2014

New Zealand Police

CREWE HOMICIDE INVESTIGATION REVIEW

Court of Appeal Judgments

APPENDIX 19

Appendix 19

Court Judgments

1.	18 June 1971	First Appeal - Court of Appeal Judgment
2.	2 February 1972	First Petition - Report Sir George McGREGOR
3.	26 February 1973	First Referral - Court of Appeal Judgment
4.	11 July 1973	Second Appeal - Court of Appeal Judgment
5.	26 August 1974	Second Petition – Court of Appeal Judgment
6.	29 January 1975	Second Referral –Court of Appeal Opinion
7.	29 August 1980	Judicial Review – High Court Judgment
8.	30 July 1982	Judicial Review - Court of Appeal Judgment

Appendix 19

(1)

18 June 1971

First Appeal - Court of Appeal Judgment

C.A.25/71

IN THE COURT OF APPEAL OF NEW ZEALAND

THE QUEEN v. ARTHUR ALLAN THOMAS

Coram: North P.
Turner J.
Haslam J.

Hearing: 4, 5, 6 May 1971

Counsel: Temm Q.C. and Webb for Appellant
Morris and Baragwanath for Crown

Judgment: 18 June 1971

JUDGMENT OF NORTH P. AND HASLAM J.
DELIVERED BY NORTH P.

The appellant was arraigned in the Supreme Court at Auckland before Henry J. and a jury in February 1971 on two counts of murder, namely that on or about 17 June 1970 at Pukekawa he did murder both David Harvey Crewe and his wife Jeanette Lenore Crewe. At the conclusion of a trial which extended over some 16 days, he was convicted of both these crimes and on 2 March 1971 was sentenced to imprisonment for life. He now appeals against his conviction.

The amended grounds of appeal are these:-

"That there was a miscarriage of justice in that:

(a) The learned Judge presiding at my trial failed to put my defence adequately to the jury

(b) The learned Judge failed to direct the jury correctly on the standard of proof to be applied to circumstantial evidence

(c) The learned Judge was wrong in ruling that the evidence of Kenneth James Newton was inadmissible."

It will be observed that it is not contended that the verdict of the jury should be set aside on the ground that it could not be supported having regard to the evidence. Nevertheless, as the principal ground of appeal is that the learned trial Judge failed to put the appellant's defence adequately to the jury, we can see no escape from the necessity of reviewing the effect of the evidence given at the trial in some detail. For ease of reading we propose to attempt to do this under a number of headings.

Background

Harvey and Jeanette Crewe were married on 18 June 1963 and at the time of their deaths they had one child, a girl named Rochelle, who was some 20 months of age. The young couple jointly owned a mixed farm of 340 acres situate in the Pukekawa district. This is a somewhat isolated part of the Waikato for it is situated on the far side of the Waikato River across from Rangiriri. Jeanette was a local girl who had been brought up in the district. She was one of the two daughters of Mr and Mrs Lenard Demler who also farmed there. She attended a primary school in Pukekawa and then went on to a boarding school in Auckland. At the beginning of 1961 she went to England, returning to New Zealand towards the end of 1962. She had an uncle, a Mr Chennell who also farmed in the district and on his death he left his farm to Jeanette and her sister, Heather, in equal shares. On or shortly after her marriage, her husband purchased Heather Crewe's share for she was then living in California. Thus at the time of their death the young couple

jointly owned the farm on which they resided which was known in the district as the "Chennell property." In February 1970 Jeanette's mother died and under her will Jeanette inherits in due course a half share in the Demler farm, so at the time of her death Jeanette was quite a wealthy young woman. After his wife's death, Mr Demler was accustomed to dine with his daughter once a week. It so happened that the last occasion was Tuesday 16 June when he found them both in good spirits.

Disappearance of Harvey and Jeanette Crewe

On Monday 22 June 1970 a stock agent rang Mr Demler and advised him that he had been unable to get any reply to a number of telephone rings to Harvey Crewe, so Mr Demler went to the Crewe's farm at about 1.30 p.m. to see what was the matter. He could see no sign of anyone on the property, so he entered the house by the back door which he said had a key in the outside of the lock. Neither Jeanette nor Harvey were in the house but he found the baby, Rochelle, in her cot in a neglected and distressed condition. From the appearance of the cot and her clothing it was obvious she had been left unattended for a considerable period. He became even more alarmed when he observed what appeared to be large bloodstains on one of the easy chairs and on the carpet in the living room. He left the house and sought the assistance of a neighbour, a Mr Priest. They returned together and made a further inspection to no purpose, so the police were communicated with. Mr Demler took Rochelle to the house of a friend, a Mrs Willis. When the local policeman arrived and had made an inspection of the premises, he communicated with his superiors and was told to lock the house and wait for the arrival of the homicide squad.

Arrival of police party

The police party arrived at about 4 p.m. in charge of Detective Inspector Hutton. Inspector Hutton noticed that an electric light by the back door was alight and on entering the house he observed what appeared to be diluted bloodstains on the kitchen floor and on the side of the sink bench. Then in the living room he noticed that one lounge chair was heavily stained with what appeared to be blood and that there were stains of a similar appearance on the carpet. On a nearby table were the remains of a meal. He also noticed what appeared to be a blood stained drag mark leading from the chair towards the hallway leading to the front door. At the front door he saw further bloodstains and what appeared to be splashings of blood on the brick side of the house near the bottom front step. Dr Cairns, a pathologist with long experience in homicide cases was present. Between them they decided that it was probably a case of homicide and as there were no signs of a gun having been used, the most likely weapon to have caused such extensive bleeding was either a sharp weapon causing wounds, or a heavy blunt weapon causing head injuries. On this assumption Inspector Hutton allotted various duties to the members of his team. He instructed one group to make a careful search for a weapon. The search extended over several days but no weapon was found. It was thought likely that the drag mark indicated that one of the victims, probably Harvey, (because he was a man weighing some 16 stone) had been dragged out of the house through the front door. That both Harvey Crewe and his wife Jeanette had either been killed or at least seriously injured, was confirmed when later an analysis of the bloodstains showed

that those on the chair were from one blood group and some on the carpet were from another group, (which, moreover, coincided with Jeanette's known blood group.)

Fixing of the approximate time of the tragedy

Detective Inspector Hutton of course appreciated that it was important to endeavour to fix the approximate time when the tragedy had occurred. It was clear that it could not have been earlier than the evening of 17 June because the police were able to ascertain from several people that Harvey Crewe and his wife Jeanette were alive during the day time. It was thought to be unlikely that they were alive on 18 June because an inspection of the goods delivery box at the farm gate disclosed that it still contained newspapers and milk which had been delivered on 18 and 19 June. Nevertheless, there were two perplexing circumstances which require to be mentioned. On Friday 19 June a witness who was working on a farm across the road said that between 8.30 a.m. and 9 a.m. when he was engaged in feeding out hay, he saw a woman dressed in slacks and with light brown hair standing outside the Crewe homestead, apparently watching him feed out. Nearby he saw a parked car which he described as being a Hillman of a dark green colour. Then again a Mrs McConachie who passed the Crewe farm on the way to a football match at about 1.30 p.m. on Saturday 20 June said she saw a little girl standing at the gate and the description she gave of the child and the way she was dressed suggested that the child might have been Rochelle. She too saw a car parked outside the house which she recalled to be a light coloured car. Finally, the description of Rochelle given by Mrs Willis, who it will be recalled received the child at about 2.30 p.m. on Monday

22 June, in the opinion of Dr Fox a child physician who made a detailed examination of the child at the instance of the police on Tuesday 23 June, was that the child could not have been in the physical state she was when he examined her if she had been without food or drink for a period in excess of 72 hours. At all events, the Crown was satisfied to present its case on the assumption that the killings had occurred some time during the evening of 17 June.

Period between 22 June and 16 August

During the whole of this period the police officers went about their several duties. Police Inspector Gaines was appointed as officer-in-charge of the search for the two missing persons. The search commenced on 23 June and was carried out both on the ground and also by boat on the Waikato River and as well from the air. In all, during the first week rather more than 200 persons in addition to the police were engaged in the search but after the first week the number dropped to about 60. The majority of the searchers were farmers from the Pukekawa area. The appellant Thomas did not take part in the search.

The usual routine enquiries were made with the view to discovering any person or persons who might be in a position to help the police. But while the police had formed the opinion that the tragedy was the work of some local person or persons for nothing appeared to have been stolen from the house yet no weapon was discovered and no motive for the crime emerged. However one possible clue was the discovery in the wardrobe in a spare room of an unopened box containing a brush, comb and mirror set in which there was an undated Christmas card addressed, "To

Jeanette, from Arthur." From the appearance of the wrapping it appeared that Jeanette had done no more than perhaps take a look at the present and then had put it aside and never used it. Naturally enough the police decided that it was worth investigating who "Arthur" was and when he had given the present to Jeanette. On 12 August Detective Sergeant Parkes went to the appellant's farm taking with him the card, but not the brush and comb set. He showed the card to the appellant and asked him whether he was the writer. The appellant said he was and that it had been attached to a brush and comb set which he had given to Jeanette when he wanted to court her. Later it was established that the appellant had given Jeanette this present in December 1962 on her return from overseas. On 13 October when matters had further developed, the appellant was seen by Detective Johnston who asked him a number of questions, one of which was, did he know whether Jeanette had used the brush and comb set that he had given her? The detective said that the appellant replied that he did not know, it could still be wrapped up for all he knew. The possible significance of this rather odd reply will be referred to later for it formed part of the circumstances which the Crown called in aid of its contention that the appellant had killed both Harvey and Jeanette Crewe.

Recovery of the bodies of Jeanette and Harvey Crewe

On 16 August Jeanette's body was found in the Waikato River which shortly before had been in flood. Detective Constable Higgins who examined the body on the riverbank said that it was clothed and that there was a blanket wound round the lower part of the body and also a piece of multi-coloured cotton material, both of which were

proved to have been taken from her home. The wrapped body was tied with wire but was not attached to any object. The search then went on in the hope of discovering the body of her husband, Harvey Crewe, but it was not until 16 September after another flood that his body was found in the Waikato River some miles above where Jeanette's body had earlier been found. At the time of discovery, the body appeared to be anchored to some object in the bed of the river. However, before the nature of this object was ascertained the body broke loose while being moved. When the body of Harvey Crewe was placed on the riverbank it was found that he too was clothed and likewise had the remnants of a blanket wrapped round his waist. There was a considerable quantity of copper wire wound round his body. An examination of the bed of the river immediately beneath where the body had been found resulted in the discovery of a trailer axle weighing about 56 lbs. which bore marks which were at least consistent with it having been tied to some object by material such as wire, but at the time it was discovered there was no wire attached to the axle.

Post-mortem examination of the bodies

On Sunday 16 August Dr Cairns conducted a preliminary examination of the body of Jeanette Crewe on the riverbank near where she was found and later he conducted a detailed examination at the mortuary. He formed the opinion that some of the injuries on her face and neck may well have been caused after death, but he was of opinion that the injury to her eye and nose and other injuries to her temple were caused before death. He found the cause of her death to be a bullet wound in her head. He expressed

the opinion that the most likely sequence of events was that she was knocked to the ground from a blow with a blunt weapon and that while she was lying on the ground with the left side of her face downwards she received a bullet wound in the right side of her head. Dr Cairns recovered the bullet and handed it to the police. When Harvey Crewe's body was recovered from the river on 16 September, his body too was examined by Dr Cairns who found that he also had died as a result of a bullet wound, the point of entry being on the left side of his head. The bullet had gone through the skull and had caused many fractures and had gone through the brain and was lodged beneath the skin in front of the left ear. Small fragments of the bullet were recovered around the entrance in the skull and from brain tissue and a large fragment of bullet was found beneath the skin in front of the left ear. These were handed by him to the police.

Dr Cairns was of opinion that both Harvey and Jeanette Crewe would have been rendered unconscious immediately, but that death would not have occurred for some time afterwards. He said that in his opinion the large quantity of blood found on the lounge chair supported the conclusion that Harvey Crewe was sitting in his easy chair when he was hit by the bullet, and immediately he was hit he must have slumped forward on to the right side of the chair which explained the position of the bloodstains in the chair and the fact that blood had also seeped down between the right arm and the seat. From the position of the chair when he inspected the living room on 22 June, he considered that the person responsible must have fired the rifle from the direction of the kitchen. He considered that the blood

marks leading to the front door were consistent with the body having been dragged out to the front door and taken away.

Evidence regarding the identification of the rifle which fired the fatal shots

The two bullets were from a .22 rifle and immediately they were recovered steps were taken by the police to collect rifles of this calibre from residents in the district. In all, no less than 64 rifles were obtained by the police and were submitted to experts for examination. In their opinion, the bullets extracted from the heads of the two victims revealed striations which conformed with the rifling of only two of the firearms submitted to them. One of these rifles was owned by the appellant. A representative of the company which had manufactured the two bullets was able to say that both bullets were old ammunition which had not been manufactured since 1962. The appellant was seen by the police and invited to hand to them any .22 cartridges in his possession. It was found that all of these cartridges were of a later manufacture, but a search subsequently made by the police of the appellant's garage resulted in the discovery of one round of the same kind of ammunition which had been used in the killings. This cartridge was found in a box with some nuts and bolts. The rifle owned by the appellant was a repeater.

Search undertaken by police to identify the axle found under Harvey Crewe's body

Exhaustive enquiries were made by the police with the object of discovering who had owned the axle. In the end it was found to have belonged at one time to the appellant's father and had been attached to a trailer he owned. Later when it was found that the axle was giving

trouble, it was replaced with another axle by an engineer, Mr Rasmussen. Mr Rasmussen had no doubt whatever that the axle produced at the trial was the one he had removed from Mr Thomas snr's. trailer, and he said that the discarded axle together with other parts of the axle assembly were taken away by the person sent by Mr Thomas snr. to collect the trailer. With this information in their possession, the police made an intensive search of the appellant's farm and found in various parts of the farm the other parts of the discarded axle assembly which too were identified by Mr Rasmussen as having come from Mr Thomas snr's. trailer. At the same time a search was made to see whether the wire found around the bodies of Harvey and Jeanette Crewe had also come from the appellant's farm. Samples of wire found on his farm in the opinion of an expert, were similar in metal constituents and in gauge to the wire which had been wrapped around the body of Harvey. The wire which was found around Jeanette's body was less cogently identified.

Discovery of .22 cartridge case

When the results of Dr Cairns examination of the bodies were received by Detective Inspector Hutton, it was decided to consider more closely what was the most likely place from which Harvey Crewe had been shot. To begin with, it had been assumed that he had been shot by an intruder who had entered through the kitchen door, but further consideration of the circumstances gave some support for the conclusion that it was unlikely that an intruder could have entered the house without either Harvey or Jeanette Crewe hearing him. Then the fact that the electric light outside the kitchen door was burning when the police arrived,

suggested that someone might have been looking for some object. As two shots had been fired from a rifle which might have been a repeater, it was at least possible that if in fact the first shot had been fired from outside the house through for example, the louvre window in the kitchen, the ejected cartridge might not have been recovered by the person responsible. Accordingly a more detailed search of the area was undertaken and on 27 October a spent .22 cartridge case was found in the garden in a position consistent with its ejection by someone when re-loading a repeater rifle near the louvre window. This cartridge case was submitted to a ballistics expert who gave a confident opinion that the cartridge could have been fired only by the appellant's rifle. His opinion was based on a microscopic examination of the cartridge case which, he said, showed marks of a highly individual character in relation to the firing pin, the breech lock and the ejector.

The questioning of the appellant by police officers

Prior to the discovery of the bodies, the appellant had been interviewed by police officers more or less as a matter of routine. On 2 July 1970 he was asked by Detective Senior Sergeant Hughes whether the information the police had received that in earlier days he had some sort of passion for Jeanette Crewe was correct. He admitted that he was "fond of her." Now that the evidence in the hands of the police pointed to the fact that the appellant may have been the person responsible for the killing of Harvey and Jeanette Crewe, he was of course subjected to close questioning by more than one detective. I have already referred to the evidence of Detective Johnston who questioned the appellant regarding the brush, mirror and comb set when

it will be recalled this witness said that the appellant had said that for all he knew it could still be wrapped up. He was asked by the same detective why he had not taken any steps to assist the police who, on 10 October had published in the "New Zealand Herald" a photograph of a trailer which the police were anxious to trace. He admitted that he had recognised the trailer as one similar to a trailer his father at one time had on the farm, but he said that he had not done anything about the matter because he thought his father would recognise the trailer and communicate with the police. He admitted that he knew in a general way the layout of the Crewe house for he had visited there when the house was occupied by a Mr Henley who managed the farm for the Chennell Estate. He agreed that in earlier days he had a "real crush" on Jeanette and had been anxious to court her. He acknowledged that he had given her a present of a writing case when she left for England and he produced a letter of thanks from her which she had sent to him from England. The letter was no more than a conventional letter of thanks. However, on her return from England when he gave her the brush and comb set and had asked her whether he could take her out, she had declined saying that she was friendly with another boy and did not want to continue seeing him. In answer to a further question, he said that he was not upset by her response for she spoke "in such a nice way." He said that he had seen Jeanette from time to time over the years but only in a casual way and infrequently. He said that he was quite happily married though he and his wife were disappointed that they had no children, which he said was his fault and not the fault of his wife.

