



New Zealand Police

2014

CREWE HOMICIDE INVESTIGATION REVIEW



**Opinion of Solicitor-General
Paul NEAZOR QC as to the
prosecution of
Bruce HUTTON, 1981**

APPENDIX 16

CONFIDENTIAL



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The Commissioner of Police

Thomas Commission

Opinion as to prosecution of Mr B.T.N. Hutton

1. The question arising from the Report of the Royal Commission on which you asked my advice is whether any prosecution should be brought against Mr B.T.N. Hutton in relation to the cartridge cases which were exhibits 350 and 343 at the trial, or in respect of evidence given by him during the course of the various proceedings relating to the prosecution or of the enquiry by the Royal Commission.
2. The late Detective Johnston's conduct has been the subject of comment by the Commission comparable in some respects with that made in respect of Mr Hutton, but since there can now be no question of a prosecution against him, I am not directly concerned with what was said about him, although my conclusions in respect of the one will no doubt reflect my views in respect of the other.
3. It seems to me that I should state with some care the extent to which I am giving advice, having regard to the fact that the proceedings of the Royal Commission are currently the subject of challenge in the Courts. I am not exercising an appellate function in respect of the Commission's opinions, nor am I writing a further report on the Thomas prosecution. My views are limited to the question stated in paragraph 1 above.
4. The Commission's report, which for present purposes becomes a statement of allegations, involves findings,
 - (a) expressly that the shell case exhibit 350 was planted in the Crewe garden by Det. Inspector Hutton and Det. Johnston;
 - (b) expressly that an exhibit cartridge case (343) was substituted by another by Police officers to the knowledge of Mr Hutton.
 - (c) inferentially, that at some stage or stages perjured evidence was given by Police officers, including Mr Hutton.
5. The offences so alleged are against ss 113 of the Crimes Act (fabricating evidence with intent to mislead a tribunal holding judicial proceedings), s.115 (conspiring to prosecute for an offence knowing the accused to be innocent); ss 116 and 117(d) (conspiring or wilfully attempting to obstruct prevent, pervert or defeat the course of justice), ss108 and

109 (perjury) s. 110 (false oath - before the Commission of Inquiry).

6. There seems clearly to be no direct evidence establishing any charge. There are two questions in respect of any possible charge:

(a) whether there is sufficient evidence to establish a prima facie case that the offence was in fact committed;

(b) whether there is sufficient evidence to establish a prima facie case that Mr Hutton or Mr Johnston or both committed the offence.

7. As I read the Report the path by which the Commission reached its conclusions in respect of the two exhibits was this:

(a) in respect of Exhibit 350:

(i) that this shell was essential to the Crown case against Thomas either because it was the shell of a cartridge which had been fired in Thomas's rifle and one which had contained one of the bullets which caused the deaths of the Crewes, or alternatively because it demonstrated that Thomas's rifle had been on the Crewes' property at the time of the murder, the presence of the shell being consistent with its having been ejected from the pump-action rifle when the first bullet fired at the Crewes was being brought up into the chamber - in either case being evidence tending to demonstrate that Thomas had been on the property;

(ii) that the shell had been demonstrated not to have contained a bullet of the kind which killed the Crewes and (even if it had contained such a bullet) not to have been able to reach the place where it was found as a result of the ordinary process of ejection at the place where the Crown asserted the first shot to have been fired at the Crewes;

(iii) that it had been demonstrated that the shell was not in the garden in which it was ultimately found when the Police first searched that garden and that its physical state when it was found was such that it could not have been in the garden for the period between the date of the killing and the date of its being found;

(iv) that the only tenable theory for its presence in the garden was that it was planted there to bolster up a weak case against Thomas by providing circumstantial evidence indicating that his rifle and accordingly he himself had been on the premises when the killings took place.

(v) that Mr Hutton and Mr Johnston were at the Crewe property on a day within 27 days of the finding of the shell and (i.e. "some time after 30 September", the shell being found on 27 October) and on that occasion placed the case in the garden.

(vi) that confirmation of this view is to be found in the fact that Mr Hutton arranged for the search to take place which produced the shell case although earlier searches had not done so.

(b) in respect of Exhibit 343:

(i) that this shell supported the Crown case because, a challenge having been mounted to the proposition that Exhibit 350 could have been part of a cartridge the projectile of which was a pattern 8 bullet (that being the type found in the Crewes' bodies), Exhibit 343 was part of a cartridge containing just such a bullet, was found on Thomas's farm and was itself a shell having the same identifying characteristics as Exhibit 350.

(ii) that the shell which when obtained by the Police contained a pattern 8 bullet at some stage had substituted for it another shell and that during the trial the substitute shell itself had substituted for it yet a third shell;

(iii) that the first substitution was negligent;

(iv) that the second substitution came about because Dr Sprott had examined the first substitute and identified it as a shell which could have been part of a cartridge containing a pattern 8 bullet, but as being different from Exhibit 350, whereas Dr Nelson who gave evidence later said that it had the same characteristics as Exhibit 350.

