

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR
IDENTIFYING PARTICULARS OF ACCUSED UNTIL CONCLUSION OF
TRIAL OR FURTHER ORDER.**

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CRI-2009-085-8992

THE QUEEN

v

SR

Hearing: 19 May 2011

Counsel: M W C Snape for Crown
T Ellis and G Edgeler for Accused

Judgment: 26 May 2011

**RESERVED JUDGMENT OF DOBSON J
(Application for recusal)**

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Background to present application

[1] This is an application for me to recuse myself from presiding at any trial in these proceedings. Mr R currently faces the prospect of a jury trial on two charges of arson in relation to fires lit under a Wellington school classroom in December 2009.

[2] There have been protracted pre-trial arguments, the details of which I will identify as necessary, but which relevantly included numerous hearings pursuant to the procedure in subpart 1 of Part 2 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP). A number of my judgments in this matter have been appealed to the Court of Appeal. I have been endeavouring to manage all pre-trial arguments to enable any trial that was to ensue to occur in the week of 30 May 2011, which is already an adjourned date from that originally proposed for December 2010. However, a Minute issued on 2 May 2011 by Randerson J, who is responsible for case-managing the appeals in the Court of Appeal, contemplated that the three appeals to that Court already on foot should be granted a fixture pre-trial, which is not to occur until June or July 2011. The sequence contemplated by that Minute has resulted in my vacating the presently proposed date for any trial.

[3] It is important that what has already been an unusually protracted pre-trial procedure be concluded as promptly as possible. Because of that, I acknowledged to counsel at the conclusion of the present hearing that I would give priority to producing my judgment so that if either side wish to appeal the decisions made in it, the parties would have the maximum opportunity to include any possible further appeal with those presently contemplated for hearing in the Court of Appeal in June or July 2011. In dealing with the matter in this way, I am neither encouraging any appeal, nor necessarily recognising that a right exists to pursue an appeal, pre-trial, from a decision on recusal.¹

¹ The prospect of such an appeal was conditionally recognised by the Court of Appeal in *R v Bain* [2008] NZCA 455 at [17].

[4] Subject to upholding the application that I recuse myself, I would have been the Judge at any trial of Mr R that proceeded on 30 May 2011. At the outset of the present hearing, I acknowledged to counsel that, as that trial date was no longer relevant, there was no certainty about the identity of the Judge who would preside if a trial proceeds on a later date. In particular, acknowledging that I would urge the Executive Judge to accord priority to the allocation of a further trial date, and anticipating that that might occur in the fourth quarter of 2011, I indicated that the trial Judge would not be me. Notwithstanding that, I invited argument on the basis that I would not exclude myself from those Judges on the Wellington roster eligible to preside at any trial at a later date, unless and until I was satisfied that grounds did exist for me to recuse myself.

The test for bias

[5] The authorities on judicial bias cited by Mr Ellis included some from the European Court of Human Rights, the Supreme Court of India, the Court of Final Appeal for Hong Kong and the High Court of Australia. To the extent that those authorities might influence the approach to the present circumstances, I will consider them in due course. However, as to the standard applying to recusal in New Zealand law, I did not understand there to be any disagreement that the test is as most recently articulated by the Supreme Court in *Saxmere*,² which adopted the test for real or apparent bias from the Court of Appeal's decision in *Muir*.³ It is as follows:⁴

In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.

² *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

³ *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495.

⁴ *Muir* at [62], cited in *Saxmere* at [85].

[6] For the Crown, Mr Snape also cited the test in *Jessop v R* which was to the effect:⁵

...a Judge is not normally disqualified because he or she has sat on an appeal at an earlier stage of a proceeding. It is necessary for there to be some real ground for doubting the ability of the judge to bring an objective judgment to bear.

[7] Mr Ellis argued that because *Jessop* was a leave judgment, the Supreme Court's view of the matter was not binding and ought not to be followed. I do not accept that proposition. Whilst it is a decision which does not have the benefit of full argument, it is nonetheless a relevant statement from our final Court of Appeal. In any event, I consider it would be sensible to apply the approach suggested by the Supreme Court, similarly in the trial context. I apprehend that the more pertinent point is whether the criticisms Mr Ellis makes of the nature of my earlier involvement in the present case go beyond the mere fact of an involvement per se in earlier stages of the proceedings.

[8] The Crown also submitted that the presumption of judicial integrity acknowledges that Judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold, and that the presumption of integrity is rebuttable only by cogent evidence. Here, there is little doubt about the extent of my prior involvement. The issue is the construction that would be placed on that by a fair-minded lay observer.

[9] I am to assume that such an observer is fully informed.⁶ In the present context, that means the observer understands the procedure provided for by CPMIP. Mr Ellis's view of that procedure is that it is inevitably flawed because it involves breaches of the human rights of those who are potentially mentally impaired. From that perspective, he labels my earlier decisions unfair, and assumes that the requisite observer shares his view on that, with the consequence that the relevant perception if I presided at trial would be of the continued participation of a Judge responsible for unfair decisions adverse to Mr R.

⁵ *Jessop v R* [2007] NZSC 96 at [6].

⁶ *Muir* at [60].

Grounds for recusal

[10] Mr Ellis pursued arguments for my recusal of two types. First, those that were generic or systemic, in the sense that the disqualifying features arise by virtue of the steps in the proceedings thus far, that would have arisen for any Judge. The second type were personal criticisms of me alleging either the appearance of, or actual bias, against Mr R.

[11] The systemic grounds for disqualification all focus on the nature of the steps required of the Court in determining the issues arising under Part 2, subpart 1 of CPMIP. Mr Ellis's first point was that a determination under s 9 of CPMIP, to the effect that the evidence against Mr R was sufficient to establish that he caused the act or omission that forms the basis of the offence with which he is charged, amounts to a conviction. Arguably, having determined a conviction in respect of Mr R, I am thereby disqualified from taking any further part in the same proceedings.

[12] Alternatively, even if a finding under s 9 does not have standing as a conviction, then it constituted a sufficient involvement, contrary to the interests of Mr R, that a fair-minded lay observer would have doubts about the ability of a Judge to deal impartially with subsequent stages in the same criminal proceedings.

Generic criticisms

Section 9 finding "a conviction"?

[13] Mr Ellis's categorisation of the consequences of a s 9 finding as a "conviction" relied on analogies he drew with the reasoning of Sir Anthony Mason sitting as a Judge of the Court of Final Appeal of the Hong Kong Special Administrative Region in the appeal of *Koon Wing Yee v Insider Trading Tribunal*.⁷ The issues considered in that appeal included whether insider dealing proceedings heard by the Hong Kong Insider Dealing Tribunal in relation to insider trading allegations constituted the determination of a criminal charge for the purposes of

⁷ *Koon Wing Yee v Insider Trading Tribunal* [2008] HKCFA 21.

certain articles of the Hong Kong Bill of Rights. The sanctions available in the event of a positive finding included the Tribunal's power to impose a fine or to order disqualification of the person involved from being a director, liquidator, receiver or manager of listed companies.

[14] In its inquiry, the Tribunal had compelled answers to certain questions, notwithstanding concerns about self-incrimination, and had made substantive findings on a standard that appeared to be less than the criminal standard of proof beyond reasonable doubt. As to whether a "criminal charge" was involved, Sir Anthony Mason undertook a three-step analysis. First, he identified the classification of the offence under domestic law, secondly the nature of the offence, and thirdly the nature and severity of the potential sanction as the criteria to be taken into account. The judgment held that the proceedings involved the determination of a criminal charge by reason of the power to impose a penalty. Mr Ellis argued that, here, the charge is a criminal one under domestic law, that the nature of the offence is clearly criminal, and thirdly that the potential sanctions are up to life in a psychiatric hospital or three years (or indeed longer if orders are renewed) in intellectual disability care. On the basis of those potential outcomes, he argued that a s 9 decision means that a criminal charge is "determined".

