Privy Council Appeal No 9 of 2006

David Cullen Bain *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 10th May 2007

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Sir Paul Kennedy

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*[Delivered by **Lord Bingham of Cornhill**]*

1. On 29 May 1995, following a trial before Williamson J and a jury, the appellant David Cullen Bain was convicted on each of five counts of murder. As more fully narrated below, his appeals against those convictions have failed. He now appeals to the Board against the convictions under section 385(1)(c) of the Crimes Act 1961. He contends, in the light of fresh evidence which was not before the trial jury, that if that jury had had the opportunity to consider the case with the benefit of that fresh evidence they might reasonably have reached different conclusions. The convictions should accordingly be quashed and a retrial ordered. The Crown strongly resists that contention.

2. On 20 June 1994, when these five killings occurred, David was a 22-year old student studying music and classics at the University of Otago. Each of the counts related to a member of David's immediate family: his father Robin; his mother Margaret; his sisters Arawa and Laniet; and his younger brother Stephen. Robin, aged 58, was the principal of Taieri Mouth Primary School, a two-teacher school about 50 kilometres down the coast from Dunedin. Margaret, 50, did not work; she had (with Robin) been a missionary in Papua New Guinea, but her beliefs appeared latterly to have inclined towards the occult. Arawa, 19, attended a teachers' training college. Laniet, 18, had lived away from home for a period but had returned to the family home for the weekend. Stephen, 14, was still at school.

3. Robin spent three nights a week at Taieri, initially sleeping in the back of his van but more recently in the schoolhouse. He and Margaret were estranged, and on returning to the family home at the weekend and on Monday nights he lived in a caravan in the garden. Laniet had lived for a time in a flat in Dunedin and then with her father in the Taieri schoolhouse.

4. The family home was at 65 Every Street, Dunedin. It was an old, semi-derelict, wooden house, which was deliberately burned down shortly after the deaths. Internally, as is clear from the evidence at the trial and contemporary photographs, most of the rooms were dirty, squalid and very disorderly. They, and the caravan, contained large quantities of the family's belongings in disordered heaps.

5. The house faced south on to Every Street. It was on two levels, and was well set back from the road. The front door was in the middle of the front of the house at ground level. On entering the house through the front door, the visitor would enter a hallway. To his immediate right was the lounge, which had some chairs and occasional tables. To one side of this room was a curtained alcove. It was in this living room that Robin was shot. Opposite this room, across the hallway, was David's room, to the visitor's left on entering the house. Immediately next to David's room, on the left of the hallway, were steps down to the lower level of the house. Continuing down the hallway past the stairs, the visitor would come, on the right, to Margaret's bedroom, from which Stephen's room led off. On the left the visitor would come to the room where Laniet was sleeping at the time of the deaths, and beyond that to a living room which plays no part in the story. If the visitor were to go down the stairs to the lower level he would find three rooms: Arawa's bedroom; a kitchen; and a bathroom/lavatory in which the washing machine and a dirty

clothes basket were kept. A door on the western side gave access to the house at this level.

The competing cases at trial

6. The Crown case against David, as developed at trial, was in very bare outline to this effect. At about 5.0 am or earlier on the morning of Monday 20 June 1994 David got up and dressed. He took from his wardrobe his .22 calibre Winchester semi-automatic rifle and unlocked the trigger lock with a spare key which he kept in a jar on his desk. He usually used a key tied on a string round his neck, but he had taken this off on Sunday 19 June when he took part in a polar plunge and had left it in the pocket of an anorak in Robin's van. He took ammunition from the wardrobe. He then shot and killed, in an unknown order, his mother, his two sisters and his brother. There was a violent struggle with Stephen, who was part strangled as well as shot, and during the struggle a lens of the glasses which David was wearing fell out in Stephen's room. These killings, particularly those of Laniet and Stephen, were very sanguinary, and as a result David's person and clothing became stained with blood. He therefore washed and changed his clothing, leaving marks in the bathroom/laundryroom, and put his blood-stained clothing in the washing-machine, which he started. Then, as was his normal practice, he set off at about 5.45 am to deliver newspapers. He did this rather more quickly than usual, returning home at about 6.42 am. He then went upstairs to the lounge and switched on the computer at 6.44 am, either then or at some later time typing in a message "SORRY, YOU ARE THE ONLY ONE WHO DESERVED TO STAY". David knew that it was his father's practice, some time before or after 7.0 am, to come in from the caravan and go to the lounge to pray. So he waited with the loaded rifle in the alcove off the lounge and, when his father entered the room and knelt to pray, shot him from very close range in the head. He then arranged the scene to make it look like suicide, and after a pause, rang the emergency services to report the killings, pretending to be in a state of great distress.

7. David's account was that he got up at the usual time, put on running shoes and shorts, took his yellow newspaper bag and set off on his newspaper round with his dog at about 5.45 am. He ran much of the route, as he usually did, and he took an interest in how long he took. He arrived home at about 6.42 — 6.43 am, entered by the front door, noticed that his mother's light was on and went to his own room. There he took off the paper bag and hung it up. He took off his shoes, took off his walkman and put it on the bed. He then went downstairs and into the bathroom. There he washed his hands to get off the black newsprint, sorted out some coloured clothes and jerseys (including a red sweatshirt

he had worn on his paper run for the past week) and started the machine. He then went upstairs to his room, put on the light and noticed bullets and the trigger lock on the floor. He went to his mother's room, and found her dead. He visited the other rooms, heard Laniet gurgling and found his father dead in the lounge. He was devastated, and rang the emergency services in a state of acute distress. His case inevitably involved the proposition that Robin, having killed the other family members, had switched on the computer, typed in the message and committed suicide.

8. It has never been suggested that anyone other than either Robin or David was responsible for these killings or that the culprit, whoever it was, was not responsible for all of them. Thus, leaving the burden of proof aside, the question has always been, as the judge put it in the opening line of his summing-up, "Who did it? David Bain? Robin Bain?".

The trial

9. The trial before Williamson J and the jury lasted from 8-29 May 1995. During the trial over 60 witnesses were called to give oral evidence, some of them the same witnesses giving evidence on different aspects of the case, and over 20 written statements were read by consent. It will be appreciated that both the Crown case and the defence case were very much more complex than the simplified summary given above might suggest.

10. During the trial the judge was called upon to give a number of rulings. Two of these are relevant for present purposes. Both relate to evidence which the defence wished to call from a witness named Dean Cottle. Laniet had a cellphone registered in the name of Mr Cottle, and this led the police to interview him on 23 June 1994, three days after the killings. He made a statement, saying he had met Laniet about ten months earlier in a Dunedin bar, and they had become friends. According to Mr Cottle, Laniet had told him that she had been a prostitute and that her father Robin had been having sex with her for about a year and was still doing so. This was one of her reasons for leaving home. Later she said she was going to make a fresh start, her parents had been questioning her and she was going to tell them everything. In an affidavit dated 26 June 1995 (after the trial), Mr Cottle stated that on Friday 17 June, just before the killings, Laniet had said to him that she was going home that weekend to tell the family about everything that had been occurring, she was going to put a stop to everything, she was sick of "everyone getting up her". The incestuous relationship with her father had, she said, begun when the family were in Papua New Guinea.

11. The judge's first ruling was given on 24 May. In the course of his reasons the judge acknowledged that Mr Cottle's evidence was hearsay, but he did not rule out admission of the evidence on that ground:

> "The present crimes were horrific and the jury, like every other person, will be considering why they occurred. Any evidence that might shed light on this must, in my view, be relevant. A motive for Robin Bain is certainly relevant to the primary issue in the case. If sufficient relevance were the only test then I would be inclined to admit the evidence despite its remoteness in time and questionable probative value."

But the judge regarded the reliability of the evidence as the real stumbling block. He was unable to conclude that it would be reasonably safe to admit the evidence or to conclude that the evidence would have sufficient reliability or probative value. He had already recorded that Mr Cottle, although subpoenaed to appear as a witness, had endeavoured to avoid service, had not appeared and could not be located.

12. The second ruling was given on 26 May, after prosecuting counsel had completed his closing address to the jury, when Mr Cottle voluntarily attended at the court office in answer to a warrant of arrest. On this occasion Mr Cottle was questioned in court about his failure to appear and his recollection of what Laniet had said to him. He was in a state of some confusion. The judge concluded that his evidence would not be reasonably safe or reliable, and said he did not believe him. He therefore again ruled against admission of this evidence, not because it was hearsay but because it was unreliable. Thus the jury never learned of this possible motive attributed to Robin.

13. In his summing-up the judge listed the points particularly relied on by the defence and then, drawing on the closing address of prosecuting counsel, the cardinal points relied on by the Crown. There were 12 such points:

(1) The rifle and ammunition were David's and the key to the trigger lock was in an unusual place where he had hidden it.

(2) David's bloodied fingerprints were found on the murder weapon.

(3) David's bloodstained gloves were found in Stephen's room.

(4) David had fresh injuries to his forehead and knee. There was no explanation for them and the nature of them indicated that it was he who had had the fight with Stephen.

(5) The glasses (with a missing lens) and fitting David's general glass prescription were found on a chair near where he was in his room when the police arrived, and, significantly, the left side of the frame was damaged and the missing lens was found in Stephen's room quite near his body.

(6) Blood-stained clothing, including a green jersey with fibres matching those found under Stephen's finger nails, was washed by David; and his Gondoliers sweatshirt with blood on the shoulder had been sponged.

(7) Blood found on the top of the washing machine powder container, porcelain basin and various light switches must have come from David's touch.

(8) Droplets of blood were found on David's socks as well as blood which had caused the luminol observed part sock prints in other parts of the house.

(9) The computer had been switched on at 6.44 am, and the jury would conclude on all the evidence that this was just after David had returned home from the paper run, if the evidence (including his own) were accepted that he was at the nearby corner at 6.40 am and that it would take 2-3 minutes to reach 65 Every Street.

(10) David's partial recovery of memory might have enabled him to suggest explanations for some of the blood on him but it did not explain other vital items such as the fingerprints, the clothes or the glasses. The Crown said that David confidently denied matters that he could not remember although they had happened.