(v) that the second substitution was deliberate and designed to mislead the Court by having Dr Sprott and Dr Nelson each give truthful evidence but in respect of what were in fact different exhibits;

(vi) that Inspector Hutton at least knew of the second substitution and that it had been deliberately made.

8. The path by which the Commission reached its conclusions may or may not be a valid one for the purpose of the exercise with which the Commission was charged. That will be argued elsewhere and is a question with which I am not now concerned. My present purpose is to take the Commission's conclusions as a starting point and to advise whether it appears that by the ordinary process the Crown could prove positively that what the Commission has concluded caused the shell to be on the Crewe property did happen, and that the substitution happened in the way the Commission determined it did. I have proceeded on the basis that it is now accepted by the Crown experts that the cartridge case Ex. 350 probably would not have been associated with the bullets found in the Crewes' bodies.

9. The charge which might be laid against Mr Hutton in respect of Exhibit 350 would be easy enough to formulate. It would be framed in terms that he either

(a) with intent to mislead a tribunal holding a judicial proceeding fabricated evidence by means other than perjury; or

(b) wilfully attempted to obstruct, prevent, pervert or defeat the course of justice.

It would seem clear enough that such a charge would be good even if Thomas had killed the Crewes, if Mr Hutton's alleged actions were designed to add false evidence to the case against him. An elaborate dissertation on the law is not called for: our trial process is designed to procure convictions for crime only if the crime is proved against the accused beyond reasonable doubt. It must be a perversion of that process deliberately to introduce or knowingly to try to introduce evidence which is not true (in the case of oral evidence) or not what it seems to be (in the case of real evidence). There is a general discussion of the offence in Archbold 40 Ed para 3473. In respect of fabricating evidence in circumstances such as the present R v Vreones [1891] 1 QB 360 is closely in point.

10. The placing of a cartridge shell in any particular place is not an offence in itself and any charge laid in respect of the placing of the shell in the garden would require proof of the background circumstances except in so far as these were admitted. The Crewes were killed on or about 17 June 1970. Their bodies were recovered from the Waikato River on 16 August and 16 September 1970. That a firearm was involved was not clearly apparent until Mrs Crewe's body was found in August, and of course, even if it could be deduced before then that a firearm might have been involved (say for example because of the presence of brain matter on a chair) what type of firearm could not have been known before then by anyone other than the killer.

11. On the Commission's findings, it became known on 16 August that a .22 rifle was involved, and on 19 August that the Thomas and Eyre rifles (of those collected within a radius of five miles of the Crewe farm) could not be excluded as the source of the bullets. On 16 October that was still the position as to the relationship of the bullets with the Thomas rifle. On 13 October Detective Johnston uplifted a box of .22 ammunition (the number of cartridges in it never being recorded) from Thomas's farm. The Commission has found that between 30 September and 27 October 1970 two shots were fired by Mr Hutton and another officer (probably Mr Johnston) at the Crewe farm. Since the Commission's finding was that these shots were fired from Thomas's rifle this period can be narrowed to between 20 October and 27 October, the Thomas rifle having been returned to Mrs Thomas by the Police on 8 September 1970 and not having been taken into their custody again until 20 October. On 21 October exhibit 343 (the supporting evidence relating pattern 8 bullets to particular shell cases) was uplifted from Thomas's farm. On 27 October the shell case exhibit 350 was found in the garden at the Crewe property.

12. To advance a case of deliberate planting of the cartridge shell exhibit 350 it seems to me that the Crown would have to proceed on the hypothesis that the shell was known to whoever put it on the property to have been fired in the Thomas rifle. It is of the essence of the charge that the presence of the shell on the property was to advance the case against Thomas. A good deal may have been learned about .22 ammunition in the course of the whole affair, but it was not new information in 1970 that a fired cartridge shell

could be linked by microscopic examination with a particular rifle, and to achieve the postulated purpose the shell had to have been fired in Thomas's rifle and ought also, it seems to me, to be of a kind able to be shown to have been in Thomas's possession. Unless there had quickly developed a very elaborate conspiracy this rules out the hypothesis that the shell which was exhibit 350 could have been a fired shell found on Thomas's farm by the Police, for without microscopic examination it could not be known that such a shell would be identified as having come from Thomas's rifle.

13. In response to an inquiry made at my request the DSIR has reported in terms that indicate that Exhibit 350 could have been part of a cartridge in the box uplifted from Thomas's farm on 13 October (Exhibit 318). Since the number of other complete cartridges taken from Thomas's farm was recorded (Ex 344), Exhibit 318 would appear to be the only likely source of a planted shell (apart of course from a brass .22 cartridge which had never been in any way connected with Thomas). The DSIR report leaves Exhibit 318 available as a possible source of Exhibit 350, but it is not conclusive. The report sets out the variation of dimensions of the headstamped letters on the 15 cartridges in Exhibit 318 and the recorded dimensions for Exhibit 350 and continues that the dimensions for Exhibit 350:

"... fall within these rather broad ranges, as do the dimensions for a number of other cartridges examined earlier by Mr I.R.C. McDonald and those described as category 4 by Professor Mowbray.

