300 mm in length) may make a 280 mm footprint while wearing a bloodied sock, but such footprint would be incomplete. The soles of the socks worn by the accused on the morning of 20 June 1994 were found to be partially covered in blood. The body of Robin Bain was clothed, including with shoes and socks. There was no blood on the soles of the socks. The accused told the police that he had walked in the general area where the footprints were found while wearing socks on his feet. In light of all the evidence the Crown maintains its stance that a jury may reasonably conclude the relevant footprints adjacent to the bedroom areas of the house were made by the accused.

[43] We are not persuaded that the evidence excludes one viewpoint at the expense of the other. Much will depend upon an evaluation of the evidence of Mr Hentschel and Mr Walsh. In addition, the other contextual circumstances to which we have referred may influence the assessment of the experts' evidence. In short, who made the footprints at Every Street is a quintessential jury issue.

[44] The scene examination of Stephen Bain's bedroom resulted in the location of a small piece of skin. Both Stephen Bain and the accused suffered injuries which could have accounted for the skin sample. At the first trial the evidence was inconclusive as to which brother was the source of the skin. In mid-2008 Dr Susan Vintiner analysed the skin sample in an endeavour to obtain a DNA profiling result from it. She concluded that the sample originated from a male and matched the DNA profile of Stephen Bain, but not that of the accused (nor Robin Bain).

[45] While this result represents an addition to the available scientific evidence, it does not bear upon the essential issue in the case. The sample of skin emanated from a victim. Had it originated from the accused, or his father, the further evidence would have been highly probative, but that did not prove to be the case.

Accused's bloodied fingerprints on the rifle

[46] A central plank of the Crown case at the first trial was that four fingerprints in blood were found on the upper forestock of the murder weapon. Such prints were consistent with gripping the rifle to support its weight, as opposed to holding it in a firing position. These were positive prints, in that the fingers were contaminated with blood when placed on the rifle. Negative prints are made when an uncontaminated hand touches a contaminated surface. A bloodied fingerprint of Stephen Bain was also found on the silencer to the rifle.

[47] The state of the evidence at the time of the first trial and subsequent developments at the time of the reference hearings, are described in the Privy Council judgment at paragraphs 91-96. Again, we adopt these details for present purposes.

[48] At paragraph 112 of the judgment Lord Bingham identified the Board's concerns in relation to the fingerprint evidence:

> The trial proceeded on the assumption that David's fingerprints on the forearm of the rifle were in human blood. It is now known that although blood from other parts of the rifle had been tested before trial and found to be human blood, the fingerprint material had not been tested. When it was tested after the trial it gave no positive reading for human DNA. Thus the blood analysis evidence was consistent with the blood being mammalian in origin, the possible result of possum or rabbit shooting some months before. If Dr Geursen's evidence is accepted, the blood was positively identified as mammalian in origin. There are a number of highly contentious issues arising from this evidence, including the integrity of the sample on which Dr Geursen performed his test and the reliability of Mr Jones' opinion on the age of the fingerprints and his comments on the similarity in appearance between David's fingerprints on the forearm of the rifle and prints made by Stephen on the silencer. But these were not issues which the trial jury had any opportunity to consider, and they are not, with respect, issues which an appellate court can fairly resolve without hearing cross-examination of witnesses giving credible but contradictory evidence.

[49] This assessment applies equally in the present context. The fundamental dispute is of a narrow compass. Blood samples taken from several locations on the rifle were tested and found to be human blood. However, Mr Hentschel did not take a sample from the actual fingerprint made by the accused. The nearest sample was from 5-10 mms away. This occasioned a difficulty, in that when subsequent to the first trial a sample from the fingerprint itself was taken the test results became highly contentious when the integrity of the sample was put in doubt. Dr Arie Guersen, a forensic scientist retained by the defence, considers that the blood which formed the fingerprint was mammalian in origin. Crown scientists do not subscribe to this view. Evaluation of the conflicting scientific evidence is a jury issue.

[50] Moreover, as the Privy Council noted, there is also evidence from a fingerprint expert (Mr Jones) concerning the recency of the fingerprints on the rifle and the similarity between the prints made by Stephen on the silencer and those made by the accused on the forestock. We consider that the evidence of blood found at other sites, the fingerprint evidence and the conflicting scientific evidence will all require close consideration before any conclusion is reached concerning the source of the blood in which the accused's fingerprint was found.

[51] We are also satisfied that it would be competent for the jury to find that the fingerprint evidence is strongly supportive of the Crown case. Whether it does so, or not, is for another day.

[52] Mr Reed's submissions concerning this aspect (paragraphs 131 and 132 of the written submission) seemed more directed to fair trial considerations, than to the contention that there was an insufficient case to leave to a jury. The argument was that the Crown's investigation of this aspect of the case was inadequate and that "the alleged contamination of the vital sample" meant that a conclusive result could not be obtained upon subsequent testing on the blood from the accused's fingerprint. This, it was suggested, was "highly prejudicial" to the accused. We shall return to this aspect in the fair trial context.

Crown case discredited

[53] Under this general heading reference was made to other aspects of the Crown case which were likewise considered by the Privy Council and in relation to which it was shown that the evidence heard by the jury at the first trial was incomplete or in some other way questionable. These aspects were the computer switch-on time (paras 63-68 and 108 of the Privy Council judgment), the time of the accused's return home (paras 69-76 and 109), the use made of Margaret Bain's glasses (paras 77-84 and 110) and Laniet's gurgling (paras 97-102 and 113).

[54] It is not entirely clear to us whether in characterising these aspects of the evidence as "discredited", Mr Reed also contended that in consequence the sufficiency of the Crown case was called in question. In any event, we shall consider each aspect in turn.

[55] With reference to the computer switch-on time and the time of the accused's return to Every Street it is readily apparent from the Court of Appeal and Privy Council judgments that there have been shifts in the evidence since the first trial. These shifts were undoubtedly significant in assessing whether the jury might have reached different verdicts in light of all the fresh evidence, taken together.

[56] But the question we must consider is quite different. We are by no means persuaded that the evidence relevant to these aspects will require a jury to exclude the accused from responsibility for the message left on the computer screen. Indeed we tend to agree with the comment in paragraph 63 of the Privy Council judgment that "… fine questions of timing are rarely significant in cases such as this." Put another way, experience over many years indicates that estimates of time provided by witnesses can rarely be treated with total exactitude.

[57] Whether the accused used his mother's glasses at the relevant time, while his own were under repair, is likewise a matter to be assessed on the basis of all the evidence which bears on that question. The fact remains that the glasses were located in the accused's bedroom minus a lens, which lens was found in Stephen's

bedroom. These remain as significant circumstantial factors. The shifts in the evidence do not materially affect their probative value.

[58] Whereas at the first trial the Crown case was closed to the jury on the footing that the accused's concession that he had heard Laniet gurgling when he was in her bedroom was conclusive of guilt, it is now evident that the issue of post mortem gurgling is the subject of a sharp conflict of opinion. Resolution of that conflict has the potential to diminish (even remove) a previous plank of the Crown case. It was not suggested in argument and nor do we think that the absence of this circumstantial factor would render the remaining evidence insufficient to allow the case to go to a jury. Whether this factor, coupled with others, could have that effect, is a matter to which we will return shortly.

Robin's mental state : motive

[59] Under these headings the Privy Council detailed the availability of evidence well-capable of showing that Robin Bain had been involved in a sexual relationship with his daughter, Laniet, that he was suffering from depression at the time and that the risk of public exposure could have caused him to snap. This evidence is set out at paragraphs 40-52 of the judgment. We need not repeat the details. Such evidence remains available to be called by the defence at trial, if required.

[60] At para 106 of the judgment Lord Bingham observed:

> If the jury found Robin to be already in a state of deep depression and now, a school principal and ex-missionary, facing the public revelation of very serious sex offences against his teenage daughter, they might reasonably conclude that this could have driven him to commit these acts of horrific and uncharacteristic violence.

We do not differ from this assessment.

[61] The evidence under consideration is in a different category to that to which we have referred until now. It is not to be found in the Crown case, although some Crown witnesses may provide limited support for the themes of depression, sexual abuse and therefore motive. In the main, however, it will rest with the defence to adduce evidence of these elements. That does not mean that they may not be

brought to account in a s347 context. Subsection (1)(c) enables us to consider evidence, and other matters, submitted for our consideration by either the prosecutor or the accused.

[62] As much as this evidence may have the potential to influence the balance of the trial, we do not consider that standing alone it has the capacity to so compromise the sufficiency of the Crown case as to require our intervention. Although the value of evidence of motive is not to be underestimated, it must also be accompanied by evidence implicating the person in the physical events (here, the murders).

Conclusion

[63] Thus far we have focused upon individual aspects of the evidence which were highlighted in argument in support of the challenge to the sufficiency of the Crown case. Having separately considered each point, it remains to consider the points as a whole. Our view is unchanged. We are still satisfied there is a sufficient case to go to trial.

[64] This conclusion is best explained by making brief reference to the evidence which implicates the accused and to some of the evidence which bears on the defence thesis of murder/suicide. Deliberately, we shall refer to such evidence in only bare detail.

[65] The evidence which implicates the accused includes the circumstance of Stephen's blood found on items of clothing worn by him, his palm print in blood on the washing machine, his ownership of the rifle and concealed storage of the key to the trigger guard, his fingerprints found on the rifle, his blood-stained white glove found in Stephen's room, the glasses found in the accused's room save for the lens located in Stephen's room, the contents of the 111 call, the superficial injuries suffered by the accused for which he offered no explanation and, also, his behaviour both in the period prior to 20 June 1994 and in the succeeding days until his arrest.

[66] In relation to Robin Bain and whether he murdered the four other victims and then committed suicide, we note the following points. He was found in the lounge,

dead from a single shot to the left temple, fully clothed and wearing shoes and socks. No blood from the other victims was found on his clothing and nor did his body show signs of recent injuries. His prints were not found on the rifle. If he murdered the other victims, Robin must have created the bloodied footprints while wearing socks, changed out of his socks and clothing, placed these items in and activated the washing machine, dressed in fresh clothing and footwear, composed the suicide note and then shot himself in the head at a very unusual angle of projection. All of this would have occurred while his bladder remained full, consistent with his not having been to the toilet that morning.

[67] We appreciate that most, if not all, of these points may be susceptible of qualification and differing interpretations. But the points are available on the evidence as it stands. In exercising the s347 jurisdiction we must be conscious of the limits of our role. In *Flyger* the Court approved this statement of Lord Lane CJ in *R v Galbraith* [1981] 2 All ER 1060 at 1062:

> Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

We regard this statement as applicable here.

Would continuation with the trial constitute an abuse of process?

[68] We shall consider this question under a number of discrete headings:

New case : selective evidence

[69] At the first trial the Crown called over 60 witnesses to give oral evidence. The evidence of 20 further witnesses was read to the jury by consent. For the retrial the Crown has provided statements for approximately 150 witnesses. Of these about 60 did not give evidence at the first trial. With reference to the new witnesses, about a quarter made statements to the police in the months soon after the murders. About half the new witnesses, however, are forensic or technical witnesses, who do not

supply evidence of a narrative kind. Some witnesses are to give evidence of more recent events, for example pertaining to the re-evaluation of exhibits.

[70] The new witnesses have not been cross-examined at a preliminary hearing. Although application was made in the District Court for orders that the evidence of many of the new witnesses be taken pursuant to s178(1) of the Summary Proceedings Act 1957, this initiative was declined.

[71] A related contention is that the accused is further prejudiced on account of "the Crown putting forward new theories never advanced at the original trial". Counsel referred to the evidence of a number of witnesses whose testimony effects a change, or addition, to the Crown case. For example a prison officer who admitted the accused to prison following his arrest on 24 June 1994 is to give evidence of scratch marks and bruising which he observed on the accused's upper chest. These injuries were not observed by a general practitioner (Dr Pryde, who is now deceased), when the accused was examined on the morning of 20 June.

[72] We do not accept that these matters give rise to a risk of trial prejudice. The Crown will not be running a new case. In substance its case against the accused is unchanged from the case advanced in 1995. At most the Crown will attempt to rely on subtle changes, or additions, to the body of circumstances which comprise the circumstantial case. The observation of scratch marks and associated bruising is an example of a new item of circumstantial evidence. While there has been no opportunity to test the new evidence, that right will be accommodated at trial. Crown disclosure ensures that counsel will be in a position to establish when witnesses were first interviewed and committed their recollection to writing. In relation to forensic and other professional witnesses, the availability of working notes and other contemporaneous documents will facilitate the testing of their evidence.

[73] A further argument raised the contention that the Crown is being "selective" with regard to the witnesses to be called at trial. The focus of this complaint was upon witnesses who can give evidence concerning Robin Bain's mental state in the period prior to his death and concerning his relationship with Laniet. Some of the

witnesses also speak of Laniet's lifestyle in 1993 and early 1994. Mr Reed contended that a prosecutor, in discharge of the duty of fairness to an accused, was obliged to call witnesses able to give evidence of this nature.