(11) If David heard Laniet make gurgling noises, then she must then have been alive and consequently he had been by her bed when the last shot was fired. Other comments of his such as that his mother's eyes were open when he went in and his remark, to his aunt, that they were "dying, dying everywhere" tended to confirm that he remembered, in part, being there before the deaths.

(12) Not only did the expert pathologist say it was unlikely that Robin shot himself because of the angle of the gunshot wound, but Robin could not have killed the others because

(a) no one else's blood was found on him;

(b) there was no blood at all of any type on his socks or shoes;

(c) his fingerprints were not on the rifle, although if he had shot himself he would have been the last person to have gripped it firmly;

(d) no gun powder traces were found on his hands; and

(e) if he had been the wearer of blood-stained clothing and was intent on suicide, why would he have bothered to change his clothes and be in completely blood-free clothes when he shot himself?

14. Later in his summing-up the judge gave a standard direction on the proper approach to expert evidence, drawing attention to the evidence of Mr Jones (the senior police fingerprint technician) about the bloodied fingerprints on the rifle, and Dr Dempster who, the judge said, "may have impressed you as a very competent and experienced forensic pathologist". The judge reminded the jury of prosecuting counsel's suggestion that the Crown case had three angles: a mass of evidence implicating David; strong evidence excluding Robin as the killer of his wife and children; and overwhelming evidence establishing that Robin did not commit suicide. He reminded the jury that prosecuting counsel

> "went on and said to you that although the evidence about the luminol sock foot prints in the house was tested at great length, there now can be no doubt that the prints were made by the Accused and so much of the evidence that you heard does not matter any longer in the sense that you need not worry about it; that, indeed, it need not have been called, since all the Accused now says, supports the evidence that those foot prints were his and that he went into those rooms and got wet blood on his socks."

The judge reminded the jury of prosecuting counsel's description of David as "increasingly disturbed", and of David's behaviour as "unusual and almost obsessional about some strange matters". This was indeed an accurate reflection of counsel's closing address, in which he had described David as "unusual in his behaviour" and a "disturbed young man". His behaviour had been described, more than once, as "bizarre". The judge referred again to the Crown submission about the glasses and the falling out of the lens, the switching on of the computer at 6.44 am

after David's return home at 6.42—6.43, the absence of "one piece of evidence that Robin Bain had been into the rooms of the deceased on this particular morning", and the absence of any real evidence of suicide. In summarising the defence case, the judge referred to the statement of Mrs Laney, which had been read. This was evidence relevant to the time of David's return home from his newspaper round and had, the judge said, "assumed a particular significance". The judge referred to the acceptance by defence counsel that the luminol blood prints must have been David's.

15. The jury retired at 11.45 am on 29 May. At 5.23 pm they returned with four questions, which the judge duly discussed with counsel. The first question was: "The glasses found in David's/Stephen's rooms. Whose were they according to the optometrist?" The optometrist was Mr Sanderson, a witness who had given evidence. The judge reminded the jury of Mr Sanderson's evidence and also David's.

16. The second question related to a matter on which there was no evidence. The third question was a request to read Mrs Laney's evidence, bearing on the time of David's return home. The judge re-read her statement and that of another witness which the judge had not ~~re-~~read in his summing-up.

17. The fourth question was a request to re-play the tape of David's telephone call to the emergency services. The tape was re-played.

18. The jury retired again at 5.42 pm. They returned at 9.10 pm and convicted on all five counts.

The first appeal

19. The appellant appealed to the Court of Appeal (Cooke P, Gault and Thomas JJ, "the first Court of Appeal") which, in a reserved judgment delivered by Thomas J, dismissed the appeal on 19 December 1995: [1996] 1 NZLR 129.

20. The principal question on appeal was whether the trial judge had erred in refusing to admit the evidence of Mr Cottle. But before addressing that issue the court observed that the Crown case appeared very strong and the defence theory not at all plausible. The jury obviously disbelieved David, as it was entitled to do. The court was satisfied that there had been no miscarriage of justice in the jury's verdicts. On the evidential issue, the court was unclear why the judge had refused to allow Mr Cottle to be questioned as to the truth of his statement, as counsel agreed that he had. But it held that the judge had been right to exclude the evidence, which it described as "clearly

inadmissible". Certain secondary grounds of appeal were advanced, but it was accepted that none of these was sufficient in itself to justify setting the verdicts aside and the court, having considered the evidence closely, concluded that these grounds were totally lacking in merit. A petition for leave to appeal to this Board, primarily based on the evidential ground, was dismissed on 29 April 1996.

The second Court of Appeal

21. Following wide publicity, expressions of public concern and a joint review of the case by the New Zealand Police and the Police Complaints Authority, the appellant applied to the Governor-General for the exercise of the mercy of the Crown. On such an application the Governor-General in Council may, if he thinks fit, and if he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon. The Court of Appeal must then consider the point so referred and furnish the Governor-General with its opinion thereon accordingly. That is the effect of section 406(b) of the Crimes Act 1961.

22. The Governor-General exercised his power under section 406(b). By an Order in Council made on 18 December 2000 he referred six questions to the Court of Appeal, specifying in relation to the first four questions a number of documents which the Court of Appeal was asked to consider. In the event the Court of Appeal (Keith, Tipping and Anderson JJ, "the second Court of Appeal") received over 50 affidavits from 42 deponents, 13 of those deponents being orally questioned before the court at a hearing which lasted from 14 to 18 October 2002.

23. The first of the six questions referred was:

> "Was the computer turned on at a time earlier than 6.44 am on 20 June 1994 or, at the very least, is there a reasonable possibility that the computer could have been turned on at a time earlier than 6.44 am on that date?"

Reference was made to a number of sources of evidence, including one witness examined orally before the court. The Crown accepted (paragraph 14 of the judgment) that, if this question were answered literally, the evidence demonstrated at least the reasonable possibility that the computer had been turned on earlier than 6.44 am. Had the full evidence been before the jury at the trial (paragraph 15) they would have had to contemplate a switch-on time of 6.42 am, but the court could not say that was the correct time and it was not possible to say whether the

actual switch-on time was earlier than 6.44 am. The court's answer to the first question (paragraph 16) was that

> "there is definitely a reasonable possibility that the turn on time could have been earlier than 6.44 am on 20 June 1994."

24. The second of the questions referred was:

> "Did the lens that was found in Stephen Bain's bedroom get there at a time or in a way that was unrelated to the murders or, at the very least, is there a reasonable possibility that this could have been so?"

Reference was made to four written documentary sources, the authors of three being examined before the court. Having considered all the manifold matters debated in relation to this matter, the court found it impossible to reach a firm conclusion. It considered that the possibility of the lens having got to where it was found, by a method other than planting, but still unrelated to the murders, was remote but could not be dismissed as fanciful. Its answer (paragraph 20) was:

> "We consider the possibility of the presence of the lens being unrelated to the murders cannot be excluded or confirmed as a reasonable possibility without an examination of the whole case in the depth that a full appeal would involve."

25. The third question referred was:

> "Were the applicant's positive fingerprint marks, made in blood, that were found on the rifle used to commit the murders, put there at some time before the murders or, at the very least, is there a reasonable possibility this could have been so?"

Reference was made to six documentary sources, three of the authors being examined before the court. The court said, in paragraph 22 of the judgment:

> "The key question is whether the blood in which David Bain's fingerprint marks were found on the rifle was human blood. There was no suggestion at the trial that the blood was not human. Hence the jury will undoubtedly have proceeded on the basis that it was."

As a result of subsequent inquiries, tests and analyses there was now a suggestion that it was not human but animal blood. David was known to have used the gun some months earlier for shooting rabbits and possums. The court's answer (paragraph 22) was:

> "From the scientific point of view, we consider it has been shown to be a reasonable possibility that the blood which bore David Bain's fingerprint marks could have been other than human blood. That being so, we consider it follows that there is a reasonable possibility that the marks could have been put on the rifle sometime before the murders."

26. The fourth question referred was:

> "Was the submission made by the Crown Solicitor in the Crown's closing address to the jury at the applicant's trial that 'Only one person could have heard Laniet gurgling. That person is the murderer' wrong or misleading?"

Reference was made to five documentary sources. None of those witnesses was examined orally, although the court heard the oral evidence of Professor Ferris, a pathologist called by the Crown. Its conclusion (paragraph 25) was:

> "The Crown Solicitor was in effect telling the jury, understandably as the evidence then stood (albeit the precise point was not addressed in evidence) that dead bodies cannot make gurgling noises. In the light of the evidence before us, we consider there is a reasonable possibility that this submission was wrong or misleading. Our opinion is therefore that the absoluteness of the Crown Solicitor's submission was wrong or misleading."

27. The fifth of the referred questions was:

> "Does the Court of Appeal's opinion on questions 1, 2, 3 and 4 (whether taken individually or collectively) indicate that there is credible and cogent evidence available that might, if it had been placed before the jury, along with the other evidence given at the applicant's trial, have reasonably led the jury to return a different verdict?"

The court gave its answer in paragraph 26:

> "[26] There is credible and cogent evidence which suggests at least the reasonable possibility that the computer could have been switched on earlier than 6.44 am. There is credible and cogent evidence which suggests at least as a reasonable possibility that David Bain's fingerprints on the rifle could have been put there before the murders. There is credible and cogent evidence which suggests, as a reasonable possibility, that gurgling sounds can be emitted spontaneously from dead bodies. The absoluteness of the Crown's closing submission was, in this respect, wrong or misleading. When all this evidence is viewed collectively, we are of the opinion that it might, along with the other evidence given at David Bain's trial, have reasonably led the jury to return a different verdict. While the other evidence called by the Crown at the trial itself constituted credible and cogent evidence from which David Bain's guilt could be inferred, we consider that if the fresh evidence relevant to questions 1, 3 and 4 had been before the jury, it could reasonably have resulted in a different verdict. For these reasons we answer question 5 yes. Our answer does not imply that had the jury been presented with the further evidence it would necessarily, or even probably, have reached different verdicts. What we are saying is that in our opinion on the material before us, necessarily limited as it was, there is a reasonable possibility the jury may have done so."