It is thus possible that the cartridges in Exhibit 318 are from the same batch as Exhibit 350. However a large number of cartridges that had no direct connection with the Crewe case are also reported to have similar characteristics."

14. Assuming the packet of cartridges which was Exhibit 318 to have been the source of shell Exhibit 350, and assuming that the only credible approach for a prosecutor to take would be to allege firing of the cartridge in the Thomas rifle, the cartridges and the rifle were together in the possession of the Police for the first time on 20 October 1970. A factor to be borne in mind is that when the Police first had the Thomas rifle (up to 8 September 1970) the suspect was Demler, attention having been seriously turned to Thomas after the conference on 2 October. This is disclosed in your own evidence to the Commission. The underlying hypothesis of a prosecution would be that by 20 October or within the next 6 days (the Commission's view being that Mr Hutton knew on 26 October that the shell was in the garden to be found) Mr Hutton formed the view that Thomas should be convicted of the murders and that the case against him was such that it needed to be materially helped along by the planting of real evidence which would point strongly to Thomas. An associated hypothesis must be that Mr Hutton for some reason was prepared to involve another officer in the matter (with all the associated increase in the risks of discovery) and found that officer in Detective Johnston (who according to records I have seen first became involved in the case on 18 September 1980 but who is said on 11 October to have developed the theory of a shot having been fired through the louvre window).

15. In my view for the purpose of considering a prosecution of the kind now contemplated circumstances arising or becoming known after 27 October 1970 are of secondary importance to the state of knowledge and state of mind of the people concerned before that date because all the material steps in the offence under consideration were both conceived and executed by that date.

16. Since any prosecution must be on a circumstantial basis the following points all seem to me to need consideration:

(a) can it be shown by direct evidence, with or without supporting circumstantial evidence, that the shell case was not or could not have been in the garden where it was found before, say, 20 October 1970?

(b) can it be shown that Messrs Hutton or Johnston had access to the Thomas rifle and suitable cartridges at the relevant time?

(c) what is the strength of the evidence that Messrs Hutton or Johnston or both planted the cartridge.

17. As to the first of these points, the evidence falls into two categories: evidence as to searches prior to 27 October 1970 designed to show that if the shell had then been in the garden it would have been found, and evidence designed to show that if it had been in the garden for four months its condition would have been different from what it in fact was.

18. The Commission has said categorically that if the shell had been in the garden from the date of the killings it would have been found either on 23 June or 18 August (see paragraph 328 of the Report). The Commission acknowledges that in respect of the particularly important search of 18 August this conclusion requires rejection of the evidence of four Police officers and of Mr Handcock, then Manager of the Crewe farm, and acceptance of the evidence of Mr Hewson as to whether the garden in question was sieve searched on 18 or 19 August. The Police officers engaged in the searches in August and October were Constable Meurant Det/Constable Higgins, Detective Gee, Detective Parkes, Detective Sgt Jefferies and Det. Sgt Charles. The search parties in August and October did not have any members in common. Mr Parkes was involved in the first search in July 1970 but neither he nor Mr Charles was involved in the second search and none of the second search team (including the civilians) was present on 27 October.

19. Det. Sgt Jefferies in his evidence said positively that the relevant part of the garden was not sieve searched in August (transcript 145/6) although his job sheet referred to all gardens having been cleared and sieved. He said the search of the relevant portion was visual only (p.159). Detective Gee's evidence as to the extent of sieve searching was the same as Jefferies' (transcript 658-679), as is that of Det. Const. Higgins (680-713). Constable Meurant was not prepared to say that if the shell had been on 23 June in the place where it was eventually found, his search was such that he must then have found it. He was consistent with the others as to the extent of sieve searching the garden. As to the chance of his finding a cartridge case on 18 August his evidence was that had it been on the surface it is highly

likely that he would have found it but if it had been buried, highly likely that he would have missed it (p.726). He could not specifically recall whether he disturbed the soil at that point with his fingers.

20. One of the relevant civilian witnesses was Mr J.R. Handcock who took over the management of the Crewe farm between 5 August 1970 and 2 February 1971. His evidence at that stage of the Commission hearing was really based on what he had said in 1972 and at that stage he had indicated that the sieve search did not go to the vicinity of the back gate. Having been shown photographs he was firmly of the view that the garden could not have been sieve searched at the relevant time. (1029).

21. In so far as he noticed, Det. Sgt Charles saw nothing before he and Mr Parkes began the search which produced the shell (Ex 350) to indicate that someone might have been there and pushed the shell case into the ground (transcript p. 844). He expressed the view (having already agreed that the possibility that he had been set up to find it had crossed his mind - p.856) that everything about the condition in which he found the shell told him it had been there, not a matter of hours or days, but a long time (p.858).

22. Detective Parkes said that when he saw the shell on 27 October he had the impression that it had been in the ground for some time. He said that he had had previous experience of picking up shells that had been buried or partially buried (198), and this one was consistent with the case having been fired some time previously.