[74] We do not accept this argument. Rulings have already been given in relation to applications pursuant to s368(2) of the Crimes Act by which orders were sought that the Crown call Dean Cottle, Kyle Cunningham and Leanne McNaught as witnesses. Such orders were not made. Detailed reasons for not making the orders were supplied: (CRI 1994-012-217294, judgment 17 October 2008, paras [41] - [59] and judgment 8 December 2008, paras [16] – [23]).

[75] Put shortly, the duty upon the prosecution is to call these witnesses who can give direct evidence of the primary facts of the case: *R v Oliva* [1965] 3 All ER 116 (CA) at 122. The subject witnesses supply what might be termed background evidence, most relevant to motive. It is the Crown case that Robin Bain was murdered, not that he committed suicide, and it is artificial to contend that the Crown has an obligation to call witnesses in support of that thesis. To require it to do so would distort the adversarial process. We note in passing that the rulings to which we have drawn attention were not the subject of appeal.

Non-preservation of exhibits

[76] Last year in anticipation of the retrial a document entitled "2008 Exhibit Audit" was produced. It listed the items seized in the course of the police investigation and detailed their current status. Many items were returned to the estates of Robin and Margaret Bain, or destroyed. Counsel indicated that approximately 400, out of 600 items originally seized, are no longer held by the police. This contention needs to be placed in perspective.

[77] Following dismissal of the appeal against conviction in December 1995, the police wrote to Mr Michael Guest on 22 December. The letter included this:

> As you are aware the police have been retaining a container load of items taken from 65 Every Street, Dunedin. These were not used as exhibits.

> Now that the Court of Appeal decision has been obtained, it is intended releasing the contents of the container to the trustees of the Bain estates.

There was no immediate response to the letter. Numerous items were released in January 1996, and many of these items were subsequently disposed of or destroyed.

[78] On 26 June 1996 Mr Guest, following a telephone call to his office from the police, urged that immediate steps be taken to ensure that all the evidence remained intact for a further reasonable period of time. Mr Karam wrote a similar letter to the Acting Regional Commander. He replied on 12 July 1996:

> You may be assured that the police have no intention of destroying any of the evidence which was produced at the Bain trial. In addition all other documents, photographs and material e.g. test firing shells, in police possession, will also be retained. All of these items have been and will continue to be held in secure custody.

Hence there is a need to identify the nature of the items which are no longer available. No court exhibits have been lost. Shortly, we shall refer to items highlighted in the course of argument which are no longer available, or suitable, for forensic examination.

[79] An allied issue concerns the destruction of the house at 65 Every Street. It was deliberately burnt down on 7 July 1994. John Bain, is briefed to give evidence about this at any retrial. He is an executor of the Bain Estates. Three reasons prompted the decision to raze the house. The section was considered more valuable with the house removed. It was believed that retention of the house would require the engagement of a security guard. The executors understood that the house had been condemned. John Bain spoke to the accused before the fire occurred. David Bain agreed to the proposed course of action.

[80] The principles relevant to loss of evidence are to be found in *R v Harmer* CA324/02, CA352/02, 26 June 2003. After reference to mainly Canadian authority Blanchard J, in delivering the judgment of the Court, said this:

> [91] In our view, there are two relevant considerations, namely whether the evidence has been lost because of acts or omissions by the police involving bad faith, and whether it is probable that the lost evidence would have been of real assistance to the defence in the circumstances of the particular case.

> The emphasis, we consider, should be upon the need for a showing by the accused or convicted person that it is more probable than not that the lost evidence would have been of real benefit to the defence because it would have created or contributed to creating a reasonable doubt. That is after all the fundamental question. The characterisation of the conduct of the police in this regard will not be determinative save that, if it appears that they were motivated by a desire to avoid having the evidence before the court or otherwise acted in bad faith, it may readily be inferred that the evidence would have been helpful to the defence. But, in the absence of such deliberate conduct or other bad faith by the police – which is the position in this case – the concern should be with the effect on the defence of the absence of the evidentiary material rather than with whether the police have been negligent. The particular significance of the missing evidence to the defence will necessarily have to be considered in light of all the available evidence. When, as here, the issue arises on an appeal from a conviction, the ultimate question will be whether the unavailability of the evidence to the defence appears to have given rise to a miscarriage of justice.

[81] In a pretrial context the ultimate question is whether the unavailability of the evidence has incurred the risk that the accused can no longer receive a fair trial. Section 24(d) of the New Zealand Bill of Rights Act guarantees the right of an accused to adequate facilities to prepare a defence. The ability to test prosecution evidence is an element of that right.

[82] We do not see this as a case where there have been acts or omissions involving bad faith, or for that matter negligence, on the part of the police. The evidence set out above speaks for itself. But it still remains to consider what items have been lost and whether the absence of this evidentiary material is shown to give rise to the risk that a fair trial is no longer attainable. Attention has been drawn to the following evidentiary material:

(a) the bedding, carpets and other items which were blood-stained from the bedrooms of Laniet and Stephen,

(b) bloodstained furnishings from the lounge area where the body of Robin Bain was found,

(c) the clock from the car of Denise Laney,

(d) biological samples from Robin Bain, including “possible” blood in fingernail scrapings,

(e) the computer,

(f) the taps to and the washing machine itself,

(g) blood samples from surfaces in the kitchen, bathroom and laundry areas,

(h) the ice skate under which the glasses lens was recovered in Stephen's room, and

(i) family records, including photographs.

We also need to return to the question of the integrity of the sample taken from the accused's fingerprint on the rifle. Dr John Manlove, an English forensic scientist, has sworn an affidavit concerning the significance of some of these items.

[83] Before we turn to an evaluation of the missing evidentiary material, we note what still remains available and what has already occurred in the way of forensic examination. As was to be expected the deaths of five members of a single family caused an extensive police investigation. Video footage was recorded of the rooms in the house before anything was disturbed and hundreds of still photographs were also taken. The scene examination then occupied several days. Evidence of it is to be given by police officers and a forensic scientist. As subsequent judgments of the Court of Appeal and of the Privy Council attest, this case has been the subject of intensive forensic scrutiny over many years. The exhibits from the first trial, and a great quantity of other material, remains available and has been accessed on behalf of both the Crown and the defence.

[84] Nonetheless our focus must be upon the evidential material which is no longer available and whether it is more probable than not that the missing material would have been of real benefit to the defence, in contributing to or creating a reasonable doubt.

[85] With reference to the bedding and other surfaces in Laniet's room which were blood-stained, Dr Manlove deposed that a review of the actual blood patterns, or a complete photographic record of all relevant surfaces, would have assisted his interpretation of the blood patterns. This, in turn, may have clarified the sequence of the gunshot wounds sustained by Laniet. That sequence is relevant to the question of gurgling.

[86] We do not consider it is more probable than not that the availability of this further evidence would have been of real benefit to the defence. It may have shed some light on the sequence of the shots. There is already a considerable body of evidence concerning that issue from other sources. And, it must be borne in mind that the shot sequence is relevant to the death process, which in turn is relevant to the issue of gurgling, either ante or post mortem. Gurgling is but one element of a much broader circumstantial case. At most, if further evidence was forthcoming, it might assist the defence argument in relation to this circumstantial factor.

[87] It is not apparent to us how the availability of further blood-stained items from Stephen's room would be of assistance to the defence. We understand it to be common ground that the room was in disarray, consistent with a violent struggle between Stephen and his assailant. Dr Manlove's affidavit does not refer to a need to have access to the bedding and other items from Stephen's room.

[88] A similar situation obtains in relation to what is termed "blood-stained material from the curtains in the lounge". The curtains, according to the audit, have been retained. Mr Karam's affidavit of 1 November 2008 refers to biological fragments from the curtains (paragraph 145), but it is not explained and it is not clear to us how this material could have materially assisted the defence case.

[89] A clock from the car driven by Denise Laney on 20 June 1994 was not seized by the police. Mrs Laney's evidence as to the time at which she saw the accused was derived from the clock. A constable checked the clock on 27 June 1994 and endorsed on a statement made by Mrs Laney that the clock was five minutes fast. This was confirmatory of Mrs Laney's statement. Mr Karam's affidavit notes that the constable is not to give evidence at the retrial. This is capable of remedy. Assuming he is available, the constable may be called as a witness. If he is unavailable, the endorsement contained on the witness statement is admissible as evidence. This aspect seems to us to be one easily dealt with, even perhaps by way of an agreed fact.

[90] Fingernail scrapings were taken from each of Robin Bain's hands. Blood samples were also taken from blood spots or smears on his left hand. These were

examined by Mr Hentschel in 1994. Work notes he made referred to possible traces of blood in the fingernail scrapings. Mr Hentschel considered that there was insufficient blood present in the blood samples to enable further testing. The scrapings and samples were destroyed in January 1996. Dr Manlove pointed out in his affidavit that improved scientific method might have enabled the source of the blood samples to be identified and the possible traces of blood to be analysed. If any of this biological material was shown to be from any of the other victims, this would have been of significant value to the defence. We accept this observation.

[91] There are a number of photographs of Robin Bain's hands which were taken at the mortuary. These depict the blood spot/smear evidence. Other photographs show the bullet wound to his head and the bleeding associated with it. Whether the blood on the hands could have come from the head wound will be explored at trial. Mr Hentschel is a Crown witness, and will be able to be cross-examined concerning this aspect, as well as the opinion in his work notes that there was insufficient blood available for forensic testing. We are not satisfied that it is probable this biological material, if available, and if susceptible of analysis, would have been of real assistance to the defence. The high probability must be that the blood on the deceased's hands was his own. As to the fingernail scrapings, there is no more than a possibility of the presence of blood. The contention that testing would have been of probative benefit to the defence is speculation.

[92] The Bain family computer was examined the day of the murders by Mr Martin Cox, a software engineer from the University of Otago. He reconstructed the likely turn-on time of the computer before the message "sorry, you are the only one who deserved to stay", was typed. He did so with the assistance of Detective Anderson whose watch was relied upon in the course of the reconstruction exercise. Subsequently Maarten Kleintjes from the Electronic Crime Laboratory also examined the computer. He made a clone of the hard drive onto a CD-ROM. This preserved any data held on the hard drive, including computer files, hidden files and previously deleted data.

[93] In his affidavit Mr Karam explained that the prejudice arising from the non-availability of the computer was the inability to conduct "a practical demonstration"

of its functioning before the jury. Perhaps a demonstration would have been of some assistance to the jury. But we regard the suggestion that the absence of that opportunity will probably mean the defence is denied a real chance to create a reasonable doubt, as purely speculative. Both Mr Cox and the detective who assisted him will be available for cross-examination. The operational characteristics of the computer have been thoroughly tested and that evidence will be available at trial.

[94] The accused told the police that after his return from the paper round he put a wash on in his family's washing machine. Police officers who arrived at the house at about 7.20 am did not notice the washing machine to be functioning. The time taken for a washing cycle is an issue in dispute.

[95] Several days after the murders were committed the taps which serviced the washing machine were removed by a plumber in the course of the scene examination. A few days later, when a washing machine repairer who was familiar with the actual machine was asked to test the length of a washing cycle, substitute taps were fitted. This may have affected the water flow and hence the duration of the washing cycle. Mr Karam deposed that in these circumstances "it is not possible to do any further tests with the washing machine".

[96] It is speculation what any further tests might have produced. And in any event the time taken by a wash cycle is only relevant to the assessment of one piece of circumstantial evidence. For example, that circumstantial factor hinges upon an acceptance of the assertion that the noise from the washing machine would have been noticed had it been operational shortly after 7.20 am. We are not persuaded that the defence has demonstrated a real possibility of prejudice on this account.

[97] Blood smears were located on door frames in various locations about the house. Samples from the smears have not been tested to ascertain the source of the blood. The strong probability must be that the blood emanated from the bodies of one or more of the victims, other than Robin Bain. We do not consider there is any realistic prospect that an analysis of these samples (if they still existed) would produce a result of real benefit to the defence.

[98] With reference to the ice skate from Stephen's room, Mr Karam states in his affidavit:

> Without the physical skate, the impact of this example of the quality of the police investigation is likely to be lost on the jury.

As we understand it, this is a contention that the availability of the ice skate as an exhibit would materially advance the defence case. Photographs are available of the ice skate in situ. We do not accept that the availability of the actual item would make any meaningful difference.

[99] Numerous chattels and personal effects, including family photographs, were returned to the executors of the Bain Estates. It is suggested that the photographs may have identified which member of the family owned and/or wore a green jersey which was located in a blood-stained state after the event. It is suggested that examination of family photographs may have clarified this issue. Again, we view this contention as speculative.

[100] Finally, we return to the blood sample taken from the accused's fingerprint on the rifle. We have already referred to the background (paras [46] – [52]). In this instance the sample was not destroyed, but rather the contention is that its integrity was compromised while in the care of the ESR so as to render test results obtained from the sample of no, or at least reduced, value. Whether the integrity of the sample was in fact compromised is a matter of dispute. Dr Geursen maintains that he positively identified the blood as mammalian in origin, that is from an animal rather than a human source. If his evidence is accepted, the defence will obtain significant benefit from the testing of this sample. If anything, we consider that any harm caused to the integrity of the sample is of disadvantage to the Crown, rather than the other way around.