[15] However, those consequences would follow from a finding that an accused is unfit to stand trial, which does not result from a s 9 analysis, but only from the later analysis under s 13. The limited purpose of the s 9 inquiry is whether the evidence against an accused is sufficient to attribute to him or her involvement in the *actus reus*. If that preliminary requirement cannot be satisfied, then the criminal proceedings would go no further. The legislative intention is that the personal intrusion into the mental status of the accused is not warranted unless that preliminary threshold is triggered. There is obviously no "determination" of criminal liability, because that is expressly reserved for subsequent consideration at trial, if the second part of the procedure under CPMIP, namely whether the accused is unfit to stand trial, has been positively resolved.

[16] In *Koon Wing Yee*, there was nothing provisional or incomplete about the determination. The procedure embarked upon resulted in a determination of liability

and, essentially because of the sanctions available as a consequence of that finding, it was determined to be criminal in character. If the process being compared is merely the decisions required under Part 2, subpart 1 of CPMIP, then they have not resulted in a determination that constitutes a criminal sanction. Mr Ellis wished to treat the prospects of detention under mental health legislation as a criminal sanction. However, whilst they arise out of the person's involvement with the criminal law, those are consequences that the State is empowered to enforce not as a matter of criminal law, but as a matter of New Zealand's law on mental health.

[17] Mr Ellis resisted the analogy Mr Snape invited with the reasoning of the Court of Appeal in *R v Te Moni* that was in the following terms:⁸

We also record our conclusion that the determination required by s 9 does not engage the right to trial by jury in s 24(e) of the Bill of Rights. That right applies only where a person charged with an offence is tried for that offence. A hearing that occurs in the course of determining whether a person is fit to stand trial cannot itself constitute a trial of the offence with which the person has been charged. The defendant's guilt or innocence is not being determined: a finding of evidential insufficiency does not amount to an acquittal (s 13(3)), just as a finding of evidential sufficiency does not amount to a conviction.

[18] Mr Ellis's argument was that the reasoning is not applicable because he characterised the issue that he had argued in *Te Moni* as whether an accused person was entitled to a right to trial by jury in relation to a determination under s 9. However, the issues analysed in the judgment are significantly wider than that, including an analysis of the CPMIP procedure and what is required to be proved under s 9. The observations in [66] of *Te Moni* are equally applicable to the present argument as to the characterisation of the s 9 hearing, and I respectfully adopt the Court of Appeal's analysis of it.

Wrong evidentiary standard under s 9?

[19] The next criticism Mr Ellis raised was entirely new, and there had been no reference to it prior to his oral argument on the present application. His point was that I should have appreciated that s 9 afforded the Court a discretion as to the standard of proof to be applied, and that a proper appreciation of the adverse

⁸ *R v Te Moni* [2009] NZCA 560 at [66].

consequences that could follow required me to exercise that discretion by requiring proof of the involvement of Mr R in the *actus reus* beyond reasonable doubt. It was not clear how I ought to have required that standard to be applied, when the outcome of a decision under s 9 does not constitute the “determination” of the criminal charges. Presumably, even if it was not a determination of a criminal charge, then nonetheless an appreciation of the extent of adverse consequences that could follow should have required the Court to disregard the wording of the section and apply the criminal standard.

[20] The notion that the Court had such a discretion relied on the use of “may” in the opening phrase:

A court **may** not make a finding as to whether a defendant is unfit to stand trial unless the court is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient ... (emphasis added)

[21] I am not persuaded that the terms of the section introduce a discretion for the Court to apply an evidentiary standard other than on the balance of probabilities, and given the structure intended for the procedure under Part 2, subpart 1 of CPMIP, all the relevant indications appear to me to be against such a notion.

[22] Whilst there may be public policy and human rights debates to be had as to the sequence in which preliminary steps ought to occur in relation to criminal proceedings brought against persons who may be mentally impaired, the present structure is clear. Part 2, subpart 1 of CPMIP requires the first step to be a preliminary assessment as to whether the evidence is sufficient to attribute involvement in the *actus reus* to the accused. CPMIP sees that as a pre-condition to the more personally intrusive analysis of the mental state of a person in this predicament. It seems most unlikely that Parliament intended there to be a mini or preliminary trial, but rather it has provided for a scoping exercise. Although Mr Ellis emphasises the severity of the various adverse consequences that can flow from later steps in the process, they cannot be directly attributable to the gate-keeping exercise. One aspect that clearly distinguishes it from any trial that may subsequently ensue is the standard of proof that is stipulated.

[23] I sense Mr Ellis's argument on this point was that, if accepted, then my failure to adopt the higher criminal standard in the s 9 decision meant I had participated in a flawed step and was therefore further disqualified from any later involvement. I do not accept that initial premise. The prospect that a person found, on the balance of probabilities, to have caused the act or omission forming the basis of offences, but subsequently found unfit to stand trial, might thereafter be subjected to indeterminate confinement as a result of his or her state of mental health, is not a reason to subvert the process provided for by the statute. Such an outcome is a consequence of the structure of the statute and the somewhat uneasy place it has to fill between the criminal law and mental health law.

Involvement in CPMIP process disqualifying in any event

[24] Mr Ellis's next argument was that even if I had not erred in these earlier respects, then nonetheless my involvement in the s 9 and subsequent stages in deciding that Mr R was not unfit to stand trial, represented a disqualifying extent of involvement such that another Judge ought to preside at any jury trial that ensues.

[25] Mr Ellis characterised my predicament as being made more acute by Mr R's election to give evidence at the s 9 hearing in which he denied lighting the fires that gave rise to the arson charges. Having done so, my reasoning needed to acknowledge the point, which I did in the following terms:⁹

To find in the present context that it is more likely than not that Mr R lit the fires involves a finding that it is more likely than not that he is not telling the truth in denying lighting those fires. I am satisfied that that finding is justified.

[26] Mr Ellis's point was that a fair-minded lay observer would equate that finding with a view held by the presiding Judge that Mr R was guilty, and that it would be unfair for someone having formed that view to preside at the trial. Mr Ellis cited authorities from numerous other jurisdictions, where what he treated as an analogous extent of involvement was seen as justifying the Judge's exclusion from subsequent steps in the proceedings. These included a 2009 ruling from the European Court of

⁹ *R v SR* HC Wellington CRI-2009-085-8992, 17 December 2010 at [39].

Human Rights in *Micallef v Malta*¹⁰ and an International Commission of Jurists' Guide for Judges and Lawyers.¹¹ Both of those sources emphasise that any fear of absence of impartiality must be objectively justified. The context considered in both is where a Judge would be the decider of factual issues in substantive proceedings.

[27] That distinction also applies to the High Court of Australia decision in *Antoun v R* on which Mr Ellis placed greatest reliance.¹² That appeal related to criminal proceedings that had been conducted in the District Court of New South Wales before a Judge sitting without a jury. The conduct criticised arose in relation to his peremptory dealing with a submission of no case to answer, and the manner in which he dealt with the question of bail. All of the criticisms of the trial Judge's overly robust comments against the appellants who had been the defendants in the criminal trial before him either explicitly or implicitly relate to his function as the finder of facts at the end of the trial. The judgment of Kirby J placed substantial reliance on the observations of international bodies and the European Court. However, all of those focused on the impartiality of the Tribunal making the determination so that they do not address the distinct role played by a Judge who is not the determiner, but merely presiding over a jury. For instance, Kirby J observed:¹³

Nevertheless, the [Human Rights] Committee has strongly emphasised the centrality of the manifest impartiality of Court proceedings which "implies that Judges must not harbour pre-conceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".