28. The last referred question was:

> "Having regard to the Court of Appeal's opinion on question 5, is there a possibility that there has been a miscarriage of justice that would warrant the question of the applicant's convictions being referred to the Court of Appeal under section 406(a) of the Crimes Act 1961?"

The court gave its answer in paragraph 27:

> "[27] Having regard to our opinion on question 5, the wording of which constitutes a relatively low threshold, and in the light of our conclusion on question 2 and what we have learned of the case generally in the course of considering the materials and evidence produced to us and counsel's submissions, we are of the opinion that there is a possibility that there has been a miscarriage of justice that

would warrant the question of David Bain's convictions being referred to this Court under s406(a) of the Crimes Act 1961. Our answer to question 6 is therefore yes."

The third Court of Appeal

29. On receiving these answers the Governor-General, by an Order in Council made on 24 February 2003, referred to the Court of Appeal the question of the 5 convictions of murder entered against David Bain. She exercised this power under section 406(a) of the 1961 Act, which empowers the Governor-General, if she thinks fit, to refer the question of a conviction to the Court of Appeal. The question so referred must then be heard and determined by the court as in the case of an appeal by that person against conviction. The applicable procedure was that provided by section 385(1) of the 1961 Act which at the relevant time read:

> "(1) On any appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

30. Thus David's appeal against conviction returned to the Court of Appeal (Tipping, Anderson and Glazebrook JJ, "the third Court of Appeal"). This court had before it all the material before the second Court of Appeal, with some additional affidavits, all of which it admitted, and it of course had the benefit of that court's answers to the Governor-General's questions under section 406(b), which two members of the third Court of Appeal had been party to giving. The third Court of Appeal heard submissions over five days between 1 and 9 September, but it heard no oral evidence and no cross-examination. On 15 December 2003 Tipping J delivered the judgment of the court, dismissing the appeal: [2004] 1 NZLR 638.

31. Early in its judgment the third Court of Appeal addressed the appropriate legal approach in a case where fresh evidence not considered by the jury is said to undermine the safety of the jury's verdict. The correct approach in principle is not seriously in issue between the parties and is considered below.

32. In its judgment, beginning at paragraph 31, the court summarised the key points in the Crown case. These included the unlocking of the trigger lock (paragraphs 32-34), the bloodied opera gloves (paragraphs 35-36), bloodstained clothing worn by David (paragraphs 37-40), bloodstained clothing associated with David (paragraphs 41-44), the palm print on the washing machine (paragraph 45), the bathroom/laundry area (paragraphs 46-49), injuries to David (paragraphs 50-52), the glasses and lenses (paragraphs 53-56), the fingerprints on the rifle (paragraphs 57-68), the washing machine cycle (paragraphs 69-77), the scene in the lounge (paragraphs 78-87), Robin's full bladder (paragraphs 88-90) and Laniet's gurgling (paragraphs 91-93). The court also summarised (between paragraphs 94 and 162) the key points relied on by David, to several of which it will be necessary to return.

33. At paragraph 163 of its judgment the court gave its overall assessment of the case. It found (paragraph 164) "three points in the evidence of such cogency that taken together, in the context of all the evidence, any reasonable jury must in our view have seen the case against David as proved beyond reasonable doubt." Those three points concerned the trigger lock, the fingerprints on the rifle and the scene in the lounge. The court succinctly summarised the points. Only David knew of the existence and whereabouts of the key used to unlock the trigger lock. The bloodstained condition of the rifle was such that the uncontaminated area associated with the fingerprints on the forearm led to the "almost inescapable" conclusion that the hand which made the fingerprints was in position contemporaneously with the murders, and that hand was David's. The spare magazine found beside Robin's dead

body was found standing upright on its narrow edge. The magazine must have been deliberately placed there by David. To those three points, "individually powerful and cumulatively overwhelming", must be added a number of supporting points in particular. These were (paragraph 166): the use of David's gloves; the presence of Stephen's blood on David's black shorts; the "unconvincingly explained" injuries to David's head; his having heard Laniet gurgling; Robin's full bladder; and the timing of the washing machine cycle. Cumulatively the case could only be seen by a reasonable jury as cogently establishing David's guilt beyond reasonable doubt. The court had no doubt (paragraph 172) that any reasonable jury considering the new evidence along with the old would find David guilty. The court was not persuaded (paragraph 174) that there had been a miscarriage of justice on the ground of further evidence or any other ground.

The law

34. The third Court of Appeal applied well-settled principles in its approach to fresh evidence. Thus it referred to the threshold conditions of sufficient freshness and sufficient credibility, while acknowledging that the overriding requirement is to promote the interests of justice. The court admitted all the fresh evidence submitted, and no complaint is made of its ruling on this point.

35. The court went on, in paragraph 24 of its judgment, to observe that when fresh evidence is admitted, it must move on to the next stage of the enquiry

> "which is whether its existence demonstrates there has been a miscarriage of justice in the sense of there being a real risk that a miscarriage of justice has occurred on account of the new evidence not being before the jury which convicted the appellant. Such a real risk will exist if, as it is put in the cases, the new evidence, when considered alongside the evidence given at the trial, might reasonably have led the jury to return a verdict of not guilty."

The court pointed out (paragraph 25) that its concern is whether the jury, not the court, would nevertheless have convicted had the posited miscarriage of justice not occurred. This was consistent with

> "the fundamental point that the ultimate issue whether an accused person is guilty or not guilty is for a jury, not for Judges. The appellate court acts as a screen through which

> the further evidence must pass. It is not the ultimate arbiter of guilt, save in the practical sense that this is the effect of applying the proviso, or ruling that the new evidence could not reasonably have affected the result."

36. This approach followed the earlier ruling of Keith and Tipping JJ in *R v McI* [1998] 1 NZLR 696, 711, where they said:

> "But it is important to recognise that the Court is not thereby invited to come to its own view about whether the appellant was in fact guilty of the crime or crimes alleged. Rather, the Court is required to assess whether, without the error or deficiencies of process, the jury would still have convicted. It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction. If, in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies."

37. The third Court of Appeal's ruling in the present case has recently been endorsed and followed by the Court of Appeal in *R v Haig* [2006] NZCA 226. The court there pointed out (paragraphs 58-60) that New Zealand authority differs somewhat from English authorities such as *Stafford v Director of Public Prosecutions* [1974] AC 878 and *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 and Australian authority such as *Weiss v The Queen* (2005) 4 CLR 300 in its emphasis on what the actual trial jury might have decided had it had the opportunity to consider the fresh evidence. Attention was also drawn to that court's approach to the fresh evidence it had received. In paragraph 82 it said:

> "While we accept that there are credibility issues associated with some of the deponents that are apparent on the material we have, it is significant that none of the witnesses were called for cross-examination. In that context, we do not see how we could fairly conclude that the new evidence in question is insufficiently credible to be material to the miscarriage of justice issue".

In paragraph 87 it added:

> "Hogan has sworn an affidavit in which he has explained the admissions attributed to him. It may be that a jury would

> accept Hogan's explanations of the alleged admissions attributed to him, or alternatively might conclude that if Hogan had made the admissions alleged, they were simply in the nature of boasts and did not detract from the truthfulness of his evidence. But, on the state of the evidence before us – which has not been the subject of cross examination – it would not be appropriate for us to reach a conclusion to this effect."

38. Counsel representing David made no significant criticism of the third Court of Appeal's formulation of the relevant principles. Their complaint was directed to the court's application of those principles. Thus, they submitted, the court had not given practical recognition to the primacy of the jury as the arbiter of guilt but had taken upon itself the task of deciding where the truth lay; had done so with inadequate regard to what was known of the jury's thinking; had done so in relation to matters which the jury had had no opportunity to consider; had done so despite the admission of contradictory affidavits by witnesses, many of whom had not been cross-examined; and had failed to appreciate the extent to which the case had changed from that on which the jury had based their verdict. All these criticisms the Crown roundly rejected.

The issues raised by the fresh evidence

39. In seeking to establish their case that the appeal should be allowed, the convictions quashed and a retrial ordered, David's counsel relied in argument before the Board on a large number of issues and on a considerable volume of very detailed evidence. It is not, in the Board's opinion, necessary or even desirable to attempt to consider all these issues or to rehearse all this evidence. Instead, the Board will review nine of what appear to be the most salient issues, referring only to such evidence as is necessary to appreciate the significance of each.

(1) Robin's mental state

40. As noted above in paragraph 14, the jury were invited to view David as "disturbed", "obsessional" and "bizarre" in his behaviour. There was an evidential basis for this submission since it appeared that in the days before the killings he had had premonitions of impending calamity, had described déjà vu experiences and had made curious references to "black hands". Defence counsel submitted at the trial that Robin was a proud school teacher who had been rejected by his family and had snapped after months of pressure. But there was no evidence to support this suggestion. Faced with the judge's blunt question – "Who did it? David Bain? Robin Bain?" – the jury might well have inclined to think it

was the disturbed young man (if such indeed he was, and there was evidence suggesting the contrary).

41. Before the third Court of Appeal were three affidavits from deponents well-disposed towards Robin. The first of these is Mr Kevin Mackenzie, at the time principal of a primary school near Taieri and President of the Taieri Principals' Association. He and his colleagues judged in early 1994 that Robin was deeply depressed, to the point of impairing his ability to do his job of teaching children, and to help him Mr Mackenzie organised a seminar directed to work-related stress but chiefly targeted at Robin's depression. On 23 June 1994, after the killings, Mr Mackenzie visited Robin's school: he found the classroom and office dishevelled, disorganised and untidy; piles of unopened mail were on Robin's desk. Mr Mackenzie was particularly disturbed by the writing and publication in the school newsletter of certain brutal and sadistic stories written by pupils at the Taieri School, one of them involving the serial murder of members of a family. He does not regard these as stories normal children would write unless motivated to do so. He regards Robin's decision as principal to publish them as "unbelievable" and sees them as "the clearest possible evidence that Robin Bain had lost touch with reality due to his mental state".