Witnesses who are no longer available

[101] A number of witnesses have died since the first trial. We shall consider each in turn.

[102] Dr Pryde examined the accused on 20 June 1994. He found some recent injuries, but did not see any marks on the accused's torso. In anticipation of the retrial the Crown has briefed evidence from Thomas Samuel, who observed minor injuries to the accused's chest when admitting him to Dunedin Prison on 24 June. In addition evidence is to be given by Rebecca Hemming that she saw scratches on the accused's torso on 22 June.

[103] Mr Reed submitted that the defence was prejudiced on account of its inability to cross-examine Dr Pryde to emphasise that he observed no injuries to the accused's torso. We accept there will be some small element of disadvantage. However, Dr Pryde's evidence will be read to the jury. It contains a clear account of the examination he conducted and his findings. In addition, he completed a body diagram upon which he marked the discernible injuries. This too is available to be introduced in evidence. We see no scope for actual prejudice.

[104] Mr Alister McConnell distributed the Otago Daily Times in the Andersons Bay area. He delivered the "first drop" of papers to a street corner at 5.25 am, noticed that these papers had not been picked up at 5.40 am and at about 6.15 am saw a bag containing newspapers at another street corner. This was consistent with the accused's normal practice, to leave his paper bag at the street corner and carry only the papers to be delivered to the end of the particular street. In short Mr McConnell noticed nothing unusual on 20 June. He estimated that the accused might have finished the paper round "at about 6.30, 6.45 am".

[105] Counsel submitted that Mr McConnell's absence was "highly prejudicial" to the defence because he was best able to confirm the accused's normal routine and so, it was submitted, this witness's evidence would refute any suggestion that the accused began or completed the paper round at a time earlier than usual.

[106] The evidence of Mr McConnell will be read to the jury. We do not accept that there will be any material disadvantage to the defence on that account. The witness did not see the accused on the day. His evidence does not purport to be exact. At most his testimony sets certain parameters and confirms that the accused

was delivering the papers within those parameters on 20 June. To the extent his evidence shows David Bain was acting normally, it assists the defence.

[107] Mrs Kathleen Mitchell lived at 128 Somerville Street and the accused delivered her copy of the Otago Daily Times. On 20 June the paper was delivered between 6.10 am and 6.15 am and Mrs Mitchell was aware of the delivery because of her dog barking. In anticipation of the retrial Mrs Mitchell made a further statement to the police. In it she said that there was further information she could provide which she had held back in 1994. This was to the effect that it was unusual for the accused to come onto her balcony, but he had done so on 20 June, which was what caused the dog to bark. Until about a year previously the paper was delivered to her balcony, but Mrs Mitchell asked the accused not to do so and that became the accused's practice, save for this particular morning.

[108] The Crown proposes to read Mrs Mitchell's evidence at trial. Her evidence was admitted by consent at the first trial. There has been no opportunity to cross-examine her, particularly with reference to the new content contained in her revised witness statement. We accept that this changed evidence is in a different category and will require particular care. It will be essential for the jury to be alerted as to the shift in the evidence and also warned concerning its reliability, particularly in the absence of cross-examination. Subject to these safeguards we see no real possibility of prejudice.

[109] Mrs Deborah Rackley was another resident to whom the accused delivered the Otago Daily Times. Her evidence is that she woke early on account of a sore back on 20 June and went to fetch the newspaper from her letterbox at 6.00 am. To her surprise the paper had been delivered. It was earlier than usual. She checked the time on her microwave. As to the normal time of delivery she said this was "after 6.00 am each morning".

[110] This evidence is hardly precise. It is not evident whether the paper was delivered only a few minutes earlier than usual, or by a considerable margin. The absence of opportunity to explore this point is as likely to prejudice the Crown, as

the defence. Mrs Rackley may not have been capable of greater precision. All in all we do not consider that scope for material prejudice is demonstrated.

[111] Detective Robinson supplies only formal evidence for the Crown, relevant to his obtaining a search warrant in respect of Telecom records. However, the defence wished to cross-examine him concerning a check he made as to the accuracy of Detective Anderson's wristwatch (used to reconstruct the turn-on time of the computer). Detective Robinson also prepared a transcript of Exhibit 1, the 111 call made by the accused shortly after 7.00 am on 20 June. It was submitted that Detective Robinson's absence would be "highly prejudicial" from the defence perspective. We very much doubt whether this witness's absence will occasion any material prejudice. The checks made in relation to the wristwatch are well-documented. What more could be elicited through cross-examination is difficult indeed to see. While the authenticity of Exhibit 1 is in issue, witnesses from St Johns Ambulance Service who received the incoming call and dubbed the conversation onto an audio cassette from the 24 hour tape, are available. In addition, the authenticity of the tape has been assessed by witnesses in England. Detective Robinson's role in preparing a transcript of the conversation was comparatively minor and, we note, such transcript is not to be provided to the jury. We consider there is little or no scope for prejudice.

[112] Mr Raymond Pritchard was a laboratory technician at the Otago Medical School. He was an intended defence witness concerning the phenomenon of gurgling noises from dead bodies. Mr Pritchard was to give evidence that bodies may gurgle spontaneously and, more commonly, when moved. A hearsay notice has been filed seeking an order that the evidence may be read to the jury. The Crown is opposed to the evidence being read on the basis that, if gurgling is a known phenomenon, it must be possible for the defence to obtain another mortuary assistant to give such evidence. This would preserve the opportunity for cross-examination.

[113] Assuming Mr Pritchard's evidence is read, we see no scope for prejudice to the defence. At worst, the weight which a jury might accord the evidence could be affected because it was read, not given orally. But we think the weight likely to be accorded to Mr Pritchard's evidence will most depend upon the assessment of the

evidence of other witnesses who are to give evidence on this same aspect. That is, the quality and trend of the evidence as a whole is likely to be the most persuasive factor. Again, we see little or no scope for prejudice to the defence.

[114] Two further witnesses may not be fit enough to personally attend the trial. Both are resident in Australia. Mrs Barbara Short stayed with the Bain family in January 1991. She is briefed to give evidence of Robin Bain's morning routine of rising at an early hour and spending time alone in meditation, or prayer, in the front lounge.

[115] Dr James Gwynne is a retired pathologist. He is an intended defence witness. Directions have already been made pursuant to ss103 and 105 of the Evidence Act permitting his evidence to be taken in advance of trial, if need be. Alternatively, Dr Gwynne will be permitted to give evidence by video link to Brisbane.

[116] In our view there is no scope for prejudice to arise in relation to these witnesses. Their evidence will be available to the jury. Evidence given by video link is a fact of life these days.

Prejudicial pretrial publicity

[117] It is common ground that this case has received almost unprecedented media coverage. Books have also been written espousing opposite viewpoints concerning who was responsible for the killings. Mr Karam's affidavit confirms that numerous websites may be accessed by use of the name "David Bain" and that they contain material designed to persuade of his guilt, or innocence.

[118] A change of venue from Dunedin to Christchurch was ordered last year. A significant factor in that decision was the nature of the publicity in Dunedin, which was found to have a parochial flavour, evidenced by a sensitivity concerning any criticism of the police investigation.

[119] Counsel cited the Privy Council case of *Montgomery v HM Advocate* [2003] 1 AC 641 in which Lord Hope of Craighead said at 667:

> The common law test, which is applied where pre-trial publicity is relied upon in support of a plea of oppression, is whether the risk of prejudice is so grave that no direction by a trial judge, however careful, could reasonably be expected to remove it.

This statement may indicate an approach more stringent than that applied in New Zealand, judging by the trend of the cases in this country.

[120] Consistent with the right to a fair and public hearing by an independent and impartial Court guaranteed by s25(a) of the Bill of Rights Act, the New Zealand authorities articulate that where pretrial publicity has been of such a nature as to demonstrate that, on balance, a fair trial is no longer attainable, then a permanent stay of the proceeding may be appropriate: *R v Coghill* [1995] 3 NZLR 651 (CA) and *R v Cara* (2004) 21 CRNZ 283 (HC).

[121] We consider another passage from the speech of Lord Hope in *Montgomery* of particular relevance. At 673-674 he said this:

> Recent research conducted by the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: *Young, Cameron & Tinsley, Juries in Criminal Trials: Part Two*, vol 1, ch 9, para 287 (New Zealand Law Commission preliminary paper no 37, November 1999). The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. Nevertheless the risk that the widespread, prolonged and prejudicial publicity that occurred in this case will have a residual effect on the minds of at least some members of the jury cannot be regarded as negligible. The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict.

[122] With this passage in mind we can record our conclusions in relation to this aspect quite briefly. Without doubt this case has excited a high level of public interest and extensive media and internet coverage. This is confirmed in a public survey conducted on behalf of the defence for the purpose of the venue application. That said, a notable feature of the publicity is that it is divided as to viewpoint.

Unlike many cases where pretrial publicity is said to imperil the right to a fair trial, much of the publicity in this case is unsympathetic to the Crown case.

[123] The issue of the effects of pretrial publicity on fair trial rights has also recently been considered in two high profile New Zealand cases *R v Rickards & Ors* HC AK CRI 2005-063-1122 25 May 2006 and by a Full Court in *Solicitor-General v Fairfax NZ Ltd & Anor* HC WN CIV 2008-485-000705 10 October 2008. In both cases, the authorities were canvassed and the conclusion reached that pretrial publicity (including extensive internet material) was not such as to prejudice a fair trial.

[124] Without question, great care will be required in empanelling a jury. Emphatic directions will be necessary before the case is opened. The need to discard all prior knowledge of the case, have regard only to the evidence adduced at trial and to preserve an open mind, will all need to be stressed. The evidence will then unfold over a considerable period of time. The ebb and flow of evidence directed to the many contentious issues in the case will be at the forefront of the minds of the jurors. The addresses of counsel, and a summing-up, will provide a necessary overview of the case as a whole. In short, the trial process will dominate at the expense of any residual recollections of the pretrial publicity.

[125] For these reasons we do not consider that words written or spoken in the pretrial debate are likely to prevent a fair trial.

Legislative changes

[126] Counsel submitted that since the first trial in 1995 there have been legislative changes which have impacted in relation to the accused's trial rights. The written submission contained the observations that the legislative factors, "not critical on their own", may nonetheless be considered in assessing whether a trial would be unfair and therefore an abuse of process.

[127] The first changes were several brought about by the Evidence Act 2006. It was argued that the principles for the admission of hearsay evidence have been

significantly liberalised, subject to a requirement that hearsay notices be served before trial. This latter development, it was noted, applied equally to the defence and prompted the complaint that this created an inroad into an accused's previous ability to adduce evidence without warning to the Crown.

[128] A further submission was to the effect that opinion evidence is more readily admitted today, than was the case before the new Act was passed. Reference was also made to a pretrial ruling (affirmed on appeal) that the Crown may adduce evidence comprising extracts from the accused's testimony at the first trial as part of the Crown case. This was characterised as "a significant departure" from what would have been allowed in 1994-95, as if the new Act was influential in relation to the ruling.

[129] The second area of legislative change which was highlighted was the passing of the Juries Amendment Act 2008. It reduces challenges without cause from six to four, abolishes the previous requirement for routine sequestration of the jury overnight (although sequestration remains an available option) and allows for majority verdicts (a majority of 11), provided the jury has deliberated for four hours and there is no probability of a unanimous verdict.

[130] Whether the contentions as to the effects of the new legislation are correct and whether it is right to say that some of the changes actually affect an accused's trial rights is, we think, highly questionable. But that is not the issue. On the one hand a defendant may only be convicted of an offence as it was defined at the relevant time and is subject only to the penalty then prescribed. Section 26 of the New Zealand Bill of Rights Act affirms these basic rights. On the other hand there is no similar presumption against retrospectivity in relation to rules of evidence and procedure. In *Rodway v R* (1990) 92 ALR 385 (HC) the rule of evidence requiring a corroboration warning was relaxed between the date of the offence and trial. The High Court of Australia at 389 said this:

> A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in *Maxwell v Murphy*, that no-one has a

> vested right in any form of procedure. It is a principle which has been well established for many years: see also *Wright v Hale* (1860) 6 H & N 227; 158 ER 94, per Wilde B (H & N at 233; ER at 96); *Attorney-General v Sillem* (1864) 10 HLC 704; 11 ER 1200, per Lord Wensleydale (HLC at 763; ER at 1224); *Warner v Murdoch* (1877) 4 Ch D 750, per James LJ at 752.

The position is no different in New Zealand.

[131] It follows that this argument is without substance. Rights have not been taken away or eroded. The true extent of an accused's right is to a trial conducted in accordance with the current rules and practices of the courts and in accordance with the requirements of fairness.

The impact of delay

[132] We have deliberately left this aspect until now. The submissions concerning delay were extensive. Although the accused was charged with the murders only days after their occurrence and the first trial was completed less than 12 months later, the fact is that the retrial is scheduled to occur almost 15 years after the accused was charged. The arguments were directed to that period of delay and the consequences said to flow from it. Although for the purposes of this judgment we have positioned this aspect under the abuse of process heading, it might better have been considered on a stand alone basis. In essence, a breach of s25(b) is asserted. If established, the remedy of a stay may be available, irrespective that such remedy could not necessarily be justified under the abuse of process principles and the fundamental obligation of fairness.