He was told by Detective Sergeant Parkes that the police were satisfied that it was his rifle that killed Harvey and Jeanette Crewe and he was asked for an explanation. He replied, "If you say it was my rifle it must have been, but I did not do it." When he was later questioned by Detective Johnston about the axle, the cartridge case and the copper wire and was asked for an explanation why all these things had been traced to his farm, his reply was, "I've been framed," and added, "Somebody must have known I was writing to Jeanette, somebody like Derek Booth who was then going with Heather. I can think of no other reason." He was then asked, "How did they get possession of your gun?" He replied, "Somebody must have cased the farm the weekend before." He was asked if he had loaned his rifle to anyone but said that as far as he knew it was in his house on 17 June. Detective Keith said that on 21 October he commenced searching a garage on the appellant's farm and while so engaged he noticed that the appellant and his wife were having a conversation just outside the garage. He said that he watched them through crackholes in the garage wall and that he heard Mrs Thomas say something to the appellant but what she said he did not hear. However, he claimed that he heard the appellant reply, "If they think I am guilty, I am, and that is that." He was closely questioned by Detective Inspector Hutton regarding his movements on 17 June. He was asked whether he could recall that a local ratepayer's meeting had been fixed for that night. He said that he did not remember that nor did he recall anyone ringing him up about this meeting, but he said that he usually went to such meetings. He said that he was at home the whole of the evening and had watched T.V. after attending to a sick cow.

The last witness called by the Crown was a Mr Eggleton, a jeweller in business in Pukekohe. He claimed that one day during the week in which the disappearance of the Crewes was reported in the "New Zealand Herald", a man came into his shop and asked him to fix the broken glass of his watch. When he examined the watch after the man had left, he noticed blood and mucous in what he called the lugs on the watch. In November 1970 he noticed among photographs in a locally published booklet called "Photo-News" a photo of a Mr Thomas. He said that he recognised Mr Thomas as the man who had come into his shop to have his watch fixed. This witness only came forward during the course of the trial but it was not challenged that the photo in the publication he produced was that of the appellant and his wife. His delay in coming forward however, considerably weakened the value of his evidence.

Miscellaneous points in the evidence not previously referred to

Early in the case the Crown called the appellant's cousin, a lad of 18 years of age who was living with the appellant in June 1970. He was called to give evidence regarding the appellant's rifle and where it was kept. He said that until the police took it away it was in his bedroom behind the door. He said he never used the rifle himself and did not know of anybody else who had possession of it. He claimed to have remembered the Wednesday 17 June and said that the appellant was still up when he went to bed. He remembered the incident about the sick cow and recalled that it was strapped to the rafters and left hanging to let the blood circulate in its legs. He knew it was due to calve

shortly. He said he was present at a discussion which took place between the appellant and his wife regarding their movements at the time it was reported that Mr and Mrs Crewe were missing.

Another witness called by the Crown was Mrs Crewe snr., the mother of Harvey. She said she often visited her son and daughter-in-law and she identified a bedspread which had been found wrapped round one of the bodies as one which usually covered the bed in the spare room where she was accustomed to sleep. This piece of evidence was regarded by the Crown to be of some importance because the brush and comb set was found in the wardrobe of that room. In cross-examination she was asked whether her son was keen on television. She replied that he worked too hard to be too keen on T.V. and often it was his habit to go to sleep in his chair. Mrs Crewe also said that when she was visiting her son and daughter-in-law, their habit was to sit about in the lounge after the evening meal leaving the dishes to be done later just before they went to bed. It will be recalled that the appellant when questioned by Detective Johnston about the axle, cartridge case and copper wire, had replied that he had been framed and he mentioned, "Somebody like Derek Booth." The police accordingly called Derek Booth who was a married man living at Whangarei. He said that he had not left Whangarei during the whole of the relevant period. His evidence was not challenged by Mr Temm.

Photographs

Two volumes of photographs were produced as part of the Crown case. Among these were photographs showing the state of the lounge when the homicide squad arrived on 22 June.

There was no observable sign of a struggle having occurred between Harvey Crewe and the intruder. So far as Jeanette was concerned the position was a little different. Her knitting was found on the sofa but one of her knitting needles was lying on the floor and it was noticed that seven stitches had been dropped. Her slippers too were lying in different parts of the room.

Police statements obtained from appellant

Two written statements signed by the appellant were produced. The first was dated 15 October and the second 25 October. The appellant said that he had married his wife, Vivien, on 7 November 1964 and after their marriage he had worked away from the district for a time, but in June 1966 he had taken a lease of his father's farm at Pukekawa. He admitted having been interested in Jeanette in earlier years but said that when she told him that she had a boyfriend he had "taken the hint and never visited her again." He was shown the axle and stub-axle and agreed that at one time they were all part of the same assembly but said that he could not recall any of the articles he was shown being on his farm. The only suggestion he could make was that someone had come to his farm and taken away the axle and the copper wire which was attached to the body of Harvey Crewe. He excused himself for not joining with other local farmers in the search for the missing Crewes and explained that he was too busy to spare the time as his cows had commenced to calve. He denied being in any way concerned with the death of Harvey and Jeanette Crewe but said that he knew all along that he was a suspect because he "used to chase Jeanette along a bit and used to write to her."

Evidence called for the defence

The appellant and his wife both gave evidence. The appellant denied that he had left his farm on the evening of 17 June and said he had nothing whatever to do with what had happened in the Crewe house that night. He said that he remembered the evening of 17 June because he was busy attending to a sick cow which had given birth to a calf that evening after it was dark. He denied that he had ever visited the shop of Mr Eggleton, or had owned a gold watch such as that described by the witness. In cross-examination he was questioned regarding his statement that the cow had calved on 17 June, the very day, according to the records, it was due to calve. It was pointed out to him that only two of the twenty five cows had in fact calved on the due date. He was closely questioned regarding the reasons which had caused his wife and himself to discuss what their movements were on the night of 17 June when they heard over the radio on 23 June that the Crewes were missing from their home. He denied that he was jealous of Harvey or Jeanette Crewe, although he was well aware that they were in far more comfortable circumstances than he was. He did not deny that he had told Detective Johnston that for all he knew the brush and comb set could still be wrapped up, but he claimed that this observation, if he made it, had no particular significance. He denied that he had ever used the word "guilty" claimed to have been overheard by Detective Keith. He admitted that when he was questioned by Detective Inspector Hutton regarding his contention that he had been framed, he had replied, "I know I am sitting on rocks, I have got to stick to what I have already told you otherwise I am a goner."

Mrs Vivien Thomas, the wife of the appellant, said she was sure her husband had not left their farm on the evening of 17 June. She said they had gone to bed together after a late meal caused by the need to attend to the calving of a sick cow. She was closely cross-examined regarding certain calving entries she had made which it was claimed supported her husband's and her own evidence regarding the calving of the sick cow. On a number of matters she was obliged to confess that her memory was faulty by reason of the time that had elapsed and the strain she had been under. She denied that her husband had ever said anything that indicated that he was guilty, though she remembered the conversation in the garden which she said was in the nature of a complaint by her of the way her floors were being walked over by the police. She denied th t she was the woman Mr Roddick claimed to have seen outside the Crewe home on Friday 19 June. She said that she had been required to go on an identification parade but was not recognised by Mr Roddick. She agreed she regularly wore slacks on the farm and that she drove a 1965 Hillman car painted light green. She claimed that her hair was dark brown and not light brown as stated by Mr Roddick of the woman he had seen that day. She said that she had never on any occasion been to the Crewe farm.

Another witness called to support an alibi was Mrs Rosemary Thomas who said she had rung the appellant's wife on 17 June to see whether she would like to go with her to a ratepayers' meeting fixed for that night. She said that Vivien Thomas had said that they were not going to the meeting as they had not yet had dinner due to having to attend to a sick cow. Several witnesses deposed as to the general good character of the appellant.

The defence did not call any expert witnesses in reply to the evidence given by the Crown witnesses regarding the identification of the appellant's rifle, the identification of the cartridge case, the axle, the stub-axle or the copper wire. However, two witnesses were called with the object of establishing how difficult it would have been for anyone to have fired from outside the Crewe house through the louvre window in the kitchen. One of these witnesses was a retired army officer, a Mr Brant, and the other a Mr MacKenzie a field supervisor. Mr Brant, whose evidence was confirmed by Mr MacKenzie, said it was only with very considerable difficulty that he could get himself into a position to sight the rifle through the window in the direction of the chair where it was suggested that Harvey Crewe was sitting at the time he was shot. He said there was only a very limited angle so that if the chair was in a slightly different position a shot from outside the house would not have been possible. He considered too that there would be great difficulty in aiming the rifle from outside the house into the lighted room.

Refusal by Henry J. to admit the evidence of a psychiatrist

A suggestion inherent in the Crown case was that the rejection by Jeanette of the attentions paid to her some years earlier by the appellant and jealousy arising from her wealth as compared with his own financial position could have furnished a motive for the murders. In order to rebut any such suggestion, Mr Temm proposed to call Dr Newton, a medical practitioner specialising in psychiatry, to say that having examined the appellant while in custody he had formed the opinion that at the time of the offences the appellant

was in no way obsessed by any feelings of rejection by Jeanette. But Henry J. ruled that he could not receive such evidence. Accordingly, Dr Newton was stopped when he was about to say what his final findings were after he had conducted some psychological tests to reinforce his clinical impressions. Now that we have, we hope, sufficiently covered the evidence called in this long trial, we are in a position to consider the grounds of appeal against conviction which were advanced by Mr Temm and supported by Mr Webb in this Court.

(a) Failure to put the defence adequately to the jury

Mr Temm did not contend that the learned trial Judge had unfairly imposed his views of the case as a whole on the jury as was the position in Broadhurst v. The Queen 1964 A.C. 441, 446. Nor did he contend that the Judge had failed to leave the facts to the jury to decide. What he did submit was that the summing-up in several respects was inadequate and that in other respects the summing-up as a whole could not be accepted as a fair presentation of the way the appellant's case had been put to the jury with the consequence that in Mr Temm's submission, the appellant had been deprived of his right to a fair trial, R. v. Raymond 1956 N.Z.L.R. 537. We should say at once that we agree that a Judge cannot unfairly take sides and then cover himself by saying that the matter is really for the jury to decide. A fair balance must be maintained. But on the other hand, it must not be forgotten that the presiding Judge has the dual responsibility of seeing that an accused receives a fair trial and that the strength of the Crown's case is fairly placed before the jury, particularly now that counsel for the accused enjoys the privilege of addressing the jury last and quite properly

will have emphasised all the points he can make in the accused's favour. Mr Temm made four principal complaints. First, that the evidence as to the defence of alibi had not been fairly and adequately covered. Having studied the summing-up carefully, we are of opinion that there is really no substance in this complaint. The Judge referred to this defence on three separate occasions telling the jury:-

> "You must be satisfied that you can safely reject the accused's denial of his guilt as being false and that you can safely reject the evidence of his wife when she says that her husband, so far as she knew - and she is a light sleeper - never left their home that night."

The alibi in this case rested solely on the evidence of the appellant and members of his family and we see no reason why the Judge should be required to refer in detail to what each of these persons said. In our opinion, the way Henry J. dealt with the matter was consistent with the views recently expressed by this Court in R. v. Taylor 1968 N.Z.L.R. 961.

Secondly, Mr Temm submitted that the significance of the absence of an adequate motive for the crimes had not been fairly weighed in the summing-up. It is of course quite clear that proof of a motive for a murder is not a necessary part of the proof that the Crown is required to produce to support a conviction. But while that is so, it cannot be doubted that the existence of an adequate motive is a relevant circumstance and if the evidence is sufficiently strong, may be used as part of the circumstantial evidence that the accused was the person responsible for the crime, see Plomb v. The Queen (1963) 110 C.L.R. 234. But so far as the

present case is concerned, we are satisfied that Henry J. did not over-emphasise the evidence as to a possible motive and indeed he played it down. He spoke of the earlier romantic interest the appellant had in Jeanette Demler and said:-

> "You may think that that has gone into the background and may be of little importance now."

Then he went on to refer to the suggestion that the appellant may have been jealous of the fact that Jeanette was a wealthy girl and she and her husband enjoyed a degree of prosperity denied to him and his wife, saying:-

> "This, so the Crown claims, is a background which is not unimportant in weighing later evidence. It has, I think, been called a motive. Motive for a murder is not a necessary part of proof. If one be proved it is only a piece of evidence to be weighed with all the rest of the evidence. That is only commonsense, because a person may have a motive and not carry it out. However, so much for the question of motive. I myself, for the want of a better term, will call this early background."

In our opinion then, we think the Judge put the matter into proper perspective and that there are no grounds for concluding that the jury were in any way misled as to the significance of the somewhat slender evidence as to the existence of a possible motive for the crimes.

The third matter referred to by Mr Temm was that the Judge had failed to comment on the fact that the expert who examined the 64 rifles found another rifle which equally well could have fired the bullets found in the heads of the two victims. Mr Temm submitted that it was a weakness in the Crown case that the person who owned that

rifle had not been called to explain his movements on the evening of 17 June. That may be so, but if Mr Temm had thought the matter to be of any importance he could have insisted that Detective Inspector Hutton disclose who that person was and what steps he had taken to ensure that he was in no way involved. It is trite law that a Judge is not required in his summing-up to deal with every contention advanced by the defence and in our opinion this is just such a matter. Indeed if, as we assume was the case, Mr Temm made something of this point, what he said was not weakened by any comment from the Judge as might well have been the case if the Judge had been so minded.

The fourth and last particular complaint made by Mr Temm was that the Judge had not adequately dealt with a contention he had made in his final address, namely that the true position might well be that this was a case of murder and suicide. He suggested to the jury that the fact that there were some unpaid accounts lying on the table with the remnants of the meal might indicate that Jeanette might have been displeased with her husband's handling of the farm accounts and in anger have shot him and then in remorse committed suicide. Then at some time later someone visited the house, removed the weapon and disposed of the bodies in the river in order to conceal the existence of a domestic tragedy. We hope we are not being unjust to Mr Temm who had a very difficult task in view of the strength of the evidence collected by the Crown in the course of a long and painstaking investigation, if we say that we are surprised he thought it worthwhile to make this suggestion which we would think would be immediately rejected by the jury. If

this was not something in the nature of an afterthought, surely a proper foundation should have been laid. The pathologist should have been asked whether the bullet in Jeanette's head could have been self-inflicted and Mr Demler, who was the most likely person to have intervened, should have been questioned on the matter. With admirable restraint, Henry J. did not express, as he was fully entitled to, his own opinion on the matter and contented himself by pointing to the difficulties in the way of adopting such a theory involving as he said, "the intervention of a third person to do the wrapping up and disposal of the bodies." In our opinion then, there is no substance in this complaint.

Apart from these particular matters, Mr Temm drew the Court's attention to a number of other passages in the summing-up which, he submitted, when taken together resulted in the summing-up being partial and unfair. We have considered in turn each of the matters referred to by counsel, but in our opinion none of them, whether taken singly or cumulatively, would justify this Court holding that in this case this experienced Judge had departed from the standards of fairness and impartiality which was to be expected of him. No doubt, here and there the learned Judge revealed that he thought the case against the appellant was a strong one. So it was in our opinion, and with the exception of one or two passages open to criticism if read in isolation, we do not think it can possibly be said that the Judge did not deal with the case in a fair way. It is perhaps inevitable that counsel who are engaged in a long and difficult trial are inclined to feel that the Judge was not as generous as they hoped he would be in dealing with matters of defence.

But it must always be remembered that a summing-up should never be analysed microscopically for apart from directions on matters of law it is intended to be no more than a practical help to a jury who have already heard all that can be said by counsel, either in favour of a conviction or in favour of an acquittal. As this Court pointed out quite firmly in R. v. Raymond 1956 N.Z.L.R. 527, 531:-

> "It must be but seldom that a summing-up is without any imperfections, but it is not the function of this Court to consider whether this or that phrase was the best which might have been chosen, or whether more or less stress should have been put on particular parts of the evidence, but to determine broadly and generally whether in the summing-up the case was fairly put before the jury; and, if the summing-up has done that and all relevant issues have been left for decision by the jury, no objection can be taken to it."

However, in order to do justice to the earnest argument we heard from Mr Temm, we think we should refer to some of the more important points he made. (i) Mr Temm submitted that Henry J. had not dealt adequately or even fairly with the contention of the defence, supported as it was by the evidence of two witnesses that there were great difficulties in the way of a person shooting Harvey Crewe from outside the louvre windows. We have carefully considered all that the learned Judge said on this matter and we are bound to say that we think he put the position quite fairly. He said:-

> "No doubt the bullet is consistent with firing from the kitchen or from the louvres. No

doubt at all that he was bleeding when he was in the chair, but there may be a source of error in stipulating the chair must be in the very position in which it was found on the 22nd."

Now the evidence of the pathologist quite clearly we think, showed that Harvey Crewe was taken completely unaware and was killed while he was sitting in his chair. Once this is accepted, then it really is not of vital importance whether he was shot from outside the house or after the intruder had entered the kitchen. The objection to the adoption of the second possibility was that it was said that Harvey Crewe would have heard the intruder enter, but the jury might well have thought that as it was a wild night and as the television set may have been on and perhaps as well Harvey Crewe may have been dozing in his chair, he would not necessarily hear the intruder enter. Once the cartridge case was found outside the kitchen door and that cartridge case was proved to have come from the appellant's repeater rifle, then the exact position from which the shot was fired loses a great deal of significance. The plain fact is that whoever the intruder was, Harvey Crewe was shot through the head while sitting in his chair and not after he had been warned of the arrival of an intruder. (ii) The brush and comb set - we do not think there was anything unfair in the Judge raising the possibility that the appellant had not been altogether frank with the police when he was first interviewed by them in that he made no reference to having given Jeanette any presents. But we are inclined to agree with Mr Temm that some minds would think that Henry J. rather over-emphasised the importance of the appellant's later comment that for all he knew this quite expensive present

could still be wrapped up. The Crown made a good deal of play of this comment as indicating that the appellant was the person who had been in the spare room and had taken the bedspread from the bed for the purpose of wrapping up one of the bodies. The suggestion was that in searching for suitable wrappings he had opened the wardrobe door and had recognised the present he had given Jeanette many years before. However, while that may be a point of criticism in the summing-up, the whole matter was left to the jury who would, we feel sure, not be greatly influenced by that observation standing alone. But we agree it might in a small measure have influenced them when they came to consider all the various pieces of circumstantial evidence which the Crown said pointed beyond doubt to the fact that the appellant was the person who had killed Harvey and Jeanette Crewe. On any view of the matter then, we cannot say that Henry J. acted unfairly in preferring the way the Crown put the matter so long as he left - as he did - the question to the jury.