23. The witness who supports the garden having been sieve searched is Mr Hewson. He was a friend of the Crewes and went to Pukekawa when he knew they were missing. He was quite specific that the garden in question had been sieve searched, on the basis that all were done, although he did not say that he personally took part in the whole operation (p.812). Mr Hewson's recollection of events was challenged as was his credibility on other grounds, but assuming those challenges to have achieved nothing the position seems to me to be that the Crown would have to proceed on the basis that the garden in question was said by one witness to have been sieve-searched whereas four say specifically that it was not and another expressed the view that from its later state it could not have been so searched. Mr Hewson's evidence is not that he personally took part in a sieve search of that part of the garden, but more generally that all of the gardens were sieve-searched. On this state of the evidence I do not think that the prosecution could establish the positive allegation to the required standard of proof that the shell case could not have been in the garden on 18 August 1970.

24. I should refer to Det. Sgt Jefferies' job-sheet which records that at the time of this search all gardens were cleared and the earth sifted and examined. That sheet could not of course in any way in a prosecution be evidence against Mr Hutton. What Jefferies now says would be the evidence (subject to any challenge to his credibility by reference to the job sheet). His evidence before the Commission was that the

sheet was incomplete and incorrect in so far as it indicated or implied that the relevant garden had been sieve-searched. He said further that he had told Mr Hutton what had been sieve-searched and what had not. (ppl60/161). Mr Jefferies' evidence as to what he told Mr Hutton and the other evidence to the effect that the garden was not sieve-searched would support a prosecution to the extent that it would show that there was a part of the garden in which a shell could safely be planted if someone was minded to do that, but that same evidence tends to destroy an essential plank of the case in support of planting.

25. The issue of the degree of corrosion on the shell case exhibit 350 was given some weight by the Commission in support of the conclusion that the case was not subjected to exposure to weather or soil conditions for 18 weeks, but the Commission's view was that the evidence was too inexact for heavy reliance to be placed upon it. Since the object itself is no longer available and there is a reason for a possible difference between its condition when found and when photographed, and the evidence about the effects of corrosion is itself inexact, it seems to me that to go through this would not advance the case. Mr Hutton's statements about corrosion do not seem to me to be material because when he first made them the object was in existence for anyone who looked at it to decide whether or not they agreed with him. If they are to be used against him it must be propounded that he was very well informed as to what a corroded shell should look like.

26. The second point referred to in paragraph 16 is whether it can be shown that Messrs Hutton or Johnston had access to the Thomas rifle and suitable cartridges at the relevant time. I proceed on the basis that Exhibit 318 could have been the source of a suitable cartridge (see paragraph 13 above). The movement of Exhibit 318 (the packet of cartridges) is not shown on the Exhibit Movement Chart. The bullets are however recorded in the Exhibit Book as having been received on 13 October 1970 by Det. Johnston. I understand this entry to be in Mr Johnston's handwriting and the opinion of the Chief Document Examiner to be that the notation "Held (Johnston)" was made at the same time as the entry. Detective Parkes, while not appearing to have any true recollection of the matter accepted that the box of cartridges was uplifted on that date by Johnston (p.1648), although he says he cannot recall whether he knew about it (1654). He agreed that the notation indicated where the exhibits were (p.1661). Det. Sgt Keith gave evidence (1069) that the packet of cartridges was tagged in Det. Johnston's writing as having been uplifted on 13.10.70., but did not recollect when he received them from Johnston (1087) or apparently ever receiving it from him (1094). Having read the evidence I am unable to discern any clear picture of where these cartridges were at any stage during the period 13 to 27 October 1970. Neither the evidence nor the records referred to appear to establish that the number of cartridges was ever determined as at the date they were picked up from the Thomas farm. Accordingly it is not established that the number in the Exhibit as produced in Court was all of the cartridges which were picked up. I conclude therefore that so far as the evidence goes a cartridge the shell of which was exhibit 350 could have been available to Detective Johnston and Inspector Hutton at the relevant period.

27. The evidence about the Thomas rifle, exhibit 317, is rather different. Detective Parkes collected the rifle on 20 October (p.188) and was firm that it was in his and Det. Johnston's possession until it was handed to Mr Keith that day, that no-one but himself and Det. Johnston had access to it that day, that it was not fired and could not have been fired by Det. Johnston without his knowledge and that no shell cases were removed from the rifle during that time (p.1658). A good deal of Mr Keith's evidence is related to the custody of the rifle after he received it on 20 October. He has consistently said that he received the rifle on that day and kept it thereafter in his personal locker to which he alone had the key and that no one else had access to the locker. He could not explain what the notation "held (Johnston)" in the Exhibits Register meant (1093/4, 1103).