[133] Given the rolled up nature of the arguments which were presented, we shall likewise consider delay on a general basis. If we are satisfied that a breach of s25(b) is established, there will be a need to separately consider the issue of remedy.

[134] The general impact of delay has been substantially considered in our evaluation of the submissions concerning the loss of evidentiary material and the non-availability of witnesses. There is an additional dimension concerning the erosion of memory with the lapse of time, to which we will refer shortly. But it also remains to consider whether a retrial in 2009 represents an infringement of the right

to be tried without undue delay. This must be viewed as a separate issue, since although trial prejudice may be a relevant factor, it is not a prerequisite of a breach finding.

[135] For the reasons already given in considering lost evidence and non-availability of witnesses, we are not persuaded that trial prejudice will arise in either of these regards. But, Mr Reed also argued that it may be presumed there will be an erosion of memory as a result of the passage of time, with the result that the accused is at risk from the faulty recollections of witnesses. Our attention was drawn to *Guidelines on Memory and the Law*, *Research Board of the British Psychological Society,* June 2008. This study, we think, is of most value in relation to primary witnesses, those who were the victims of criminal acts (for example childhood sexual abuse) or who witnessed the commission of a crime. In such cases the evidence of a single witness may be pivotal, for example as to the identification of the offender, and therefore in relation to the verdict.

[136] The present case is not in that category. The Crown case is circumstantial in nature. It derives from numerous sources. It is the combined effect of multiple pieces of evidence which is said to establish the case against the accused. Certainly, there are a number of witnesses who are reliant upon memory and who are to give evidence concerning events some of which occurred an appreciable time before June 1994. These are typically witnesses who provide contextual information which is in turn relevant to the assessment of the overall circumstantial case. Some of the prospective defence witnesses may be in a similar category.

[137] Not only is the nature of the case itself significant, but we are also influenced by a number of other considerations. The fact of the killings was known very soon after the event. Likely witnesses had immediate occasion to recall matters within their knowledge concerning the Bain family. Many witnesses were interviewed by the police and committed relevant matters to writing at an early stage.

[138] Although a period of almost 15 years has now elapsed, this case has not been out of mind for any appreciable period during the intervening years. Appeals, inquiries, the publication of books and Court decisions, amongst other things, have

maintained the case in the public consciousness. In this regard we are confronted with a situation which is different, if not unique, in assessing the potential for delay to have eroded memory. We also bear in mind s122(2)(e) of the Evidence Act. As required, appropriate warnings may be given to the jury concerning the reliability of evidence. This will be done with the benefit of having seen and heard such witnesses giving evidence and their being tested by cross-examination.

[139] For all these reasons we do not regard the case as one where the delay until a retrial involves a significant risk of prejudice to the accused on account of false memories or the erosion of memory.

[140] Nonetheless, is it shown that a retrial would infringe the accused's right to be tried without undue delay? The first issue is whether delay attributable to the appellate process is relevant in this context. This point was considered and determined in *R v Taito* [2005] 2 NZLR 815 (CA). That case was different to the extent that it was a delay of about 10 years in the determination of an appeal against conviction which was at stake, as opposed to a retrial following a successful conviction appeal. Under the heading "Undue appellate delay" the Court held that the s25(b) right warrants a broad approach and, in light of the preponderance of authority both overseas and in New Zealand, the right should extend to the prompt determination of appeals from decisions in criminal cases.

[141] Reliance was placed upon the Privy Council's decision in *Mills v Her Majesty's Advocate* [2004] 1 AC 441, which concerned a Scottish case where there had been undue delay in the determination of a conviction appeal (occasioned in part by an application to adduce fresh evidence on appeal). The Privy Council affirmed the appropriateness of a remedy fashioned by the Scottish courts in response to the breach, being a nine month reduction of sentence. We note there are some factual similarities between *Mills* and this case, although like *Taito*, *Mills* did not involve a retrial.

[142] A frequent approach to the evaluation of an undue delay contention is to follow the Canadian example from *R v Morin* (1992) 12 CR (4^{th}) 1 (SCC). The factors to be considered were gathered as follows:

1. The length of the delay;
2. waiver of time period;
3. the reasons for the delay, including
    (a) the inherent time requirements of the case
    (b) actions of the accused
    (c) actions of the Crown
    (d) limits on institutional resources
    (e) other reasons for delay; and
4. prejudice to the accused.

With these factors in mind we turn to the relevant chronology.

[143] It is as follows:

29 May 1995	Guilty verdicts returned
21 June 1995	Sentence imposed
19 December 1995	Conviction dismissed by the Court of Appeal
29 April 1996	Privy Council declined leave to appeal
15 June 1998	Application made for the exercise of the prerogative of mercy
18 December 2000	The Governor-General referred six questions to the Court of Appeal pursuant to s406(b) of the Crimes Act
October 2002	Court of Appeal hearing in relation to the six questions
17 December 2002	Court of Appeal judgment (answering the six questions)
24 February 2003	The Governor-General referred the case back to the Court of Appeal pursuant to s406(a) of

	the Crimes Act
1-9 September 2003	Further Court of Appeal hearing
15 December 2003	Second appeal against conviction dismissed by the Court of Appeal
6 June 2006	The Privy Council granted leave to appeal
10 May 2007	The Privy Council quashed the convictions
21 June 2007	The Solicitor-General decided a retrial should proceed
5 May 2008	Original date scheduled for the retrial
11 August 2008	2nd scheduled retrial date
16 February 2009	3rd scheduled retrial date
2 March 2009	Present trial date

This is a bare chronology of the relevant events. Many more dates and events could be added, including with reference to the raft of hearings (including appeals) which have occurred over the past 12 months or so.

[144] It cannot be suggested that the hearing of the first appeal against conviction was unduly delayed, in fact the delay was minimal (about six months). Following the Privy Council's judgment declining leave to appeal there was a delay of over two years before an application for the exercise of the prerogative of mercy was filed. The next five and a half years (June 1998 to December 2003) was taken up by initiatives relevant to that application, including the two references to the Court of Appeal. There was then a gap of about two and a half years before the Privy Council granted leave to appeal, and a further delay of almost 12 months before the decision quashing the convictions.

[145] This background presents a difficulty. By comparison *Taito* was a straight-forward situation. A conviction appeal was dismissed on the papers. Following an appeal to the Privy Council it was determined that an oral hearing of the conviction appeal was required. Only at that point (10 years on) was the conviction appeal heard according to law. The same cannot be said of this case. After verdict, there was a very prompt appeal hearing and, equally promptly, the appellant's final criminal appeal rights were exhausted before the Privy Council.

[146] The next several years did not involve the exercise of appeal rights, but rather an appeal to the executive branch of government for the exercise of the prerogative of mercy. The two references to the Court of Appeal, initiated by the Governor-General, occurred within that context. Is this period of time relevant in assessing the issue of undue delay? We did not have the benefit of submissions on this point.

[147] We doubt that this period is relevant. Even according s25(b) a broad approach (as affirmed in *Taito*) we do not think a period of time when a case is before the executive, rather than the courts, is relevant. Section 25 is headed "Minimum Standards of Criminal Procedure" and it is the right to be "tried" without undue delay which is guaranteed. Mr Bain was not awaiting trial, whether before a trial or an appellate court, throughout this period. But in case we are wrong in this regard, we shall also briefly consider whether any delay has been undue.

[148] In this case this is a difficult (and perhaps artificial) exercise. Ordinarily a delay of this magnitude in the context of s25(b) would be decisive of the outcome. A finding of undue delay would be almost inevitable. But this is anything but an ordinary case. The brief chronology of events set out earlier confirms as much. The submissions referable to this aspect did not seek to criticise anyone in relation to the delay from 1996 to 2007. An extraordinary amount of work was undertaken during that time. The issues arising in relation to the fresh evidence were time-consuming for scientists, lawyers, departmental officials and members of the judiciary, alike. We are not persuaded that a finding of undue delay (assuming it to be available) is open.

[149] The same may be said of the period since May 2007, when the convictions were set aside and an order for a retrial made. A full chronology of the events over that period (which are sufficiently evident from a reading of this judgment) indicates why earlier trial dates were abandoned, despite every endeavour to retry the case as soon as possible.

[150] We therefore conclude that a breach of s25(b) is not established.

Allegations of prosecutorial misconduct in relation to witnesses and evidence from the Victoria Forensic Science Centre

Background

[151] Over the 15 year period since 1994, forensic work in connection with this case has been undertaken at various times in Melbourne by the Victoria Forensic Science Centre (VFSC). Some of the work has been undertaken at the request of the New Zealand Police and some at the request of David Bain or those representing him. To facilitate the forensic testing work, the New Zealand Police arranged from time to time to deliver exhibits to the VFSC such as the rifle used in the killings and items of clothing belonging to both David and Robin Bain.

[152] Some limited work was carried out in 1995 by Dr Stephen Gutowski of the VFSC. Subsequently, at the request of the defence, a substantially greater body of work was undertaken by a number of scientists at the VFSC at David Bain's request in 1997. At that time Mr Colin Withnall QC was representing David Bain and was being assisted by Mr Karam and a scientist, Dr Arie Geursen. Dr Geursen was giving scientific advice to Mr Withnall in connection with David Bain's defence. Mr Karam was instrumental in arranging for the further forensic testing work to be carried out by the VFSC including, with the agreement of the New Zealand Police, taking certain samples to Melbourne for that purpose.

[153] The VFSC provided certain reports to Mr Karam some of which were then used to support David Bain's petition filed in June 1998 seeking the exercise of the prerogative of mercy. Some of these reports and, later, affidavits based on them,

were presented to the Court of Appeal in connection with the Governor-General's references in 2002 and 2003 under s 406 Crimes Act.

[154] In August 2003, at the request of the Crown, Mr Withnall provided some of the underlying case notes for reports which had been prepared by Dr Gutowski and provided also an affidavit prepared by another VFSC scientist Mr Nigel Hall. It is accepted that any privilege which may otherwise have attached to the case notes and the affidavit disclosed at that time has been waived. However, it is submitted on behalf of David Bain that all other material held by the VFSC relating to the 1997 testing remains legally privileged and may not be used by the Crown or produced in evidence by the Crown at any retrial of David Bain.

[155] This matter arises for consideration because, in 2007, after the Privy Council quashed David Bain's convictions and ordered a retrial, a police officer (Detective Karl) went to Melbourne and uplifted from the VFSC a substantial body of case notes and other materials which are those said to be legally privileged. As well, the Crown proposes to lead at trial evidence from Dr Gutowski, Mr Hall and a VFSC armourer, Senior Constable Henry Glaser. All three of these witnesses had been involved in undertaking forensic work on David Bain's behalf in 1997.

[156] While previous reports supplied to Mr Karam by Dr Gutowski and Mr Hall have been used for the purposes of the petition and the references to the Court of Appeal, Senior Constable Glaser's evidence has never been relied upon or disclosed at any stage until Detective Karl's visit to Melbourne in 2007.

[157] The police have also obtained material from VFSC in relation to two other VFSC scientists who were involved in the testing undertaken for Robin Bain in 1997. These are a Mr Ross and Mr Claven. The Crown does not intend to call either of those witnesses.

[158] It is not in dispute that the defence team was not informed of Detective Karl's proposal to visit the VFSC in 2007 but Mr Karam and present counsel learned of the visit shortly afterwards and immediately protested. Copies of all the material

obtained were promptly provided to the defence as part of the police disclosure requirements.

The Issues

[159] It is submitted on David Bain's behalf that the actions of the police in obtaining the relevant materials from the VFSC and attempting to use some of it at trial amounts to serious misconduct of such a degree that the Court should exercise its jurisdiction to order a stay of proceedings. On the other hand, the Crown submits that while, in hindsight, the police should have acted more cautiously, they acted in good faith and their conduct is not of such a nature as to require a stay of proceedings.

[160] It is also submitted for the Crown that the materials relating to the 1997 testing do not attract either solicitor/client privilege or litigation privilege. While accepting that some obligation of confidence arose on the part of the VFSC and its scientists in 1997, the Crown submitted there was no longer any basis to maintain any such obligation given the intervening period of 10 years between the time of the testing in 1997 and Detective Karl's visit to Melbourne in 2007 as well as the disclosure of much of the material in the court processes in the intervening period.

[161] The issue is, therefore, whether the conduct of the police was of such a nature as to warrant the Court exercising its jurisdiction to order a stay. As part of that issue, the following questions arise:

a) Was the material subject to any form of privilege or obligation of confidence?

b) If so, has there been any waiver of privilege or disclosure of the material such that the privilege or confidence has been lost?

c) If any privilege or obligation of confidence continues to apply, what consequences flow?

[162] To address these issues, the facts must first be established.