42. A second witness, Mr Cyril Wilden, is a former teacher and a registered psychologist. In the latter capacity he from time to time visited the Taieri School, where he noted Robin's depressed state of mind. Robin appeared to be increasingly disorganised and struggling to cope. Mr Wilden asked Robin whether he was receiving regular medical attention. Robin said that he was. Mr Wilden formed the view that Robin was clinically depressed with a form of reactive depression. When he learned of the killings he immediately assumed that Robin's mental state had deteriorated to the point where he was no longer able to cope and that he had taken the lives of his family and then his own life. Mr Wilden shares Mr Mackenzie's view of the children's stories, observing that "Children write stories in response to stimuli", and Mr Wilden thinks it likely that the stimuli came from Robin's teaching at the school.

43. The third witness, Ms Maryanne Pease, is also a former teacher and a registered psychologist. She never met Robin, but visited his school after the killings. She had never during her short career encountered comparable disorganisation. A pupil reported that Robin had hit him. She regards the publication of the children's stories, selected by the principal, as a matter of grave concern, causing her to believe that he was "quite seriously disturbed".

44. The third Court of Appeal reviewed this new evidence in paragraphs 141-146 of its judgment. It observed of the children's stories (paragraph 142) that

> "There is, however, no evidence that Robin encouraged or otherwise induced the children to write these stories which could well have been prompted by movie watching".

In paragraph 143 the court held:

> "This evidence of Robin's mental state gives some balance against the evidence led at trial which tended to suggest that David himself was not coping well with the family situation. That is an evidentiary advance from David's point of view. But it is important to recognise that this further evidence neither diminishes the force of the individual strands in the Crown's case against David already identified, nor does it of itself provide any evidence that Robin actually did kill the others and then himself…"

The court's conclusion (paragraph 145) was:

> "Although David's new evidence about Robin's mental state represents an advance in that respect from the evidence at trial, a reasonable jury could well still consider that David's own mental state was at least as relevant as that of Robin."

45. In the Crown's written case to the Board it is submitted that the fresh evidence of Robin's mental state adds little or nothing to what was before the jury at trial. The point is made that there is no evidence that Robin selected the children's stories for publication, or that he even taught the children who wrote them. The Solicitor General and Mr Pike did not address this subject in oral argument.

(2) Motive

46. As noted above (paragraphs 11-12), the trial judge ruled against admission of Mr Cottle's evidence not because it was hearsay but because it was judged to be unreliable, a decision upheld by the first Court of Appeal against whose decision the Board refused leave to appeal. The question whether Laniet intended to make or had made sexual allegations against her father at around the time of the killings was accordingly not

canvassed before the trial jury. Nor was it raised in the questions referred to the second Court of Appeal.

47. Before the third Court of Appeal were four affidavits. The first deponent, Mr Kedzlie, kept a shop in Dunedin. He says that Laniet lived opposite and was a regular customer. He describes an occasion when Laniet visited his shop distressed and crying. He asked what was the matter. She replied that there had been troubles at home, she was on drugs and she was having an affair with her father. On this occasion, according to him, she "burbled on" in an unspecified way about pregnancy and an abortion. Mr Kedzlie placed this occasion in March or April of 1994.

48. A second affidavit is sworn by a deponent who asks that her identity be treated as confidential. She deposes that in 1993 she ran an escort agency and engaged Laniet as a prostitute. She had many conversations with Laniet, who on one occasion asked how the deponent had become involved in prostitution, to which the deponent replied that she had been raped at the age of 15. This seemed to upset Laniet, who said that the same thing had happened to her and, on further questioning, identified her father as the culprit. It had started, she said, when the family were still in Papua New Guinea.

49. The third affidavit is sworn by Mr Sean Clarke who in early 1994 was a student at Otago University and was a friend of both David and Laniet. He describes an occasion on 27 May 1994 when he was waiting to meet David and Laniet came up to him. She also wanted to meet David and chatted to Mr Clarke while waiting. She said she was living at Taieri Mouth with her father. She was upset because David didn't arrive and, when asked what the problem was, said she wanted to move back to the family house but had had an argument with her mother and did not know whether she would be welcome. She wanted David to intercede. She was agitated and in tears and said: "I want to move back because I can't live with him anymore. I can't stand what he's doing to me any longer." Both she and Mr Clarke left before David arrived. Mr Clarke made a note for himself: "Must talk to [David]. What is going on between Laniet and her dad?"

50. The fourth affidavit is sworn by Mr Brian Murphy, a director of Murphy Corporation in Dunedin. On Friday 17 June 1994 he interviewed Laniet for a job as a tele-marketer. He decided to employ her. She was due to start on Monday 20 June and seemed very happy and excited about getting the job.

51. The third Court of Appeal (paragraph 149) considered this evidence to be clearly of sufficient reliability to be admitted before a jury:

> "It demonstrates at least the reasonable possibility that Laniet did have an incestuous relationship with her father, was proposing to break it off and was going to make disclosure. It thereby arguably provides some evidence that Robin may have been in a state of mind consistent with doing what David contends he did. This too represents some advance for David on this point from his position at trial, albeit it could perhaps be seen as giving David a motive or reason as well, in wishing to destroy those in his family he considered should not survive. But, as with the evidence of Robin's mental state, this new evidence does not provide any basis for concluding that Robin did actually commit the murders. David has now produced evidence as to why Robin might have had reason to do so, but the evidence does not of itself establish that he might actually have done so. While we must and do certainly bear the new evidence on this and the previous head firmly in mind, its proper compass must be appreciated".

In paragraph 168 the court repeated:

> "There is no evidence positively implicating Robin Bain on any tenable basis. Motive and the state of his mind must be seen in that light. Those matters could not possibly be seen by a reasonable jury as producing a reasonable doubt about David's guilt which is so clearly proved by the combination of affirmative points to which we have drawn attention".

52. The Crown, in its written case to the Board, submit that this fresh evidence does not diminish its case against David or provide a direct motive for Robin to kill members of his family while sparing David. Attention is drawn to the absence of evidence of any disclosure by Laniet over the weekend, and to a statement by the appellant to a relative that the weekend "was a little bit tense but it wasn't anything more than it usually was when Dad was home". The Crown did not elaborate this submission in oral argument.

(3) Luminol sock prints

53. Luminol is a chemical which under certain conditions reacts with blood to produce blue luminescence. It may be used, and is most valuably used, where the blood is not visible to the naked eye. The outline of a print made by a bare foot, or a foot wearing socks or shoes, may be

briefly illuminated and measured. Between 20 and 24 June 1994 Mr Hentschel, a forensic chemist employed by the Institute of Environmental Science and Research Limited ("ESR"), a Crown Research Institute, in Christchurch took part in the examination of the Bain house at 65 Every Street. During that examination he treated the carpet with luminol. A number of sock prints were identified, made by a right foot wearing socks which had become stained with blood. These prints, some of them incomplete, were found in Margaret's room, going into and out of Laniet's room and in the hallway outside Margaret's room, pointing towards the front door. It appeared that all the prints had been made by the same foot. In his evidence given at trial, Mr Hentschel said of that print

> "I said I measured it at 280 mm. That print encompassed both the heel and the toes, that was a complete print from heel to toe."

This evidence he repeated:

> "The other prints that I detected with luminol showed the toes as well, taken from the top of the toes to the heel."

Giving oral evidence to the second Court of Appeal, Mr Hentschel testified to the same effect.

54. The situation of this complete print was a matter of some potential significance, since while David testified in evidence that he had gone from room to room, and there was enough blood in the house for a sock to become impregnated, the print was found in a place where, on the Crown case, Robin would never have been. If, on leaving his caravan in the garden on the morning of 20 June, Robin had entered the house by the front door, he would have turned right into the lounge, the first room on his right. If he had entered by the lower door and gone up the stairs, he would have turned right and then left into the lounge. He would have had no occasion to enter Margaret's or Laniet's rooms, and no occasion to go down the hallway where the complete print was found. In the course of his summing-up to the jury the judge reminded them of the Crown submission that "there was not one piece of evidence that Robin Bain had been into the rooms of the deceased on this particular morning".

55. At trial it was accepted that the prints had been made by David. It is not clear why this should have been accepted, save that evidence was given by Mr Hentschel that socks taken to be Robin's were measured at 240 mm, and socks taken to be David's were measured at 270 mm. Evidence was given of the inside measurements of their respective shoes,

showing Robin's at 275 mm and David's at 304 mm, but this did not displace the assumption and the jury were not told, by the Crown or the defence, that Robin's feet had been measured in the mortuary and found to be 270 mm. Thus in his closing address to the jury the prosecutor submitted (according to his very full note): "There are the [Luminol] footprints – stocking feet – [too] big to be father's". The judge echoed this submission in the passage quoted above in paragraph 14 and reminded the jury that defence counsel accepted the prints were David's while resisting the inference that this identified him as the killer.

56. On a date after the trial Mr Joseph Karam measured David's feet. He found them to be 300mm. This measurement has not been verified. But it is consistent with David's inside shoe size, it is consistent with his height (6' 4"), it is consistent with independent evidence that David has large hands, and it is consistent with the shoe size and foot measurement of Mr Walsh, mentioned below. The measurement is not understood to be challenged.

57. On 29 October 1997 Mr Kevan Walsh, a forensic scientist also employed by ESR, made a report for the Police and Police Complaints Authority inquiry already mentioned. He was asked to determine whether or not David could make bloodied sock prints which were 280mm in length. He noted certain difficulties in the task, including a possible measurement error of +/- 5mm. He described tests he had done on himself, his left foot measurement being 298mm when standing, his height being 6' 3" and his shoe size being 12, the same as David's. From his experiments he concluded

> "that a walking person with a 300mm foot, making sock prints with the sock completely bloodied, would be expected to make a print greater than 280mm. However, it is my opinion that a print of about 280mm could be made."

58. None of the questions referred to the second Court of Appeal referred to the luminol sock prints, and it expressed no opinion on the matter.

59. Before the third Court of Appeal it was argued on David's behalf that given the size of his feet he could not have made a complete footprint measuring 280mm. Robin, it was argued, could, when allowance is made for some extension of the foot when weight is put on it, and for the inherent error in measurement, make a print of almost exactly this length. The court did not accept this. It said (in paragraph 156 of its judgment):

> "In post trial evidence the forensic scientist, Mr Walsh, has said that a 300mm stockinged foot could make a print of about 280mm. He has given quite detailed reasons for that conclusion which we do not need to traverse as Mr Walsh was not called for cross-examination, either on his reasons or on his conclusion. The end result is that on the evidence David could well have made the footprints in question. The matters now raised by him come nowhere near excluding him from responsibility for the footprints. Nor do they establish that the prints must have been made by Robin."