[28] The pre-trial stages of criminal proceedings intended to be tried before a jury are routinely supervised by the Judge allocated to preside at the trial. Certainly, there is no presumptive basis for disqualifying a Judge who determines pre-trial applications, from those who are subsequently eligible to preside at the trial. There are substantial efficiencies in the same Judge dealing with all phases of criminal proceedings.

¹⁰ *Micallef v Malta* (17056/06) Grand Chamber, ECHR, 15 October 2009.

¹¹ *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (International Commission of Jurists, Geneva 2004) at 28.

¹² *Antoun v R* [2006] HCA 2, (2006) 224 ALR 51.

¹³ At [39].

[29] Is there any difference in kind, or only a difference in degree, between, say, decisions to reject an application under s 347 of the Crimes Act 1961 for discharge, or under s 344A of the Crimes Act to admit propensity evidence, and a pre-trial ruling under s 9 of CPMIP to the effect that the Crown's case establishes on the balance of probability the involvement of the accused in the *actus reus*? I am satisfied that those situations are not different in kind. It is not unheard of for accused persons to give evidence in pre-trial hearings in other contexts, and for the outcome to reflect an adverse view of the credibility of the accused. A common example is evidence contesting the circumstances in which a Police search occurred, when the accused subsequently seeks to exclude evidence of what was found. Pre-trial involvement in the full range of matters likely to come before a Judge who would subsequently preside at trial is not treated as raising any spectre of apparent bias, principally because such decisions occur in a context that is provisional, and leaves the ultimate issue to a jury.

[30] Again, I assume that a fair-minded lay observer is adequately informed to appreciate the distinction in functions between a jury as the finders of fact, and the Judge as regulator of the process of trial. For a Judge's views on pre-trial issues already determined to give rise to the spectre of an appearance of bias, would involve the observer assuming that the Judge had a role in determining the facts at a subsequent trial. That is clearly not the case and as Mr Snape submitted, the Judge's limited involvement in summing a case up to the jury is governed by relatively tight rules. The objectivity and balance of a summing up are able to be measured and, if necessary, appealed.

[31] I also attribute to a fair-minded observer an appreciation that the jury would not learn of the Judge's pre-trial rulings on any contentious matters such as the scope of evidence to be heard by the jury, or the outcome of, and reasoning for, determinations under CPMIP.

[32] I accept that the requirement to make a credibility finding that is adverse to Mr R, even on the balance of probabilities, puts my pre-trial involvement in as sharp a context as is ever likely to arise, because I had to record a view about the merits of his denial of involvement in lighting the fires. Mr Ellis advised that Mr R is

concerned, and considers that another Judge should preside at the trial. That antipathy is understandable. Whoever is to decide his fate at trial, Mr R would reasonably not want a Judge presiding at the trial who had already made a finding adverse to him.

[33] Mr Ellis did not put the point in this way, but at its highest, it would be legitimate to attribute to a fair-minded observer an appreciation that, notwithstanding the division of responsibilities between Judge and jury at any trial, an accused who had been exposed to pre-trial procedures such as those conducted in Mr R's case under CPMIP would hold a reasonable apprehension that the Judge could not prevent his view adverse to the accused influencing the course or outcome of the trial. Although such a view is not rationally justifiable, in circumstances such as the present it may nonetheless be reasonable.

[34] However, I am not satisfied that that component of the circumstances in which trial would occur is sufficient to constitute a reasonable apprehension of the appearance of bias. It would require the observer to identify with an apprehension of bias from an accused's subjective perspective. Objectively, the Judge does not participate in determining the verdict, and I did no more than make a finding on the balance of probabilities, which is very different from the evaluation when the Crown would have to satisfy the jury beyond reasonable doubt. Indeed, a Judge may often come to different conclusions from a jury in the course of a trial. However, those conclusions are of no moment to the verdict because decisions of fact are entirely matters for the jury and such conclusions are not disclosed by the Judge.

Personal criticisms

[35] Mr Ellis also advanced criticisms of my personal handling of various aspects of the pre-trial hearings as establishing either the appearance of, or the existence of, actual bias against Mr R. These related to three circumstances:

- a response I made during the 1 April 2011 hearing, to the effect that a comment Mr Ellis had made was “contemptuous”;

- my alleged failure to properly consider an application for stay and arguments in relation to it; and
- the manner and terms on which I had dealt with successive requests from him to provide communication assistance for Mr R.

Treating a comment as “contemptuous”

[36] As to the first of these, it is necessary to list the extent of pre-trial arguments that had preceded the 1 April 2011 hearing, in order to understand the context of the particular exchange.

[37] Since shortly before the proceedings were allocated to me, the following pre-trial steps have occurred:

- **16 August 2010:** Miller J presided at a third callover, and directed that a two day hearing commencing 14 October 2010 should occur in respect of fitness to stand trial. He directed that the hearing address both involvement in the offence and mental impairment, with the question of whether propensity evidence is admissible for the purposes of a s 9 hearing being determined at the hearing.
- **17 September 2010:** Miller J issued a Minute adjourning the pre-trial application hearing from 14 and 15 October 2010, in light of the unavailability of experts’ reports within the contemplated time frame.
- **19 November 2010:** I convened a telephone conference to resolve the sequence in which various issues should be determined. Over the Crown’s objection that the first determination ought to be that under s 9 of CPMIP, I acceded to Mr Ellis’s request that the capacity of Mr R to instruct counsel should be resolved as a preliminary issue. Mr Ellis wished to use reports from the expert psychiatrist and psychologists retained for that limited purpose.

- **22-23 November 2010:** Hearing on Mr R's capacity to instruct counsel, and the admissibility of propensity evidence relating to earlier, 2004, arsons. In a judgment dated 25 November 2010 I recorded the reasons for having indicated on the morning of 23 November 2010 that Mr R was competent to instruct counsel. I also ruled in favour of the Crown on a propensity evidence application in relation to the 2004 arsons. My judgment recorded the view that I had been in error to have entertained Mr Ellis's concern at Mr R's ability to instruct counsel as a discrete inquiry.¹⁴
- **9 December 2010:** Hearing on whether the Crown could establish Mr R's involvement in the *actus reus* of the charges, for the purposes of s 9 CPMIP. My reserved judgment of 17 December 2010 found that that onus was discharged in respect of counts 2 and 3. I found Mr R would be entitled to a discharge under s 347 of the Crimes Act on count 1 of the indictment, but deferred formally doing that until an application for discharge under s 347 was argued in respect of all counts.
- **15 December 2010:** Minute issued proposing a half day fixture on 25 January 2011 for the purpose of arguing any s 347 application brought on behalf of Mr R. Counsel for Mr R was not available at that time.
- **22 February 2011:** Application for discharge under s 347, focusing on inadequacy of evidence on counts 2 and 3. During the hearing, I took the view that the Crown would be entitled to invite a jury to have regard to the evidence in relation to count 3 (second fire lit two days after the first fire allegedly lit by Mr R under the same school classroom) when considering count 2. Mr Ellis objected that the evidence in relation to count 3 should not be treated as admissible in relation to count 2 unless the Crown applied to treat it as propensity evidence under s 43 of the Evidence Act 2006, and the Court was satisfied, after argument, that the Crown was so entitled. After the hearing, I reflected on Mr Ellis's concern, and on 23 February 2011 issued a judgment partially recalling

¹⁴ R v SR HC Wellington CRI-2009-085-8992, 25 November 2010 at [46]-[49].

the oral judgment I had given dismissing the s 347 application the previous day in relation to counts 2 and 3. In that judgment, I directed that the Crown have seven days in which to make an application under s 43 of the Evidence Act to have the evidence in relation to count 3 treated as admissible propensity evidence in relation to count 2.