Work undertaken by the VFSC in 1995

[163] In March 1995, the police provided certain exhibits and samples to the VFSC for testing. These included a number of items of clothing worn by David and Stephen Bain; white cotton gloves found in Stephen's room; dried blood samples from each of the deceased and from David Bain; and two pieces of skin which the police believed may have belonged to David and may have been dislodged in a violent struggle with Stephen. Dr Gutowski undertook blood typing work in connection with all of the six Bain family members and also tested three of the exhibits (a pair of black shorts worn by David Bain and the two pieces of skin). Dr Gutowski undertook this work at the request of the ESR which was itself undertaking forensic work for the police. Dr Gutowski's report on his examinations was provided to the High Court for the purposes of David Bain's trial in 1995 and read by consent.

Work undertaken in 1997 on behalf of David Bain

[164] According to documents produced before us, Dr Geursen approached Dr Gutowski in June 1997 inquiring as to the existence of any DNA extracted from the reference samples in the Bain case. Dr Geursen made it clear that Mr Withnall was acting for David Bain and that he (Dr Geursen) was advising Mr Withnall about the further testing which should be undertaken.

[165] On 12 June 1997 Dr Geursen advised Mr Withnall that DNA extracts remained available at the VFSC and recommended to Mr Withnall that Dr Gutowski be formally briefed to undertake testing of blood stains on all remaining clothing belonging to Robin Bain with a view to identifying the sources of any such stains.

[166] It was agreed that further testing should be carried out and Mr Karam undertook the task of instructing the VFSC and arranging with the police to send to the VFSC the necessary police exhibits. Mr Karam gave formal instructions to the

VFSC on 31 July 1997. The testing was to cover DNA sampling and testing, ballistics, fingerprints, pathology, work in relation to the crime scene, chemical analyses and advice concerning the defence theory that Robin Bain had been responsible for killing four of the Bain family members and then shooting himself.

[167] Mr Karam also signed a formal "Request for Services" provided by the VFSC in terms of which the VFSC agreed to examine, analyse and report on all exhibits provided to it. Mr Karam agreed to pay the VFSC's costs for undertaking the work and later did so at a cost of approximately AU$12,600.

[168] In the exchanges between Dr Gutowski and Mr Karam at this time, the suggestion was made that Professor Stephen Cordner of the Victorian Institute of Forensic Medicine might also be engaged to assist on pathology issues, an issue to which we later return.

[169] Detective Senior Sergeant Mitford-Burgess delivered certain police exhibits to the VFSC on 6 August for the purpose of facilitating the further testing and, at the request of Assistant Commissioner B P Duncan, the VFSC gave written undertakings to preserve the integrity and security of the exhibits which at all times remained the property of the police. The exhibits provided to the VFSC included a number of items of Robin Bain's clothing, the rifle used in the killings, magazines, spent shells, lead fragments, photographs, finger and palm prints for each of the members of the Bain family and samples of blood stains from each of the family. Later, further exhibits, not earlier delivered, were entrusted to Mr Karam to take to the VFSC for testing.

[170] On 11 August 1997, Mr Karam met in Melbourne with a number of scientists and other employees of the VFSC including Dr Gutowski, Mr Hall, Mr Ross and Mr Scheffer. Following this meeting, the Director of the VFSC (Mr D N Gidley) prepared an internal memorandum dated 13 August 1997 which he circulated to relevant personnel within VFSC. The memorandum is instructive because it indicates clearly how the VFSC saw its role at that time. The memorandum makes it clear that, with the approval of the New Zealand Police, the VFSC would be undertaking work for Mr Karam as a private New Zealand citizen and at his cost.

The memorandum refers to the high public interest about the case in New Zealand and states that:

> ...we will proceed as per normal case work with nothing divulged unless to the client who in this case is MR KARAM.

[171] Mr Gidley further advised:

> In order to closely manage this sensitive case I will fulfil the role of Case Manager and provide the sole point of communication with the client.

[172] Thereafter, Mr Karam visited the VFSC on a number of occasions. He was permitted to be present in the laboratory while exhibits were examined by Dr Gutowski, Mr Hall and Mr Ross. Upon the completion of the work, various reports or statements were prepared by the VFSC staff involved and provided to Mr Karam. Mr Karam has sworn an affidavit, and we accept, that these reports were all undertaken on Mr Karam's instructions with a view to being submitted to Mr Withnall on behalf of David Bain.

[173] Mr Withnall has also sworn an affidavit as to his understanding of the basis on which the work was undertaken by the VFSC in 1997. He states:

> It was always my understanding that except for the limited waiver that David Bain gave, all investigations and in particular notes of instruction and other sensitive and confidential information would remain protected by privilege and terms of confidentiality. VFSC were engaged experts to carry out scientific examinations on our client's behalf, and to provide me with the results of those examinations, for the purpose of formulating and giving legal advice to my client, and preparation of argument and evidence to assist his case.

[174] The reference to a limited waiver we take to refer to a waiver given to legal advisers to the Ministry of Justice at the time the Ministry was considering the petition in the period leading up to the first reference to the Court of Appeal. The terms of that limited waiver were:

> **I DAVID CULLEN BAIN** confirm that I waive privilege only as it relates to the inquiry by the Ministry of Justice into the following issues raised by my petition to the Governor-General for the exercise of the Royal prerogative of mercy:
>
> - Errors by defence counsel in the preparation and conduct of my defence;

- Non-disclosure of certain material by the Police before trial and appeal;
- Unfounded prejudicial allegations by the Crown which were not seriously challenged by counsel; and
- Trial by ambush on the part of the Crown.

> This waiver of privilege is only to the extent that you may discuss these matters with officials from the Ministry of Justice, and further that any discussions with officials concerning privileged information shall not be disclosed in whole or in part, to any other person or the media without my authorisation.

[175] Mr Withnall goes on to state in his affidavit that he had no intention of compromising any future trial by allowing David Bain to agree to a waiver of privilege or by waiving privilege on his behalf except to the limited extent just mentioned and in respect of the further documentation for which he later waived privilege in August 2003. Mr Withnall also deposes that Ministry officials were well aware that privilege was being maintained in respect of the expert advice from the VFSC and in all other respects except to the extent that privilege was waived by David Bain or on his behalf.

[176] Mr Withnall also deposes that, when preparing the application for the exercise of the prerogative of mercy, he considered that, having regard to the complexities of the case it was inevitable that any application lodged would lead to a referral to the Court of Appeal by the Governor-General under s 406 Crimes Act. Mr Withnall says that he had undertaken a search into comparable cases where this had been the outcome and states:

> This is what we set out to achieve, and what we expected to happen. That is the context in which we decided to instruct the Victoria Forensic Science Centre to carry out investigations on David Bain's behalf. While we expected to present supportive scientific evidence to the Ministry of Justice in support of any application we lodged, the dominant purpose was to gain sufficient expert evidence which we could use during the course of any section 406 referral.
>
> We therefore prepared everything with the apprehension and understanding, and in the contemplation, that matters would proceed to a proceeding before the Court of Appeal pursuant to section 406 of the Crimes Act 1961.

[177] We later describe in detail the VFSC reports and affidavits utilised in David Bain's petition and the two subsequent references to the Court of Appeal.

Events in 2003 leading up to the hearing by the Court of Appeal of the Governor-General's second reference in September 2003 under s 406(a)

[178] In the period July/August 2003, there were a number of communications between the then Deputy Solicitor-General (Ms N Crutchley), Dr Gutowski and Mr Withnall. On 9 July 2003 Ms Crutchley wrote to Dr Gutowski, sending a copy of her letter to Mr Withnall. In the letter, Ms Crutchley reviewed the history of work carried out by the VFSC in 1995 and in 1997. Ms Crutchley raised in particular the topic of work carried out by Dr Gutowski and Mr Hall in relation to the examination of suspected bloodstains on the rifle. Ms Crutchley mentioned a statement by Dr Gutowski of 12 November 1997 and one by Mr Hall of 20 November 1997 which had been provided to the Governor-General in support of the petition. Mr Hall had reported that, contrary to earlier ESR evidence, the only human blood detected on the rifle during the 1997 examinations by the VFSC was that of Stephen Bain and the blood was detected on part of the silencer on the weapon. Ms Crutchley also referred to an affidavit sworn by Mr Hall on 30 June 2003. She noted that neither Dr Gutowski's nor Mr Hall's report contained details of the work which had been undertaken.

[179] In her letter, Ms Crutchley made a number of requests of Dr Gutowski as to the existence of swabs or extracts from swabs obtained during the examination of the rifle, a copy of the results of DNA analysis of samples taken from the rifle, whether he would be able to undertake continuing work for the Crown or to make available samples to the ESR for further analysis, and whether he would be willing to make an affidavit for the purpose of the Court of Appeal reference.

[180] In paragraph 22 of Ms Crutchley's letter she stated:

> I am unaware of the basis of the communications you had with Messrs Karam or Withnall QC on behalf of the appellant over this additional work. You may think it necessary to consider whether legal professional privilege attaches to your extra work on the rifle reported in part by Mr Hall in his recent affidavit. Waiver of such in my view has occurred, by dint of the presentation of Mr Hall's affidavit reporting his part of the work on the additional rifle samples.

[181] Upon receipt of a copy of Ms Crutchley's letter to Dr Gutowski, Mr Withnall wrote to the latter concerning the work carried out by Dr Gutowski and Mr Hall on the rifle. Mr Withnall stated:

> She has requested copies of the working notes relating to the work carried out by yourself and Mr Hall. These notes, of course, relate to the work carried out on David Bain's behalf as instructed by Mr Karam and are legally, in my view, subject to privilege. It is likely that privilege will be waived but, before doing that, I need to see the notes and I would be grateful if you would forward these them [sic], including any amplification and quantification records directly to me as a matter of urgency.

[182] Dr Gutowski promptly provided the working notes of Dr Gutowski and Mr Hall which were sent by Mr Withnall to Ms Crutchley on 14 August 2003 with no further elaboration. The material disclosed included the case notes of Dr Gutowski and Mr Hall comprising technical data in relation to their examination of the rifle and the analysis of the suspected blood stains; a copy of Mr Hall's affidavit of 30 June 2003; and a copy of a further brief statement by Dr Gutowski dated 17 December 1997 in relation to his findings from analysing blood stains on the pair of white gloves found in Stephen's room.

[183] In the meantime, Ms Crutchley was in correspondence with the VFSC raising concerns about suggestions that the VFSC might not be prepared to carry out any further work. On 7 August 2003, Ms Crutchley wrote to Dr Gutowski stating that Mr Withnall had told her the VFSC would not be doing any more work on the samples which had been taken from the rifle in 1997. In a response the same day, Dr Gutowski advised both Ms Crutchley and Mr Karam that he was available to swear an affidavit or to be cross-examined at the forthcoming hearing of the Governor-General's second reference. The following day, the Assistant Director of the VFSC (Mr Canavan) advised Ms Crutchley that the VFSC would be unable to carry out any more testing due to work pressures.

[184] In the same letter, Mr Canavan asked Ms Crutchley for the outcome of legal deliberations about ownership of extracts identified in earlier correspondence between Dr Gutowski and Mr Karam. There is no evidence of any response from Ms Crutchley to Mr Canavan's request, but shortly afterwards, there was an email exchange between Detective Superintendent Burgess of the New Zealand Police and

Dr Gutowski regarding the existence of DNA samples taken from the pieces of skin earlier sent to the VFSC.

[185] On 14 August 2003, Dr Gutowski informed Detective Superintendent Burgess that the decision had been taken "not to carry out any further work on the case here in Victoria". Dr Gutowski further advised that if there were a written request, the VFSC could

> ....see no conflict in sending the samples to you since they pre-date any agreement which may or may not have been reached between Mr Karam and the Crown.

[186] The communications from the VFSC at this time (August 2003) indicate that Mr Canavan as Assistant Director was aware of potential issues in relation to the exhibits and samples taken from them at various stages of the VFSC's work. The police were clearly aware of this too through Detective Superintendent Burgess. It appears that Ms Crutchley met Dr Gutowski in Wellington in February 2004. At that time, she sent to Detective Senior Sergeant Croudis copies of the August 2003 correspondence with Mr Withnall relating to the testing on the rifle in 1997 and raising the issue of privilege. Ms Crutchley also sent to Detective Senior Sergeant Croudis at that time copies of the case notes made by Dr Gutowski and Mr Hall which Mr Withnall had released to the Crown in August 2003.

Events in 2007 after the Privy Council ordered a retrial

[187] After advice was received on 10 May 2007 of the quashing of David Bain's convictions and the ordering of a retrial, the police promptly began inquiries in relation to the availability of witnesses. Responding to a telephone inquiry from Detective Sergeant John Hedges of the New Zealand Police, Dr Gutowski stated in an email on 29 May 2007:

> As you can see I am still employed by the Victoria Police Forensic Services Department. As you would know, the early work I did in the Bain case was done for the NZ Police and then later work was done for Joe Karam and therefore David Bain. I am not sure who paid us for what and when but as an institution (and as an individual bound by the ANZFSS Code of Ethics) we've always taken the view that who pays should not be relevant to the

> testimony given. After meeting Nicola Crutchley in Wellington in 2004 though, I am sure there is a lot I don't know about the legal ramifications of the case and our testimony in it.