60. This ruling prompted further recourse to Mr Walsh, which in turn resulted in a memorandum presented to the Board jointly by counsel for David and the Crown. To this were annexed a supplementary statement by Mr Walsh dated 1 February 2007 and copies of his working notes made in October 1997. The statement reads :

> "I have been asked to clarify a comment I made in my 'Supplementary report to the review by Kevan Walsh of some aspects of the forensic evidence relating to Operation Bain', dated 29 October 1997.
>
> In particular, on page 3 and in relation to a person with a 300mm foot, I stated 'it is my opinion that a print of about 280mm could be made'. That means if a 280mm print were made by a completely bloodied sole of a 300mm foot, then the print must be incomplete to the extent of 20mm. Therefore a portion from the tip of the toes, or the end of the heel, or both, must be missing from the print."

The working notes showed the results of tests done by Mr Walsh on his own feet.

61. In response to this fresh evidence of Mr Walsh the Crown applied for leave to submit a further affidavit and statement by Mr Hentschel. David's counsel resisted the application, largely because of the manner in which the statement had been obtained. The Board decided to read the statement *de bene esse*. It now formally admits it. In the statement Mr Hentschel explains that by "a complete print from heel to toe at 280 mm" he means that in the print he can see the toe area as well as the heel area, to differentiate it from other partial prints. He also makes observations on the difficulty of measuring luminol prints.

62. In its written case to the Board, perhaps settled before the date of the draft memorandum, the Crown relied on Mr Walsh's opinion that a 300mm foot could make a 280mm print. It was pointed out in oral argument, quite correctly, that at trial the sock prints had been accepted as David's.

(4) The computer switch-on time

63. The time at which the computer was switched on and the time of David's return home from his newspaper round are not facts of significance in themselves, and fine questions of timing are rarely significant in cases such as this. But in the present case these facts were relied on by David as significant in relation to each other. It was common ground at trial that whoever switched the computer on was the killer of Robin, and these timing points were important pegs of David's defence that he could not have switched the computer on since he did not return home until later and had not on any showing gone straight to the lounge on returning home. Although related, these points must be considered separately, since the facts relating to each are quite different.

64. On the afternoon of 21 June 1994, the day after the killings, the computer at 65 Every Street was inspected by Mr Martin Cox, a computer adviser employed by the University of Otago. The computer was still on, and still showing the message typed in the day before. Mr Cox was accompanied by Detective Constable Anderson, who recorded what he did. The evidence given by Mr Cox at trial was :

> "I ascertained that 31 hours and 32 minutes had passed since the computer had been turned on. We saved the file 31 hours and 32 minutes after the computer had been switched on. I had saved the message at 16 minutes past 2 on the afternoon of 21 June. This was noted and taking 31 hours and 32 minutes back from that I ascertained the computer and the word processor had been turned on at 6.44 am, that is on the morning of 20 June 1994."

The message, he said, could have been typed in at any later stage. At trial both sides conducted their cases and the judge directed the jury on the basis that the computer had been switched on at 6.44 am, not earlier or later. The judge reminded the jury that it was one of the Crown's key points that the computer had been switched on at 6.44, just after David had returned home.

65. When the examination was made, Mr Cox was not wearing a watch. He therefore relied on the timings provided by DC Anderson's watch. The constable's watch, having no second hand and no divisions marked between the five minute intervals, was not a very suitable one for making exact measurements. It moreover appeared that it had at the relevant time been 2 minutes fast. Thus it would appear, making the retrospective calculation, that the switch-on time was 6.42 am. But it was suggested that the message had not been saved at 2.16 but at some time, perhaps 2 minutes or more later. This was not accepted by the defence. Hence, as recorded in paragraph 23 above, one of the Governor-General's questions referred to the second Court of Appeal related to the switch-on time. That court heard oral evidence from two witnesses, and received additional affidavit evidence not the subject of cross-examination. The court's conclusion has been quoted above. It held (paragraph 15 of the judgment) that had the inaccuracy of the constable's watch been brought out at trial the jury would have been bound to contemplate a switch-on time of 6.42 am, but (paragraph 16) whether 6.42 am was the correct time it was not possible to say.

66. Further evidence of a detailed and technical nature has been filed by both sides since the ruling of the second Court of Appeal. The issue remains highly contentious. The parties are agreed that the computer could have been switched on as early as 6.39.49 am, but there is no agreement on the most likely switch-on time.

67. Before the third Court of Appeal the Crown pointed out that the inaccuracy in the constable's watch had been recorded in a jobsheet disclosed to the defence before trial, and admission of the evidence was resisted on that ground. But the court considered (paragraph 106) that "it can be said that the Crown should have ensured the correct position was brought to the jury's attention". The court went on, however, to rule (paragraph 111) that "we find ourselves unable to conclude, with any confidence or precision, exactly when the computer was switched on" and (paragraph 112) :

> "The most that can be said about the new evidence relating to the computer switch-on time, when viewed in isolation, is that it cannot be regarded as excluding David in the sense of showing that it was physically impossible for him to have committed the murders."

68. In its written case to the Board the Crown rehearses the parties' competing contentions on timing and complains that the stance of David's counsel today differs from that adopted by his counsel at trial. In

oral argument the Crown supported the approach of the third Court of Appeal.

(5) The time of David's return home

69. On the morning of 20 June 1994, within hours of the killings, Detective Sergeant Dunne questioned David about the timing of his newspaper round. David said that he left home at about 5.45 and arrived back at about 6.40. He made a written statement in which he said that at 6.40 exactly he was just past Heath Street on the way up to his house. He said it took 2 or 3 minutes to walk up to the house. In evidence at trial he confirmed that account, but added that the 2 or 3 minutes was an approximation, "I can't tell you how long it takes exactly".

70. The Crown case at trial was that on this morning David had begun earlier or covered the route more quickly than usual, in order to make sure that he could secrete himself in the alcove off the lounge before his father reached the room. To this end the Crown read (by consent) the statements of several witnesses the purport of whose evidence was that on that morning their newspapers had been delivered earlier than usual. The Crown adduced evidence of the time it had taken police officers to walk and run David's route. The Crown also read (by consent) the statement of Mrs Laney who worked at a rest home in Every Street up the hill beyond No 65. In her statement (made on 27 June 1994) she said that she was supposed to start work at the home at 6.45 am but on the morning of 20 June she was a bit late. She drove up Every Street past No 65, and as she did so noticed a person going past the partially opened gate of that house. She thought she must be running late as she normally saw that person down by Heath Street. She looked at the clock in her car and it read 6.50 am. She knew the clock was 4-5 minutes fast as it was about 6.45 am as she drove past him. She described what she thought he was wearing, but saw no dog, which she had seen with him before.

71. In his closing address to the jury, prosecuting counsel submitted, referring to Mrs Laney: "She passed at speed. Did not identify the [accused]. Saw someone at the gate. She thought at [6.45] am". In a summary of the Crown case prepared for the first Court of Appeal this remained the Crown's contention: "Laney observed some person at the gate of the house (whom she was unable to identify) at around 6.45 am".

72. In his summing-up to the jury, the judge re-read most of Mrs Laney's statement, and reminded the jury of the other evidence. When the jury asked him to re-read Mrs Laney's statement, he did so. No question relating to this point was referred to the second Court of Appeal, which accordingly did not address it.

73. After the trial it became evident that the Police Constable who took Mrs Laney's statement on 27 June 1994 checked the clock in Mrs Laney's car and found it to be 5 minutes fast. This was endorsed by the constable on a copy of Mrs Laney's statement, but was not brought to the attention of the defence, the judge or the jury.

74. It also became evident that Mrs Laney was re-interviewed by the police on 28 March 1995, just before the trial. This was to "firm up on the timings of the paper round" and "clarify any ambiguities" in her statement. She explained that the digital clock in the dash of her car was at least 5 minutes fast. When it was 7.0 o'clock her car clock would show 7.05. She made and signed a second statement. In this she said that she saw the paper boy standing in the gateway to No 65. He was a tall person, but she could only see the outline of his body, not his face or head because of the darkness. What she did see was the yellow paper bag over his left shoulder. Because she saw him she thought she was running late. She looked at her digital car clock. It read 6.50. Whenever she had seen the paper boy he was carrying the yellow bag. She usually saw him further away, before Heath Street. She identified him as "a tall thin guy, late teens, early 20s". When she looked at her clock and it read 6.50 she knew it was 5 minutes fast, so she believed the real time was 6.45. When the news came on, the clock was usually 5 past the hour.

75. In paragraph 109 of its judgment the third Court of Appeal said:

> "We mention again here the fact that Ms Denise Laney claimed to have seen David outside the gate to 65 Every Street at 6.45 am. The circumstances in which she came to that view are such that her suggested time cannot be regarded as anywhere near precise. The greater detail in her second statement which was not disclosed to the defence does not, in our view, lead to any materially greater precision".

The court referred to the 59 second imprecision in a digital car clock and Mrs Laney's failure to correlate her calculation with any verifiable time signal but only with the commencement of the news on a station or stations which she did not identify. It noted (paragraph 110) that Mrs Laney thought she was running late, but an alternative explanation was that David was running early. When (paragraph 111) all the relevant evidence was assessed, including the evidence about the various sightings on the paper run, and times and distances from those sightings to 65 Every Street, the court found itself unable to conclude with confidence

and precision when David returned home. Relating the computer switch-on time and the return home time, the court concluded (paragraph 113):

> "The new evidence widens the potential time gap but it cannot be regarded as clinching the matter in David's favour by reason of physical impossibility. The times involved do not have nearly enough precision or reliability to produce that consequence. The timing evidence is such that a reasonable jury could conclude that it was physically possible for David to have committed the murders; whether the Crown had proved he had done so would then be a matter for assessment on all the other evidence".

The court made no reference to the jury's request to hear Mrs Laney's evidence re-read, and did not consider the possible significance of that request.