(iii) The way the Judge treated the alleged remark of the appellant to his wife, "If they think I am guilty, I am, and that is that", - we do not think that the learned Judge was unfair in the way he dealt with this piece of evidence. He began by saying, "This statement is under no circumstances to be treated by you as a possible confession." Then he went on and pointed out that the fact that these words were used were denied both by the accused and his wife and continued:-

> "Now if you do accept Detective Keith - and that is a matter for you - we do not know what the whole context of that discussion was, and without the context its true purport cannot be known, and that is why I warn you that under no circumstances are you totreat

that as in any way being a confession or tending to a confession of guilt."

We do not think that the Judge can be criticised in adding, as he did, that it was a matter for the jury to consider whether the kind of conversation, if it in fact occurred, would have taken place if Mrs Thomas knew her husband's every movement on the night of 17 June and they had satisfied each other that the accused had no part in the deaths of the Crewes.

All these matters were dealt with in the early part of the summing-up and Henry J. then turned to what he referred to as "the really important items in the Crown case," adding:-

"Whilst you consider each separately to see what has been proved, in the end it is a matter of assessing the weight or value of all the circumstances proved and in the light of all the evidence. It is the combined weight of circumstances, their totality that in the end must be weighed by you against the claims of the defence."

The Judge then referred again to the contention of the Crown that the appellant's comment that his present might be still in an unwrapped condition should be treated by the jury as a statement made "in some unguarded moment giving himself away." Then he referred to the fact that the bullets in the heads of the two victims had No. 8 stamped on them which enabled the manufacturer's representative to say that they had been out of production for many years so that not everyone would have them. Having said that, the Judge said:-

"In fact the accused did have them and that is nothing unusual in itself, it only means

> that the accused had ammunition similar to that which killed the Crewes and other people may also have similar ammunition."

Now this, as Mr Temm pointed out, was an over-statement for the evidence disclosed no more than that one No. 8 bullet was found in the appellant's garage in a box containing some nuts and bolts. But this was an unintentional error of fact on the part of the Judge which is understandable in a lengthy trial. If Mr Temm thought the matter of importance, he only had to ask the Judge to correct the error, but he took no such step. Therefore, he cannot be heard at this stage to complain. (iv) Treatment of the expert evidence called by the Crown connecting the spent cartridge with the appellant's rifle - Mr Temm did not call any expert evidence to refute or cast any doubt on the evidence of the ballistics experts called by the Crown. He contented himself by cross-examining the experts in the hope that something would emerge which would cause the jury to be less certain than they were that the cartridge had indeed been fired from the appellant's rifle. No doubt any point he thought he had made in his cross-examination would be mentioned by him in his final address. We have carefully read the passage in the summing-up dealing with the examination of the 64 rifles which were tested and later with the passage dealing with the spent cartridge case. So far as the identification of the appellant's rifle was concerned, the Judge made it perfectly clear that standing on its own it did not carry the Crown's case the full distance. He said:-

> "Two of those rifles could have been used and, of course, there may have been others. It is not an unusual pattern....."

He then spoke of the utmost importance of the identification of the spent cartridge case which Detective Charles had said he had found. The Judge said:-

> "It is a matter for you, of course, you know the length of time and so forth, but the Crown claims it was found in a position where it might well expect to fall after there was a re-loading outside the louvre windows. Well, the question you have to ask yourselves is, was it fired by the accused's rifle? And, if so, was it fired at the Crewe's home on that night? Of course, the final question is, who fired it?"

The Judge then went on to refer briefly to the evidence of the two scientists, Dr Nelson and Mr Shanahan, pointing out that they relied on minute marks seen under the microscope. He said:-

> "It is, of course, for you to say whether or not you accept that evidence. No expert evidence was called to the contrary, and both these scientists have sworn to that. But it is still for you, as Mr Temm says, to say whether you accept their evidence."

The Judge then discussed the enlarged photographs of the spent cartridge case which Mr Temm had claimed did not fully support the experts' opinions and said:-

> "I suggest to you that it is a matter for you when you are asked to discard this evidence merely on the photographs. Ridges and valleys, so the scientists say, are clear to them and are seen by them as three-dimensional objects and clearly magnified, whereas the photographs are only two-dimensional, black and white and shades of black and white, and do not show the comparative depths and, indeed, any of the fine detail made by the end of the firing-pin that

> the scientists speak of and upon which, as you will recollect the demonstration given to you, they so clearly rely."

His summing-up on this important matter occupied over two pages of the record and ended with these words:-

> "Well, that is a matter for you. As I say, it is for you to judge the expert evidence, to judge it in the light of all the criticism that has been made of it."

In our opinion then, it cannot be said that the Judge did not deal with this important matter both adequately and fairly. He drew the jury's attention to the nature of the criticisms which were levelled by Mr Temm in respect of the expert evidence, and we fail to see what more could be expected of him. The one blemish in this part of the summing-up is that the Judge once again referred to the fact that the appellant was one perhaps of many people who had in his possession No. 8 ammunition, thus implying a supply of this type of cartridge and not merely a single round. But as we have said earlier, it was always within the power of Mr Temm to have had that matter corrected, and as he is a counsel with great experience, he would not have let it pass if he had thought it necessary to intervene as we are sometimes told is the case with young and inexperienced counsel. (v) Treatment of the appellant's statement, "I have been framed" - It would appear that Mr Temm in his final address must have spent some time in discussing with the jury the possibility that someone might have picked up a spent shell from the appellant's place and put it in the Crewe's place. As to this suggestion, the Judge thought it right to point out that if that had happened it would not

carry matters very far unless that person also took with him the appellant's rifle. He said:-

> "Please do not think I am suggesting it, but you may well think that any suggestion of the planting of a shell has little or no merit or validity. If you reject the claim made that the shell could have been planted, then if you accept that it was fired by accused's rifle, you have his rifle being the one which fired the fatal shots, and you will ask yourselves, was it reasonably possible for someone, a stranger to the household, to obtain and return the rifle without the knowledge of the accused or his wife, and certainly return it so that he could get it with comfort on the day of the 23rd, whenever it was he shot the cow? It is a matter for you, but even if this was possible, you will ask yourselves, does the evidence as a whole exclude that possibility as being a reasonable one, and this leads at once, of course, to the other evidence which is relevant and which must be weighed by you on this topic....."

At this stage the learned Judge took the adjournment and said that he would continue his address after lunch. He then went on to deal with the final topic which he thought it necessary to deal with.

(vi) The axle and the copper wire - He began by saying that the jury would have to ask themselves, "Did the axle come from the accused's farm?" He then went on to deal with the evidence of Mr Rasmussen and pointed out that this witness not only identified the axle but was able to identify as well all the component or associated parts which were later found on the accused's farm. (vii) The learned Judge then pointed to the evidence that the appellant did not take any

part in the search for the bodies although by the 23rd he was discussing his movements on the night with which the jury were concerned. He said:-

> "Well, he gives you his reasons for that and, of course, you must weigh them, and you must agree, of course, that they are fairly weighty reasons. He had just shot a cow, and apparently the other cows were coming in."

Having said that the Judge then referred to the fact that when the axle and the other things were advertised and the police were seeking information concerning them, the appellant did nothing again. These comments were in our opinion, fully justified and no exception could properly be taken to them. Having discussed the axle and its identification, he then said:-

> "Mr Temm claimed first of all that the evidence did not prove that the axle was attached to Harvey Crewe's body. Well, there was a very strong submission to you from the Crown that there were very good reasons for you to come to a conclusion that it was. Let us assume for a moment that the situation was as bad as Mr Temm claims, that this axle was found as stated by the police but that no one knew anything about it until after the body had been recovered and the search was made in that area. Mr Temm puts it to you that that is pure chance that that would happen. Well, I am suggesting to you - although it is a matter for you - that is perfectly competent for you or any jury to say that the chances of that were so long, so distant, that it could be ruled out as pure chance, and that a reasonable jury could come to the same conclusion - because this body apparently had not been submitted to the air for a very considerable period - that the axle was in fact the weight so used."

The Judge then went on to refer to the wire, pointing out that so far as the search was concerned:-

> "Be it inconclusive or not, extensive or not, they did find and find only similar wire on the accused's farm."

The Judge then summarised the evidence for the Crown and concluded his summing-up by again referring to what the defence had to say. We will record the passage in full so that anyone reading the judgment will be able to appreciate how little substance there really is in the complaint made by Mr Temm that the defence was not put adequately to the jury:-

> "The defence claims that the accused never left his home on the night of June 17th, that is at any time when these killings could happen. The defence claims that the Crown evidence in any event is not sufficient to prove guilt in the manner, of course, and to the extent which I have laid down for you. The Crown claims that when this evidence is properly evaluated and weighed it proves that the accused, despite what he and his wife says, did leave his home that night, and that it proves beyond reasonable doubt that it was the accused who fired the rifle at the Crewe's house on that night, and that it does enable you - it is a matter for you - to exclude the reasonable possibility that anyone else could have done it. Now that, as I have told you again and again, depends upon your evaluation of the whole of the evidence. It is for the Crown to prove its case, prove it to the extent that I have stated to you. It is no business of the defence to prove innocence or even prove a reasonable doubt. The defence, if it can show any weakness in the Crown case, if it can bring you to the stage where you have a reasonable doubt, then, of course, you ought to

> acquit, but that is only argument on the evidence. The burden of proof, as we call it, to prove the crime and to prove who was the criminal, rests and rests always upon the Crown and it is now for you to come to your decision applying the principles of law I have laid down to you, and considering - as I am sure you will - all those matters that have been put to you by both counsel, and considering - as I am sure you will - this circumstantial evidence on the basis I have put to you. You can do what you like about it. You are not bound to do that, but that is the method whereby circumstantial evidence is used and tested and considered, and you ought so to use it, you ought so to test it and so consider it, but what you shall do and how you shall do it, I have been at pains to tell you, is purely a matter for you, nothing to do with me at all. You observe the law as I have laid down to you, and within that, giving fair and careful consideration to everything, as I am sure you will, you will reach the verdict that you think proper. The matter now rests with you. Will you kindly retire to consider your verdict."

We have dealt with the first and principal ground of appeal in some detail, but as the case has created considerable public interest we thought it right to examine the criticisms levelled by Mr Temm against the summing-up in far more detail than is customary in appeals in criminal cases. Having done so, while we agree that the summing-up was certainly robust, we are of opinion that it did not exceed the bounds which is to be expected of an experienced Judge called upon to preside over the trial of a man charged with two exceptionally brutal murders who was defended by an able and very experienced counsel who had the benefit of the final address to the jury. In these circumstances, as this

Court pointed out in R. v. Anderson 1951 N.Z.L.R. 615, 627:-

> "The trial Judge is entitled to assume that the jury will give consideration to the whole of the matters put forward on behalf of the accused, and the administration of justice would be gravely impeded if the Judge had to traverse in his summing-up seriatim all the arguments put forward on behalf of the accused. He performs his duty of summing-up if he directs its attention sufficiently to the issues it has to decide. It is advisable in many cases that he should comment on the possible value of the evidence or types of evidence of the various witnesses, or classes of witnesses; and it would be unfortunate if the jury was deprived of such assistance as the experience and training of the Judge are able to afford it even in such matters as lie within its province only."

For the reasons we have endeavoured to express, we are of opinion then, that the first ground of appeal fails.

(b) We turn now to consider the appellant's second ground of appeal which was that the learned Judge had failed to direct the jury correctly on the standard of proof to be applied to circumstantial evidence. Once Harvey and Jeanette Crewe's bodies were found to have been put in the Waikato River and the pathologist was able to say that both had died as a result of bullet wounds in their heads, then the question remained whether the Crown had proved beyond all reasonable doubt that the appellant was the person responsible. Plainly enough this is how Henry J. approached his task in summing-up the case to the jury. He said:-

> "Now the case against the accused rests upon what is called circumstantial evidence. That

simply means this. The prosecution seeks to prove certain facts upon which witnesses can give direct evidence because they say they have either seen or they have heard the particular matters to which they swear. If those facts be proved, then by a process of reasoning other facts may be inferred and so may be treated by a jury also as having been proved although no witness can be called as to the fact so inferred. This is a process of reasoning, as I have already told you, and it is a method widely used and widely accepted as proof of guilt in criminal cases. Most crimes, if premeditated, are committed by stealth or in secrecy, frequently with added attempts to destroy or hide any matter or thing which will disclose either the crime itself or the identity of the criminal. Therefore the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find a verdict of guilty by this process of reasoning.....Now whilst each piece of evidence must be carefully examined, because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive judgments on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect. It is a consideration of the totality of the circumstances that is important. One circumstance probably existing by itself may have but little effect. Other circumstances may make that circumstance more likely to be true, and also in combination to make those other circumstances themselves likely to be true or even true. Now that is the importance, as I see it, of circumstantial evidence. Whilst you do examine each particular piece of it, its true worth, its true value cannot be ascertained until you look at it in the whole of the setting as you find that setting and say what you think about it.....It would be a strange law that would not permit a jury to use circumstances, if sufficiently proved, to identify the killer,

and our law allows just that, but it requires me to give you a careful direction on this matter of proof. I have tried to impress upon you, first and foremost, it is a process of reasoning and not a matter of guessing or of conjecture. So you have to see what facts you find to be proved, and then you ask yourselves, is the proper conclusion from those facts, beyond reasonable doubt, that the accused was the killer? Or do those facts fail to give you that necessary degree of proof?"

Mr Temm however, submitted that this direction, which we should add was elaborated again later on in the summing-up, was insufficient and indeed in some respects misleading. He summarised his argument by stating four propositions in the following words:-

(a) That the facts from which the Crown sought to draw inferences should be severally proved beyond reasonable doubt.

(b) That where more than one inference might be drawn, one tending to prove guilt and another tending to prove something other than guilt, the guilty inference should not be drawn.

(c) That while the jury was entitled to consider the totality of the facts and inferences drawn therefrom, such totality included only facts and inferences properly proved.

(d) That where a fact or inference was not proved beyond reasonable doubt it should be disregarded.

If we have understood Mr Temm's argument correctly, it is the passage in the summing-up which we have underlined that he challenges. As the argument proceeded, it became increasingly plain to us that the premise for his propositions

was based on a misconception of the respective functions of the Judge and the jury in a criminal case. It is the duty and obligation of the Judge to instruct the jury on all matters of law, including the burden and standard of proof required in criminal cases. The facts, on the other hand, are for the jury, and while the Judge may think it right to give the jury some assistance in dealing with the facts, it is no part of his duty to tell the jury that each item of evidence must be weighed by them separately, and that they must decide that it has been proved beyond reasonable doubt before they can use it in reaching their verdict. It is for the jury to determine for themselves which parts of the evidence they are prepared to accept or to reject. What Mr Temm apparently sought in vain at the trial and now sought to support in this Court, was, what he claimed as the appellant's right to a direction instructing the jury to proceed by a series of separate steps, eliminating as they proceeded on their intellectual journey every fact which, considered by itself, raised more than one inference, so that in the end the jury should consider only those facts and inferences which in themselves proved beyond reasonable doubt that the appellant was guilty.

The Crown case in this instance was built up of a number of separate ingredients, which it was contended acquired a meaning in the context of the indictment, only when examined with proper regard to the inter-relation of the constituent elements. The two victims were found in the Waikato River and obviously both had died as the result of gunshot wounds. Successive witnesses presented to the jury a narrative which connected the shot in the heads of the two

victims with a rifle owned by and in the possession of the appellant at the material time. There also was evidence for the jury to accept that the cartridge case, stated to have been found near the back door of the Crewe house, had been ejected from the same rifle. The axle was traced in origin to the farm of the appellant. The bodies were bound with wire, part of which was of a type found on the appellant's farm but on none of the other farms searched by the police. In addition, there was evidence of the appellant's previous association with Jeanette Crewe, of his reaction to questions put to him by police officers, and of his inactivity when the assistance of those residing in the neighbourhood was sought by the police. It was contended by the Crown that in their cumulative effect the co-existence of this series of items pointed to the appellant as the offender. But some items of evidence, and indeed some of the exhibits considered in isolation, might have had insufficient potency to prove that the appellant was guilty of the crime. But when all the exhibits, with the explanatory evidence to which we have earlier referred, were presented in sequence as a connected story, it was contended that the case took on a different complexion.

In our opinion, Mr Temm's contention that the jury should have been directed to proceed "by a series of separate steps" cannot be supported. A plea of "not guilty" puts in issue the essential factual components of the crime alleged. In the present case, the Crown had to establish the actus reus, namely the killing of the victim; the requisite mens rea, namely the intention to kill; and finally the identity of the appellant as the murderer. Each of these

facta probanda had to be proved beyond reasonable doubt.

The evidence for the Crown was the means whereby the prosecution sought to establish those facts as an end result. It is the totality of that narrative to which the formula "beyond reasonable doubt" applies, and in our opinion any departure from the approach adopted by Henry J. in the present case would lead only to confusion and uncertainty. So far as we can see, Henry J. followed the approach of Chief Baron Pollock when he summed-up to a jury in the well known case of R. v. Exall (1886) 4 F. and F. 922, 176 E.R. 850, 853, saying:-

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise.....Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

We notice that this simple approach was accepted by the Supreme Court of Canada in Cote v. The King (1942) 1 D.L.R. 336 where it was said:-

> "It may be, and such is very often the case, that the facts proven by the Crown, examined separately have not a very strong probative value; but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for a conviction."

In Plomb's case (supra), in a content it is true, differing in some respects from the present case where motive featured more prominently in the narrative, Sir Owen Dixon C.J. at p.242 said:-

> "All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done."