[188] Dr Gutowski went on to say that he would be willing to help but there might be a fee involved. This initial contact was followed up by Detective Senior Sergeant Croudis who stated in an email to Dr Gutowski on 31 May 2007:

> In the event that a retrial is ordered then it is likely that there will need to be a complete stocktake on your examinations through the years. Appreciate that this has been for "both sides" so to speak and that may require some legal opinion.
>
> Any trace material or exhibits held will also require scrutiny.
>
> The whole issue of forensic examination will be a phase of the new (re)enquiry, so this communication is just a heads up, thanks K.

[189] This email was copied to Ms Markham of the Crown Law Office. Two months later in July 2007 Detective Senior Sergeant Croudis contacted Dr Gutowski again making further inquiries about reports he had made and whether samples collected in testing carried out by the VFSC were still available. Dr Gutowski responded sending copies of the statement he had made to the police in 1995 and the November and December 1997 statements he had made to Mr Karam. In the email sending these statements dated 16 July 2007, Dr Gutowski stated:

> We have always taken the position that there should be no property in witnesses and assumed that you had the November 1997 statement and addendum. We were perhaps a little naïve to assume so, as I found out in later discussions with Nicola Crutchley.

[190] In August 2007, Ms Markham inquired of Dr Gutowski whether further testing on the skin samples could be undertaken. Dr Gutowski indicated that there were a number of practical difficulties in carrying out further testing and advised that the Director might not agree to any analysis.

[191] In September 2007, Detective Karl was asked by his superiors to travel to Melbourne to make inquiries at the VFSC. In an email to Dr Gutowski on 11 September Detective Karl listed the matters he needed to address in Melbourne as follows:

- collection of a skin sample (Item 563) which was handed to you on 10 March 1995 by Chief Inspector ROBINSON
- a full copy of your working notes in relation to the work you've carried out in relation to this investigation.
- a full copy of the notes of Nigel Murray HALL who has also been engaged in examinations involving the Bain case.
- a full copy of the notes of Senior Constable Henry GLASER who is specifically mentioned being involved in the firearm related items sent to VFSC

[192] Detective Karl added:

> Depending on what additional matter I discover in the notes, I may need to consider obtaining further statements from others involved, however this will need some consideration.

[193] On 21 September 2007, Detective Karl sent Dr Gutowski a draft depositions statement in relation to some of the work he had carried out in 1997. This was effectively to incorporate his statements and reports prepared for Mr Karam dated 12 November 1997 and 17 December 1997.

[194] Detective Karl then visited the VFSC on 24 and 25 September. He spoke to Dr Gutowski who provided to him copies of case notes in relation to the work undertaken by Dr Gutowski himself, Mr Hall and Senior Constable Glaser. Detective Karl spent some time reading the notes and noting relevant points in his own notebook. His job sheet states that some of the notes were made "merely to assist in my own understanding of them to determine if there was anything of further relevance that I could identify while in Australia". The job sheet goes on to record that Detective Karl decided to obtain a DNA sample from Robin Bain's shirt in addition to the skin sample DNA that he had already been sent to retrieve.

[195] Detective Karl obtained a hand-written statement from Dr Gutowski clarifying some points. He saw for the first time notes made by Senior Constable Glaser. He learned that Senior Constable Glaser had informed Mr Karam that the suicide theory was discounted by the VFSC and surmised that "this should have been known by Colin Withnall QC". Detective Karl went on to record that there did not appear anything further to be gained from Mr Hall's materials (which had of course been disclosed in 2003). Arrangements were made to bring the skin samples (or extracts from them) back to New Zealand.

[196] Over the next month, Detective Karl prepared statements for Dr Gutowski, Mr Hall and Senior Constable Glaser with a view to their giving evidence at a retrial. In an email from Detective Karl to Senior Constable Glaser dated 19 October 2007 Detective Karl expressed his interest in Senior Constable Glaser's statement which he stated had been "prepared for Mr Karam" and "had not been previously disclosed in the course of multiple appeals and court hearings that had played out in this matter". Detective Karl stated he was not surprised that Senior Constable Glaser's examinations of the projectiles and ammunition were consistent with those of New Zealand scientists but noted that Senior Constable Glaser's views on the issue of suicide "don't particularly support the defence contention...". He went on to express the view that Senior Constable Glaser's evidence on this point did not suit the defence position but was supportive of the police case.

[197] By this time, David Bain's present counsel had become aware through Mr Karam that the police had been making inquiries of Mr Ross and had been requesting case notes from scientists who had previously done work for the defence. Counsel immediately wrote on 19 October 2007 to Mr Canavan raising these issues and noting with concern that Mr Canavan had "categorically advised Mr Karam that your Centre is no longer prepared to give any assistance to the defence". Mr Canavan was asked to confirm immediately the basis of any arrangements the VFSC had entered into with the New Zealand Police or the ESR and what previous information and case notes had already been provided to the police, the ESR or to Crown Law.

[198] Mr Canavan replied the same day stating:

> Due to our growing service demands, a decision has been made that this Centre is not in a position to provide further assistance to <u>either</u> Prosecution or Defence in relation to this matter. A decision has been taken <u>solely</u> on the basis of <u>our own</u> jurisdictional workload being our priority attention.
>
> I apologize if MR KARAM felt we were being selective or have entered into any arrangement with NZ Police to do work solely for them – we have not.
>
> An officer from NZ Police did recently attend this Centre. I suggest as a starting point you contact NZ Police to discuss. (original emphasis)

[199] Shortly afterwards, senior counsel for David Bain raised the issue with the Crown Prosecutor in Dunedin and requested immediate and full disclosure of all information and documents obtained by the Police from the VFSC. This was provided promptly thereafter.

[200] Despite having received a copy of the correspondence raising concerns about the activities of the police, Detective Karl sent a further email on 23 October 2007 to Mr Canavan seeking copies of the case notes prepared by Mr Ross which he understood to have been archived by the VFSC. The terms of this email suggest that Detective Karl was under the impression that, because the police would be obliged to disclose to the defence anything obtained from the VFSC there did not appear to be any difficulty in these notes being provided. Amongst other things, Detective Karl noted in his email that the case notes held in respect of work undertaken by Dr Gutowski, Mr Hall and Senior Constable Glaser were already in the possession of David Bain's representatives and it was "curious that they should be voicing concern about the police having access to scientists' notes". Detective Karl informed Mr Canavan that his supervisor (Detective Senior Sergeant Croudis) had been informed of the concerns raised by David Bain's counsel and by Mr Karam and that the Crown Solicitor would also be advised. The case notes of Mr Ross were supplied to the police by the VFSC on 1 November 2007.

[201] On 30 October 2007, an important exchange of emails took place between Mr Canavan and Detective Karl. Mr Canavan raised with Detective Karl the earlier email of 31 May 2007 from Detective Senior Sergeant Croudis to Dr Gutowski referring to the work of the VFSC having been carried out for both sides and the possible requirement for some legal opinion (see [188] above). Mr Canavan asked whether Detective Karl could advise the outcome of this, particularly in relation to case notes. Detective Karl's response about an hour later on the same day was:

> Yes I can help you out here. The email to Steve in May 2007 pre dates my involvement on this inquiry so I have just spoken to Kallum Croudis about this. The decision that was made regarding this topic is that the scientific information held by VPFSD is discoverable. This means that our Court has found it is appropriate for you to release the data/exhibits.

> This decision must have been made some time ago and I should think that Mr Reed was well aware of it which does make one wonder why he worded his communication to you the way he did!!!!
>
> Hope this settles you well enough and it would seem to be definitive.

[202] Detective Karl was cross-examined before us on the contents of his affidavit and the other material we have outlined. Detective Senior Sergeant Croudis was also called to give oral evidence and was cross-examined. The undisputed parts of their evidence are first that, prior to Detective Karl's visit to the VFSC in September 2007 both were aware of potential legal issues over the case notes which were to be sought from the VFSC. Secondly, despite the reference by Detective Senior Sergeant Croudis to the possible need for a legal opinion in his email to Dr Gutowski on 31 May 2007, no legal opinion was sought or obtained prior to Detective Karl's visit to the VFSC. Thirdly, no approach was made to David Bain's lawyers to advise them of the intended visit or to attempt to obtain their consent to obtaining the case notes and discussing the issues with the VFSC scientists and other relevant staff. Fourthly, as already noted, despite being aware of protests by David Bain's counsel, after Detective Karl's visit to the VFSC in September 2007, Detective Karl continued to seek and received the case notes for work undertaken by Mr Ross of the VFSC.

[203] Referring to his email to Mr Canavan of 30 October 2007, Detective Karl said he consulted with Detective Senior Sergeant Croudis after receiving Mr Canavan's email earlier that day referring to the legal opinion mentioned in the earlier email from of 31 May 2007. Detective Karl confirmed that he had spoken to Detective Senior Sergeant Croudis who told him "that the case notes were ready to be made available, and it was some sort of court decision". He was not shown any court decision or referred to any legal opinion but, based on what he was told, sent the reply the same day to Mr Canavan's request. He added that he had since learned that there was no court ruling of any kind about the Australian scientists' case notes. He agreed that he had received a substantially greater volume of documents from the VFSC than those he had requested and that these included some communications between the VFSC and/or Mr Karam and Mr Withnall. However, based on the advice he had received from Detective Senior Sergeant Croudis, he did not understand there to be any problem in the police having the material provided by the VFSC.

[204] In his evidence, Detective Senior Sergeant Croudis said he had not made any note of his discussion with Detective Karl on this topic and had no independent recollection of it. However, he said he must have mentioned that the scientific information held by the VFSC would be discoverable and it was likely he had mentioned a well-known New Zealand case on the police obligation to make disclosure of all relevant material obtained in the course of their inquiries. He readily accepted, however, that this decision had nothing to do with any issue of privilege or confidentiality which might attach to the material at issue. He accepted there was no relevant legal opinion or court decision that related to the material from VFSC and could only explain Detective Karl's email response to Mr Canavan by suggesting that it was Detective Karl's interpretation of what he had been told. In relation to the continued efforts to obtain the case notes of Mr Ross after protest by the defence, he said he was influenced by Dr Gutowski's view that there was no property in a witness. He had not seen anything wrong in sending Detective Karl to Melbourne in terms of any possible privilege issue or otherwise.

[205] Our assessment of this issue is that Detective Karl believed, on the basis of the advice received from Detective Senior Sergeant Croudis that there was no legal impediment to his obtaining the VFSC material, discussing the issues with VFSC scientists and other staff and in preparing briefs of their evidence. We also find that the focus of the Detective Senior Sergeant's advice was on the issue of disclosure of material obtained rather than any issue of privilege or confidentiality. In translating the advice received from Detective Senior Sergeant Croudis to Mr Canavan in the 30 October 2007 email, Detective Karl has read rather more into that advice than was warranted. In particular, in making the statement "that our Court has found it is appropriate for you to release the data/exhibits".

[206] While we do not read anything sinister into the actions of these two police officers, their approach to the issue was most unfortunate in the circumstances. Detective Senior Sergeant Croudis was an experienced senior police officer. He had been aware since 2004 of privilege issues in respect of the VFSC evidence and, only five months before, had raised the possible need for a legal opinion with the VFSC. While there was an attempt by Detective Senior Sergeant Croudis to suggest that he had intended the VFSC to obtain a legal opinion, it was clear from Mr Canavan's

email to Detective Karl of 30 October 2007 that Mr Canavan had a different view. He specifically inquired as to the outcome of the legal inquiry which he obviously expected the New Zealand Police to have obtained. Notwithstanding that, no attempt was made by either of the officers or anyone else in the inquiry team to establish the correct legal position before approaching the VFSC. Nor was the issue raised with the defence. Even after the protest made by the defence, Detective Karl continued to seek and obtained Mr Ross' notes. Given the high public interest and sensitivity of the case, it is regrettable that no such steps were taken. A great deal more caution should have been exercised by the police.

[207] There are, however, a number of mitigating points. First, Mr Raftery emphasised the delay of 10 years between the work undertaken for the defence by the VFSC in 1997 and Detective Karl's visit in 2007. Secondly, at least part of the material Detective Karl obtained had already been disclosed in support of the petition and during the Court of Appeal references. Thirdly, the issue and the defence contentions in relation to them had already been extensively scrutinised during the Court of Appeal references and again in the Privy Council. Fourthly, there is the evidence that the police were encouraged to some extent by the observations made by the VFSC about "no property in witnesses" and their willingness to co-operate.

Was the material obtained by Detective Karl from the VFSC subject to any form of privilege or obligation of confidence?

[208] At common law the general rule is that, in the case of expert witnesses, legal professional privilege attaches to confidential communications between the solicitor and the expert but not to any materials or documents on which the expert based his or her opinion or to the independent opinion of the expert himself: *R v King* (1983) 1 All ER 929, 931 (CA) applying *Harmony Shipping Co S.A. v Saudi Europe Line Ltd* (1979) 3 All ER 177, 181; (1979) 1 WLR 1380, 1385 (CA). The rule was held to apply equally to both criminal and civil proceedings. The reasons for the rule were stated to be that there is no property in an expert witness any more than in any other witness and, in order to ascertain the truth, the Court was entitled to have the actual facts which the expert observed in considering the expert's opinion on them.