- **23 March 2011:** I issued a Minute which responded with my provisional view to a Memorandum filed on behalf of the Crown on 3 March 2011, suggesting that an application to admit the evidence in relation to count 3 as propensity in relation to count 2 was unnecessary, but that if it should be treated as propensity evidence, then analysing the reasons supporting an order that it could be admitted in that way as propensity evidence. My provisional view was to agree with the alternative proposition, but I deferred a final view because, contrary to the sequence I had directed in my 23 February 2011 judgment, no response to Mr Snape's Memorandum had been received from Mr Ellis. The 23 March 2011 Minute also addressed the terms on which evidence ought to be heard from the mental health experts at a further hearing that had been scheduled for 1 April 2011.
- **1 April 2011:** Hearing convened on whether Mr R is mentally impaired. Evidence was called from Dr Barry-Walsh, Ms Medicott and Mr Woodcock. My reserved judgment, delivered on 14 April 2011, decided that Mr R is not mentally impaired, and that he is not unfit to stand trial. That judgment also resolved outstanding aspects of the application for a discharge under s 347 of the Crimes Act.

[38] This review is by no means exhaustive, but is intended to describe the sequence in which matters that are relevant to the present application for recusal, have occurred.

[39] The exchange Mr Ellis complained of occurred during the hearing on 1 April 2011. Given the significance attributed to it in his current argument, I have had the relevant part of the exchanges between us transcribed. It is appended at the end of

this judgment. My use of the word “contemptuous” appears near the top of page four of the transcript. The comment was made in response to Mr Ellis’s insistence that the Court had delayed in hearing an application for stay that was among the pre-trial initiatives he had signalled on behalf of Mr R. In the exchanges near the top of page 5 of the transcript, Mr Ellis confirmed that he had never sought a hearing for the application for stay. Given the absence of any justification for the criticism that the Court had delayed a hearing, either on the application for a stay, or on any other aspect of the pre-trial initiatives Mr Ellis had pursued, a robust rejection of his comment to that effect was appropriate.

[40] My reaction was that the suggestion of delay by the Court was contemptuous because the Court had acceded to Mr Ellis’s requests as to the procedure that should be adopted, including the separate determination of the preliminary issue as to whether Mr R was competent to instruct counsel. I observed in my judgment confirming Mr R’s capacity to instruct counsel that it had been an error to have entertained it as a separate issue in the way that I did.¹⁵ Because of Mr R’s concerns, expressed personally to me during hearings, to “get an answer”, which clearly referred to a substantive outcome, and because until early April 2011 he was remanded in custody, I was concerned to complete all relevant pre-trial arguments as promptly as possible. To that end, I had, for example, volunteered to hear the stage after determination of the inquiry under s 9 of CPMIP (ie an application on behalf of Mr R under s 347 of the Crimes Act for a discharge) in the last week of the summer vacation on 25 January 2011. Mr Ellis was unavailable at that time, and that hearing was unable to occur until 22 February 2011.

[41] The Court has, at each stage, accorded whatever priority it could to scheduling the next stage of the pre-trial arguments.

[42] Notwithstanding all of that context, I did not anticipate any consequences from my reaction to the incorrect criticism that the Court had delayed hearing an application for a stay when that had not been the case. No further reference was made to it at the time, and I heard argument from Mr Ellis and Mr Snape on the part of “generic challenges” that I had accepted were specific to the circumstances in

¹⁵ *R v SR* HC Wellington CRI-2009-085-8992, 25 November 2010 at [46].

which a report had been prepared from Dr Barry-Walsh. Nor, to the best of my recollection, did Mr Ellis make any further reference to my characterisation of his comment as contemptuous during the balance of argument on 1 April 2011. From my perspective, the matter was part of robust exchanges that would not impact on any aspect of the issues to be determined.

[43] However, on the present argument, Mr Ellis has raised it as a discrete instance of either apparent or actual bias. The summary of his written submissions described it as my:

...intimidating and harassing attitude to counsel by determining his remarks during the 1 April 2011, s 14 hearing as “contemptuous” without an opportunity to be heard. Additionally, breaching counsel’s duty to fearlessly defend his client, and his client’s and his own personal right to Freedom of Expression.

[44] In argument, Mr Ellis relied on a decision of the European Court of Human Rights in *Kyprianou v Cyprus*,¹⁶ in which a challenge by a Cypriot Court to what it perceived to be excessive cross-examination led to a protest by Mr Kyprianou, who was the counsel. The differences continued to an extent that Mr Kyprianou was found in contempt and sentenced to five days’ imprisonment. He subsequently appealed to the Cyprus Supreme Court and thereafter to the European Court.

[45] The European Court treated the conviction for contempt as an interference with counsel’s right of freedom of expression and fined the State of Cyprus for violating Mr Kyprianou’s rights. The reasoning of the majority included an acknowledgement of the “chilling effect” of the imposition of a custodial sentence on counsel for conduct deemed to be contemptuous.¹⁷

[46] Mr Ellis claimed that my observation had a similarly chilling effect on his pursuit of Mr R’s interests. He characterised it as an attempt to intimidate. From a review of the scope of matters argued, both on 1 April 2011 and in the context of the present hearing, I am unable to accept that my single observation did indeed have any chilling or intimidating effect on the range of arguments advanced by Mr Ellis, or indeed the manner in which he presented them. Although not decisive, I can

¹⁶ *Kyprianou v Cyprus* (73797/01) Grand Chamber, ECHR, 15 December 2005.

¹⁷ At [175].

certainly confirm that I had no intention to intimidate counsel, or anything of the sort.

[47] More relevantly, objectively assessing how a fair-minded lay observer would respond to the interchange in the context of the whole of the pre-trial hearings, and attributing to that observer an awareness that the single reference was not followed by any suggestion of consequences flowing from it, I am not satisfied that such an observer would treat the remark as giving rise to a reasonable apprehension of bias against Mr R. If at all, it conveys a criticism of the manner in which Mr Ellis was characterising the mode of the Court's dealings with all the pre-trial applications, and it did not convey any adverse view in relation to Mr R, or the merits of his position.

[48] Mr Ellis cited his obligation to fearlessly pursue the interests of his client, and his right to freedom of expression, as absolute notions. From that standpoint, my observation that a comment he made was contemptuous took on greater significance because he saw it as compromising his right to freedom of expression, and interfering with his obligation to fearlessly pursue his client's case.

[49] The rights of counsel to freedom of expression are not unqualified, and the Court is not required to grant the fullest hearing sought by counsel on arguments, irrespective of whether they are untenable or irrelevant. Fearless pursuit of a client's interests is not a licence to be offensive or unduly prolix.

[50] The balance between fearless pursuit of client's interests and obligations to the Court was recognised by Lord Reid in *Rondel v Worsley* in the following terms:¹⁸

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

¹⁸ *Rondel v Worsley* [1969] 1 AC 191 at 227F.

[51] The overriding duties of counsel as officers of the Court, which qualifies the obligation to protect the interests of clients, now finds statutory recognition in s 4(d) of the Lawyers and Conveyancers Act 2006.