In our opinion then, there is no need to depart from the well known statement of Viscount Simon L.C. in Mancini v. D.P.P. (1942) A.C. 1, 11, when he referred to "The rule that the prosecution must prove the charge it makes beyond reasonable doubt." Accordingly, we are of opinion that Mr Temm's second submission also fails.

(c) Ruling that the evidence of Dr Newton was inadmissible

The third ground of appeal was briefly argued by Mr Webb. It was contended that the learned Judge had wrongly rejected the evidence to be tendered from Dr K.J. Newton, a medical practitioner who had made a study of psychiatry. It was proposed to call this witness for the defence to depose that after conducting three examinations of the appellant, he could express the opinion that the evidence of one Crown witness that the accused at one time had had a somewhat unbalanced infatuation for Jeanette was quite unfounded, and that he perceived no sign that the rejection of the appellant by Jeanette had aroused feelings of jealousy on his part. It is unnecessary to repeat what this Court said in R. v. McKay 1967 N.Z.L.R. 139, which was no doubt sufficient authority to discourage the defence from calling Dr Newton to give evidence about the accused's veracity on the main issue of his guilt or innocence. The limited extent to which opinion evidence on the credibility of a witness was received is illustrated in Toohey v. Metropolitan Police Commissioner 1965 1 All E.R. 506; 49 Cr.App.R. 148, where the House of Lords allowed medical evidence that a Crown witness suffered from some disease or mental defect and that his evidence against the accused was unreliable. In the present case, if the jury felt that the accused's attitude towards Jeanette during her lifetime was at any stage relevant, then he himself was best able to depose to that very fact and to rebut, as he purported to do, Crown evidence on this topic. We do not think that justice requires the approval of a further rule of evidence allowing testimony of this type to be given in a criminal trial.

In our opinion, all three grounds of appeal fail and accordingly the appeal against conviction is dismissed.

A.K. North P

45

C.A. 25/71

IN THE COURT OF APPEAL OF NEW ZEALAND

THE QUEEN

V.

ARTHUR ALLAN THOMAS

JUDGMENT OF NORTH P. AND MACLAY J.
DELIVERED BY NORTH P.

C6

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 25/71

THE QUEEN

v.

ARTHUR ALLAN THOMAS

Coram:	North P. Turner J. Haslam J.
Hearing:	May 4, 5, & 6, 1971.
Counsel:	Temm Q.C. and Webb for Appellant Morris and Baragwanath for Crown
Judgment:	June 18th 1971

JUDGMENT OF TURNER J.

I have had the advantage of reading the joint judgment of the President and Haslam J. which the President has just read. I agree with them that this appeal must be dismissed, and I agree with the principal propositions upon which they have based their conclusion. It is only on the question of law raised by Mr Temm's second ground of appeal that I wish to add some words of my own, in which I shall endeavour to say in plain terms why his argument failed with me.

In Mr Temm's second ground of appeal he submitted that the learned trial Judge had misdirected the jury as to the way in which they should weigh the evidence of a number of matters put forward by the Crown as circumstantial evidence, collateral to the main theme, but supporting in an evidentiary way the principal thesis of murder by the accused. Mr Temm enumerated a series of matters as to

which evidence had been led by the Crown, to which his submission related. These covered the Crown evidence supporting the following alleged facts:

(1) The fact of a parcel being found in the wardrobe with the brush and comb set in it, and the terms of a conversation between appellant and a police officer relating thereto.

(2) The fact that appellant took no part in the search for the bodies.

(3) The fact that appellant, notwithstanding that there had been an advertisement by the police calling for information as to the trailer, did not voluntcer the information which he had as to its identity.

(4) The fact that a single round of No. 8 ammunition had been found in a box of nuts and bolts on the premises of appellant.

(5) The terms of a conversation between appellant and his wife in the garden overheard by a police officer, in which appellant had used words such as "If they say I am guilty I am guilty".

(6) The facts as to an earlier association (long before the murder) between appellant and Mrs Crewe, before her marriage.

(7) The fact that appellant had on one or more occasions been in the Crewe house at some earlier date, and therefore presumably knew something of its interior arrangement.

Each of these alleged facts, Mr Temm submitted, was a fact which the Crown had sought to prove, which if proved, yet in itself did not prove the guilt of the appellant, but was

submitted by the Crown, however, as an item of circumstantial evidence supporting indirectly and by inference the Crown case, when taken in conjunction with the others or with some of them. Mr Temm submitted that the Judge was as a matter of law obliged to direct the jury that before they could use any of these facts or any inference drawn from them to support the Crown case they must find that particular fact proved beyond reasonable doubt, by the evidence led in support of it, and without reference to other evidence led only on the principal issue of guilt; and that he had not done so.

Juries have indeed sometimes been expressly directed by trial Judges in the terms for which Mr Temm contended; and he pointed as an example in this country to the direction of Richmond J. given to the jury in R. v. Taylor, cited verbatim in this Court in the appeal against the conviction in that case reported in 1968 N.Z.L.R. 981 at page 984. There, Richmond J. said inter alia:

> "You folk have got to ask yourselves the question in this case, whether or not you are left in any reasonable doubt about this case. If you are, then the accused must have the benefit of that doubt. He must be acquitted; and you must apply that same rule on any question you have to decide on the way to arriving at your verdict - give him the benefit of any reasonable doubt you have got in any matter."

This part of Richmond J.'s direction was not the subject of any argument on the appeal in R. v. Taylor, and the dismissal of that appeal in favour of the Crown did not necessitate any consideration of the point now put forward by Mr Temm. His submission before us in the present case was not only that the direction given by

Richmond J. in Reg. v. Taylor was correct; but, further, that Henry J.'s refusal or omission to direct the jury in similar terms in the case before us amounted to a misdirection as to the law sufficient to entitle appellant to a new trial.

I am of opinion that principle requires the rejection of Mr Temm's argument, and I shall try to state that principle. It is this: that Mr Temm's argument overlooks the fact that a jury is not required to make specific findings collectively on collateral or evidentiary matters such as are the subject in this case of Mr Temm's submissions.

It is of course inherent in the process of conviction by jury that the jury must be convinced as a whole, and each member must be convinced individually, beyond reasonable doubt of the guilt of the accused. This necessarily extends to every essential element of the crime charged: and a direction to a different effect will be a misdirection in law. The necessity for giving such a direction has its source in the presumption of innocence, as to the existence and effect of which a jury must be directed - Roscoe on Criminal Evidence 20; I Taylor on Evidence 12 ed. 106. And this direction must necessarily include a sufficient direction, varying from case to case, as to the kind, content, and quality of the evidence by which the presumption of innocence may be rebutted by the Crown.

But Henry J. did give such a direction in this case. What Mr Temm contends is that it was necessary for him to go on, and give a further similar direction as to the collateral, evidentiary, facts which I have listed. In my

opinion such a direction was unnecessary, and indeed would have been inappropriate in this case.

While, as I have said, the presumption of innocence cannot be rebutted unless the members of the jury are individually and collectively convinced beyond reasonable doubt of the guilt of the accused, it does not logically follow that each of the members of the jury must base his or her individual conclusion upon the same reasoning as the others. Different members may individually be convinced beyond reasonable doubt of the guilt of the accused, by their individual acceptance of different facts. Circumstantial evidence has by some writers been likened to a rope composed of a number of cords, a sufficient number of which, taken together, may without the others support the burden of proof. Some jurors may find it supported by some cords, other jurors by others.

This is why, in my opinion, it has not, except in the exceptional cases which I shall presently mention, been found necessary, or even proper, to direct jurors that they must collectively find proved beyohd reasonable doubt the circumstantial facts which the Crown puts forward as cumulatively supporting a conclusion of guilt. While the conclusion as to guilt is the conclusion of the jury as a whole, and one of which they and each of them individually must be convinced beyond reasonable doubt, the circumstances on which any individual juror relies in being led to such a conclusion may not be the same in the case of all the jurors. Some may properly rely on circumstances which others reject. This fact makes the direction which Mr Temm contended for both inappropriate and impracticable.

In so concluding I by no means say that the direction given by Richmond J. in R. v. Taylor (supra) was

unnecessary or wong on the particular facts of that case. Indeed it may possibly be thought, on a reading of the text of his direction beyond the passage which I have cited, that it was intended to be understood as applying only to the special facts about which he was actually speaking to the jury, and not as stating any general rule. There may of course be a kind of case in which without the affirmative proof of some collateral circumstance, not itself an essential ingredient of the crime charged, the Crown case must fail, for reasons special to the particular case. In such a case it will be necessary for that particular fact to be proved to the satisfaction of the jury beyond reasonable doubt; for if it is not so proved, ex hypothesi a reasonable doubt must remain on the whole case. But such cases are exceptional. This case is not one of them. An example, if one is needed, will be found in the facts of R. v. Dehar 1969 N.Z.L.R. 763.

I agree with my brothers then, that the appeal fails; on the second ground, for the reasons which I have endeavoured to express, and on the other grounds for the reasons to be found in the joint judgment of the President and Haslam J.

Solicitors for Appellant: Grierson, Jackson & Partners, PUKEKOHE

Solicitors for Crown: Meredith, Connell & Co., AUCKLAND

52.

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 85/71

THE QUEEN

v.

ARTHUR ALLAN THOMAS

JUDGMENT OF TURNER J.

Appendix 19

(2)

2 February 1972

Report of Sir George McGREGOR,

To The Honourable the Acting Minister of Justice.

THE QUEEN v. THOMAS

Arthur Allan Thomas was arraigned in the Supreme Court at Auckland before Henry J. and a jury in February 1971 on two counts of murder, that on or about the 17th June 1970 at Pukekawa he did murder David Harvey Crewe and Jeanette Lenore Crewe, the wife of David Harvey Crewe. The trial extended over sixteen days, and at its conclusion he was convicted of both these crimes. On the 2nd March 1971 he was sentenced to imprisonment for life. He appealed against his conviction to the Court of Appeal. The hearing at the Court of Appeal was on the 4th, 5th and 6th May 1971, and on the 18th June 1971 judgment was given dismissing the appeal. I will refer later to the grounds of appeal.

Three petitions have been presented to the Governor-General in Council, asking for a new trial under the provisions of s. 406 of the Crimes Act 1961, for a review of the conviction. Section 406 of the Crimes Act 1961 provides as follows:-

> "Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any Court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either -
>
> (a) Refer the question of the conviction or sentence to the Court of Appeal or, where the person was convicted or sentenced by a Magistrate's Court, to the Supreme Court, and the question so referred shall then be heard and determined by the Court to which it is referred as in the case of an appeal by that person against conviction

70

or sentence or both, as the case may require; or

(b) 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, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly."

It would seem that the petitions in the present matter are within s. 406(a) of the Act. I have been requested by the Honourable the Acting Minister of Justice to review the evidence, the petitions and other relevant matters and to report my conclusions on the case as a whole.

At this juncture it is helpful to review the chronology of the facts which seem to be undisputed.

(1) Neither of the two deceased was seen after the evening of the 17th June 1970.

(2) The two deceased persons were married on the 18th June 1966, and at the time of their deaths they had one child, a girl named Rochelle, who was some 20 months of age.

(3) On the following Monday, the 22nd June 1970, a stock agent rang Mr. Demler, Mrs. Crewe's father, who lived on an adjacent property, and informed Mr. Demler that he had been unable to obtain any reply to a number of telephone calls to Harvey Crewe. As a result Mr. Demler went to the Crewe's farm at about 1.30 p.m. He could see no sign of anyone on the farm, so he entered the house by the back door, which he said had a key on the outside of the lock. Neither Harvey Crewe nor Mrs. Crewe were in the house, but he found the baby Rochelle in her cot, in a neglected and distressed condition. It was obvious that she had been left unattended for a considerable period. He became more alarmed when he saw what appeared to be large blood stains on an easy chair and on the carpet in the living room. He sought assistance of a neighbour, a Mr. Priest, and they returned to the Crewe house

71

together, made a further inspection, and communicated with the police. Mr. Demler took Rochelle to the house of a friend, a Mrs. Willis. The police party arrived at about 4 p.m., in charge of Detective Inspector Hutton.

(4) On Friday the 19th June a witness working on a farm across the road deposed that between 8.30 a.m. and 9 a.m. while he was engaged in feeding out hay, he saw a woman dressed in slacks, and with light brown hair, standing outside the Crewe homestead, and nearby he saw a parked car, which he described as being a Hillman of a dark green colour.

(5) On Saturday 20th June a Mrs. McConachie passed the Crewe farm on the way to a football match, at about 1.30 p.m. She has given evidence that she saw a little girl standing at the gate, and the description she gave of the child and the manner in which she was dressed suggested that the child might have been Rochelle. She recalled having seen a light coloured car parked outside the house.

(6) On Monday the 22nd June a neighbour, Mrs. Willis, received the child Rochelle at about 2.30 p.m. On the 24th June a child physician, a Dr. Fox, made a detailed examination of Rochelle. In his opinion the child could not have been in the physical state she was in when he examined her if she had been without food or drink for a period in excess of 72 hours.

(7) Between the 22nd June and the 16th August the police carried out an extensive search both on the ground, and also by boat on the Waikato River, and from the air. They were assisted by more than 200 persons in the search, the majority being farmers in the Pukekawa area. No weapon was discovered, and no motive for the crime emerged. The police at this stage formed a tentative opinion that the tragedy was the work of some local person or persons, for nothing appeared to have been stolen from the house.

72

Practically the whole of the evidence for the Crown at the trial was of a circumstantial nature. I am very much assisted in regard to the evidence by the comprehensive, and if I may say so, excellent summing-up of the trial judge, Henry J. A classic statement as to the correct approach of a jury to and of the value to be placed on circumstantial evidence is contained in a statement of Chief Baron Pollock in R. v. Exall (1886) 4 F. & F. 922; 176 E.R. 850 at p.853:-

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ..... Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

In his summing-up to the jury, Henry J. made a similar direction as follows:-

> "Therefore the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find their verdict of guilty by this process of reasoning. Whilst each piece of evidence must be carefully examined, because that is the accused's right, and that is your duty, the case is not decided by a series of separate and exclusive judgments on each item, or by asking 'What does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect. It is the consideration of the totality of the circumstances that is important."

73

Three petitions have been presented to His Excellency in Council. The main petition is that of the Arthur Allan Thomas Appeal Committee Incorporated, presented through its Chairman George Patrick Field Vesey and Allan Glyndwr Thomas, the father of Arthur Allan Thomas. The petition is somewhat lengthy, but in accordance with legal principles it stresses three matters:-

(1) The evidence of Brian Michael Roddick, the witness who had deposed to having seen a lady dressed in slacks and having light brown hair, in the Crewe property on the 19th June, two days after the 17th June, the date on which the Crown alleged the murders took place. The description given by Roddick does not correspond with any description which might be applicable to Mrs. Thomas, the wife of the accused. Roddick also attended an identification parade on Friday the 30th October, at which Mrs. Thomas, the wife of the accused, was in the line-up. Roddick was unable to identify any person in the identification parade as being the person he had seen on the Crewe farm. Mrs. Thomas in her evidence denied being at the Crewe farm on this day or on any other day. Although the Crown suggested that the person on the farm was Mrs. Thomas, Mr. Justice Henry in reference to the matter in his summing-up refers to Roddick's description, and while leaving the matter to the jury he carefully points out the difference in description between the person on the farm and Mrs. Thomas. It would seem to me that Roddick's evidence, and his failure to identify the person on the farm, does not implicate Mrs. Thomas in any way. This incident appears not to have been referred to to any extent in the judgments of the Court of Appeal. The judgment of North P. merely refers to it in passing as a perplexing circumstance.

(2) The next complaint in this petition refers to the evidence of William James Eggleton, described as a surprise witness. It appears that during the period of the trial in

74

the Supreme Court Eggleton saw a photograph of the accused in the Franklin Photo News. He communicated with the police, and was called as a witness at the conclusion of the case for the prosecution. He stated that he remembered a person calling at his shop in King Street, Pukekohe, and giving him a rolled gold watch to repair. This was on a date in the week that the homicides of Harvey Crewe and Mrs. Crewe were reported. He stated he recognised the photograph, and that the person who had delivered the watch to him was the accused. The lugs of the watch which he received were covered in blood and mucous, but he did not identify the accused in Court as the person who delivered him the watch.

A number of affidavits are attached to the petition. If these affidavits are correct the person who delivered the watch to Mr. Eggleton could not have been the accused. In one of the affidavits, a cousin of the accused, William Thomas, also of Pukekohe, deposed that he had given to Eggleton a wrist watch for repair at about the relevant time, and it was subsequently collected from Eggleton by or on behalf of William Thomas. A number of affidavits have been filed by acquaintances of the accused that he had never been seen to wear a rolled gold watch, but had always worn a steel watch. I am not impressed by the evidence of Eggleton. It was not referred to by the trial judge in his comprehensive summing-up, and I would infer therefrom that this evidence was not relied on or commented on in the final addresses of counsel, either by counsel for the Crown or counsel for the defence. It was referred to in the judgment of North P. in the Court of Appeal, and his only comment is that the delay of the witness in coming forward considerably weakened the value of his evidence. It was denied by the accused in evidence that he ever possessed a rolled gold watch. There is further evidence in one of the affidavits now filed that a man named Connolly had sold to the accused a stainless steel wrist watch some five years ago.

This stainless steel watch was regularly worn by the accused. The matters deposed to in these affidavits, and the original weakness of Eggleton's evidence, must, in my view, create a doubt in regard to this evidence. It would seem to me that Eggleton was mistaken. I think this doubtful evidence would not have influenced the jury in its decision.

(3) The next complaint in the petition is in regard to the cartridge case found in the Crewe garden on the 27th October 1970, more than four months after the tragedy. This evidence is important, in that the ballistic experts have identified the cartridge case, from the mark of the striking pin and other marks, as having been fired by the rifle of the accused.