28. Mr Keith's evidence was that movements of the exhibit would be recorded (or should have been recorded) (1293). The system does not however appear to have worked to perfection because it is agreed that the rifle was taken for testing by the D.S.I.R. on 29 October, but there is no record of that movement (1095). Under cross-examination at the first trial (p.269 of notes) Mr Thomas said that when he was interviewed by Mr Hutton (apparently the interview on 25 October 1970) his rifle with a packet of bullets on the guard was in Mr Hutton's office. Apart from that, there is no positive evidence so far as I can see placing the rifle in the hands of Mr Hutton or Mr Johnston after it was uplifted on 20 October and handed to Mr Keith, but the evidence which would rule out the possibility completely has its imperfections. Accordingly I would again conclude that the rifle could have been in the hands of one or the other after 20 October, notwithstanding Mr Keith's evidence to the contrary.

29. The third point referred to in paragraph 16 is the strength of the evidence that Mr Hutton or Mr Johnston or both planted the cartridge. Under this heading I am referring to the positive finding by the Commission (at paras 348 to 350) that on a date after 30 September the case was planted in the garden. The evidence relating to this seems to be the nearest there is to direct evidence that Mr Hutton planted the case, and the only evidence (apart from the oddities about his possession of the rifle and ammunition ex 318) to cause Det. Johnston to be singled out as a party. The relevant evidence from Mrs Priest was of short compass (895-897). It was to the effect that on a date after 29 September 1970 Mrs Priest heard shots from the Crewe farm in the middle of the afternoon. Having heard the shots she and her husband looked towards the Crewe house. The transcript of her evidence continued:

"what did you see . . could see two people.
where were they . . on the back porch
Do you mean the back porch of the Crewe house . . yes
Could you see whether either of them was carrying or
using a rifle . . no
Could you recognise either of them at that distance . . no
How many shots did you hear . . 2

What did you do then . . From memory we went back and tidied up in the eggroom and then continued to walk down the road towards our home.
Do you recall how long you spent tidying up the eggroom before starting off [no answer]
I think as you were walking back along the road a car came along and stopped . . yes
Who was in it . . Mr Hutton and Dt Sgt Johnston
Was there a conversation between you . . I said hullo and then my husband spoke to them.
What did your husband say to them . . that he had just heard two shots, I think.
Do you recall whether there was a reply, and if so what it was . . . Not fully but I think Hutton said how did we know.
Did your husband answer that question . . . yes
What did he say . . . we heard you.
Was there any further conversation about the shots . . . no"

Mrs Priest related the date to the fact that her husband had been in hospital on their wedding anniversary (29 September) and this incident happened after he came out. In fact he left hospital on 30 September 1970. Under cross-examination Mrs Priest said that she did not know whether this incident was before or after the arrest of Arthur Thomas (899).

30. Mr Priest's evidence is less positive than his wife's in one respect and that is that he did not see who Inspector Hutton's companion was in the car. As to the date of the incident he described as a guess "early October". He arrived at that date by saying that it didn't seem to be long after he came out of hospital. He estimated the incident to be before the day on which other evidence shows the shell exhibit 350 to have been found. However, he was not clear whether the incident was before or after Thomas was arrested (904). In sum, he was quite unclear as to date. Having said he heard shots, Mr Priest's evidence was recorded as:

"Where did the shots come from . . Crewe house
Did you look over in that direction . . . yes
What did you see . . a gentleman on the porch and a gentleman seemed to be on the flat path area.
The front porch or the back porch . . back porch
Could you recognise either of the men . . no
Could you see if either of them appeared to be carrying or have a shape like a rifle . . no I couldn't see
How many shots did you hear . . . two
What happened next . . . We had a little more work to do and we did that, locked up came back out on the road and walked up towards our house. Then a car came down the road and I glanced around and could see it was a Police car and I saw it stop and the car pull up alongside us.
Who was in it . . Mr Hutton definitely and I think Mr Johnson.
And there was a conversation between you . . yes briefly.
Did you make any reference to the shots . . yes after saying hello I said to Mr Hutton you just fired 2 shots at the house and he said how do you know and I said, we heard you.

Did he reply . . . he said how do you know and I said we heard you but further to that there was not much, just niceties.
It is supposed to be reported somewhere in Mr Yallop's book that Mr Hutton is supposed to have denied to you shooting at the Crewe home on that occasion, what do you say to that . . . no Mr Hutton didn't deny it."

Under cross-examination of Mr Priest this question and answer are recorded:

"I can give you the date [of Charles visit the day ex 350 was found] because have had it here, 27 October, it would mean a probability you heard those two shots some time between 30 Sept and 27 Oct . . . I would think so, yes."

He agreed that the event was about 2.30-3 p.m. and then answered the following questions.

"If someone suggested say that there was a rabbit in some other area who had fired those shots and you made a mistake . . . no it was confirmed later. When you say it was confirmed later, tell us about that . . . only by what Mr Hutton said when I suggested he had fired 2 shots he said how did you know. There was no denial and there was implicit in his answer an acknowledgement . . . yes. Detective Johnston who was with him did he make no comment . . . no comment. I am not 100% sure it was Detective Johnston.

Later he said that when the Police car stopped the only person he could actually see from where he was standing was Mr Hutton.