[52] In terms of the appearance of the exchange Mr Ellis complains of, I attribute to the fair-minded lay observer an appreciation that there are some basic qualifications on counsel's right to freedom of expression, and that it is not inappropriate for the Court to respond robustly to criticism of it which is factually incorrect. I do not accept that Mr Ellis's criticism of my comment would register as evidencing or giving an appearance of bias on my part.

Alleged failure to consider stay application

[53] The next of the criticisms of my personal conduct was the alleged failure to properly consider the stay application.

[54] Mr Ellis's written submissions summarised this argument in the following way:

Your Honour's failure to properly consider the stay hearing on a misguided view that this was a Declaration of Inconsistency, reinforces the view that counsel's applications (Communication assistance, Stay) will not necessarily be listened to unless they coincide with Your Honour's view reached in breach of natural justice. No well informed independent observer would conclude Mr R could get a fair trial [sic] before Your Honour.

[55] The circumstances in which I attempted to confine the range of arguments that would be heard pre-trial is reflected in the extract from the transcript of the 1 April 2011 hearing annexed to this judgment. Mr Ellis's argument was that the approach I adopted rebutted the presumption of impartiality and established bias on my part.

[56] On 8 December 2010, Mr Ellis had filed submissions in support of a stay of the proceedings against Mr R, running to some 21 pages. Those submissions argued that:

- the Crown had an onus to justify limitations on civil rights;

- the procedure under CPMIP breached the rights of persons with disabilities;
- the s 9 standard of proof on the balance of probabilities was a discriminatory breach of the absolute right to a fair trial contained in s 25(a) of the New Zealand Bill of Rights Act 1990 (BORA);
- the process under CPMIP blatantly discriminated against persons with disabilities in breach of s 19 of BORA; and
- the analysis of “involvement” in s 9 of CPMIP involved a breach of the presumption of innocence.

[57] Not for the first time, Mr Ellis invited cross-reference to arguments he apparently had raised in the case of *Ruka*, and which he intended pursuing in the Court of Appeal in June 2011. An outline of the submissions intended for that case has also been provided to the Court.

[58] These issues were all “generic” in the sense that they did not depend on Mr R’s individual circumstances, beyond the assumption that he suffered from some form of mental impairment. No application for a stay was pursued, and in early 2011 it was agreed that the next stage after a finding under s 9 of CPMIP in relation to Mr R’s involvement should be an application for discharge under s 347 of the Crimes Act.¹⁹ At hearings and in the filing of papers during February and March 2011, Mr Ellis referred to additional arguments he wished to raise, all of which were generic in the sense that they challenged the lawfulness of procedures that purported to conform with the provisions of CPMIP. In a Minute on 23 March 2011, I directed Mr Ellis to provide an outline of the arguments he intended to raise on any generic challenges to the procedures adopted under CPMIP by the end of 29 March 2011, to enable me to consider the then present form of all such arguments before the further hearing on 1 April 2011.²⁰

¹⁹ *R v SR* HC Wellington CRI-2009-085-8992, 17 December 2010 at [45]-[47], and Minute of 15 December 2010.

²⁰ Minute of 23 March 2011 at [12] and [13].

[59] In response to that direction, Mr Ellis filed a 61 page submission, described as “Synopsis of Generic Submissions and Related Matters”. Mr Ellis arranged generic challenges under the following headings:

- A. Is the process mandated by the CPMIPA discriminatory and unlawful?
- B. Does following the CPMIPA procedure cause a breach of the Judicial Oath of Office?
- C. The current system of appointment of health assessors under s 38 CPMIPA is unlawful.
- D. ...Was the accused unlawfully detained at the time of his s 38 report undertaken by Dr Justin Barry-Walsh? And if so is his report admissible?
- E. Does the appointment of Health Assessors under s 38 CPMIPA require the Court and/or others to advise the detainee of his NZBORA rights including those under s 23(1) NZBORA?
- F. Can the Court require more than s 38 reports, i.e. examinations or interviews, if not, what are the limits of the Courts powers?
- G. Given that a s 9 finding is regarded as a “conviction” by s 16 CPMIPA for the purposes of an appeal. Are findings under ss 9 and 14 CPMIPA that the accused committed the act, but is fit to plead, a jeopardy for the purposes of the double jeopardy rule, and therefore a conviction for the purposes of a special plea of previous conviction, and/or a breach of the presumption of innocence?
- H. Does the Court holding a s 9 CPMIPA hearing which is determined by a finding of commission of the Act on a balance of probabilities, breach the accused rights to a presumption of innocence?
- I. Section 347 hearing
- J. Remedy for breaches of the above.

[60] The remedies sought on each of these grounds was that, individually or cumulatively, they warranted a permanent stay of the criminal proceedings against Mr R. Mr Ellis had indicated at the hearing on 22 February 2011 that argument on these matters, and the determination required under s 14 of CPMIP, would likely take two days.²¹ At that point, Mr R had been in custody for more than 12 months. Attempts to settle acceptable terms for him to be bailed were being worked on, but had not been concluded. In the context of timetabling the various pre-trial initiatives

²¹ *R v SR* HC Wellington CRI-2009-085-8992, 23 February 2011 at [13]-[15].

Mr Ellis foreshadowed, Mr R had compellingly voiced his own concern that “all he wanted was an answer”. It was important that if a trial became necessary, it ought to be scheduled as soon as possible. The Court Registry had been able to reserve the week of 30 May 2011 as a week in which a trial could proceed, if one became necessary, and because of the Court’s commitments and those of counsel, I considered the one day hearing that became possible for further pre-trial argument on 1 April 2011 should endeavour to resolve as many of the remaining pre-trial issues as possible.

[61] For the generic arguments foreshadowed to succeed would require a finding that compliance with the procedure under CPMIP would breach Mr R’s rights under either BORA or the Human Rights Act 1993, to an extent that he would be exempt from the criminal trial process, in the event that he was found not unfit to stand trial at the conclusion of the procedures under CPMIP. The Court of Appeal has recognised difficulties in applying the procedure,²² but both the High Court and the Court of Appeal have consistently recognised that the procedure is to be applied where an issue is raised as to the mental capacity of accused persons in criminal proceedings. In my exchanges with Mr Ellis, I referred to the need for something in the nature of a declaration of inconsistency for his arguments to succeed. I cannot now recall whether there had been an earlier reference to the difficulties of obtaining such a declaration in criminal proceedings, but took Mr Ellis to be familiar with those difficulties.²³

[62] That requirement for a declaration of inconsistency might not apply in every possible contingency contemplated by his arguments, but it was the essence of where Mr Ellis’s arguments would go, if anywhere.

[63] The exception was Mr Ellis’s argument about the report prepared under s 38 of CPMIP by Dr Barry-Walsh as being inadmissible because it resulted from Mr R being unlawfully detained when he was interviewed by the doctor, more than 14 days after the order had been made for preparation of the report (ie item D in the list of challenges in [59] above). I heard argument on that matter and dismissed that

²² See, for example, *R v McKay* [2009] NZCA 378.

²³ For example, *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [123]. Mr Ellis was counsel in that case.

ground of Mr Ellis's challenge.²⁴ As to the balance of the arguments raised in the submissions, I summarised my views in relation to each of them, reflecting what I saw as their relative untenability in the 14 April 2011 judgment.²⁵ That section of the judgment ended with the following acknowledgement:²⁶

I am bound to acknowledge the theoretical prospect that I may have been persuaded to view one or more of these arguments more favourably after hearing Mr Ellis in support of his written submissions, together with the terms of a response on behalf of the Crown. In practical terms, however, the impediments to any relief being granted are such that I remain satisfied that no injustice arises from the procedure I adopted to deal with them.