The effect of the affidavit is that the flower bed where the cartridge case was found had been previously and thoroughly searched and sieved by police officers, one Graham Robert Hewson assisting them. It is now suggested that as the flower bed had been previously searched, the cartridge case must have been placed in the garden after the first and second searches of the police. The accused when questioned in regard to this cartridge case said that someone was framing him. The evidence is that the cartridge case was found some six inches below the surface of the ground. Apart from the evidence of the accused and the affidavit now filed by one Graham Robert Hewson, who assisted in the first search, the evidence given at the trial cannot in my view be attacked.

From a perusal of all the evidence with regard to the cartridge case I think it is a reasonable inference that the cartridge case had been overlooked in the earlier searches. In my opinion the evidence of the ballistic officer in regard to marks on the cartridge case definitely identifies it as having been fired by the rifle of the accused. The accused has stated that as far as his knowledge is concerned his rifle

76

had been in his possession at all the relevant times. It would seem that it would be impossible for any third person to procure the accused's rifle, fire a bullet, and return the rifle to the accused's home, without his knowledge.

The evidence in regard to the cartridge shell was fully discussed by Mr. Justice Henry in his summing-up at pp. 22 et seq. He prefaces his remarks by emphasising that this spent shell and the finding of it is of the utmost importance in the consideration of the case by the jury. He poses the questions "Was it fired by the accused's rifle?" "Was it fired at the Crewes' home on the night of the tragedy?" and "Who fired it?". He suggests in effect that the evidence of two scientists, Dr. Nelson and Mr. Shanahan, was definite, and no expert evidence was called to the contrary, but it was still a matter for the jury to say whether they accepted the evidence of the scientists. I will refer again to this evidence when considering the evidence identifying the bullets found in the brains of both the deceased persons as having been fired by the accused's rifle by whoever the murderer might be.

The second petition to His Excellency in Council contains very little new. It states that it is in the interests of justice that a new trial be granted, and that the circumstantial evidence given at the trial was not of sufficient weight. The only other matter to which reference is made is an allegation that all the .22 rifles in the Pukekawa district were not examined by the police (on what information this is based is not shown), and that the woman seen at the Crewe home on the Friday subsequent to the homicides was not Mrs. Thomas. This may well be so, but the evidence for the Crown does not identify this person as being Mrs. Thomas.

The third petition has been presented by one Stephen James Bird, who describes himself as a New Zealand citizen resident in Manakau City Auckland. The grounds on which

77

this petition is based are very difficult to follow. He complains that in his opinion a degree of selective evidence was put forward by the prosecution, and had full facts been presented to the Court the jury would have reached an alternative conclusion. One of the items of "selective evidence" is in regard to the recovery of a car axle from the Waikato River. The evidence at the hearing in regard thereto claimed that when the body of Harvey Crewe was discovered in the river it was attached by wires to a weight which subsequently proved to be a car axle. The petitioner maintains that although the car axle was found in proximity to the body of Harvey Crewe it was not attached, and in effect it was a mere coincidence that the body and the car axle were found in close proximity. Later I will have to consider all the evidence in connection with the car axle.

Furthermore, the evidence of Detective Inspector Hutton is attacked, and the petitioner goes as far as alleging that the Detective Inspector had committed perjury. He also criticises the evidence of other police officers in connection with the finding of the body and the axle.

The petitioner also challenges the evidence, to which I will later refer, of the finding of the cartridge shell in the Crewe property on the 27th October, and the police evidence as to the position in the house from which the shootings took place.

Before considering the petitions and the application for a further trial it is necessary to discuss the principles in respect of which the Court of Appeal, on a reference back by the Governor in Council, will consider the admission of further evidence and review the earlier proceedings. This is important in the present case, because the summing-up of the trial judge has already been considered by the Court of Appeal, and the Court of Appeal has most carefully analysed all the evidence.

78

The appeal to the Court of Appeal was based on three grounds :-

That there was a miscarriage of justice in that:

(a) the learned Judge presiding at the trial failed to put the defence of the appellant adequately to the jury

(b) the learned Judge failed to direct the jury correctly on the standard of proof to be applied to circumstantial evidence

(c) the learned Judge was wrong in ruling that the evidence of one Kenneth James Newton was inadmissible.

The Court of Appeal dismissed the appeal of Thomas on all three grounds.

In regard to the first ground of failure to put the defence adequately to the jury, in the judgment of North P. there is a review of the effect of the whole of the evidence given at the trial, in some detail, and the Court has held that there has been no miscarriage of justice.

In <u>In re O'Connor v. Aitken</u> (1953) N.Z.L.R. 776, where a petition for a new trial was considered by the Court of Appeal, the judgment of the Court was delivered by Cooke J. Previously, an order had been made for the examination of additional witnesses, and this evidence, taken before a Magistrate, was before the Court of Appeal. In the judgment Cooke J. says at p. 783, referring to a decision in New South Wales under a provision similar to s. 406(a) of the New Zealand Act:-

79

"It was there held, following several other decisions that were referred to, that the fact that an appellant had exercised his ordinary right of appeal did not prevent the Court of Criminal Appeal from being invested with jurisdiction to deal with the case on a general reference .... with regard to para.(a) of s. 17 of the New Zealand statute."

Later the learned Judge says:-

"The principle that was applied in R. v. Calandar (1947) N.Z.L.R. 290, namely, that fresh evidence cannot be a ground for a new trial unless there would otherwise be a miscarriage of justice, appears to us to be applicable to such cases."

Again later Cooke J. says:-

"There may for instance be cases in which the fresh evidence will appear to the Court to be so suspicious and unreliable that it should be wholly rejected, and in other cases the hearing of the fresh evidence will often be such that it will fall short of showing that the refusal of a new trial would cause a miscarriage of justice .... The power should be exercised only with great caution."

The matter was further considered by the Court of Appeal in R. v. Morgan (1963) N.Z.L.R. 593. In reference to s. 406 of the Crimes Act North J., delivering the judgment of the Court says:-

"It will be observed that this section may be invoked whether or not the person concerned has already appealed against his conviction or sentence, and that there may either be a general reference under subs.(a) or a particular and limited reference under subs.(b). So far as subs.(a) is concerned we think we should state that in our opinion the Court will be greatly assisted by being given information in each case of the considerations which have caused the Executive Council to refer the matter once again generally to the Court of Appeal .... It seems unlikely that in a case in which there has already been an appeal which has been disposed of on the merits, the Court would regard itself as being obliged to readjudicate upon any ground of appeal that has already been heard and disposed of, unless some new matter had come to light which made a consideration of the ground necessary or desirable."

Later it is said:-

"Where upon a reference pursuant to s. 406 an application is made to the Court to receive fresh evidence, it should be recognised that the Court may not feel justified in acting upon the well-established and wise rule of practice that it will not receive fresh evidence unless it is shown that that evidence could not have been produced at

80

> the trial, or that some point which could not have been foreseen arose at the trial upon which the evidence was material .... The Court is therefore placed in a position of some delicacy for it is clearly undesirable to encourage astute criminals dishonestly to by-pass the Court after the conviction in the hope that fresh evidence, genuine or otherwise, might be got before the Court as a result of a petition and a reference of the matter to the Court."

Later it is said, regarding the manner in which the Court should look at new evidence:-

> "The governing principle was we think clearly stated by the English Court of Criminal Appeal, namely, that the Court should apply the same test as has been laid down in considering whether the proviso to s. 385(1) of the Crimes Act 1961 should be applied, viz, whether we are satisfied that no reasonable jury properly directed throughout would, or could, now come to any other conclusion than that to which the first jury did come, and accordingly that no miscarriage of justice has actually occurred."

In the present case, as I have already said, the case for the prosecution is almost entirely based on circumstantial evidence. It is to my mind incontestable that Harvey Crewe and Mrs. Crewe were murdered by some person at the outset unknown. There was a suggestion in the final address on behalf of the accused that the case might be one of murder and suicide. There is not a tittle of evidence to support this submission. The Court of Appeal stated that they were surprised that counsel for the defence thought it worth while to make this suggestion, which the Court thought would be immediately rejected by the jury. No proper foundation had been laid for this suggestion. The pathologist was not asked whether the bullet in Jeanette Crewe's head could have been self-inflicted. Mrs. Crewe's father was not questioned on the matter, and the Court of Appeal held that there was no substance in this complaint.

I should also state at this juncture that there was no evidence of any motive leading to the killing of the husband and wife. The Court of Appeal considered the significance of the absence of adequate motive. The Court stated that it was

81

quite clear that proof of a motive for murder is not a necessary part of the proof that the Crown is required to produce to support a conviction, but while that is so, it cannot be doubted that the existence of an adequate motive is a relevant circumstance, and if the evidence is sufficiently strong may be used as part of the circumstantial evidence that the accused was the person responsible for the crime. In his summing-up the trial Judge spoke of an earlier romantic interest that the accused had in Jeanette Demler, as she then was. He stated that the jury might think that that had gone into the background, and might be of little importance. He also referred to a suggestion that the accused might have been jealous of the fact that Mrs. Crewe was a wealthy girl, and that she and her husband enjoyed a degree of prosperity denied to the accused and his wife. Again he said that for want of a better term he would call this early background. The Court of Appeal considered that the trial Judge had put the matter in the proper perspective, and that there were no grounds for concluding that the jury were in any way misled as to the significance of a positive motive for the crimes. I would agree that the scanty evidence or suggestions cannot lead to any finding of a positive motive.

I therefore proceed to consider the matters of circumstantial evidence which were referred to, presumably by counsel in their final addresses, and by the trial Judge in his summing-up.

There had been certain discussion as to where Harvey Crewe was sitting when he was shot, and the position from which this shot was fired. The evidence of the pathologist showed that Harvey Crewe was taken completely unaware, and was killed while he was sitting in his chair. One suggestion was that the intruder fired the rifle through the louvre windows of the room where the two deceased persons were obviously shot, or alternatively that the shots were fired after the intruder had

82

entered the kitchen. As the Court of Appeal said, once it was accepted that Harvey Crewe was killed while sitting in his chair it was not of vital importance whether he was shot from outside the house, or that the intruder had entered the kitchen. I would incline to the view that the shot which killed Harvey Crewe was fired from the kitchen, but in my view the position from which the rifle was fired is immaterial.

I now propose to consider the various pieces of circumstantial evidence relied on by the prosecution.

(1) It was common ground that many years before there had been a friendship between Mrs. Crewe and the accused. Mrs. Crewe went on a visit to England at the beginning of 1961, returning to New Zealand towards the end of 1962. Before leaving for England she was on friendly terms with the accused, who showed an affection for her, but this friendship did not develop in any way. The friendship was not to any extent reciprocated by Mrs. Crewe. Just prior to Mrs. Crewe leaving for England the accused gave her a present of a writing case. This was acknowledged by Mrs. Crewe. On her return from England the accused gave to her a brush and comb set. It appears that no use was ever made by Mrs. Crewe of this set. It was placed in a wardrobe in a spare bedroom by Mrs. Crewe. still wrapped up, although it would appear that the wrapping had been opened but replaced. It appears that in this spare bedroom a bedspread, which was ultimately found with Harvey Crewe's body, was usually kept. The suggestion of the prosecution was that the murderer had been in the spare room, had taken the bedspread from the bed, and that in searching for suitable wrappings he had opened the wardrobe door and had recognised the present he had given Mrs. Crewe many years before.

The accused, on the 13th October, when he was questioned by the police in regard to his friendship of many years

83

before with Mrs. Crewe, had admitted giving the brush and comb set to Mrs. Crewe, and had stated, when he was asked whether he knew if Jeanette Crewe had used the brush and comb set that he had given her, that he didn't know. "It could still be wrapped up for all he knew".

The brush and comb set were found by the police in the room from which the blanket or bedspread had been taken. The jury were asked to infer that when the accused went into the spare bedroom to obtain some wrappings for the bodies he looked into the wardrobe, saw the brush and comb set wrapped up, and this was the origin of his statement that it could still be wrapped up for all he knew. This was referred to by the trial Judge, who said it might lead to an inference that the killer went into the spare room to get the blanket, it might point to the accused's knowledge of this unusual happening, the keeping of the gift in this wrapped state, and it points to his presence in the bedroom, enabling him to make the remark he did.

(2) After the body of Mrs. Crewe was found on the 16th August, an examination of the body was made by the pathologist Dr. Cairns. The pathologist formed the opinion that serious injuries to her face and neck were caused before death, and that some of the injuries on the face and neck might well have been caused after death. He found the cause of her death to be a bullet wound in her head. Dr. Cairns recovered the bullet, and handed it to the police. The bullet had been fired from a .22 rifle, and the police proceeded to collect rifles of this calibre from residents in the district. Sixty-four rifles were obtained by the police, and were submitted to experts for examination. The ballistic experts formed the conclusion that the markings on the bullet extracted from the head of Mrs. Crewe conformed with the rifling of only two of the 64 firearms submitted to them. The police asked the accused to hand to them any .22 cartridges in his possession.

84

The accused handed to the police a number of cartridges. The bullet found in Mrs. Crewe's brain was of an old manufacture. It was marked with a figure 8. A representative of the manufacturing company stated that it was old ammunition, and had not been manufactured since 1962. The bullets handed to the police by the accused were of a later manufacture, but in a search of the accused's premises the police found a similar No. 8 cartridge of the early manufacture in a box containing a number of nuts and bolts. The expert evidence in effect decides that the shooting was done with the accused's rifle, that the cartridges used were of this old manufacture, and another cartridge of this old manufacture was found in the possession of the accused. This is strong evidence from which an inference might be drawn that the accused's rifle, which the accused stated had never been out of his possession or out of his house, was the lethal weapon, and an inference can be drawn that the rifle was fired by him. When questioned the accused could give no explanation, but said that to his knowledge over the relevant period the rifle had never been out of his house. He said something to the effect that if the police said the shots had been fired from his rifle that must be so, but he didn't do it.

(3) The body of Mrs. Crewe was found in the Waikato river on the 16th August. The body of the husband was also found in the Waikato river on the 16th September, some miles above where Mrs. Crewe's body was found. Until Mrs. Crewe's body was found Dr. Cairns the pathologist, from the pools of blood in the room, and the fact that knitting was found on the spot where it would appear that Mrs. Crewe was sitting, and a knitting needle found on the floor, and the fact that some stitches had been dropped in the knitting, considered that Mrs. Crewe had been knocked senseless, had been attacked with a heavy blunt weapon, or had been stabbed. Until the body

was found there had been nothing to indicate that the two deceased had been killed by rifle shots. In the initial stages the police had searched the house, the garden, and the surroundings, to ascertain if any weapon could be found. Nothing was found. After the finding of the husband's body, and the pathologist reporting that he also had been killed by a shot from a .22 rifle, and the recovery by the pathologist of a bullet from his brain, the police proceeded to conduct another search with the object of finding the shell which would have been ejected from the rifle before the second shot. This was a search, it would seem to me from the evidence, more extensive than the original search. There was considerable evidence as to the place from which the husband was shot. It may have been through an open louvre window in the living room, or it may have been from the kitchen. I do not think that the position from which the rifle was fired is vital. Be that as it may, in October a third detailed search of the area was undertaken, and in the course of sieving the earth in a bed near the fence separating the house area from the farm, a spent .22 cartridge case was found in a position consistent with its ejection when reloading a rejector rifle near the louvre window. This cartridge case was sent to a ballistic expert, who gave the opinion, after a microscopic examination, that it was from the accused's rifle. The cartridge shell under microscopic examination bore marks in relation to the firing pin, the breech lock and the ejector which could have come only from the accused's rifle. No evidence was called by the defence to question this opinion of the ballistic expert.

(4) When the husband's body was discovered in the Waikato river it appeared it had not earlier risen to the surface on account of some weight attached to the body. The deceased's body had been tied to some weight by wires. During the endeavour to remove the body from the river some of the

86

wiring broke. The police then searched the bed of the river at the same spot, and recovered a trailer axle. There was no wiring on the trailer axle, but the axle showed marks leading to the belief that it had been attached to something by wire.

The police next proceeded to make exhaustive enquiries as to the ownership or possession of the axle. Information was obtained that the axle must have been portion of an old Nash car. Some early owners were traced, and finally enquiries were made from an engineer, a Mr. Rasmussen. He gave evidence that a trailer had been handed to him for repair some years before, by the father of the accused. The axle of the trailer was replaced with another axle by Mr. Rasmussen. He gave evidence that he had no doubt whatever that the axle produced at the trial, which was the axle found in the river, was the one he had removed from the trailer of the accused's father. The discarded axle, together with other parts of the axle assembly, had been taken away from Mr. Rasmussen by a person sent by Mr. Thomas Senior to collect the trailer. An intensive search of the accused's farm was then made, and in various parts of the farm other parts of the discarded axle were found, and were identified by Mr. Rasmussen as having come from the trailer of the accused's father. Wire had been found around the bodies of both Mr. and Mrs. Crewe. Wire was found on the accused's farm, in the opinion of an expert similar in metal constituents and in gauge to the wire which had been wrapped around the body of Harvey Crewe. The wire around the body of Mrs. Crewe was less accurately identified. The facts relating to the axle and the wire seem to me very potent evidence to connect the accused with the tragedies.

The defence queried the evidence as to the axle ever having been attached to the body, as the police alleged. It was obvious that in the long period between the tragedy and the finding of the body, the body must have been weighted in some

way. It would be an extraordinary coincidence that the axle should be found in the exact spot below where the body was found, if they had not been connected. This is very strong circumstantial evidence that the person who had possession of the axle, and had deposited it in the river wired to the body, could not have been any person other than the person who shot Mr. and Mrs. Crewe. Despite the accused's denials, he was unable to give any explanation as to how or by whom the axle was removed from his farm, and why it had not been left in the area in which the other parts of the axle assembly were found.