76. In its written case to the Board, the Crown admits that the non-disclosure of Mrs Laney's second statement to the defence was "an unfortunate error" and the prosecutor's comment that Mrs Laney did not identify David, although strictly accurate, would have been better omitted. But it is submitted that the second statement does not materially assist David's argument that he could not have switched on the computer because he had not returned home in time. The Crown criticises the detail of Mrs Laney's statements, suggesting inconsistencies between the two. In oral argument, the Crown supported the approach of the third Court of Appeal.

(6) The glasses

77. It is common ground that David was short-sighted with a degree of astigmatism in one eye. He ordinarily wore glasses for some activities. A few days before the killings his glasses were damaged and he took them to be repaired. The Crown case was that during part or all of the time that he was killing the members of his family David wore another pair of glasses, the distorted frame and detached right-hand lens of which were found in his room after the killings. The detached left-hand lens of those glasses was found after the killings in Stephen's room. The Crown contended that this lens was dislodged when David was struggling with Stephen. Issues have arisen concerning the glasses and the lens found in Stephen's room ("the left-hand lens"). It is convenient to review these issues separately.

78. At the trial the Crown called Mr Sanderson, a highly qualified optometrist on the staff of Otago University. He examined the glasses and the left-hand lens. He testified that the two lenses were similar, but not identical, to glasses prescribed for David two years earlier.

79. When David gave evidence at trial he said that these were not his glasses. They were an older pair of his mother's which he wore on occasion. He added:

> "I know of the evidence of the optometrist, there is a dispute with my evidence as to whether those glasses were mine or someone else's. I have no doubt they were my mother's glasses, yes. On occasions in the past I have worn my mother's glasses if my ~~own~~ glasses were not available, but only for watching TV programmes, basically that is it, or going to lectures".

He could not say how they came to be in his room. David was cross-examined:

> "Q The pair of glasses which have been produced to the court, a saxon frame?
>
> A Yes.
>
> Q You say they are not yours but they are an older pair of your mother's?
>
> A That's right.
>
> Q The ophthalmologist, Mr Sanderson, from the hospital was of the opinion that they were an earlier prescription of your existing optometry prescription?
>
> A That is incorrect …
>
> Q The ophthalmologist was of the opinion that the prescription of the two lenses that fitted the frame are similar to the prescription prescribed for you in October 1992. Do you recollect him giving that evidence?
>
> A I do, that is only in one lens though, not the other.
>
> Q You say he is wrong?
>
> A Yes".

80. The judge in his summing-up gave no direction to the jury on the ownership of the glasses but, as recorded above (paragraph 15), the jury asked a question about it. The judge reminded the jury of what Mr Sanderson and David had said.

81. The Governor-General referred a question to the second Court of Appeal about the left-hand lens but not about the ownership of the glasses. The second Court of Appeal did, however, hear evidence from Mrs Janice Clark, who said David had admitted to her that he had worn the glasses over the week-end before the killings, and from Mr Wright, the prosecutor at the trial, who understood that fact to have been privately conceded by defence counsel. These facts are contested but are not immediately material. In addition, the court heard evidence from Mr Sanderson. The effect of his evidence was that, shortly before the trial, there became available a photograph of Margaret wearing the glasses in question, and this caused him to change his opinion and conclude that the glasses were Margaret's, not David's. The second Court of Appeal made no finding on the subject.

82. Before the third Court of Appeal was a further affidavit of Mr Sanderson. In it he says that a short time before the trial he was shown a photograph of Margaret wearing what were clearly the frames in question. He realised that his original opinion that the glasses were David's was totally wrong. They were Margaret's, not David's. He communicated his view to Detective Sergeant Weir, who acknowledged that this was probably correct and said Mr Sanderson's statement would be changed accordingly. He gave evidence in the belief that his statement had been changed. He now realises, reading the transcript of his evidence to the jury at trial, that his change of opinion was not conveyed to them.

83. The third Court of Appeal (paragraphs 53-56) drew inferences adverse to David from the finding of the glasses in his room and the fact that they were of some use to him and none to Robin. It acknowledged (paragraph 138) that David was:

> "cross-examined in a way which could have suggested that he was not correct in this evidence. The ownership of the glasses was thus apparently put in issue. The jury seems to have thought so because they asked a question: the glasses found in the accused's/Stephen's rooms, whose were they according to the optometrist?"

In paragraph 140 the court continued:

> "The force of the ownership point is that David now contends that although the Crown knew that the glasses belonged to his mother, his evidence to that effect at trial was nevertheless challenged. The Crown suggests that this

> was not so but we are of the view that the jury could have seen the Crown as challenging David's evidence in this respect and thus as impugning his credibility. This point and the point concerning the evidence about the lens might in other circumstances have given rise to concern from a process point of view. In the particular circumstances of this case, however, we do not consider that these matters raise any risk of a miscarriage of justice. The real point was that the glasses were of no use to Robin but could have been used by David: see the discussion in paras 55 and 56. For reasons which are essentially the same as those pertaining to the further evidence issue as a whole, we do not consider that the Crown's approach to this aspect of the case has caused any miscarriage of justice".

84. In its written case to the Board the Crown contends that ownership of the glasses was not a plank of its case against David. His use of the glasses over the week-end before the killings was understood to be conceded. Mr Sanderson was not briefed to give evidence about ownership at the trial, but in a rather confusing way appeared since the trial to have misgivings about the effect of his testimony. The photograph shown to Mr Sanderson by the police was received from Papua New Guinea shortly before the trial. The Crown did not invite the jury to conclude that David was a liar when he said the glasses were his mother's. In oral argument the Crown stressed that the ownership of the glasses was not an issue at trial.

(7) The left-hand lens

85. The exact location of the left-hand lens in Stephen's room was of obvious significance if it was a place where it could probably have fallen during a struggle between David (wearing the glasses) and Stephen.

86. At the trial Detective Sergeant Weir gave evidence on this point with reference to a blown-up photograph of a portion of the floor in Stephen's room. He told them "You can just make out the edge of the spectacle lens just in front of the ice skating boot". The officer left the witness box to point out the location in the photograph to the jury, counsel and the judge. The photograph was taken, he said, on Monday 20 June when Stephen's body was still there, and the lens was on the underneath side of the skate. Cross-examined, he said that the lens was exactly where he had said. At the invitation of the judge, he again left the witness box and pointed with his pen to the image of the lens in the photograph. Faithfully reflecting this evidence, the judge reminded the

jury of the Crown case that the left-hand lens was found in Stephen's room quite near his body.

87. By the time of the hearing before the second Court of Appeal, Mr Weir's contemporaneous notes and typed-up job sheet had been disclosed. The former recorded "Locate lens from glasses beneath clothing etc in front of bunks" and the latter "Underneath the ice skating boot is a lens from a pair of optical glasses". Mr Weir was called as a witness and was cross-examined. In answer to questions, he accepted that his evidence at trial as to where he had found the lens had been wrong, and that he may have misled the jury, although not intentionally. He had found the lens under a skate boot under a jacket, and it was not the object he had identified in the photograph. He agreed it was unlikely that the skate boot had been pushed to where it was found during a struggle. It was possible that the lens had been in position before the struggle and had not been disturbed. Both lenses had been examined by ESR and no blood, hair, human tissue or finger-prints were found on either. The left-hand lens was dusty.

88. The second Court of Appeal's conclusion on this point is quoted in paragraph 24 above. This conclusion was preceded by two paragraphs which merit quotation:

> "[18] There can be no doubt that a lens was found in Stephen Bain's bedroom. The frame from which it came and the other lens were found in David Bain's bedroom. There has been much controversy as to exactly how and where the lens in question was found, and how Detective Sergeant Weir came to his mistaken belief that he could see the lens in a particular photograph. We do not consider it to be helpful to traverse all the issues covered on these and allied points. The Crown's thesis that David Bain was wearing the glasses when engaged in a struggle with Stephen, before shooting him, is certainly a tenable one on the evidence. Indeed, in the absence of any other explanation for the lens being found in Stephen's bedroom, where he was killed, the Crown's thesis is a strong one. The issue for us, however, is whether it is reasonably possible the lens could have got into the vicinity of Stephen's dead body in a manner or at a time which was unrelated to the murders. That could be so only if the lens was there prior to the time when the murderer entered the room to shoot Stephen. There is no direct evidence suggesting how or why a lens from a pair of glasses Stephen

> never wore, and had no need to wear, was already on the floor in his bedroom, prior to his being shot.
>
> [19] Against that we recognise that the lens had no forensic evidence on it; no blood, no fingerprint, indeed nothing of note. That circumstance could be explained by the fact that although the lens was already in the room, and in the close vicinity of where Stephen's dead body was found, it was covered up by clothing at the time the suggested struggle and the shooting took place. There is support for that possibility in Detective Sergeant Weir's own contemporaneous note that when searching Stephen's bedroom he found the lens 'beneath clothing etc' in front of the bunks".

89. The third Court of Appeal's general approach to this issue in paragraphs 53-56 of its judgment has already been summarised. It returned to the glasses and lenses in paragraph 136, observing: "We do not regard the evidence on this aspect of the case as assisting the Crown's case to any appreciable degree". It acknowledged that the lens the officer pointed out in the photograph was not a lens, and continued (paragraph 137):

> "The jury were led to believe that the lens was discovered out in the open, whereas Detective Sergeant Weir had recorded in contemporaneous notes that he had found it beneath clothing. It was more consistent with the Crown's theory for the lens to be found in the open rather than under clothing, albeit it could have got covered up during the struggle. The jury were undoubtedly misled by the Detective Sergeant's evidence. We will bear that in mind when we come to our overall conclusion. It is fair, however, to record that nothing we have seen, read or heard leads us to the view that the jury were deliberately misled …"

In paragraph 168 it added:

> "The glasses and lens issue has not featured significantly in our analysis of the strength of the case against David. It does not in any way tend to exculpate David".

90. In its written case on appeal to the Board, the Crown reject any allegation of deliberate misconduct. It is suggested that the lens was close to where the officer said he saw it. The precise location of the lens was not regarded by the Crown as relevant at trial. It was submitted in oral argument that the lens was not a critical issue.