[64] Another Judge dealing with this case may have weighed the competing priorities differently, and afforded Mr Ellis a hearing on all of these generic challenges. I also accept that the Court of Appeal might also disagree with the weighting I gave these competing considerations. In the circumstances pertaining, that would inevitably have required a delay of any trial that was to occur, from the then proposed date on 30 May 2011. As it has transpired, Mr Ellis's initiatives in the Court of Appeal have resulted in that trial date being lost. However, at the beginning of April, the priority in managing the case was to get it to trial, if there was to be a trial.

[65] Reflecting on the competing priorities that had to be managed, I do not accept that the view I took of the relative priorities of getting the matter to trial, and having a fuller airing of generic legal challenges, would create the appearance, in the view of a fair-minded lay observer, of apparent bias against Mr R.

Alleged bias in dealing with requests for communication assistance

[66] Mr Ellis has raised, on a number of occasions, his concerns at the limitations on Mr R's ability to communicate with counsel during the course of pre-trial hearings and at any trial.²⁷ At the outset, this was an aspect of Mr Ellis's concerns that Mr R was not competent to instruct counsel.

²⁴ *R v SR* HC Wellington CRI-2009-085-8992, 14 April 2011 at [48]-[58].

²⁵ At [59]-[79].

²⁶ At [79].

²⁷ Counsel's Memoranda, 17 October 2010 at [6], 22 February 2011 at [1]-[5] and 25 March 2011 at [4]-[6].

[67] Mr Ellis's 22 February 2011 Memorandum raised the notion that communication assistance, in the form of Ms Bernice Kershaw, who was familiar with Mr R from her time as a Department of Corrections social worker, should be ordered by the Court. Ms Kershaw's position was apparently disestablished from 31 March 2011 and Mr Ellis has made repeated requests for the Court to order her on-going availability at hearings.

[68] I dealt with the request, so far as it related to the hearing on 1 April 2011, at the outset of my judgment on the matters dealt with at that hearing.²⁸ Mr Ellis characterised my decision to proceed with the hearing on 1 April 2011 in the absence of communication assistance as pre-determining Mr R's fitness to stand trial when that was a matter to be argued that day.

[69] Mr Ellis also objected to my comment about permitting Ms Kershaw's attendance with Mr R at earlier hearings as "an indulgence" as suggesting a bias against Mr R. All that was intended by that observation was that I was going along with, or indulging, what I saw at the time as a Department of Corrections initiative when ordinarily matters of procedure are positively controlled by the Court. It was not intended to convey that I perceived the Court's acquiescence in Ms Kershaw's presence as having been inappropriate.

[70] Nor was the decision I made on 1 April 2011 to proceed without requiring Ms Kershaw's presence a reflection on the substantive issue then before me, namely Mr R's fitness to stand trial. As noted in my judgment, the decision did not involve a necessary rejection of the premise implicit in Mr Ellis's request, namely that Mr R is mentally impaired.

[71] In more recent exchanges on the issue of communication assistance, Mr Ellis has raised Mr R's entitlement to the presence of Ms Kershaw under s 80 of the Evidence Act 2006. That section provides:

²⁸ *R v SR* HC Wellington CRI-2009-085-8992, 14 April 2011 at [3]-[7].

80 Communication assistance

- (1) A defendant in a criminal proceeding is entitled to communication assistance, in accordance with this section and any regulations made under this Act, to—
 - (a) enable the defendant to understand the proceeding; and
 - (b) give evidence if the defendant elects to do so.
- (2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the Judge.
- (3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and any regulations made under this Act to enable that witness to give evidence.
- (4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the Judge.
- (5) Any statement made in Court to a Judge or a witness by a person providing communication assistance must, if known by the person making that statement to be false and intended by that person to be misleading, be treated as perjury for the purposes of sections 108 and 109 of the Crimes Act 1961.

[72] Mr Ellis has not addressed s 81 of that Act, subsection (1) of which provides:

81 Communication assistance need not be provided in certain circumstances

- (1) Communication assistance need not be provided to a defendant in a criminal proceeding if the Judge considers that the defendant—
 - (a) can sufficiently understand the proceeding; and
 - (b) if the defendant elects to give evidence, can sufficiently understand questions put orally and can adequately respond to them.

...

[73] Within the context of the hearing on 1 April 2011, and given a pattern of direct exchanges at previous hearings between Mr R and me, I was satisfied that he sufficiently understood what was occurring. His indication to me was that he understood the process and wanted the matter to proceed that day. In addition to observing Mr R at each of the hearings, I had also viewed a videoed interview of him conducted by a Police officer on the day of his arrest in December 2009. My

impression of that as a lay person was that Mr R was able to appreciate the consequences of the questions asked of him, and to adequately respond.²⁹

[74] My decision on 1 April 2011 was not a finite rejection of the appropriateness of ordering communication assistance under s 80 of the Evidence Act at later hearings, and in particular at trial. Numerous contingencies might influence a fresh consideration of such a request depending on the identity of trial counsel and that counsel's extent of rapport with Mr R, Mr R's own views at the time, and the availability of a communication assistant who could materially alleviate any difficulties Mr R may have in understanding all matters raised in a trial context.

[75] For the Crown, Mr Snape indicated that he is not aware of any criminal proceeding in which an order has been made for assistance on account of mental health difficulties for an accused, as distinct from linguistic difficulties where an accused person has limited understanding of English. Mr Snape confirmed that where the communication skills required were those of an interpreter, the parties generally simply recognise the need for that and jointly seek an order from the Court for the presence of an interpreter, without any specific resort to s 80 of the Evidence Act.

[76] Would a fair-minded lay observer who understood the background and observed my dealings with Mr R at the outset of the hearing on 1 April 2011 treat my refusal of Mr Ellis's request for communication assistance as evidence of apparent or actual bias against Mr R? In answering that question, I again have to acknowledge that another Judge may have dealt with the matter differently. Indeed, another Judge may have been prepared to adjourn the hearing, accepting the consequences for subsequent steps in the proceedings, to ensure that arrangements could be made for Ms Kershaw to attend.

[77] I am also satisfied, however, that an observer of the relevant events would have treated my reaction to Mr R's own views on the matter as being reasonably open to me. There was a reasonable imperative (not one to be pursued at all costs)

²⁹ See [21], [22], [33] and [34] of my 14 April 2011 judgment as to the reaction of the experts to Mr R's conduct during the Police interview.

that progress be made with the pre-trial arguments, Mr R had observed the content of all the previous hearings, and could reasonably be taken to appreciate the issues to be determined on 1 April 2011.

[78] Accordingly, I do not accept that the way in which I dealt with the request for communication assistance on 1 April 2011 could give rise to a reasonable apprehension of actual or apparent bias in the mind of a fair-minded lay observer. Nor did it suggest pre-determination of Mr R's fitness to stand trial. He may have been able adequately to follow the issues at the 1 April 2011 hearing, but nonetheless be unfit to stand trial.

Cumulative impact of concerns

[79] A remaining issue on the appearance or presence of bias is whether all of the concerns raised by Mr Ellis have a cumulative impact which would take the fair-minded lay observer from a position where no reasonable apprehension of bias was raised, to one where it did arise because of the cumulative impact of any seeds of doubt on one or more of these matters.