(5) I would refer again to the evidence of Eggleton. It seems to me likely that counsel for the defence were caught by surprise when the evidence of this witness was given at the trial. I do not know whether the Crown had advised counsel for the defence of this evidence before this witness was called. No reference was made to the evidence in regard to the watch by Henry J. in his comprehensive summing-up, which meticulously covered the facts in every other matter given in evidence. It would seem to me that in their final addresses neither counsel for the Crown nor counsel for the defence made reference to the evidence in regard to the watch; otherwise the trial Judge would have commented on it. The evidence of Eggleton is considered in the judgment of the President of the Court of Appeal, who expressed the opinion that the delay of Eggleton in coming forward considerably weakened the value of his evidence. I would go further and take the view that Eggleton was mistaken.

(6) There are a number of other items of less importance in the evidence. I have referred to the remarks of the accused when it was suggested to him that the two deceased had been killed by bullets from his rifle. I have referred to the finding of the brush and comb set given by the accused to

88

Mrs. Crewe some years before, and the accused's remarks about it, that as far as he knew it was still wrapped. The Bedspread which evidence shows was kept in the spare room, in the wardrobe of which the accused's gift was found, was recovered by the police when the body of Harvey Crewe was recovered from the Waikato river, and it appeared that this bedspread had been bound round the body of Harvey Crewe by wire. Whoever fired the fatal shots and removed the bodies to the river must have procured the bedspread from the spare bedroom. This evidence does not really assist, except in considering the remark of the accused in regard to the wrapping of the brush and comb set in the wardrobe in the same room. The remark may on the one hand implicate the accused, but on the other hand it might have been a casual remark that does not carry the matter any further.

The next matter that should be considered is the defence put forward at the trial, and the statements made by the accused.

It appears that the accused, along with a number of other people in the neighbourhood, was interviewed by the police within a short time of when the tragedy had been discovered, and a considerable time before the bodies were found. The accused had no information to give the police. Reference has been made to the fact that although up to 200 people assisted in the general search after the tragedy was discovered, Thomas gave no assistance, and did not take part. This may or may not be significant. He explains it by the fact that he was particularly busy on his farm and could not assist. Later, when the axle was found, and the police were endeavouring to establish the identity of the owner of the axle, a considerable amount of publicity was given. The accused saw this publicity, and recognised that the axle was similar to the one his father had had on a trailer at one time, but did not give any information

89

to the police. He explains that he did not do so because he thought his father would give the information. He certainly gave no help to the police in regard to the axle.

After the police had obtained further information Thomas was interviewed on two dates, the 15th October 1970 and the 25th October 1970. On the former occasion he acknowledged his earlier friendship with Mrs.Crewe from 1960 onwards until she went overseas. He acknowledged that he had written to her twice while she was overseas, and had given her the writing compendium at the time of her departure, and the brush and comb set after her return, it appears the following Christmas. After her return he also telephoned her and went to her father's house to see her. She told him she had another boy friend, and did not want to go out with Thomas. After Mrs. Crewe was married the accused admitted speaking to her at various times when she was alone in Tuakau. He never spoke to her when she was in the company of her husband. In the earlier statement he stated that there was no trailer on the farm left there by his father, and although he could recall the trailer his father had had he did not know what had happened to it. He was shown the axle by the police, and said he had not seen it before. He referred to the night of the 17th June and said that he was at home with his wife and his cousin Peter Thomas, and he was attending a sick cow which calved around 6 p.m. that same night. He admitted the ownership of the .22 rifle which had been test fired by the police, and which he then had back at home. He denied all knowledge of the killing of Mrs. Crewe or her husband.

He was further interviewed on the 25th October and was duly warned. He spoke of his earlier friendship with Mrs. Crewe, and the brush and comb set which he had taken to her as a Christmas present after her return from England. He was questioned in regard to his movements the night of the rate-

90

payers' meeting on the 17th June. He spoke of his being occupied that evening attending to the sick cow.

It is clear from his statement that soon after he heard that Mr. and Mrs. Crewe were missing, he, his wife and his cousin discussed what they were doing that night, and it was then he recalled that they were at home attending to the sick cow. It appears from the statements, and later from his evidence, that all three agreed that the 17th June was the night they were attending to the sick cow, but it might be inferred that the wife and the cousin agreed only after the accused had made the suggestion. He also said that the difficulty with the cow occurred on the night of the ratepayers' meeting, and made it too late for him to go to the meeting. He was shown the axle which had been found with Crewe's body, together with the two stub axles found by the police on his farm tip, and part of the same assembly. He said that he could not recall any of these articles being on his farm, and could not explain how the axle came to be found with Crewe's body. After examination he agreed that the axle seemed to have come from his father's trailer. He stated that he was almost certain that his .22 rifle could not have been taken out of his house without him knowing, and that he did not lend it to anyone about that time. He remembered using the rifle to shoot a sick cow about two weeks after the Crewes went missing, and that about a month before the statement he used the rifle to shoot a blind dog, and at times to shoot rabbits. He said his wife did not shoot, and his cousin had never used the rifle to his knowledge. He suggested that someone must have come to his farm and taken the wire and axle. He could not explain the fact that one bullet similar to the No.8 bullets that had been found in the bodies had been found on his farm, altnough he was aware that ammunition did have numbers stamped on the bullets.

On an earlier occasion he was told by Detective Sergeant

91

Parkes that the police were satisfied that it was his rifle that killed Harvey and Jeanette Crewe, and he was asked for an explanation. His reply was "If you say it was my rifle, it must have been, but I didn't do it". He was later questioned about the axle, the cartridge case and the copper wire, and was asked for an explanation why all these things had been traced to his farm. His reply was "I have been framed". He added "Somebody must have known I was writing to Jeanette, somebody like Derek Booth who was then going with Heather. I can think of no other reason". He was asked "How did they get possession of your gun?" He replied "Somebody must have cased the farm the weekend before". He was asked if he had loaned the rifle to anyone, and he said that as far as he knew it was in his house on the 17th June.

On the 21st October a Detective Keith said he was searching the garage on the accused's farm, and he noticed that the accused and his wife were having a conversation just outside the garage. The detective said that he watched them through crack holes in the garage wall, and that he heard Mrs. Thomas say something to the accused, but what she said he did not hear. The detective claimed that he heard the accused reply to his wife "If they think I am guilty I am, and that is that". At the interview with the police on the 25th October he was told that a pair of overalls found in the boot of his car had blood on them. He replied that he did not remember any blood getting on those overalls, and he used them to fix a puncture or other repairs to the car when he was in good clothes. He was again questioned by the police as to his failure to help the police and local farmers with the search, and explained that he was unable to spare the time.

Gold

The accused's evidence at the trial corresponded in the main with the statements to the police. He gave lengthy evidence as to the cow having given birth to the calf on the 17th June in the evening, and he produced some records which his

92

wife kept of the dates of births of calves from particular cows. He said that the discussion with his wife and cousin as to what tney had been doing on the 17th June must have been on the 23rd June, the night after the disappearance of the Crewes was first on T.V. When he was questioned by Detective Sergeant Hughes on the 2nd July (as Detective Sergeant Hughes has given in evidence) he had been asked his movements between Wednesday the 17th and Monday 22nd, and he told the Detective Sergeant that on the 17th June he was at home. The Detective Sergeant said in evidence that the accused suggested that he did not know why he knew that he had been at home on this particular date. The accused stated further that he never heard the Detective Sergeant say that, and that the Detective Sergeant had not asked him how he knew he was at home on the 17th.

There was also considerable disagreement with the evidence of Detective Parkes as to whether the accused had made reference to the trouble with the cow and calving being on the 17th June. The accused was questioned at length whether on a previous occasion he had referred to the calving trouble being on the Tuesday night, but he maintained that it was definitely on the Wednesday night. He denied the conversation with his wife as to guilt mentioned by Detective Keith, and said he had said nothing like that at all.

The remainder of his evidence corresponds more or less with the statements he had earlier made to the police.

In regard to the axle and the wire which had come off his farm he stated that it looked as if someone had come on his farm and he had been framed. He suggested that it was only a possibility, but it could have been that someone had got his rifle, the axle, and the wire from the farm. He admitted that he had told Inspector Hutton on the last interview before he was arrested that he knew he was sitting on rocks and he was a goner.

93

There was other evidence called for the defence as to the previous good character of the accused. The wife of the accused gave evidence to support what has been referred to as the alibi as to the Wednesday evening, when the killings took place. She gave some detailed evidence as to the records of calving which she had kept. It is unnecessary to go into the details of this evidence, except to say that in parts at least it was somewhat confusing. Mrs. Thomas stated in answer to a question that she had no recollection of her husband saying anything to the effect that "If they think I am guilty I am, and that is that". She was unable to give the date of the conversation between her husband, herself and the cousin as to their movements on the evening of the 17th June, and she could not remember any details of this conversation. She was closely questioned about the calving records, but had difficulty in explaining the matter, and I doubt if these records take the matter any further.

There was one discrepancy in regard to the calving records, in that on one occasion she told a detective that the cow was destroyed two days after the calving. It appears that the cow was destroyed on the 23rd June. This would make the calving on the 21st June, and not the 17th as previously stated. This may be important, or it may be a matter of confusion during a long conversation.

The only other evidence in regard to the alleged alibi is that of a sister-in-law, Mrs. Rosemary Thomas. She stated that she finally decided to go to the ratepayers' meeting at Pukekawa on the 17th June, and that she had rung Mrs. Arthur Thomas and asked her if she would like a ride, as Mrs. Rosemary Thomas was going past the gate. She stated that Mrs. Thomas did not accept, as they had not had their dinner, and they were late because they were looking after a sick cow. It is not clear as to the time of this telephone conversation.

94

The evidence seems reasonably clear that the tragedy occurred on the evening or night of Wednesday the 17th June. Several people were able to say that they had seen Mr. or Mrs. Crewe on that day. The fact that Mr. and Mrs. Crewe were missing was not discovered until the afternoon of Monday the 23rd when Mr. Demler went over to the house after a stock agent had rung him to say no answer could be obtained from the Crewes' telephone. Then he found the child in her cot, in an agitated and dirty state, and later took her to Mrs. Willis. The evidence of Dr. Fox, a child physician who saw the child on the Wednesday, is strongly of the opinion that the child could have been without food or drink for at the most 72 hours before she was handed to Mrs. Willis. Dr. Fox was not cross-examined by counsel for the defence, and the defence called no evidence to refute this opinion. It must, therefore, in my view be accepted that this is correct.

There are two further entirely unexplained pieces of evidence. On the Friday following the tragedy a youth named Roddick was feeding out hay on a property immediately across the road from the Crewe property. When doing this he states that he noticed a car of a similar description to the Crewes' own car, outside the Crewe gate, and inside the gate he noticed a woman standing. His description of this woman does not conform with the description of Mrs. Thomas, both in regard to height and in regard to the colour of the hair. The police later held an identification parade in which Mrs. Thomas was in the line-up, but Roddick could not identify any person in the parade as conforming with the woman he had seen on the Crewe property. At about half past one on the next day, Saturday, a Mr. and Mrs. McConachie were driving past the Crewe farm en route to a country football match. Mrs. McConachie, when passing the Crewe property, noticed a small child just outside the door of the house. All she could say in regard to this was that the

95

child was somewhat similar to the small Crewe child. At the same time she noticed a light coloured car outside the Crewe gate. The police have been entirely unable to trace the ownership of the cars respectively described by Roddick and Mrs. McConachie, and have been unable to identify the woman on the property. The only significance of this is that if the uncontradicted evidence of Dr. Fox is accepted, some person must have been on the property and given some attention to the baby on the Thursday, Friday or Saturday. Another minor item that may be of help is that some dirty napkins were found by the police on their initial search of the property, lying on top of a refrigerator, an unusual position for anybody to deposit dirty napkins. The whole of these happenings remains a mystery.

In passing, I think I should refer to the evidence of Peter Renton Thomas, a cousin of the accused, who during the week lived with Mr. and Mrs. Thomas. Peter Thomas is eighteen years of age, and ordinarily lives at Onewhero with his parents, but through the week he sleeps at the Thomas place and does outside work. He has given evidence as to the tip on the Thomas property, although he had been there only once some months before the incidents with which we are concerned, but he never noticed any axle on the farm. He says that the accused's rifle was for some time kept in the room he occupied, and that after the police had taken it and later returned it, it was in the wash house. He did not know of the rifle ever having been used while he was on the farm, although he knew that at times the accused went out duck shooting, and that he was not a bad shot. He stated that neither Mr. nor Mrs. Thomas to his knowledge were out on the evening or night of the tragedy. Apparently on the evening of Monday 23rd a neighbour telephoned the Thomas household and told them that Mr. and Mrs. Crewe were missing. He said that this matter was discussed in the Thomas household a few times. He thinks it was on the next night, which would be the 24th June,

96

there was a discussion about the disappearance. He is unable to remember clearly, but he thinks this was the second discussion. He says this would be about a month before the police saw him, although he is not sure of the time. He thinks that Mrs. Thomas commenced the discussion, by passing some remark as to what they were doing that night. He refers to a discussion in regard to the sick cow, and that the accused said it was on that night that he had a sick cow in the shed, and that it was in calf or something. Peter Thomas is somewhat vague as to the discussions in regard to what the Thomases were doing on the particular night, but he seems to have accepted that the sick cow incident was on the night of the tragedy. From reading this evidence it seems to me that the cow incident was somewhat indefinite as far as this witness is concerned, and that he accepted Thomas's statement, which seems to have been reiterated at other discussions, that the sickness of the cow was on the Wednesday night. I would hesitate to accept his evidence as to the vital date.

The judgment of the learned President, Mr. Justice North, in the Court of Appeal, carefully considers the whole of the evidence given at the trial, and I am wholly in agreement with the views he has expressed. He considers fully the submissions for the defence, which can be summarised that there had been a miscarriage of justice, and dismisses, after full consideration, this argument.

I have carefully perused the large body of evidence given at the trial, and I entirely agree that there has been no miscarriage of justice. While some minor matters of little importance may be somewhat vague, it seems to me clear that the fatal bullets were fired by Thomas's rifle, and that the bullets recovered from the bodies were of the No. 8 type, an unusual type, which has been out of manufacture for a considerable period of time. One No. 8 bullet was subsequently found in the

garage of the accused. The cartridge shell found at a later date, from marks made by the firing pin and the ejector, corresponded with the same marks on test cartridges fired by the scientists with Thomas's rifle. The trailer axle was identified as having come from the accused's farm. The wiring on the bodies, both copper wire and galvanised wire, corresponded with wire found by the police later on the accused's farm. The evidence in regard to the identity of the copper wire is very clear. The real matter at issue at the trial was the identity of the murderer. This was entirely a matter for the jury. The trial judge carefully in his summing-up emphasised that if on any matter there was a reasonable doubt in the minds of the jury as to the inferences which they might draw, the accused should have the benefit of that doubt and be acquitted. The jury were also referred to the defence evidence as to an alibi, and the evidence that the accused did not leave his home that particular night. They were warned that even if they were unable to accept this evidence, but nevertheless it raised a doubt in their minds, the accused should be acquitted. It seems to me that considering the whole of the evidence at the trial the jury was satisfied that there was no doubt as to the identity of the accused as the murderer. This conclusion seems to be fully warranted on the evidence at the trial.

At this stage the matter for consideration is whether there is sufficient new evidence to warrant the matter being referred back to the Court of Appeal under s. 406 of the Crimes Act 1961.

Considering first the petition of Stephen James Bird, it must be remembered that it is based on dissatisfaction with the verdict on the evidence presented at the trial. It complains that had full facts been presented to the Court, in the opinion of the petitioner it would have caused the jury to reach an alternative conclusion. The only new evidence to which it refers is that since the trial new evidence has become

98

known to the petitioner which disputes that wire connections with the axle ever existed, but no indication is given from what person or persons this evidence can be obtained, or any details of it. It criticises the evidence of Inspector Hutton in a number of respects, but all these matters were properly placed before the jury at the trial. I cannot, in respect of the matter contained in this petition, deduce any grounds which would warrant a new trial.

Numerous portions of the evidence at the trial which are criticised were all before the jury, but it does not seem to me that the inferences from this evidence could not be accepted. They were all matters for the jury. These numerous matters in contradiction of evidence heard at the trial refer simply to the petitioner's belief, and these matters were fully considered by the Court of Appeal. There is no evidence in the petition to warrant the suggestion of the petitioner that Inspector Hutton committed perjury.

The second petition, signed by approximately 24 persons, is based on the ground that in the interests of justice, and in the interests of the public, a new trial should be granted, and that new evidence is available in that some .22 rifles in the district were not examined by the police, that the woman seen at the Crewe house on the Friday subsequent to the homicides was not Mrs. Vivien Thomas, and that the circumstantial evidence at the trial was not of sufficient weight. No details are given in regard to the .22 rifles said not to have been examined by the police. I do not think from the evidence that it would be accepted by the jury that the person seen on the property was Mrs. Vivien Thomas. Rather, the evidence was that it was not.

The third petition, of a Mr. Vesey and the father of the accused, is forwarded on behalf of the Arthur Allan Thomas Appeal Committee Incorporated. It refers to some of the evidence given at the trial, again as to the identity of the woman seen

99

on the farm by Roddick, without any suggestion as to who this person was. Attached there are some seven or more affidavits refuting the evidence of Mr. Eggleton, the jeweller. I have already criticised the evidence of Eggleton, and I would very much doubt after the summing-up of the trial Judge that the jury accepted Eggleton's evidence in regard to the identity of the owner of the watch.