(8) David's bloodied fingerprints on the rifle

91. Evidence was given at trial that four bloodied fingerprints, identified as David's, were found on the forearm of the rifle used in all these killings. The evidence was that the prints were "defined in blood or what appeared to be blood. When I say the print was in blood – I mean that the fingers were actually contaminated by blood when going down on the gun as opposed to the fingers going down into blood that was already on the gun".

92. David, when questioned by the police on 21 June 1994, said that he had last used the gun in January or February for shooting possums. Cross-examined at trial, he repeated this. He said he could not remember touching the rifle on the morning of 20 June. He was asked to account for his fingerprints on the rifle and replied:

> "I can't account for that, because I don't remember touching the gun at all that morning. All I can say is that I must have picked it up at some stage but I do not recall touching the gun at all or seeing it".

The trial judge listed David's bloodied fingerprints on the murder weapon as one of the key points in the Crown case. As the second Court of Appeal was later to observe (paragraph 22 of its judgment):

> "There was no suggestion at the trial that the blood was not human. Hence the jury will undoubtedly have proceeded on the basis that it was".

93. Unknown, it would seem, to the judge, the jury and the defence at trial, the blood in which David's fingerprints were impressed had not at that stage been tested although material in the close vicinity had been tested, as had samples taken from elsewhere on the rifle, all of which were human blood. Such a test was performed on the fingerprint material, well after the trial, on 7 August 1997 by Dr Sally Ann Harbison. The reagent blank used as a control on that occasion tested negative, as it must if a valid test is to be carried out. The test was carried out on a number of samples of material taken from the rifle, other than from David's fingerprints, all of which proved positive, indicating the presence of human DNA. The test on the material in which David's fingerprints were made proved negative: it did not indicate the presence of human DNA. Dr Harbison repeated the test on 19 August 1997, but on this occasion the reagent blank tested positive, which indicated that it had been

contaminated; the test was therefore invalid. The second Court of Appeal heard oral evidence from four witnesses on this subject, and found a reasonable possibility that the blood which bore David's fingerprints could have been other than human blood, put there before the killings.

94. In 1998 Dr Geursen, a biochemist with long experience of molecular biology research, obtained samples of the fingerprint material and the reagent blank from Dr Harbison. The reagent blank tested negative. The test performed on the fingerprint material yielded a result which showed, in the judgment of Dr Geursen, that the material was not of human origin. Dr Harbison has not accepted this result: she has said that the fingerprint sample she had supplied was not part of the sample tested in her first test of 7 August but was a sample from the invalid second test of 19 August. This is an explanation which, on scientific grounds, Dr Geursen does not accept. His evidence on affidavit, with much other evidence (including evidence given by him in another trial), was before the third Court of Appeal in written form.

95. The third Court of Appeal (paragraph 62) thought it

> "a powerful inference that the existence of David's fingerprints in the small area on the rifle which was otherwise uncontaminated with blood, establishes that the fingers which deposited the prints were in position at the time when all the other blood came onto and was spread throughout the rifle … This aspect of the evidence, on its own, comes close to being conclusive of David's guilt. It is an almost irresistible inference that his prints must have been placed on the murder weapon contemporaneously with the murders".

The court considered (paragraph 67), on the evidence, that the excellent definition of David's fingerprints, and Mr Jones' opinion of their recent origin, constituted a very powerful case that they were deposited at the time of the killings. Later in its judgment (paragraph 130) the court expressed its inability to accept that the fingerprint blood was of animal rather than human origin. The court referred to the tests by Dr Harbison and Dr Geursen, and concluded (paragraph 135):

> "In these circumstances we are of the view that nothing of moment has been raised to cast doubt on our earlier discussion of this topic which demonstrated, for the reasons there set out, that from a practical rather than a scientific point of view, David's fingerprints were almost certainly

> deposited on the fore-end of the rifle contemporaneously with the murders".

It added (in paragraph 168):

> "The confused and uncertain science concerning the nature of the blood in which the fingerprints on the rifle were deposited does not detract from the force of the physical evidence on this topic".

96. In its written case on appeal to the Board, the Crown submits that recent well-defined fingerprints from David's bloodied left hand were found on the forestock of the rifle. The rest of the rifle was smeared with blood. It had been wiped. The only plausible explanation is that David gripped the forestock of the rifle when he wiped it. Dr Geursen's tests are valueless, since he tested a contaminated sample. It was submitted in oral argument that the third Court of Appeal were unquestionably right on this question.

(9) Laniet's gurgling

97. Laniet suffered three gun shot wounds to her head: one to her cheek, one above her ear and one to the top of her head. The evidence was that the wound to her cheek was unlikely to have killed her at once; either of the other wounds would have been immediately fatal.

98. Dr Dempster gave evidence at trial of his findings at the post mortem examination of Laniet. He found a large amount of liquid in her lungs, which were distended largely as a result of the lungs developing pulmonary oedema. He inferred that Laniet had lived for a time after what he took to be the first of her injuries, that to the cheek. He would have anticipated that Laniet would have been making readily audible gurgling or similar noises as this material accumulated in her airways. During his evidence in chief David testified that he remembered being in Laniet's room and could hear her gurgling, elsewhere described by him as groaning type sounds muffled by what sounded like water. In his closing address to the jury prosecuting counsel submitted that "Only one person could have heard Laniet gurgling – that person could only have been the murderer". The judge reminded the jury of that submission, and of the evidence given by David and Dr Dempster.

99. As noted above (paragraph 26), one of the questions referred to the second Court of Appeal related to this matter. The court heard oral

evidence given by Professor Ferris, who supported the Crown case. It was also aware of expert reports expressing a contrary opinion.

100. The evidence before the third Court of Appeal addressed two aspects of this matter: the order of the shots fired to Laniet's head; and the phenomenon of post mortem gurgling. Professor Ferris and Dr Thomson supported the Crown case that the shot to the cheek was fired first and that post mortem gurgling can only occur if a body is moved. Four deponents relied on by David disagreed on one or both of these points. These were Mr Ross, a forensic scientist who first ascertained that the shot to the top of Laniet's head had been fired through a white cloth, a fact of some potential significance, and who considered that that shot had been fired first; Dr Gwynne, a retired pathologist of long experience; Professor Cordner, Professor of Forensic Medicine at Monash University, Melbourne, who supported Mr Ross' view on the order of shots but had no personal experience of gurgling in unmoved bodies; and Mr Pritchard, who for 15 years had been the laboratory technician in charge of the Pathology Teaching Museum at the Otago Medical School, and deposed that there were many occasions when he had experienced the phenomenon of gurgling noises emanating from dead bodies, most often when a body was moved but sometimes spontaneously.

101. The third Court of Appeal observed (paragraph 93) that subject to the force and effect of the new evidence, the gurgling evidence was another substantial strand in the case against David. The court considered (paragraph 117), on the evidence, that the shot to Laniet's cheek had been the first in time. It observed (paragraph 118) that the white cloth through which the shot to the top of the head had been fired had never been found, despite a thorough search of the premises by the police, and suggested that David could easily have disposed of it on his newspaper round. The court referred to the affidavit evidence of Professor Cordner, Mr Pritchard and Dr Gwynne, but concluded (paragraph 123):

> "Up to this point we do not consider the new evidence provides any sufficient basis for doubting the force of the proposition that, as David heard Laniet gurgling, he must have been the murderer".

The court referred to the evidence of Dr Thomson and Professor Ferris and concluded (paragraph 129):

> "All this simply confirms the view we reached on an appraisal of David's new evidence. Any uncertainty there may have been at that point is substantially dispelled by the

> Crown's further evidence on this issue. Overall we consider that the new evidence does not undermine the way the jury were invited to look at this topic; certainly not to the point of our being concerned that any miscarriage of justice has occurred on this account. This point can indeed properly be viewed as strongly indicative of David's guilt".

102. The Crown submits in its written case to the Board that the veracity of the prosecution's submission to the jury gains weight from later evidence, and that David could only have heard what he described after Laniet had been shot through the cheek and before the fatal shots were fired, indicating that he fired them. In oral argument the Crown submitted that Laniet had first been shot through the cheek, and it supported Professor Ferris' evidence based on that inference.

Substantial miscarriage of justice

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. Such a miscarriage involves no reflection on the trial judge, and in the present case David's counsel expressly disavowed any criticism of Williamson J. It is, however, the duty of the criminal appellate courts to seek to identify and rectify convictions which may be unjust. That result will occur where a defendant is convicted and further post-trial evidence raises a reasonable doubt whether he would or should have been convicted had that evidence been before the jury.

104. In the opinion of the Board the fresh evidence adduced in relation to the nine points summarised above, taken together, compels the conclusion that a substantial miscarriage of justice has actually occurred in this case. It is the effect of all the fresh evidence taken together, not the evidence on any single point, which compels that conclusion. But it is necessary to identify the source of the Board's concern in relation to each point.

Robin's mental state

105. Many questions were directed at trial to establishing David's mental state. The jury may well have accepted the Crown's characterisation of it. Contrasted with Robin who, despite the irregularity of his domestic and marital life, may well have appeared to be a mature and balanced, devout school principal, David could have appeared much more likely to engage in a frenzy of killing. The third Court of Appeal

acknowledges that the fresh evidence redresses the balance in favour of David, and represents an evidentiary advance for him. But only the jury can assess the extent to which the balance is redressed and the evidence advanced. The jury might accept the evidence of three professionals, as yet uncontradicted, that stories of the kind described above are not written by children and published in a school newsletter without participation by the principal of a two-teacher school, and there is no evidence to support the suggestion that they could have been inspired by movie watching. The jury might, not extravagantly, have felt that this evidence put a new complexion on the case. It is true, of course, that this evidence does not alter the underlying facts of the killings. But many of those facts are highly contentious, and the evidence could well have influenced the jury's assessment of them.