[80] The law is familiar with the notion that the separate impact of individual factors that are singly insufficient can have a cumulative weight that changes the outcome. Being as objective as possible on this evaluation, I attribute to the fair-minded lay observer the intellectual rigour of rationalising the superficial concerns that Mr Ellis's arguments played to on each head, and relegating them to the lack of weight that, on proper reflection, I am satisfied they deserve. Once that process is undertaken, then this is not a case in which the cumulative effect of all his arguments can change the outcome.

Conclusion

[81] For all these reasons, I am satisfied that no basis exists for me to recuse myself from further involvement in the proceedings.

[82] If an appeal is pursued from this judgment, and any point is to be made on the conduct of the hearing on 19 May 2011, then I invite the parties to revert to the Court for a comment as to how it was conducted.

Dobson J

Solicitors:
Crown Solicitor, Wellington

Annexure

R v SR

Transcript of legal discussion – 1 April 2011

2.52pm (At conclusion of Ms Medicott's evidence)

Judge: Mr Ellis, if you considered there was anything arising from your cross-examinations, I would entertain an application from you that Mr Woodcock be recalled, if you wanted to put matters to him. I can't immediately think of any matters that I want to raise and I don't want it to be an endless iteration. But, this is really....

Mr Ellis: No, I understand.

Judge: This is really your one chance ...

Mr Ellis: I understand that.

Judge: And I want to reflect on what they've said. It's – you've traversed the ground pretty thoroughly. I appreciate that the – what you're now going to advance is argument about mental impairment.

Mr Ellis: Yes.

Judge: And depending on the answer to that, I give you reasons and we then come back on the fitness to stand trial.

Mr Ellis: Yes.

Judge: And I'm certainly not contemplating that we have another round with the witnesses at that stage if we get to it.

Mr Ellis: Well, you may not be contemplating it, sir, but it's our statutory right to call evidence on that and depending on what your reasons are, and whether we can improve on it, we might be contemplating it, we might not be, depending on what your reasons are, but the statute authorises us to – in fact requires you – to hear evidence if we want to call it – so, you know, I mean – you should be contemplating it sir.

Judge: Mmm. I have allowed the ground to be traversed pretty thoroughly and that's my provisional view. If you tell me depending on my answer that yes, you've got evidence to call, then of course. But at the moment, certainly Dr Barry-Walsh and Ms Medicott are here as assessors responding to the direction they've had from the Court.

Mr Ellis: Yes, well, we had planned today to call Ms Kershaw to give her view because you're not – you're not obliged just to hear from two health assessors. But we haven't got her here so we can't call her because she's the one who's had most interaction with him and ...

- Judge: What are her qualifications?
- Mr Ellis: She's a social worker.
- Judge: Mmm.
- Mr Ellis: And well, that - you may "mmm" sir but certainly in the English system social workers have a very important part in the interface between the mentally impaired and others. They may not have it here. Certainly Dr Duncan who's the national adviser on intellectual disabilities - I've had some exchanges with him about that and it seems we differ. But that doesn't mean to say there wouldn't be any useful contribution. But it really does depend, sir, on what your finding on mental impairment is.
- Judge: Alright, all I was raising with you is the possible way forward is because for the day, for today at least, I now want to excuse the witnesses from further attendance.
- Mr Ellis: Oh, yes, certainly sir. Certainly. Well, I mean just looking at the section sir, if the Court is - if the Court is satisfied on the evidence under subsection (1) he's mentally impaired, the Court must record a finding to that fact and give each party an opportunity to be heard on whether he's unfit to stand trial. So we are contemplating that the Court follows the statutory procedure and which we perceive no Court has done.
- Judge: Don't be facetious - I am too.
- Mr Ellis: No, no I'm not being facetious. I am saying I don't think any Court has followed that before because nobody's quite realised there's this two part process and if one looks at all the case law, nobody's split it up into two ways. So if that's what ...
- Judge: Well, I'm not sure you're right on that either.
- Mr Ellis: Well, I may be wrong but I can't see that anybody's been doing it and as the doctor said, well that's the first time I've heard this mental impairment argument so I'm not being facetious at all sir. I'm just being ..
- Judge: Alright. Okay.
- Mr Ellis: Ah, yes.
- Judge: Ms Medicott, Dr Barry-Walsh, Mr Woodcock, I release you from your attendance today. Thank you all very much for your patience and for your giving freely of your opinions to the diverse questions that have been put to you from all of us. **[Experts leave Court.]** Now Mr Ellis, do you wish to advance discrete argument on why I should find Mr R mentally impaired? I understand that your generic challenges you are content to park and I may need to come back to that because you have a specific challenge to Dr Barry-Walsh that is fact-specific to this case.
- Mr Ellis: Yes sir.

- Judge: And if my assessment of whether Mr R is mentally impaired is to have regard to his evidence, as I understand that particular part of your generic challenges, if you succeeded in the argument you want to advance to me, I wouldn't be able to have regard to it at all. Is that where I end up?
- Mr Ellis: Yes sir. And equally part of the generic challenge in terms of the way the assessors are appointed, if you accept that, then you can't have the doctors or Ms Medicott.
- Judge: So I have to decide it only on Mr Woodcock's evidence?
- Mr Ellis: Well, that's – you can't then do that because you haven't heard two mental health assessors.
- Judge: Mmm, I see.
- Mr Ellis: Which is unfortunate but we're taking the principled position and of course it does help our client because obviously there's an adverse opinion. We must do the best for our client whether it's inconvenient or not sir. I did wonder whether it might be possible on a pragmatic basis not to take the point about Ms Medicott because it may be realistically any other assessor's going to come up with the same conclusion. And I don't want to go round in circles wasting everybody's time, but I think as I put in my submissions if we get the principle established and Dr Justin Barry-Walsh's one out of the way, we might be prepared to not take that point but we're in a bit of a problem in that on generically if the system is wrong, there's nothing we can do about that. And I don't think we're capable of waiving systemic unlawfulness sir. Unless I suppose you can use one of the past historic persons as another health assessor. We've had lots of health assessors.
- Judge: What I would prefer to, what I am going to do, is to hear you on your – on the substance of your arguments as to why Mr R is mentally impaired. And of the generic arguments, I will hear you on the disqualification of the Barry-Walsh report on account of it resulting from an interview undertaken more than 14 days after the order. For the rest of it, those generic points really depend on the procedures adopted and the provisions of the Act being contrary to BORA.
- Mr Ellis: And the Human Rights Act.
- Judge: And the Human Rights Act.
- Mr Ellis: Trying to be conscious.
-
- Judge: I will record your protests but Mr R keeps on saying he wants an answer. And I am not going to wade through all those arguments and trouble Mr Snape to – you can treat them as having been – as you have previously – filed objections to the process which you want to preserve and you can preserve those as well for appeal points if we get to a trial and if the man is convicted.