Attached to this petition is an affidavit by a Mr. Hewson, a resident of Woodville, and a close friend of Harvey Crewe and his wife. Immediately after it was discovered that Mr. and Mrs. Crewe were missing he arranged to go to Auckland and thence to Pukekawa on the following day. He stayed with Mr. Demler for about a week, and then moved to the Pukekohe Hotel, where he stayed with Mrs. Crewe Senior and a cousin, Mr. Turner. It was then arranged that he would return to Woodville and then he would come back to Pukekawa to manage the Crewe farm until a farm manager could be appointed. He returned to Pukekawa early in July. He stayed about a month, and returned home, but again returned to Pukekawa when Mrs. Crewe's body had been found. He assisted the police in a search of the grounds of the Crewe farm house. He states that the search party examined the ground around the house very thoroughly, including digging up the earth, and putting excavated earth through a sieve. He considers from the thoroughness of the search that if a cartridge case had been in that garden at that time it would not have escaped notice. He apparently did not hear of the subsequent search until after the trial, and after the trial he stated what he could say over the telephone to Mr. Temm. This evidence is somewhat negative.

The Executive Council is empowered to refer the matter back to the Court of Appeal, and that Court can have any new evidence taken before a person whom the Court of Appeal designates. After such evidence has been taken it is forwarded to the Court of Appeal for consideration. Considering this new evidence I do not think it takes the matter any further. It seems to me that

100

further evidence from Roddick that the woman in the Crewe property was not Mrs. Thomas is only in line with the evidence he gave at the trial. The trial Judge in his summing-up put it to the jury that this person was unknown, and that the description given by Roddick did not correspond with a description of Mrs. Thomas.

In regard to the new evidence as to the watch, I fully agree that it completely refutes Mr. Eggleton's evidence, but again I do not think that Mr. Eggleton's evidence could have been accepted by the jury. It would be put aside.

Mr. Hewson's affidavit raises a doubt whether the cartridge case was in the garden from the time of the shooting. This of course is an important matter, although it is clear that it was fired by Thomas's rifle. It is difficult to accept that some other person obtained access to Thomas's rifle after the first two searches and before the third, and had "planted" the cartridge case in the Crewe garden.

From evidence at the trial it seems that in the early stages and before the finding of the body of Mrs. Crewe, a search was made of the Crewe property in an endeavour to find a heavy blunt weapon or a stab weapon. At this stage the police and the pathologist, from the amount of blood found in the room where the tragedy took place, thought that a weapon of this nature had been used. It seems that the surroundings of the house were carefully examined, and nothing was found.

A further search took place after the finding of Mrs. Crewe's body, and it having been found that she had been shot in the head by a bullet from a .22 rifle, a more careful search then took place, and Mr. Hewson was present and assisted in the search, the object being to find if possible a .22 calibre shell.

There are two garden plots between the house and the gate to the farm paddocks. After considering the whole of the evidence in regard to this search it would appear that the garden bed alongside the house was carefully searched, but police

101

engaged in this search stated that the concentration was on the bed immediately adjacent to the house, where a thorough search was made of the soil. In regard to the bed a short distance away running alongside the fence separating the garden from the paddocks the search was not so thorough. It would seem generally that in this bed plants were pulled out or disturbed to make certain that there was no cartridge shell under the leaves of the plants, but that the soil of this bed was not disturbed to any extent, except where plants were pulled out.

Mr. Hewson in his affidavit says that the gardens alongside the wall of the house, and along the fence lines of the enclosure were both thoroughly searched, and that this involved removing all vegetation, and then digging up the earth to the depth of the length of a spade's blade or more, and putting the excavated earth through a sieve.

At the trial there was evidence given by various police officers in contradiction of such digging and the extent of the search. Detective Sergeant Charles, one of the police officers engaged in the search on the 27th October, states that the soil of the fence bed was loosened with the use of a tooth-pronged hand fork, by Detective Sergeant Parkes. Detective Sergeant Charles searched the soil down to a depth of about 6 inches, and found the .22 shell case. He says the soil in the bed was fairly damp, but there were pieces of soil which he described as bone dry. Detective Sergeant Charles was not cross-examined to any extent as to the condition of this flower bed prior to this search. Detective Sergeant Jeffries, who at the outset of the investigation was delegated to the position of officer in charge of the scene at the Crewe house and the section, states that in regard to the first search which then took place it was limited to a visual search, and there was no soil search. After the finding of Mrs. Crewe's body on the 17th August Detective Sergeant Jeffries returned to the Crewe property and conducted a search in the house

for bullet marks of any dead shells. On the following day, with a party of three men, a sieve search of the garden area immediately surrounding the house was made. He states that this was a garden on the left hand side of the house against a brick wall of the house. He states that plants were pulled out, and soil dug to a spade's depth, and sifted. He states that all the remaining gardens, including the garden along the fence line (where subsequently the shell was found) were not sieve searched, but plants were pulled out, and a visual search made. He states later that the garden alongside the fence was not sieve searched. In cross-examination he again asserts that the search was a visual search, and shrubs and plants were removed where necessary so that the ground underneath could be searched. He again asserts that the boundary bed was not touched so far as sifting was concerned. That was searched visually.

Other officers engaged at this time agree with Detective Sergeant Jeffries that the search of the bed alongside the fence was visual only.

The cartridge shell was not found until late in October. As I have earlier stated, the accused made statements on the 15th October and on the 25th October. In the latter statement, when being questioned in regard to the wire found in Harvey Crewe's body, and the axle, the accused stated that someone must have come onto his farm and taken the wire and axle, and I think on an earlier occasion the accused told the police that he had been framed.

It seems that the suggestion of the accused being framed included a suggestion at the trial that included in the framing was the planting by some unknown person of the cartridge shell between the August search and the October date when the cartridge shell was found. The trial Judge in his summing-up discussed this suggestion, and pointed out that this would entail

103

a visit to Thomas's farm, a search for and the finding of a spent shell to be planted by somebody, of whom the Court did not know anything at all. He further said "The shell will not involve the accused unless the bullets found in the heads of Jeanette and Harvey Crewe were No. 8, the same as his, and had the same rifling mark as would be made by his rifle. How would an unknown person know that his (accused's) rifle and spent ammunition from his farm would give that result? Because if the lead in the bodies did not match up with the lead found or fired from accused's rifle, then, of course, a spent shell is of no value at all in implicating the accused, and this is the sort of thing, I suggest to you, you want to be on your guard about when suggestions were made that this might have happened and that might have happened. So it is only if his rifle, or a rifle with a similar barrel and the same ammunition with No. 8 on it is used, is it possible for any other person to involve the accused. I suggest that it is important to you because he says 'I have been framed. Somebody has cased the place' and claims like that are made." This is later slightly elaborated in the summing-up.

The whole body of the evidence at the trial negatives Mr. Hewson's positive assertion that this garden (the bed running along the fence) was stripped of vegetation, and then carefully sieved in the few days after Jeanette's body was found. It is also a matter of comment that Mr. Hewson's assertion was not made until after the hearing in the Court of Appeal. The trial extende from the 15th February to the 2nd March. More than two months intervened until the hearing in the Court of Appeal on the 4th, 5th and 6th May, and the judgment which was delivered on the 18th June. It is clear that Mr. Hewson followed closely the happening from the time when the disappearance of Mr. and Mrs. Crewe was ascertained. He appears to have followed the course of the trial in every respect. I cannot understand Mr. Hewson's silence,

104

more especially in the period between the conviction of Thomas and the commencement of the hearing in the Court of Appeal, and then his further delay in volunteering this information, it would seem not until late September or early October.

Before concluding I should mention one minor matter, At one stage when the accused said he had been framed he made a suggestion that the person responsible for such framing might have been Mrs. Crewe's brother-in-law Mr. Booth. It was established by the police that the brother-in-law in the crucial period was living in Whangarei and that he had not been absent from Whangarei. This negatives the somewhat vague suggestion of the accused.

I will now endeavour to summarise my conclusions. There are three important matters in evidence which point strongly to the identity of the accused as the murderer, and in respect of which he has been unable to give any explanation contrary to the evidence identifying him as the person responsible.

In the first place the ballistic evidence identifies the bullets found in the brains of the two victims as having been fired by the accused's rifle. This is clear from the identification of the marks on the bullets as having been fired by a rifle, the rifling corresponding with the marks on the bullets.

In the second place, the axle which must have been attached as a weight to Harvey Crewe's body came from the accused's farm.

In the third place the cartridge shell found in the garden at the third search is identified as having been ejected from the rifle of the accused.

These matters, as I have already stated, seem to me to identify the murderer as the person who had at all times possessed the rifle, who possessed No. 8 cartridges, and who had the axle on his farm, These three matters must have satisfied the jury that the only inference beyond any reasonable

105

doubt was that the accused was the guilty aggressor. There are a number of other matters which, although not conclusive, individually point in the same direction.

I have been handed some 1800 odd additional petitions. It appears that a number of papers in the Waikato printed short forms of a petition to His Excellency the Governor-General. Persons who wished to support a new trial were enabled to fill in the particulars in these short forms, and forward them to the Executive Council in support of the petitions. I have been given access to these petitions. I cannot find any real reasons to support these petitions, except a considerable number place reliance on the new evidence which might be available refuting the evidence of Eggleton, and the dispute as to the cartridge case not having been discovered in the earlier searches to which I have referred. In my view the only new evidence which could be given to the Courts is the evidence I have already considered in support of the petitions, namely the evidence negativing the evidence of Eggleton, the jeweller at Pukekohe, and also the evidence of Mr. Hewson disputing the evidence of the police as to the extent of the searches. I have already discussed these matters.

The conclusion I reach is that the evidence before the jury was conclusive as to the identity of the person who killed the two unfortunate victims. I do not think that any other verdict would have been warranted, and the jury could not have been left in any reasonable doubt as to the identity of the person who committed the crime.

In these circumstances I do not think that the additional evidence could negative the view that was taken by the jury, or could in the event of a new trial or further consideration by the Court of Appeal establish any reasonable doubt.

I regret that this report is of undue length, but it seems to me that a complete analysis of the 305 pages of the evidence, the summing-up of the trial Judge, and the judgment of

106.

the Court of Appeal has been necessary. In my view, from the legal aspect, no further reference to the Court should be granted. In my opinion there has been no miscarriage of justice.

2.2.72.

Appendix 19

(3)

26 February 1973

First Referral - Court of Appeal Judgment

5

Post Appeal
Ist Referral

IN THE COURT OF APPEAL OF NEW ZEALAND

IN THE MATTER of an Order in Council dated at Wellington on the 21st day of August 1972 pursuant to Section 406 (a) of the Crimes Act 1961

A N D

IN THE MATTER of an Application by ARTHUR ALLAN THOMAS for Leave to Appeal against his conviction for murder.

Coram - Wild C.J.
McCarthy J.
Richmond J.

Counsel - Ryan for Applicant
Morris and Baragwanath for Crown

Hearing - February 5, 6, 7, 8 and 16, 1973

Judgment - February 26 , 1973.

JUDGMENT OF THE COURT DELIVERED BY McCARTHY J.

There has been some public misconception concerning the nature of these proceedings. That makes it all the more desirable that we ensure that it is plain what the proceedings are, what the task is which the Court has to perform, and what are the principles which must guide it in performing that task.

The matter comes before us pursuant to an order made by His Excellency the Governor-General on the advice of the Executive Council, which refers to this Court for examination the conviction of Arthur Allan Thomas on indictment at the Supreme Court at Auckland on 2 March 1971 on two counts of murder, one of David Harvey Crewe and the other of David Harvey Crewe's wife, Jeanette Lenore Crewe. Section 406 (a) of the Crimes Act 1961 enables His Excellency to do that, whether or not the

convicted person has earlier appealed in the usual way to the Court of Appeal from his conviction. In fact, Thomas had appealed to this Court. That appeal was heard by a Court consisting of North P., Turner and Haslam JJ. in May 1971. It was dismissed on 18 June 1971 (1972 N.Z.L.R. 34). It had been presented on grounds related exclusively to alleged misdirections and errors of law said to have been made by the Judge who presided at the trial. The result of that appeal accordingly has no bearing on the matters now referred to us. The present referral arises as a result of representations later made to the Governor-General in Council that since the trial further evidence had become available which made a fresh consideration of the case by a jury desirable in the interests of justice. Those representations received due consideration and as a result the referral which we are now concerned with was made by Order in Council.

We emphasise as strongly as we can that the task of this Court on a referral made by His Excellency under s.406 is not to try again the convicted person and decide on his guilt or innocence, but to determine whether having regard to the matters placed before it (in this case fresh evidence) the conviction should be set aside and a new trial of the indictment ordered. Accordingly nothing in this judgment should be read as an expression of opinion by this Court as to the guilt or innocence of Thomas. That question must be determined by a jury of an accused person's fellow citizens.

In order, however, to decide whether the conviction should be set aside and a new trial of the indictment ordered it was necessary for us to examine all the evidence, both old and new. To that end we have considered with care the summary of the evidence led at the trial which is found in the judgment of this Court on the appeal previously brought

by Thomas, a summary which counsel for the Crown and Thomas have accepted in these present proceedings as accurate and sufficient. Then, in those areas where it seemed to us that a more intensive enquiry as to what was said at the trial was necessary, we turned to the notes of evidence taken at the trial. On 5, 6, 7 and 8 February we sat to hear the parties, perused the affidavits submitted on Thomas's behalf, heard those deponents whom the Crown required called for cross-examination by counsel for the Crown, and finally heard the evidence of a number of witnesses whom the Crown wished to call in rebuttal. Then on 16 February, in order to investigate a particular aspect in even greater depth, we recalled a witness who had given evidence on one of the earlier days. He was examined by the Court and by counsel for the Crown. Again the Crown was permitted to call evidence in further rebuttal. By these means we endeavoured to ensure that every evidentiary item which either the Crown or Thomas wished to put before us was heard, and tested by cross-examination whenever that was necessary.

Referrals by the Governor-General such as the one we now have before us are not made often, but there have been several in the past years. As a result the Court has been able to formulate certain principles to guide it in the discharge of its duty on these occasions, and on this question we refer in particular to the judgment of this Court in R. v. Morgan 1963 N.Z.L.R. 593. In accordance with these principles, our first task was to consider to what extent the fresh evidence tendered to us was credible in the limited sense of being capable of being believed by a jury; in other words, we had to satisfy ourselves that the evidence was not such that it could be said of it that no reasonable jury could believe it. Some of the evidence we thought not credible, and accordingly set it to one side as having no value.

As regards the remainder of the evidence the Court was satisfied that it related to issues of importance in the case and that there was no special reason why it should be excluded from our consideration. We therefore proceeded with the most important part of our task. In accordance with the established principles to which we have referred, the Court will not order a new trial if it is satisfied that no reasonable jury properly directed throughout would or could in the light of all the evidence, that given at the trial and that now submitted, come to any other conclusion than that to which the first jury came. Unless however the Court is so satisfied then a new trial will be ordered. After careful consideration of the new evidence, not in isolation but in its place as part of the totality of the evidence in the case, the Court finds itself unable to say with the degree of confidence that such a serious matter as this requires that if the further evidence had been before the Supreme Court at the trial no reasonable jury properly directed would or could in the light of all the evidence, have come to any verdict other than that of guilty. That being so, it follows that there must be a new trial.

Because that is the Court's view we have deliberately refrained from giving any details of the evidence which we have heard or expressing any opinion on the weight or lack of weight of any particular part of it. Such matters are for the jury at the second trial, and it is essential in our view that the jury should be in a position to discharge its duty of weighing the evidence and deciding the guilt or innocence of the accused completely uninfluenced by any expressions of opinion of this Court concerning the worth of any identifiable part of the testimony, and unaffected by any public discussion in the newspapers or elsewhere of what we have heard. It was for this reason, too, that the Court has during its hearing of the referral prohibited

the publication of the names of witnesses or details of their testimony in this Court. That prohibition will continue until our further order. It does not apply to publication of this judgment nor to any evidence given by the same witnesses on the new trial.

Three further things need to be said quite firmly.

First: The fact that a new trial has been ordered does not mean that the jury should not have convicted at the first trial, nor that for any other reason there was a miscarriage of justice. Indeed it has not been urged on Thomas's behalf that that jury was not entitled to reach the verdict that it did on the evidence before it. The ruling of this Court is founded on the existence of the new evidence and it is only because of that evidence that the new trial has been ordered.

Second: It is now just over six months since the Order in Council was signed by His Excellency. This Court has ever since been able and willing to hear this appeal. The postponement of the hearing until this month was requested by the parties to enable the record to be prepared and counsel to investigate the matters raised in a proper way and then to prepare their submissions.

Third: Though the Court in the light of the history and circumstances of the case saw fit to have the witnesses brought before it for examination, it does not follow that such a course will be taken in other cases of referral under s.406 (a). Often it will be more satisfactory to have the examination of any witness, if that be necessary, conducted before a Magistrate, as was done in R. v. Morgan (supra).

The order of the Court is that there will be a new trial of the indictment. In the special circumstances of this case the Court feels it should add that this result is in accordance with the opinion of the majority of its members.

T.L. McCarthy J.

Appendix 19

(4)

11 July 1973

Second Appeal - Court of Appeal Judgment

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 48/73

THE QUEEN v. ARTHUR ALLAN THOMAS

Coram: Wild C.J.
McCarthy P.
Richmond J.

Hearing: 3 July 1973

Counsel: K. Ryan for Appellant
D.S. Morris and W.D. Baragwanath for Crown

Judgment: 11 July 1973

JUDGMENT OF THE COURT DELIVERED BY WILD, C.J.

This is an application for leave to appeal against conviction on two counts of murder at Pukekawa on or about 17 June 1970, the first of David Harvey Crewe and the other of his wife Jeanette Lenore Crewe.

In view of the lengthy course of the case it is desirable first to set out in chronological sequence but without elaboration the main events in its history.

22 June 1970: The Crewes' baby was found in a neglected and distressed condition in her cot in the Crewes' house at Pukekawa. There were large blood stains on one of the easy chairs and on the carpet in the living room. The two Crewes were missing.

16 August 1970: Jeanette Crewe's body was found in the Waikato river wrapped in a blanket and tied with wire.

16 September 1970: Harvey Crewe's body was found in the Waikato river tied with wire. Immediately beneath it was the axle of a trailer.