31. Mr Hutton gave evidence to the Commission about this matter beginning at p.2297 of the transcript. The record of the examination on this point is unclear because Mr Hutton became involved in an exchange with the Chairman of the Commission during it. Mr Hutton is recorded as saying that in a conversation on an unascertained date Det. Johnston said that they had not fired any shots (pp 2297, 2300, 2302) but at one stage that he (Mr Hutton) had said that they had not fired a couple of shots (2301). On the same page he denied firing any shots at Pukekawa on the day in question, and he later said that he had not had the Thomas rifle on that occasion, which he placed as occurring on 13 September (2346). He denied planting the exhibit or any belief that anyone had done so (2346).

32. This material (other than what is in paragraph 31) is the evidence which would have to be adduced in a prosecution to prove that Mr Hutton was directly identifiable as someone who planted the cartridge case in the garden. Looked at objectively, I do not think it can be said that this evidence reaches the standard required for a prosecution to place Mr Hutton and Mr Johnston on the Crewe property with a rifle (let alone the Thomas rifle) between 20 October and 26 October 1970. If there was any question now of prosecuting Det. Johnston that would be very important, because his involvement in the case otherwise appears not to have been such as to suggest that he would be likely to have any reason to have become engaged in any improper activity. So far as Mr Hutton is concerned the matter seems again to be no more than evidence of opportunity, and no doubt he had many opportunities to visit the property other than this one.

33. My conclusion and my advice, having regard to the matters I have traversed in respect of the allegation of planting the cartridge case, is that the positive evidence available is not such that any charge should be made against Mr Hutton in that respect.

34. I turn to the question of the switching of Exhibit 343. The Commission discussed this Exhibit at length in paragraphs 161-189 of the Report. The particular finding of present importance is that a cartridge containing a pattern 8 bullet having been found by Detective Keith on 21 October 1970 that cartridge (in a dissected condition) became Exhibit 343; that at some stage before 12 April 1973 another case was substituted for the original case and that another case was deliberately substituted for the second one by some member of the Police "to the knowledge of at least Mr Hutton" between 12 and 13 April 1973. The allegation is that Mr Hutton was a party to a substitution in which someone else was the prime mover or that there was conspiracy to make such a substitution (see paragraph 188 of the Report).

35. To establish a charge such as this, the prosecution would have to establish to the required standard first, that there was a substitution, and then Mr Hutton's active participation in that in one or other of the ways mentioned. The starting point on the first question must be what the Exhibit was on 12 April (since the Commission's view is that it was then something other than what Mr Keith took from the Thomas property). It must then be shown that something else was in its place on 13 April. It is perhaps worthy of note that if Mr Keith is right the first substitution must have taken place on or after 4 April 1973 because his evidence is that on that date at the second trial he produced as Ex. 343 a fired shell case (transcript pp 1298/9). The Exhibit no longer exists, and indeed not even a photograph of it taken at any time exists. According to his evidence, the exhibit was examined only once by Dr Sprott (transcript p.515) and his examination did not involve measurement, but a comparative check of the lettering on that shell with the lettering on two others - see e.g. transcript p.472.

36. Both Dr Sprott and Dr Nelson gave evidence as to having examined an unfired .22 cartridge case in April 1973. The basis of the inference that there had been a change and that they both did not look at the same thing is that they reached different conclusions as to the dimensions of the letter 'C' appearing on the base of the shell, relative to Ex 350, and that Dr Nelson did not see a mark which Dr Sprott said he had placed on the Exhibit during the course of his examination of it - a mark which he said could have been seen by anyone with good eyesight (p.391 transcript). The existence of this mark appears first to have been referred to three years after the event, and it appears first to have been identified with particularity before the Commission eight years after the event. So far as I can determine no reference to this marking was made in the second reference to the Court of Appeal in 1974/1975 and it is agreed that no reference was made to it in a letter of 27 September 1973 (after the Exhibits had been disposed of at the tip). It was not identified to the Police when they interviewed Dr Sprott in October 1977. (Job Sheet T 81/3). The nearest there is to other evidence of the marking is that Mr Miller saw Dr Sprott trying to pick or scrape something on the top (base) of the shell and suspected that he was trying to mark it, but Mr Miller is firmly of the view that that was Ex 350. The trend of evidence

seems to be that it was probably Exhibit 343.

37. The Commission says to refuse to accept that the designated mark was placed on the case is to assert that Dr Sprott is a liar. I do not think it necessary to express a judgment one way or the other. I am concerned with the state of the evidence for a prosecution and I cannot think that in any case but one with a history such as this it would for a moment be considered appropriate to proceed with a charge an essential part in the proof of which was an assertion as to a matter of fact by one witness which is now incapable of independent proof and has been so for years and in circumstances when that assertion has not been made on earlier occasions when it could reasonably be expected to have been made.