[209] While the Evidence Act 2006 was not in force when the VFSC work was carried out for the defence in 1997, it was in force at the time Detective Karl obtained the disputed materials in September 2007 and the Court of Appeal has ruled that the new Act will apply to any retrial. In many respects, the law related to legal professional privilege remains consistent with previous common law but, in certain significant areas, the Evidence Act has modified the common law, particularly in relation to litigation privilege.

[210] Subpart 8 of the Evidence Act relates to privilege and confidentiality. Section 53 provides:

> **53 Effect and protection of privilege**
>
> (1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding—
>
> (a) the communication; and
>
> (b) the information, including any information contained in the communication; and
>
> (c) any opinion formed by a person that is based on the communication or information.
>
> (2) A person who has a privilege conferred by section 60 or 64 in respect of information has the right to refuse to disclose in a proceeding the information.
>
> (3) A person who has a privilege conferred by any of sections 54 to 59 and 64 in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document not be disclosed in a proceeding—
>
> (a) by the person to whom the communication is made or the information is given, or by whom the opinion is given or the information or document is prepared or compiled; or
>
> (b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.
>
> (4) If a communication, information, opinion, or document, in respect of which a person has a privilege conferred by any of sections 54 to 59 and 64, is in the possession of a person other than a person referred to in subsection (3), a Judge may, on the Judge's own initiative or on the application of the person who has the privilege, order that the

communication, information, opinion, or document not be disclosed in a proceeding.

(5) This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding.

[211] For present purposes, we are concerned with s 54 (communications with legal advisers); s 56 (privilege for preparatory materials for proceedings); and s 69 (confidential information).

Solicitor/client privilege under s 54

[212] It is convenient to deal first with the privilege formerly known as solicitor/client privilege. Section 54 relevantly provides:

54 Privilege for communications with legal advisers

(1) A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—

(a) intended to be confidential; and

(b) made in the course of and for the purpose of—

(i) the person obtaining professional legal services from the legal adviser; or

(ii) the legal adviser giving such services to the person.

[213] In approaching subpart 8, s 51 provides certain definitions including definitions of "lawyer" and "legal adviser". The expression "communication" is not specifically defined but subsection (2) provides:

(2) A reference in this subpart to a communication or to any information includes a reference to a communication or to information contained in a document.

[214] Communications need not be directly between the client and legal adviser. Section 51(4) provides:

(4) A reference in this subpart to a communication made or received by a person or an act carried out by a person includes a reference to a

> communication made or received or an act carried out by an authorised representative of that person on that person's behalf.

[215] The term "information" is not relevantly defined for the privilege at issue here but does come into play under s 56.

[216] We were provided with two folders of copies of documents obtained by Detective Karl from the VFSC. These folders excluded the documents for which Mr Withnall expressly waived privilege in 2003, but copies of these were separately provided. Apart from one or two communications between Mr Withnall and the VFSC of a purely mechanical nature, there were no documents which could be regarded as communications made for the purpose of obtaining or giving legal advice or legal services. We conclude that there were no documents obtained which could be regarded as subject to privilege under s 54 Evidence Act.

Litigation privilege under s 56

[217] The second possible category of legal professional privilege is the privilege under s 56 commonly known as litigation privilege. Section 56 relevantly provides:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the "proceeding").
>
> (2) A person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:
>
> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.
>
> ...

[218] Points of significance relating to s 56 are:

a) The privilege applies to both communications and information.

b) The privilege applies only if the communication or information is made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding. A "proceeding" means "a proceeding conducted by a court and any interlocutory or other application to a court connected with that proceeding": s 4.

c) The privilege may apply to a person who is a party to an existing proceeding or who, on reasonable grounds, contemplates becoming a party to a proceeding.

d) If the forgoing criteria can be satisfied, then the privilege applies in respect of the communications or information described in subsection (2)(a), (b), (c) and (d).

e) By virtue of s 53(1)(c) the right of the holder of the privilege to refuse to disclose the communication or information in a proceeding extends to:

> (c) any opinion formed by a person that is based on the communication or information.

f) The editors of *Adams on Criminal Law (Evidence)* express the view at EA53.02 that this provision ends the controversy existing at common law in cases such as *King* (above) as to whether an expert's opinion in relation to material submitted by a party to him or her for examination is covered by the privilege. We agree that s 53(1)(c) has changed or at least clarified the common law and that, where litigation privilege exists under s 56, the privilege extends not only to communications between the party (or legal adviser) and an expert witness but also to information compiled or prepared by the expert at the request of the party (or legal adviser) as well as the expert's opinion formed on the basis of the relevant communication or information. This is consistent with the policy justification for the litigation privilege rule which is that the effective conduct of litigation requires that parties and their legal advisers be free to prepare for litigation in the knowledge they will not have to disclose material they gather, including material from third parties.

g) As earlier noted, a communication (or information contained in it) may be made or received by an authorised representative of a person: s 51(2) and (4).

[219] It is first necessary to determine whether the documents and reports obtained by Detective Karl from the VFSC were made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding in terms of s 56(1).

[220] We do not consider that the Evidence Act has changed the pre-existing common law on the issue of dominant purpose. The established authorities such as *General Accident, Fire and Life Assurance Corp Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129 (CA) and *Guardian Royal Exchange Assurance of NZ Ltd v Stuart* [1985] 1 NZLR 596 (CA) continue to apply.

[221] In his affidavit sworn on 1 November 2008, Mr Karam deposes that he was assisting Mr Withnall in 1997 to complete the petition to the Governor-General for the exercise of the Royal prerogative of mercy. As part of that application, he gave instructions on David Bain's behalf to the VFSC to carry out the scientific examinations already described. While the immediate first step was to use any supportive scientific evidence in support of the petition (which would not itself amount to a "proceeding"), Mr Withnall's affidavit confirms that he regarded it as inevitable that the petition would lead to a referral to the Court of Appeal by the Governor-General under s 406 Crimes Act and that the dominant purpose of the preparation of the expert evidence from the VFSC was to achieve such a referral. There is no dispute that a referral under s 406 would amount to a "proceeding" for s 56 purposes.

[222] Mr Raftery submitted for the Crown that any decision by the Governor-General to refer matters to the Court of Appeal under s 406 would effectively be an act on behalf of the Sovereign which would follow only as a matter of discretion. He submitted that a referral was not an inevitability. The Governor-General might decide to take no action after receipt of a report from the Ministry of Justice or might decide, as an alternative to court referral, to obtain a report from an independent barrister or Queen's Counsel. In his submission, a reference to the court was no

more than a possibility which might or might not eventuate. The Governor-General did not refer the matter to the Court of Appeal until 18 December 2000. It followed in Mr Raftery's submission that no proceeding was pending until after that date and litigation privilege could not arise until then.

[223] While we accept that no "proceeding" was actually pending until 18 December 2000, Mr Raftery's submission overlooks the issue of whether, at the time instructions were given by the defence to the VFSC in 1997, litigation was reasonably apprehended. This is a question of fact. It is sometimes put that there must be a definite prospect of litigation or that it is probable: see the observations of Tompkins J in *Guardian Royal Exchange Assurance of NZ Ltd v Stuart* (above) at 606 referring to *Laurenson v Wellington City Council* [1927] NZLR 510 at 511.

[224] Here, we have Mr Withnall's evidence, based on research undertaken by him as to what had occurred in other high profile cases, that the dominant purpose of commissioning the VFSC scientists was to obtain material to support the petition which it was contemplated would lead to a referral by the Governor-General under s 406. We conclude that the work undertaken by the VFSC and the information and communications arising therefrom were for the dominant purpose of preparing for an apprehended proceeding namely a referral to the Court of Appeal under s 406.

[225] It also follows from our conclusion that David Bain and those acting on his behalf at the time, reasonably contemplated that he would become a party to the referral proceedings.

[226] The more difficult issue is whether there was any express or implied waiver of privilege by or on behalf of David Bain in relation to the material obtained from the VFSC (other than that which was the subject of the express waiver by Mr Withnall in August 2003). Prior to the introduction of the Evidence Act 2006, the relevant principles were helpfully summarised by the Court of Appeal in *Ophthalmological Society of NZ Inc v Commerce Commission* [2003] 16 PRNZ 569 referring to decisions of the High Court in cases such as *Equiticorp Industries Group Ltd v Hawkins* [1990] 2 NZLR 175 and the leading case of *A-G (NT) v Maurice* [1986] 161 CLR 475; 69 ALR 31 (HCA).

[227] Our Court of Appeal grappled with a similar issue in an earlier round of the current litigation (*R v Bain* CA312, 572 and 672/08 24 December 2008) in relation to a notation made by David Bain on page 101 of materials prepared by his then counsel Mr Michael Guest. Reference was made to this notation in the referral proceedings before the Court of Appeal, including statements made in oral evidence (without any apparent objection by or on behalf of David Bain). This issue was discussed at length by the Court of Appeal at [48] to [81] of its December 2008 decision with the Court ultimately concluding that privilege had been waived. The Court stated at [82] and [83]:

> [82] In the present case we see the following points as being, in their totality, of controlling significance:
>
> (a) The privileged material was adduced in evidence in open Court with the appellant's consent;
>
> (b) This occurred in a context where there were no suppression orders or other external indicia that either confidentiality and privilege was being generally maintained or that the waiver of privilege was for the purposes only of the s 406(b) and (a) hearings.
>
> (c) As page 101 is exhibited to the affidavit of Professor Ferris which itself is part of the records of this Court, it is now subject to the relevant search rules.
>
> (d) The relevant passage is recited in the judgment of this Court following the s 406(a) hearing and is thus a matter of public record.
>
> [83] Against that background, we think it clear that confidentiality in the comments on page 101 has been lost as a result of Professor Ferris (with the consent of the appellant's then counsel) referring to those comments in open court. Accordingly we see the case as falling fairly and squarely within s 64(2) and the pre-existing common law as involving a consent to the production of the once privileged material and an associated loss of confidentiality. [The reference to s 64(2) is most likely intended to be a reference to s 65(2)).

[228] The Court of Appeal considered (at [70]) that it was open to question whether s 65 Evidence Act applied when the alleged waiver of privilege occurred prior to 1 August 2007. However, the Court concluded that there was no indication that s 65 was intended to change the existing common law in any material respect. Relevantly, s 65 Evidence Act provides:

65 Waiver

(1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.

(2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.

(3) A person who has a privilege waives the privilege if the person—

(a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or

...

(4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

...

[229] As the cases demonstrate, except in the circumstances set out in s 65(4), it does not matter that the party or the party's legal adviser may not have intended to waive privilege. A key issue is whether there has been inconsistency between the conduct of the party and the maintenance of confidentiality. An implied waiver may be found to have occurred even though it was not intended: see the discussion by the Court of Appeal in the *Ophthalmological* case (above) at [20] to [31].

[230] While we accept Mr Withnall's evidence that he did not intend to waive privilege in respect of the disputed material (other than that which was subject to the express waiver) we must consider whether, objectively assessed, there may have been an implied waiver in respect of some or all of the material and the nature and extent of any such waiver. We deal with each of the VFSC witnesses in turn.

Dr Gutowski

[231] Dr Gutowski prepared a statement dated 20 November 1997 which was lodged in support of the petition. It covered the initial work undertaken by him for

the Crown in 1995 as well as the work done in 1997 for the defence. In respect of the defence work, Dr Gutowski was present when the rifle was examined by Mr Hall. Dr Gutowski undertook the DNA analysis of samples of apparent blood taken from the rifle. Dr Gutowski also tested clothing samples from Robin Bain which had been provided to him by the police at the request of the defence. This evidence was not particularly helpful to the defence since, with two exceptions, the DNA analysis of Robin Bain's clothing gave blood typings matching blood samples from him.

[232] Dr Gutowski did not provide any affidavit for the purpose of the Governor-General's references. No references are made to Dr Gutowski's evidence in the decisions of the Court of Appeal in the reference proceedings or in the Privy Council's final decision.

[233] Unlike the notes attributed to David Bain which the Court of Appeal dealt with in its decision of 24 December 2008, Dr Gutowski's statement was never adduced in open court or referred to in any court decision. Nor is there any evidence of consent to disclosure of his statement except for the limited purpose of supporting the petition under consideration. Neither Dr Gutowski nor any of the other VFSC witnesses have given oral evidence in connection with this matter at any time.

[234] We find that the express waiver by Mr Withnall on behalf of Mr Bain in August 2003 related solely to his case notes in respect of the examination of the apparent blood stains on the rifle. There was no express waiver in respect of the other work done by Dr Gutowski in relation to the testing of the Robin Bain clothing samples in 1997 or in any other respect. Given the express waiver in respect of only part of his evidence, we do not consider there is any room to find there was any implied waiver of privilege in respect of any other part of his evidence in relation to work done for the defence in 1997. Mr Withnall's uncontested evidence was that he continued to maintain privilege. We are unable to see any other basis for any implied waiver.