- Mr Ellis: Well, that's got two immediate problems. One – I filed a stay application on his behalf in July last year. I filed submissions on that in December last year. I've rewritten them at your direction, give the generic submissions. I spent four days writing those things. And if you do make that decision I'll never get paid for it cos I haven't managed to fill in a legal aid form yet. So I ask you not to make that decision until I've had an opportunity to fill in the form and do all that. But that's not right sir. We've – it's not a question of – this Court has delayed in hearing the application for a stay.
- Judge: No it has not.
- Mr Ellis: Because other matters – it has sir.
- Judge: Mr Ellis, don't say that in this Court unless you are prepared to justify it because I find it contemptuous.
- Mr Ellis: Well, if you find it contemptuous then you'll have to give reasons why you find it contemptuous. Cos it's not contemptuous. Your Honour's jumping to conclusions too quickly sir. What I'm saying is there has been delay. Whether it's been undue delay is another issue altogether. There can be delay for proper reasons. And you can't equate delay and undue delay sir which you are doing. Well, the application was filed, submissions were filed in December. You just asked me to file generic submissions which I dropped everything else and I did. And then I come here and you say I'm not going to hear you.
- Judge: No, I'm going to hear you on the part that is fact-specific.
- Mr Ellis: Yes, but you're not going to ...
- Judge: I now understand from a cursory read of them the scope of them.
- Mr Ellis: And you're not going to hear them?
- Judge: I am going to treat them as lodged and you can reserve the points for appeal. This man deserves his trial and that's what he's been wanting to get. You wish to preserve a whole lot of points that may be unnecessary to him.
- Mr Ellis: I'm asking for a stay of proceeding which as I understand it rightly you're refusing to hear me on.
- Judge: You have – in the programming you have never asked me to hear the stay. You have lodged those – lodged the application and filed the submissions. In the various sequence of dealing with issues where I have accommodated you, Mr Ellis, you have never asked that the stay be dealt with at any point before now.
- Mr Ellis: Well no, because we were waiting for the section 14 to be completed.
- Judge: Right. Is what you are now saying that you want me to hear the stay before resolving the section 14 issue? Or that I should have done so before now.

- Mr Ellis: No, I'm saying that I don't think you can determine the section 14 issue without hearing these applications. I mean why did you timetable me at short notice to write them, only to say you're not going to deal with them.
- Judge: Because I wanted to understand what the metes and bounds of the generic issues you wished to raise were. You put them in various terms. You've alluded to them in various terms at various of the hearings that we've had for Mr R.
- Mr Ellis: Yes, and we've all worked on the premise that for proper reasons we'll deal with those when we've got to the end of the section 9 to 14 process.
- Judge: At what point have you asked me to deal with the stay before resolving the section 14 issue?
- Mr Ellis: Never.
- Judge: Well, let's resolve the section 14 issue.
- Mr Ellis: Well, I'm trying to but as I say I think the section 14 issue – well if you can't hear evidence from two of the experts, and you say we'll just – that's not a fair trial. I'm just not going to hear you and you bring it up on appeal. That's not right sir.
- Judge: What you are objecting to is the process by which the Court has appointed the assessors. The part which is particular to Mr R is the timing issue as to whether Mr - Dr Barry-Walsh was not competent to conduct what he did because he didn't provide a report within 14 days.
- Mr Ellis: There's that and the issue of whether the Court is – whether this Court is independent. I said this Court is no longer independent and you're saying, oh excuse me, bring that up on appeal.
- Judge: Yep. Because that – because Mr Ellis your challenge in that regard depends on effectively – when you boil it down, you may have all sorts of little byways that you are interested in taking me down. It depends on a proposition that the procedure provided for in the Act is – should not be complied with.
- Mr Ellis: You could formulate it in those terms, yes.
- Judge: And that's something which is quintessentially for an appeal, and not for the trial Court. We've got to get on and deal with the man's – the issues relating to this man.
- Mr Ellis: But we need to have a finding of this Court on which to appeal. And an articulated reason why, if you're going to dismiss it, it's wrong. That's the way the system works isn't it. You make a decision, somebody doesn't think it's right, it's appealed. You're saying you abdicate making a decision.
- Judge: I'm not abdicating making a decision. What I am doing is enabling you to preserve the point which is one which, if at all, may appeal to an appellate

court, after trial, after the consequences of the procedure provided for by the Act and followed as best we can in Mr R's case, has run its course.

Mr Ellis: Well I am saying to you that your characterisation of the challenge that it's essentially a – the process is wrong in the statute – that is an acceptable way of classifying most of what I've said.

Judge: It is.

Mr Ellis: An acceptable way of classifying most of what I'm about. But I'm also advancing that the individual factual basis that you've said you'll hear me on but in addition to that I'm saying that the process for selecting assessors is wrong and that's compromising the independence of this Court. And I don't think it's right for you to duck that sir. That can't be right. Yeah, the Court didn't appoint any experts. You've called them. I'm challenging that you can do that. And then you're saying we're above challenge.

Judge: No, I'm not saying we're above challenge. I'm saying that's a challenge that you should address with the Court of Appeal which will be in a position to review the adequacy of both the process and compliance with BORA, Bill of Rights, all those sort of things. But until the substance of the process about which you want to complain has played out, it's not a live issue. You must have had challenges in this Court running these sort of arguments before where what you are wanting to do is you're effectively seeking a declaration of incompatibility. I'm sorry, that's riding roughshod over the fine detail that I haven't yet digested in some of your arguments. But you must know by now that this Court is the – it's the trial – in the criminal jurisdiction it's the trial Court. We've got to get on and produce a result. What if I find Mr R is not fit – is either – is mentally impaired or is not fit to stand trial? Or what if he faces trial on one or two charges and he's acquitted. Doesn't the system – hasn't the system got to respond to his consistent refrain "I want an answer". What he wants an answer about is whether he's going to go to trial and whether he's going to be found guilty.

Mr Ellis: Yes.

Judge: There's already had to be one adjournment of this trial and it's simply got to be got on.

Mr Ellis: Alright, sir. The - counsel agreed before Justice Miller that we wouldn't set the trial date until we'd finished the section 14 process. And I think he's minuted that. So how it manages to get a trial date, we pencilled one in but we haven't adjourned ...

Judge: You may be right. It may not be any more than – when I first came into it, there was certainly a date pencilled in.

Mr Ellis: I understand what you're saying. You don't want to spend time and he wants to get on with it. But if he can win by other than traditional means, that is a victory too and you're denying him that opportunity. You're saying no, we'll park that and you take it to the Court of Appeal. Well, that

isn't fair sir. And it is certainly not fair not to allow me to address this Court and say this Court is no longer independent because of the way that you've appointed assessors. I could live under protest with the proposition that most of these things you want to park and I could live with that. I cannot – I cannot accept that I cannot challenge the independence of this Court. That is the pre-requisite of you sitting there sir. If you're not independent, you can't be there. And I'm saying you're not independent because you didn't select those two assessors. So with the greatest of respect sir, I insist that you hear me on that issue as well. It's only based on a few pages from [inaudible] – it's not a lengthy and sophisticated argument. It's just a well-recognised principle that judicial power can't be delegated. It doesn't rely upon any interface with the Bill of Rights, does it? It's just a proposition about the power in the Act and it's been delegated – well, it's been sub-delegated. And if that was right, we couldn't proceed with the trial.

Judge: Are you in a position to make submissions on the – what I would call the substantive arguments about presence of a mental impairment this afternoon?

Mr Ellis: Yes.

Judge: Good, I'll hear you on that.

Mr Ellis: And what about the other matters?

Judge: I will hear you on the reasons why you say Dr Barry-Walsh's report is – I'm not quite sure how you characterise it – but one that he could not make because it was out of time.

Mr Ellis: And you're not going to hear me on the question of whether this Court is independent?

Judge: I'll wait til I've heard the rest of your argument and then I will reflect on that. But at the moment, I put that in the same basket as the others.

Mr Ellis: Well, I haven't had an opportunity to index my submissions – my generic submissions – and I have agreed with my learned friend that we would treat these as drafts because in the rush to do what you ordered me, I didn't manage to get the stay submissions integrated with these and I wanted to do that and put an index in because there's probably about 10 pages that I've missed out. So I'm sorry I can't remember where everything is in there because it's ...

Judge: Well, the one that is – that I treat as fact-specific to the assessors' reports I've had is your ground D.

Mr Ellis: Yes, which is on page 30 something or round about there, I think.

End 3.17pm