38. The happening of the switch has always been a matter of inference and there are necessarily problems in my view about the primary facts from which that inference has been drawn. The fired/unfired argument as to Ex 343 goes to this aspect, and, as I understand the Commission's findings and the evidence, at the stage Dr Sprott examined Ex 343 it was in his category 3 (which would have held a pattern 8 bullet). However it was held to be by then already a substitute for the original, so that however the first substitution came about, the person responsible for it was fortunate enough to have substituted for the original shell one compatible with the original bullet. I have given a good deal of thought to the various evidence about whether or not the shell of Ex 343 was fired, but have concluded that it does not in the end assist in proving the alleged switch which the Commission linked with Mr Hutton.

39. Assuming the evidence satisfactorily shows that the shells were changed between 12 and 13 April 1973 there is still the issue whether that can be shown to the criminal standard of proof to have been done deliberately (as opposed to having happened by chance), and to have been done by a Police officer to the knowledge of or with the connivance of Mr Hutton. Each of these conclusions must be a matter of inference based on the evidence of events and on inferences already drawn. The Commission's view has no doubt been reached on the basis of the Commissioners' assessment of witnesses and their view of the matters which were the subject of their enquiry looked at as a whole. Whether their approach was an appropriate one is, as I have noted, the subject of other proceedings. I need go no further than to advise that in my opinion the evidence as to the commission of the offence involved in this allegation and that such an offence was committed by Mr Hutton is such that it would not be proper to lay any information against him charging that offence.

40. The next issue is the question of perjury or of an offence akin to perjury. The Commission clearly has not believed Mr Hutton's evidence or some part of it. That however is something that happens every day in Court hearings without charges of perjury being laid. An example of this situation occurs in paragraph 175 of the Commission's report where the truth of the evidence of Mr Miller and Detective Abbott on a particular matter is directly rejected by the Commission.

41. In the circumstances of the case I have concentrated my attention on three matters:

- (a) the question of planting;
- (b) the question of switching exhibit 343;
- (c) the affidavit made by Mr Hutton on 25 January 1971 referred to in paragraph 439 of the Commission's Report, concerning which the Commission says that it is unable to reconcile the statements in a particular passage with some of the Commission's own findings.

So far as the first two points are concerned Mr Hutton was asked questions which go directly or sufficiently directly to the point.

At p. 2346 of the transcript he was asked:

"Did you plant exhibit 350 on the Crewe property . . .
I certainly did not.
Was it planted there by anyone else to your knowledge . . .
I don't believe it was planted."

At p. 2314 the following evidence is recorded:

"I know I have already asked the questions generally, but so we are quite clear on your answer, at no time right through the second trial did you examine Exhibits 343 or 350 or have them in your possession . . . That is correct."

My advice is that if the evidence does not warrant charging Mr Hutton in respect of participation in those two matters (and I have already indicated that view) it equally does not warrant charging him in respect of his answers on oath denying wrongful conduct in respect of them.

42. The affidavit referred to in paragraph 41(c) above received little attention before the Commission. It was produced as the Commission's Exhibit 170. It antedates the first trial, and the statement which the Commission has questioned is that at that time Mr Hutton knew of no witness other than those named or described who could give evidence material to the case or of any other material evidence that had not then been given. The matters identified by the Commission which could be relevant (because they were apparently within the knowledge of the Police before the date of Mr Hutton's affidavit) were

- (a) evidence by Mr and Mrs Priest above hearing three shots on 16 June 1970;
- (b) evidence by the Priests about hearing shots in October 1970;
- (c) evidence about the material which was burnt at the Crewe property within days of the discovery of the apparent crime;
- (d) four matters relating to Dr Nelson's examination of the bullets recovered from the Crewes' bodies;
- (e) the reports of doctors who saw the child Rochelle.

43. It is essential in my view in considering Mr Hutton's affidavit to note that it related not only to the names of witnesses known to the Police but also to the materiality to the case of what they could say. Materiality of evidence in relation to disclosure must have been present to Mr Hutton's mind at the time he made his affidavit, as it plainly was when he gave evidence to the Commission - see e.g. transcript pp 2359ff. The passage from the affidavit of 25.1.71 set out in the Commission's Report is not the full contents of paragraph 8 of the affidavit. Before the passage quoted the affidavit says:

"That I am aware of the obligation on the Crown to make any material evidence not adduced by the prosecution available to the defence. That at no time has any request been made of me by the accused's solicitors or by his counsel to advise them of the result of Police enquiries into any particular aspect of this investigation ..."

For the offence of perjury (or a kindred offence) to be established the prosecution must prove that the assertion by the accused was at the time made it known to the witness to be false and was intended by him to mislead the tribunal holding the proceeding. The assertion made by Mr Hutton related to his knowledge and to his state of mind. His knowledge of items (a) (b) and (c) can hardly be in issue although his opinion as to materiality could well be on all matters.