Nigel Hall

[235] Mr Hall's evidence is connected to that of Dr Gutowski in relation to the rifle. He examined the rifle and concluded (with the assistance of the DNA analysis conducted by Dr Gutowski) that the only human blood on the rifle was on the sight of the silencer of the weapon. He provided a statement to that effect dated 20 November 1997 to the defence which was lodged in support of the petition. This evidence is clearly helpful to the defence. He later swore an affidavit dated 30 June 2003 to the same effect which was filed by the defence in the s 406(a) reference proceedings. A copy of Mr Hall's affidavit was in the material sent by Mr Withnall to the Crown in August 2003 which was the subject of an express waiver. There does not appear to have been any express waiver in relation to Mr Hall's case notes.

[236] We do not consider it could be said there was any implied waiver in respect of his case notes supporting the conclusions expressed in Mr Hall's statement and affidavit. While Dr Gutowski's case notes on the rifle issue were disclosed, the same did not apply to Mr Hall's case notes. No reference to Mr Hall's evidence appears to have been made in either of the decisions given on the Governor-General's references or in the Privy Council appeal. There is no evidence to suggest that his evidence was given in open court as was the case with David Bain's notes.

Senior Constable Glaser

[237] Senior Constable Glaser undertook an examination of the rifle shell cases, lead fragments and the like. His evidence taken from the police brief prepared for him includes a physical description of the rifle; analysis of fired cartridge cases; ammunition and lead fragments and magazines. Senior Constable Glaser also describes the results of test firing of the rifle into cardboard at short range including soot residues. He states that "it may be reasonable to conclude this was not a case of suicide".

[238] His evidence has never featured in any form in any statement or affidavit lodged to date on behalf of the defence or otherwise. There is no basis on which it can be said that there has been any express or implied waiver of privilege in his case.

Peter Ross

[239] Peter Ross also undertook work for the defence in 1997. He provided a statement dated 20 November 1997 in support of the petition and an affidavit in the s 406(a) proceedings sworn on 25 June 2003. The statement and affidavit covered the likely source of bullet fragments; the nature and likely cause of a large wound on the top of Laniet's skull; the likely order of shots to Laniet; and the source of fibres found under Stephen's fingernails.

[240] His evidence is relied upon in part by Professor Cordner of the Victorian Institute of Forensic Medicine. Professor Cordner provided a report dated 26 November 1997 for the defence in support of the petition covering similar topics to Mr Ross and expressing the view that Robin Bain could have committed suicide as the defence contend. Professor Cordner filed an affidavit for the defence to the same effect sworn on 4 July 2003 in the s 406(a) proceedings.

[241] It is not alleged that any material was improperly obtained from Professor Cordner since he is not part of the VFSC. However it was submitted on behalf of David Bain that, to the extent that the police had obtained material relating to the work undertaken by Mr Ross, it provided an important link to the evidence of Professor Cordner who is regarded as a valuable witness for the defence. Brief reference is made in the decision of the Court of Appeal on the s 406(a) reference and in the final Privy Council decision to the work of Mr Ross and Professor Cordner.

[242] There is no evidence of any express waiver of privilege in relation to the evidence of Mr Ross or his underlying case notes and we do not consider it could be said there was an implied waiver. The case in that respect can be distinguished from the Court of Appeal's decision of December 2008 for reasons already canvassed.

The Crown does not seek to rely upon his statement in support of the petition or the affidavit he later filed.

Terry Claven

[243] Terry Claven is a sergeant in the Victoria Police attached to the VFSC. He did not file any statement in support of the petition but swore a brief affidavit dated 24 June 2003 in the s 406(a) proceedings. His evidence does not relate to any forensic examination. It is concerned solely with a search of files held in the Fingerprint branch of the VFSC and it is not suggested that any material was improperly obtained by the defence in relation to his evidence. Nor does the Crown seek to rely on it. His evidence has never featured in any of the decisions in the reference proceedings or the Privy Council.

Summary in relation to privilege

[244] We conclude that none of the material obtained by the police from the VFSC in 2007 is the subject of solicitor/client privilege. But we find that all of the other material obtained by the police at that time relating to work carried out by the VFSC for the defence (including case notes, reports, opinions and related information and documents) is the subject of litigation privilege with the following exceptions:

a) Dr Gutowski's evidence in relation to the analysis of apparent bloodstains on the rifle, the gloves and any underlying case notes on both topics.

b) The views expressed by Mr Hall in his statement of 20 November 1997 and his affidavit of 30 June 2003 (but not his underlying case notes which remain privileged).

[245] It is accepted there could be no basis to object to Dr Gutowski giving evidence for the Crown in relation to the 1995 work carried out for the police.

Is there an obligation of confidence attaching to the work carried out in 1997 by the VFSC for the defence?

[246] Given our conclusions in relation to the issue of privilege, it is not strictly necessary for us to determine whether the VFSC assumed an obligation of confidence in relation to the work carried out for the defence in 1997. If it were necessary for us to determine this issue, we would have found that the Request for Services signed by Mr Karam on 31 July 1997 and the terms of Mr Gidley's internal memorandum of 13 August 1997 were such as to give rise to an obligation of confidence in relation to the results of the work undertaken. The VFSC acknowledged that nothing would be divulged unless to their client (Mr Karam).

[247] That undertaking appears to have been lost sight of by the VFSC in later years (perhaps not surprisingly given the lapse of time and the intervening court proceedings).

[248] In terms of s 69 Evidence Act, the court has a discretion to direct whether any confidential information or communication may be disclosed in a proceeding. Given our findings in relation to privilege, we do not pursue this further.

What consequences should flow from the Police obtaining and attempting to use at trial material from the VFSC which is privileged?

[249] Mr Morten submitted on behalf of David Bain that the conduct of the police in relation to the evidence from the VFSC was so serious as to warrant the grant of a stay of proceedings whether or not David Bain has been prejudiced by that conduct. Mr Morten relied particularly on the decision of the Court of Appeal in *R v Grant* [2005] 2 Cr App R 28 which involved the deliberate interference by police with a detained suspect's right to the confidence of privileged communications with his solicitor by eavesdropping. The Court found at [54] that:

> ... we are in no doubt that in general unlawful acts of the kind done in this case, amounting to a deliberate violation of a suspected person's right to legal professional privilege, are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court...

[250] The Court in *Grant* went on to find at [57] that there was a deliberate interference with the detained suspect's right to the confidence of privileged communications with his solicitor. This was found to seriously undermine the rule of law and to justify a stay on the grounds of abuse of process "notwithstanding the absence of prejudice consisting in evidence gathered by the Crown as the fruit of police officers' unlawful conduct".

[251] Counsel also referred to two other unreported English cases at first instance. One involved bugging by customs officers contrary to their own internal authorisation procedures and the other involved the police recording privileged conversations between suspects and their solicitors while detained at police stations. We see those cases as obvious examples of cases where the conduct was so egregious as to justify a stay.

[252] We do not see the present case as falling into the same category. Nor do we see, in terms of *Fox v Attorney-General* (above), that the conduct of the police was such as to tarnish the Court's own integrity or offend the Court's sense of justice and propriety. For the reasons already discussed, we view the police conduct as regrettable and as displaying an obvious lack of caution in failing to take legal advice before Detective Karl was sent to Victoria. However wrong-headed it may have been, we do not find any evidence of bad faith on the part of the police. They knew they would have to promptly disclose what they had obtained so it is impossible to attribute to them any element of deception.

[253] It was submitted on behalf of the defence that the material obtained by Detective Karl and the discussions he had with some of the VFSC witnesses were such as effectively to "place him at defence counsel's table". We regard this submission as a substantial overstatement given the disclosures to which we have already referred. From the outset, the defence theory of the case has always been a matter of public knowledge. That has been so from the time of the first trial in 1995 and has been reinforced by the two decisions of the Court of Appeal on the Governor-General's references and by the decision on the final appeal by the Privy Council. Similarly the general thrust of the expert evidence from the VFSC has been relied upon by the defence and discussed in all of the decisions referred to. The

views of the VFSC witnesses as expressed in these materials were not in the category of previously unknown information (except in the case of Senior Constable Glaser).

[254] We have examined the bundles of material provided to the court which were said to have been obtained by Detective Karl (excluding the material in respect of which privilege was expressly waived). Our overall impression of this material is that relatively little emerged which was not already known to the police. The few communications there were from Mr Withnall and Mr Karam were largely of a routine or mechanical nature. Much of the rest of the material is in the form of underlying data supporting the statements made by the VFSC witnesses. There is nothing to suggest that the police, by receiving this material or in discussions they have had with the witnesses, have gained access to any secret strategy by the defence.

[255] Mr Morten acknowledged that, depending on the seriousness of any misconduct, the appropriate remedy could range from a stay of proceedings to the exclusion of evidence. We have no doubt that the remedy of exclusion of evidence (even though at least some of it is helpful to the defence) is the appropriate remedy. We have authority to grant such a remedy either under the inherent power to prevent abuse of process or under s 53(4) Evidence Act.

[256] Section 30 Evidence Act (relating to improperly obtained evidence) is also potentially engaged in relation to the evidence of the VFSC witnesses but in view of our other findings we say no more about that except to record Mr Raftery's candid acknowledgement that the exclusion of evidence would not result in any substantial harm to the Crown case.

[257] We observed during the hearing that some of the evidence of the VFSC witnesses which the Crown would otherwise lead is helpful to the defence and if consented to could be lead by the Crown giving the defence the tactical advantage of being able to cross-examine the witness rather than leading the evidence as part of the defence. However, this is a matter for counsel and the trial Judge to consider in due course.

[258] We should also mention that it was submitted that other documents provided to the Ministry of Justice in 1998 and 1999 in relation to the petition were later wrongly given to the Crown Law Office and to the police. These documents comprise three reports exhibited as "D" to Mr Karam's affidavit of 1 November 2008. We heard little argument about this on either side and there is a paucity of material available to make a ruling. There has been no suggestion that the Crown might seek to rely on these documents at trial. If any issue arises, it can be dealt with by the trial judge.

A further issue?

[259] Although not expressly mentioned in the second amended application seeking a stay, oral submissions were made to the effect that the defence will be prejudiced at trial through its inability to secure alternative forensic services. We note that the VFSC declined to undertake further work in relation to this case as long ago as 2003. Accordingly, both sides were on notice that at least in relation to additional scientific testing, alternative laboratory facilities would have to be found. There is no evidence concerning what arrangements the defence has made, nor evidence to establish that scientific facilities and advice are not available to counsel. If a contention of this nature was to be seriously pursued, evidence of this kind would have been required.

Final conclusions and result

[260] We have endeavoured to separately consider the multiple grounds and arguments advanced in support of the stay/s347 application. This process necessarily involved a focus on the issues one at a time. It remains necessary to stand back and consider whether the various separate points, viewed cumulatively, require the intervention of this Court. In the event, we can record our conclusions quite briefly.

[261] The starting-point is that a stay of prosecution is an extreme step and one to be taken only in clear circumstances. The crimes in this case were of the gravest nature. Five lives were lost. In 2007 the Privy Council held that a miscarriage of

justice occurred in relation to the first trial, because new evidence has emerged which might have prompted a reasonable jury to return different verdicts. In these circumstances there remains a legitimate public interest in achieving finality in relation to this case. That can only be done by the verdict of a jury at a retrial.

[262] Our overall conclusion is that there is a sufficient case against the accused to warrant full consideration of all the available evidence by a jury. Moreover, for the reasons we have given, we are satisfied that a fair trial remains attainable, so long as the various safeguards discussed throughout the judgment are utilised. It follows that the intervention of this Court to discharge the accused, or grant a stay of the proceeding, is not appropriate.

[263] In reaching that conclusion we have not overlooked the factors raised and discussed in the Privy Council (see para 17) concerning the duration and likely cost of a retrial and, more importantly, the impacts upon the accused. These considerations, we think, are considerably outweighed by the public interest factor we have just mentioned. With regard to the likely sentencing response in the event of the accused's reconviction, it is a simplification to suggest that only the balance of the original minimum period of imprisonment is at stake. Convictions in this case would inevitably result in a sentence of life imprisonment. That sentence entails susceptibility to a recall to prison throughout the offender's lifetime, if that course is warranted.

Disposition

1. The application for a stay of proceedings and/or a discharge before trial, is dismissed.

2. With reference to the material obtained by the police from the Victoria Forensic Science Centre in 2007 the Crown may not adduce that evidence at trial nor rely upon it for cross-examination or any other purposes except to the extent of:

(a) Dr Gutowski's evidence in relation to the analysis of apparent blood stains on the rifle, the gloves and any underlying case notes on both topics.

(b) The views expressed by Mr Hall in his statement of 20 November 1997 and his affidavit of 30 June 2003 (but not his underlying case notes which remain privileged).

(c) Dr Gutowski's work for the Crown in 1995.

3. As recorded earlier, this is subject to the reservation that the defence may consent to all or some of the excluded evidence being led by the Crown.

Prohibitions on Publication

[264] Order prohibiting publication of the judgment and any part of the proceedings (except as stated below) in news media or on internet or other publicly available database until final disposition of trial.

[265] Publication is permitted in relation to the outcome of the hearing, namely that the case will proceed to trial with a jury to be empanelled on Friday, 6 March 2009.

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A P Randerson J
Chief High Court Judge

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G K Panckhurst J