Motive

106. Williamson J held that any evidence which might shed light on the motive for these killings must be relevant. That opinion has not been challenged. At trial no plausible motive was established why either Robin or David should have acted as one or other of them undoubtedly did. Mr Cottle's evidence was rejected as unreliable, and no complaint is now made of that decision. But the question must arise whether his evidence would have been rejected had it been known that three other independent witnesses gave evidence to broadly similar effect. The third Court of Appeal again acknowledged that this fresh evidence represented some advance for David, but discounted it as providing no basis for the conclusion that Robin committed the murders. This, again, is a matter for the assessment of a jury, not an appellate court, and the jury's assessment would depend on what evidence they accepted. 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.

Luminol sock prints

107. At trial, it was asserted and accepted that the 280mm complete toe to heel sock print, found outside Margaret's room, seen and measured by Mr Hentschel, was David's because it was too big to be Robin's. The fresh evidence throws real doubt on the correctness of that assumption. The jury could reasonably infer that the print, if a complete print, was about the length of print that Robin would have made and too short to have been made by David. A question now arises whether, as Mr Walsh suggests, his earlier report was misunderstood and misapplied by the third

Court of Appeal. If the jury had concluded that the print had, or might have been, made by Robin, the jury might have thought this significant for three reasons. First, it would indicate that Robin had been to parts of the house on the morning of 20 June which, on the Crown case, he would never have visited. Secondly, it would establish that Robin had changed out of blood-stained socks, since if he made the print he must have been wearing blood-stained socks and the socks he was wearing when he was found dead in the lounge were not blood-stained. Thirdly, if he changed his socks, the jury might not think it fanciful to infer that he changed other garments as well, as (on David's case) he had. The implausibility of Robin changing his clothes if he was about to commit suicide, was a point strongly relied on by the Crown, as something a normal and rational person would not have done. But the jury might conclude that whoever committed these killings was not acting normally or rationally.

The computer switch-on time

108. It is now clear that the jury should not have been told as a fact that the computer was switched on at 6.44 am. It may have been switched on nearly 5 minutes earlier; it may perchance have been switched on at 6.44; it may theoretically have been switched on later. A prosecutor alert to the fresh evidence now before the court would have had to approach the switch-on time with a degree of tentativeness. The third Court of Appeal observed that this evidence, viewed in isolation, could not be regarded as excluding David in the sense of showing that it was physically impossible for him to have committed the murders. That is so. But there is no burden on David to prove physical impossibility. The onus is not on him. The jury might reasonably have considered this peg of David's argument on timing to be strengthened had they known the full facts.

The time of David's return home

109. The jury were invited to treat Mrs Laney's identification of David as problematical and her estimate of time as at best approximate. The fresh evidence might lead a reasonable jury to infer that her identification was not in doubt and her estimate of time reliable. The third Court of Appeal concluded (see paragraph 75 above) that her suggested time could not be regarded as anywhere near precise and that the new evidence did not clinch the matter in David's favour by reason of physical impossibility. But the reliability of her time estimate was a matter for the jury, who never heard the full evidence and never heard Mrs Laney cross-examined, because the defence did not know her clock had been checked by the police and did not know she had made a second statement. There is again no burden on David to prove physical impossibility. It is noteworthy that the trial jury asked to be reminded of what Mrs Laney

had said, presumably because they were concerned about either her identification or her estimate of time. It may be that the fresh evidence would have allayed their concern. But the third Court of Appeal do not mention the jury's question. This fresh evidence could reasonably have been regarded as strengthening the second peg of David's argument.

The glasses

110. The Crown is right in its contention that the ownership of the glasses, as opposed to the wearing of them on the morning of 20 June, was not in itself a live issue at the trial. But Mr Sanderson was understood to say that the glasses were David's, David said they were not his but his mother's and David was then cross-examined in a way that (as the third Court of Appeal accepted) impugned his credibility. If ownership of the glasses was in itself an immaterial matter, David's credibility was certainly not: the central question the jury had to resolve was whether they could be sure that David's account of events was untrue. While it cannot be known what motivated the jury to ask the question as to whose the glasses were, according to Mr Sanderson, it may have been because they saw in this a valuable indication of David's credibility or lack of it. If Mr Sanderson's fresh evidence be accepted, the jury were given an answer which did not reflect his revised opinion and could have led the jury, reasonably in the circumstances, to draw an inference unfairly adverse to David.

The left-hand lens

111. Detective Sergeant Weir told the jury that he had found the left-hand lens in a visible and exposed position in which, as is now accepted, he had not seen or found it. His evidence to the jury was more consistent with the Crown's case that the lens had become dislodged during a struggle than the finding of the lens, covered in dust, under other articles on the floor. The third Court of Appeal accepted that the jury had undoubtedly been misled by the officer's evidence. From the jury's point of view it did not matter that, as the court also held, the misleading was not deliberate. Nor, in the Board's view, with respect, is it determinative that the glasses and the lens had not featured significantly in the third Court of Appeal's analysis of the strength of the case against David. What matters is what the trial jury made of the incorrect evidence and, even more importantly, what they would have made of the correct evidence.

David's bloodied fingerprints on the rifle

112. 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.

Laniet's gurgling

113. The trial jury was encouraged to regard David's evidence of Laniet's gurgling as a clear indication of his guilt. The second Court of Appeal heard oral evidence from Professor Ferris, but concluded that the issue was not so straightforward. The evidence before the third Court of Appeal revealed a sharp conflict of opinion as to the order in which the shots were fired at Laniet's head (arguably relevant to the congestion of the airways and the likelihood of gurgling) and the phenomenon of post mortem gurgling. Without hearing any of these witnesses, and without giving any reason for discounting the evidence of the witnesses relied on by David, the court found it possible to regard the issue as concluded in the Crown's favour by its further evidence. But the evidence of Professor Ferris is the subject of sharp expert criticism. The Board feels bound to rule that the court assumed a decision-making role well outside its function as a reviewing body concerned to assess the impact which the fresh evidence might reasonably have made on the mind of the trial jury.

114. It appears that counsel for both parties agreed that there should be no oral evidence and no cross-examination before the third Court of Appeal. But that is not an agreement which the court was bound to accept, and such an agreement, if made, could not empower the court to choose between the evidence of deponents, accepted as credible, but testifying to contradictory effect.

115. While challenging the detail and the significance of the nine points discussed above, and other points relied on by the defence which the Board has not discussed, the real thrust of the Crown's case on appeal is to emphasise the strength of the many facts pointing clearly towards David's guilt. This, as is evident from the quotations given above of passages in the judgment of the third Court of Appeal, is the essential basis upon which the court dismissed the appeal. The Board does not consider it necessary to review these points in detail, for three reasons. First, the issue of guilt is one for a properly informed and directed jury, not for an appellate court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but whether there is or was evidence on which it might reasonably decline to do so. And, thirdly, a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial. The Board should, however, touch on the three key points which the third Court of Appeal identified as establishing David's guilt all but conclusively: see paragraph 33 above.

116. The first of the court's three key points was that only David knew of the existence and whereabouts of the spare key to the trigger lock. This is a point relied on by the Crown throughout. It is based on assertions by David, in themselves remarkable if he was a murderer seeking to avert suspicion or baffle proof. The force of the point depends on three assumptions. The first is that, as David plainly believed, Robin did not know of the existence or whereabouts of the spare key. This may of course be so. But there was evidence (not mentioned by the Court of Appeal) that twenty spent rounds were found in Robin's caravan, all fired by the murder weapon and some of the same ammunition type as was used in the killings. There was no evidence how these rounds came to be there, but the possibility may be thought to exist that Robin had on some occasion or occasions used the gun without David's knowledge and had for that purpose unlocked the trigger lock. The second assumption is that Robin did not know there were two keys to the lock. This may again be so. But Robin had much greater familiarity with firearms than David, and might reasonably be thought to know or suspect that rifles with trigger locks are sold with two keys. The third assumption is that Robin would not have rummaged about among David's belongings to look for the key. It was in a jar on David's desk across the room from where the rifle and the ammunition were kept. The defence contend that this is a place where a searcher might be expected to look and, if he looked, to find it.

117. The court's second key point was based on the blood-stained condition of the rifle generally coupled with the uncontaminated area

associated with David's fingerprints, suggesting that his hand had been in position contemporaneously with the murders. The court placed great reliance on this point. But it is not a point on which (as distinct from the fingerprints themselves) prosecuting counsel relied in his closing address to the jury, it was not one of the 12 main points of the Crown case which the trial judge listed at the outset of his summing-up and it is not a point which the judge drew to the jury's attention in the course of his summing-up. There is no reason to think that this point was in the jury's mind at all. The relevant evidence has not changed. Whatever the merits of the point may be, it can hardly be fair to rely on it for the first time on appeal 8½ years after the trial.

118. The court's third key point is that the spare magazine was found standing upright on its narrow edge almost touching Robin's outstretched right hand, a position in which it was unlikely to have fallen accidentally. This is a point which prosecuting counsel made to the jury in his closing address. But the judge did not include it in his list of the Crown's main points. His only reference was to the prosecutor's argument

> "that when you look at the position of the magazine near [Robin's] right hand, the fact that it is standing on its edge, is explainable logically only by it being put there rather than having fallen out of his hand because if it had fallen, it would have fallen on its side".

It must be very questionable whether the jury attached significance to this point. The magazine in question was found on examination to be defective. A live round found beside the rifle showed signs of having been misfed. The possibility must exist that, the magazine having caused a misfeed, it was replaced and put on the floor. But even if it be accepted that the magazine was put in the position in which it was found and did not fall into that position, the question remains: who put it there? It could have been David. But there is no compelling reason why it could not have been Robin. This again is a jury question, not a question for decision by an appellate court. Neither singly nor cumulatively can these points fairly bear the weight which the third Court of Appeal gave to them. It is unnecessary to review the six additional points on which the court also relied in particular: all are contentious, and one (the state of Robin's bladder) is a point which, although mentioned by the prosecutor in his closing address, was not mentioned by the judge in his summing up.

119. For all these reasons, the Board concludes that, as asked by the appellant, the appeal should be allowed, the convictions quashed and a retrial ordered. The appellant must remain in custody meanwhile. The

order of the Board for a retrial does not of course restrict the duty of the Crown to decide whether a retrial now would be in the public interest. As to that the Board has heard no submissions and expresses no opinion. The parties are invited to make written submissions on the costs of these proceedings within 21 days. 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) 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.