44. As to (a), the hearing of shots by the Priests in June 1970, Mr Hutton was examined on whether he communicated this to the defence and if not why not. He indicated (2303) that he did not place much reliance on the evidence because of the comparatively late stage at which it was proffered to the Police and because of a test as to the carrying of the ~~rifle~~ sound of shots in which he had taken part. He said (2305) that he felt no reason to direct defence counsel's attention to it because he regarded it as of no material substance. He further said that it was for the Crown Solicitor and not for him to decide what to tell the defence. Mr Morris had given evidence that he did not know of what the Priests had said and Mr Hutton said he did not recall whether or not he told Mr Morris. He also indicated that he evaluated Mrs Priest as a witness and concluded that she would be a "a chopping block" for Mr Ryan.

45. Mr Hutton was not specifically asked about passing on to the defence what Mr and Mrs Priest had said about hearing shots from the Crewe property in October 1970. He was examined at length about that incident and denied that he and Detective Johnston had fired any shots on the property on the occasion in question whenever that was. Except in so far as that hearing of shots relates to the question of the planting of Exhibit 350 I do not myself see in what respect it could be said to have been regarded as material as at the date of the affidavit. I would not find it easy to put forward a case in support of a charge to the effect that Mr Hutton must have thought it necessary to disclose that particular conversation to the defence.

46. As to (c) the evidence about the material which was burnt: Mr Hutton was asked briefly about this and said that he had known nothing about the material being burnt until the hearings of the Commission. (2327/8). There seems to be no evidence to the contrary.

47. The matter referred to in paragraph 42(d) was not put to Mr Hutton so far as I can see, and I do not find that surprising. The affidavit was made after depositions and I do not think it would be expected by the defence or anyone else that Mr Hutton as the officer in charge of the case should elaborate on what Dr Nelson had already said.

48. As to (e), the reports of the doctors who saw the child Rochelle: The affidavit refers to "doctors" who examined and supplied opinions on the condition of the child. Mr Morris was aware of the four opinions. Mr Hutton said he did not recall any discussion about whether they should be disclosed to the defence. This is certainly not a matter of a type in respect of which I would expect in accordance with usual practice any Police officer to decide whether a disclosure was to be made, when the case was to be conducted at all stages by the Crown Solicitor. I do not myself think that in this respect any charge against Mr Hutton could seriously be contemplated. Mr Morris was asked about the reports and he indicated that he did not regard them as material in a prosecution of Thomas (2212) and that he made the decision not to disclose them (2213).

49. The affidavit in question was prepared by Mr Baragwanath and although it would be possible to prove that Police officers and in some cases Mr Hutton himself knew of the various matters discussed above I do not think it would be possible to prove that when he made the judgment he had to make for his affidavit on 25 January 1971 Mr Hutton believed that the information or evidence was material and deliberately did not disclose it. Without that proof there can be no charge, and in my opinion there ought not to be such a charge in respect of any of the five matters discussed.

50. I have now covered all the matters to which I have thought it necessary to consider having regard to the terms of the Royal Commission's Report. My opinion is that on the evidence available there is no occasion for prosecuting Mr Hutton in respect of any of those matters.

51. I should record that before Christmas 1980 Mr Tompkins Q.C. telephoned me and told me that he had been instructed to act for Mr Hutton. He said that Mr Hutton had raised with him whether it would be appropriate for someone on his behalf to put to me material which might relate to the decision in respect of any prosecution of him. We had some discussion about Mr Hutton making himself available for interview if I wished. The final arrangement was that I was left with the invitation to say if there was any information which seemed relevant and on my request such information would be provided. In the event I have not thought it necessary to take up that invitation.

52. It wish to record my gratitude for the assistance given to me by Inspector N.B. Trendle, the Chief Legal Adviser. Without his assistance in assembling material, bringing together references for me, and arranging such enquiries as seemed to me to be needed, it would not have been possible for me even by now to have completed this opinion to my own satisfaction. I also received considerable assistance from the use of the records and indexes prepared by Det. Snr Sgt. S.R.M. Keith.

53. The question of publication of my advice will no doubt arise. There are two considerations which affect this so far as I am concerned:

(a) there are currently pending review proceedings in which the Commission's Report and its methods are to be considered. These have been removed into the Court of Appeal and will be heard next March. They relate in particular to the findings of planting Exhibit 350 and of switching Exhibit 343. One of the bases of the application to the Court is that certain of the findings were likely to and did cause law enforcement officers to consider whether Mr Hutton should be put on trial for crimes;

(b) the matter, in so far as it has been referred to me, is one of law enforcement, and it is of course not usual to disclose what has led the Police to the decision whether or not to prosecute in any case. I realise that this case in this respect has special respects.

My own view is that so long as the Court proceedings are pending it would be no more appropriate to publish my reasons for the advice I have given than it would be to publish anyone else's views on the matters which are to be considered by the Court. I do not suggest that the Court will be influenced in the slightest by my views, but I regard the publication of comment on the issues before the Court as wrong in principle. So far as the law enforcement aspect is concerned I cannot see any reason for limited disclosure of my reasons, for instance to Mr Hutton or the Police Association or the Police Officers Guild. They have no better standing in this matter than any other individual whose conduct has been considered by the Police or industrial body concerned for the interests of one of its members. If you wish I will be happy to discuss this aspect further with you.



Solicitor-General