The evidence of a pathologist was that in each case death had been caused by a bullet wound in the head. Fragments of a bullet were recovered from the head of Harvey and an entire bullet from the head of Jeanette. In the case of Jeanette the pathologist observed injuries to the face and neck which, in his opinion, were caused before her death.

15 February - 2 March 1971: On being indicted for the murder of both Crewes the appellant was tried before Henry J. and a jury in the Supreme Court at Auckland. The trial occupied 13 days. The appellant was convicted on each count and sentenced, as required by law, to imprisonment for life.

3 - 6 May 1971: An appeal against the convictions was heard over four days by this Court constituted by North P., Turner and Haslam JJ. As amended, the grounds of appeal were that there was a miscarriage of justice in that the Judge:

(a) failed to put the defence adequately to the jury.

(b) failed to direct the jury correctly on the standard of proof to be applied to circumstantial evidence.

(c) was wrong in ruling that the evidence of a psychiatrist was inadmissible.

18 June 1971: The Court of Appeal gave judgment dismissing the appeal.

Following that dismissal a number of petitions were presented to the Governor-General in Council seeking a new trial. The Hon. Sir George McGregor, a retired Judge of the Supreme Court, was requested to review the evidence and the petitions and to report to the Governor-General in Council.

2 February 1972: Sir George McGregor reported against the petitions.

Following the publication of this report, continued representations for a new trial were made to the Governor-General in Council.

21 August 1972: An Order in Council was made referring the conviction of the appellant to this Court for examination in the light of representations that since the trial further evidence had become available which made a fresh consideration of the case by a jury desirable in the interests of justice.

5 - 8 and 16 February 1973: This Court, constituted ~~as it is on this appeal~~, heard submissions and evidence from the prosecution and from the defence on the matters so referred.

26 February 1973: This Court gave judgment by a majority ordering a new trial of the indictment.

23 March - 16 April 1973: A new trial of the appellant was conducted before Perry J. and a jury in the Supreme Court at Auckland over a period of 18 sitting days. The appellant was again convicted on both counts and sentenced to imprisonment for life.

The grounds stated in the notice of appeal from those convictions filed in this Court were as follows:-

"1) That the verdict of the Jury should be set aside on the ground that it cannot be supported having regard to the evidence.

2) That there has been a miscarriage of Justice on the following grounds:
Non Direction in that the nature of the defence was not properly put to the Jury especially that pertaining to -

(i) The defence of Alibi
(ii) The necessity to consider each Count separately
(iii) The defences made concerning exhibit No. 350 referred to as the "Charles" case.

"3) Unfair Conduct of Trial in that in his final address the Crown Prosecutor told the jury the following matters:

a) That he suggested to the jury that something could have happened to Jeanette between the time of her being struck with the butt of the rifle and her being killed and by inference, suggested some form of sexual assault.

b) He suggested that the watch that the accused allegedly had taken to the witness Eggleton was in fact Harvey Crewe's watch.

c) That Police Officers could lose their positions if Thomas the accused, was found "Not Guilty".

d) That Thomas the accused, may have seen Harvey Crewe and his wife in Pukekohe or Tuakau on the day of the homicides and that there was a deep overwhelming emotion which may have been the reason to destroy Harvey.

4) Unfair conduct of the Trial in that His Honour the Learned Judge:-

(a) Told the Jury that Defence Counsel had no right to cross-examine witnesses on the sworn evidence they had given at the referral and when permission was obtained the Jury were not told that his former remarks should be disregarded.

(b) That His Honour told the Jury that Defence Counsel had no right to cross-examine the witness Shea as to the telephone conversation he had and that Defence Counsel had committed a breach in raising the matter, and then had Counsel read an admission to the Jury causing them to believe that the evidence of Shea was accurate and the evidence given by Sprott was, by inference, wrong. This signed admission was handed by the Judge to the Jury."

In opening his submissions before this Court Mr Ryan, counsel for the appellant, said at once that he abandoned the first ground so stated. He explained that,

on further consideration and having made further enquiries in Australia, he was unable to maintain any argument that the jury's verdict was against the weight of evidence.

He also expressly withdrew ground (4) which alleged unfair conduct of the trial by the Judge, and he also abandoned ground 3(c).

Mr Ryan then applied for and was given leave to add to ground (2), alleging non direction in the summing-up, the following further particular:-

> "(iv) Failure to direct the jury that Peter Renton Thomas was an accomplice whose evidence therefore required corroboration."

We proceed to consider the grounds of appeal as so amended by Mr Ryan.

Non direction:-

(1) The defence of alibi:-

The alibi was that the appellant was at home with his wife and his cousin, Peter Renton Thomas (who lived with them) on the night of 17 June 1970 when the murders were committed; that the appellant had been occupied for some time early in the evening with a cow that was calving; and that he had then had his meal and gone to bed at about 9 p.m. To support this alibi the defence adduced evidence relating to the cow's calving. Mr Ryan acknowledged that the Judge had fairly put to the jury the evidence of the appellant, his wife and his cousin as it related to the alibi, but he made two complaints. The first was that the Judge did not point out to the jury that in his various statements to the police, as well as in his evidence at the trial, the appellant had consistently maintained that he was at home with his wife and his cousin at the time the Crowes were killed.

The second was that, as Mr Ryan put it, the Judge had destroyed the strength of that evidence by adverting to the question of credibility in referring to the evidence as to the cow's calving.

The part of the summing-up dealing with the defence of alibi occupies some pages of the record before this Court. The Judge asked the jury particularly to consider the evidence of alibi which he said had been pressed as the major defence. He said they had to direct their attention to dates and times. He recalled in detail the appellant's evidence that he was busy until 8 p.m. with a sick cow which calved, and then had his meal and went to bed at 9 p.m., the evidence of the wife and the cousin substantially confirming the departure to bed, and that of a dentist who said the appellant had visited him earlier that day and talked of a sick cow. The Judge then referred to the considerable evidence as to whether the cow did calve or was merely sick that night, pointing out that, if the murders occurred about or after 9 p.m., then the events up to 8 p.m. went only to the credibility of witnesses: they did not affect the true alibi which was that the appellant went to bed at 9 p.m. and did not leave the house thereafter. He said that on that question of credibility the jury would have to consider all the evidence including the calving record, the milking-shed card and the evidence as to calvings on due date.

It is plain that the evidence about the cow's calving was introduced by the defence as a reason why the accused would remember the events of 17 June but it was not itself truly evidence of alibi. It was, however, material for the jury to consider in assessing the evidence of alibi.

The duty of the Judge was not to traverse every detail of the evidence but to put the defence of alibi

fairly. In our view it is clear that that was done. Attention was specially directed to the written statements to the Police which were made available to the jury, and, virtually at the end of the summing-up, the Judge said "it is true to say the accused has throughout denied his guilt."

In our view this ground of appeal fails.

(ii) The necessity to consider each count separately:-

In the circumstances of this case, where there has never been any suggestion that the deaths of both victims did not occur at the same time and in the same circumstances, Mr Ryan quite realistically felt unable to make anything of any omission by the Judge to direct the jury that they had to consider each count separately. In point of fact the very last words of the Judge to the jury before they retired were:-

> "I would remind you that there are two counts and a separate verdict is required in respect of each."

(iii) The shell case:-

This was a most important piece of evidence. A police officer gave evidence that he found a .22 cartridge shell on 27 October 1970, when searching a flowerbed near the back door of the Crowes' house. The Crown case was that this had been ejected from the rifle which, aimed through a louvre window from a parapet outside the door, fired the bullet which killed Harvey Crewe sitting inside the house. There was evidence that the shell case could have been ejected only from the appellant's rifle. The evidence as to the finding of the shell case was strongly challenged by the defence and there was much scientific evidence on each side

as to whether it could have remained in the place where it was found from 17 June until 27 October. Part of this evidence related to the colour of the shell case and to the extent of corrosion that would occur during that length of time. In the course of his description of the shell case, as it was when handed him by the officer who found it, Detective Inspector Hutton said that there was "a heavy ink type of stain running from the bullet end of the cartridge at its widest point and tapering up towards the rim." Later in his evidence he said that, after the dismissal of the first appeal and despite instructions to destroy all the exhibits, he retained them for exhibition in a Police museum. With that in mind he cleaned the shell case with a typewriter brush.

Arising out of this evidence Mr Ryan complained that the Judge omitted to point out to the jury two matters - first, that Hutton did not in giving evidence on any earlier occasion mention the heavy ink type of stain and, secondly, that, in giving oral evidence in this Court on the reference by the Governor-General in Council, he did not say that he had cleaned the shell case in the manner mentioned. On the first point Hutton was cross-examined at the trial by Mr Ryan and his explanation was that he did not give the evidence in question to this Court because he was not asked by either counsel. On the second point Mr Ryan did not cross-examine Hutton at all.

On reviewing the summing-up we find that the Judge reminded the jury of the Detective Inspector's evidence of the history of the shell case between 27 October 1970 and two years later when it was examined by Dr Sprott, the scientific expert called for the defence, and he also summarised the evidence of Dr Sprott. He told the jury that the matter was one of fact for them to consider. As we have said, it was not the Judge's duty to refer to every

item of evidence in detail and, in our view, no valid objection can be taken to his omission to mention the specific points now advanced.

Complaint was also made that the Judge mis-stated the effect of the evidence of Mr Shanahan, a scientific witness for the Crown, when that witness was recalled by consent towards the end of the trial regarding the extent of corrosion on other shell cases which he buried experimentally, on which point he had not earlier been cross-examined. We have compared the record of the evidence on this matter with the summing-up and we cannot see that its effect was wrongly put by the Judge.

Mr Ryan's submission under this head cannot be sustained.

(iv) The failure to warn the jury that Peter Renton Thomas was an accomplice:-

This witness was called by the Crown but it is clear from the questions put to him by Mr Ryan in cross-examination that the defence relied on his evidence to support the defence of alibi. The answers he gave did give some support to this defence and certainly did not conflict with the evidence of the accused as to his being at his home at the important period. However, the account which this witness gave concerning the help which he had rendered to the appellant prior to 8 p.m. on 17th June was relied on by the Crown as being inconsistent with the evidence given by the appellant and his wife, to which we have earlier referred, about a sick cow which calved. It is because of this that Mr Ryan now contends that Peter Renton Thomas should have been treated by the trial Judge as an accomplice and a warning given of the danger of relying on his evidence.

Now this particular ground of appeal was, as we have already mentioned, added by leave of the Court to the

original grounds of appeal. We were informed that no suggestion whatever was made at the trial that Peter Renton Thomas should be regarded as a witness in the "accomplice" category. It would indeed have been surprising if Mr Ryan had in any way impugned the veracity or motives of this witness as the defence placed such considerable reliance upon the evidence which he gave supporting the claim made by the appellant that he went to bed at 9 p.m. Be that as it may, the effect of the decision of this Court in The Queen v. Terry (not yet reported - Judgment December 21, 1972) is to confine the category of "accomplices" to persons who are parties to the offence charged within the limits set by ss. 66 and 71 of the Crimes Act 1961. In the Court's earlier decision in The Queen v. Gillies and Jorgensen (1964) N.Z.L.R. 709, 716, it was said:-

> "If it should be contended that a witness should be treated as an accomplice as to whose evidence the jury must receive the warning which the cases enjoin upon the trial Judge, such a contention must be founded upon evidence and not upon mere conjecture."

In the present case we are satisfied there was no evidence at all which could have justified the jury in concluding that Peter Renton Thomas was in some way, either as a person committing the murder or as an accessory to the crime, involved in the murders of Jeanette and Harvey Crewe. Consequently, there was no need for a warning concerning his evidence. Indeed a warning could, in the circumstances of the case, have acted to the disadvantage of the defence. In these circumstances this added ground of appeal must also fail.

In regard to these contentions as to non-direction by the Judge we think it right to add that, in our view,

the summing-up was comprehensive and fair. At the end of it the Judge, no doubt as a matter of precaution, asked both counsel whether there was any correction as to the facts that either wished him to make or any other matter that either wished him to advert to. Both counsel answered in the negative.

Unfair conduct by the Crown Prosecutor in his final address:-

The occasions when this can justify a new trial must be rare. Moreover, since the passing of the Crimes Amendment Act 1966, the defence in every criminal prosecution has the right, before the summing-up, of the last word to the jury, and can therefore answer anything said for the prosecution.

Crompton J. said long ago (R. v. Puddick (1865) 4 F. & F. 497, 499) that counsel for the prosecution in a criminal case "are to regard themselves as ministers of justice". To that reference to justice in a criminal case it is pertinent to add the observation of Lord Goddard, C.J. in R. v. Grondkowski and Malinowski (1946) 31 C.A.R. 116 at 120 that:-

> "It is too often nowadays thought, or seems to be thought, that "the interests of justice" means only "the interests of the prisoners"."

The other side, of course, is the interests of the community. The duty of counsel for the Crown is therefore to present the case fairly and completely. They must not, in the words of Crompton J., "struggle for a conviction". But they are fully entitled and indeed obliged to be as firm as the circumstances warrant.

Turning to the particular matters already mentioned as advanced in the notice of appeal under this heading:-

(a) In replying to Mr Ryan's submission on this point Mr Morris read to this Court the relevant passage from his address to the jury which, he explained, had been prepared and typed before delivery. The passage is as follows:-

> " We fortunately do not know how long elapsed between the time Jeanette realised her husband was dying and her own death or just what happened in between. We do know that at some stage she received a violent blow, consistent with being from the butt of a rifle, to her face, and that when she was finally shot she was lying on the floor.
>
> We also know that a long hearth mat and cushion were at some stage burned by the murderer and also that the room was heavily bloodstained. Whether the burning of these items was, like the use of the two saucepans, with a view to concealing the blood or whether it was done to conceal other marks traceable to the killer or his treatment of Jeanette we do not know. The murderer was impelled by some overwhelming motive and that motive may have been more than merely to destroy Harvey, perhaps out of jealousy, and silence the only other witness. The evidence is equally consistent with a desire to get to Jeanette even if this entailed first killing her husband and later Jeanette herself. Whether the murderer was impelled by a combination of these motives only he can say, but there is nothing to suggest any alternative."

Mr Ryan accepted this as a correct record of what the Crown Prosecutor had said. He submitted that it was emotive and that it suggested that Jeanette may have been sexually assaulted before she was killed. Even though Mr Morris, very fairly, was willing to accept that his words could carry that implication we do not think, having regard to all the evidence including that showing the appellant's strong affection at an earlier stage for Jeanette and his current misfortunes as compared with the Crewes, that it can

be said that this passage exceeded the bounds of propriety. It is to be remembered that, in making his final address, the Crown Prosecutor was obliged to deal with the question of motive and he had to anticipate that in his address Mr Ryan would urge the jury that the appellant had no motive to kill.

(b) The evidence was that there was no watch on Harvey's body and that none was found in his house. The fact that some man brought a watch into Eggleton's shop was not challenged by the defence, though Eggleton's evidence that the appellant was that man was disputed. Against that background there could be no objection to the Crown's suggesting to the jury the inference complained of.

(d) There was evidence that the accused passed through Tuakau and that Harvey and Jeanette also passed through Tuakau on the day of the murder. The Crown was therefore fully entitled to suggest that the appellant might have seen the Crewes.

It should be added that counsel agreed that in his final address Mr Ryan did in fact deal with these last two points though he chose to say nothing in answer to the passage set out in para. (a).

Having now dealt with all the grounds of appeal put forward our conclusion is that none of them can be sustained and that the trial was fairly conducted.

In view of the abandonment of any contention that the evidence did not support the verdict it has not been necessary in this judgment to traverse the evidence or to comment on its cogency. All that it is necessary to say is that the issues were for the jury.

Before parting with this case we would add this. On the first trial the appellant was defended, as this Court noted, by an able and very experienced counsel. In disposing of a contention that the case might have been one of murder and suicide the Court commented on the strength of the Crown case. On his second trial the appellant has been defended by a different counsel also of ability and experience in criminal cases. All the evidence, including further evidence and especially new scientific evidence, was placed before a new jury who were properly told that they must consider the case as though for the first time, uninfluenced by what had gone before. The verdict was the same.

The outcome is that in two different trials, each pronounced by the judgment of this Court to have been fairly conducted, the appellant has by the verdict of his fellow citizens been found guilty of what this Court on the first appeal described, and we now reiterate, were two exceptionally brutal murders.

The judgment of the Court is that that verdict must stand.

The appeal is dismissed.

Solicitor for the Appellant: K. Ryan, Esq., Auckland.

Solicitors for the Crown: The Crown Solicitors, Auckland.

Appendix 19

(5)

26 August 1974

Second Petition - Court of Appeal Judgment

W.D. Baragwanath

IN THE COURT OF APPEAL OF NEW ZEALAND

IN THE MATTER of an Order in Council dated at Wellington on the 1st day of July, 1974 pursuant to Section 406(b) of the Crimes Act 1961

A N D

IN THE MATTER of an application by ARTHUR ALLAN THOMAS to quash his convictions on the 16th day of April, 1973 on two counts of murder

In Chambers:

Coram: Wild C.J.
McCarthy P.
Richmond J.

Hearing: 26 August 1974

Counsel: W.D.Baragwanath for Crown
P.A.Williams for Arthur Allan Thomas

Judgment: 26 August 1974

ORAL JUDGMENT OF THE COURT
DELIVERED BY WILD C.J.

Pursuant to the powers contained by s.406(b) of the Crimes Act 1961 the Governor-General has by Order-in-Council dated 1 July 1974 referred to this Court two questions. Upon receiving the Order-in-Council the Court promptly fixed a hearing for 24 September and following days. The suitability of that fixture has been questioned by counsel for the Crown for reasons that will be mentioned. We have accordingly seen counsel in Chambers.

The first question that arises is as to the form of Question (1) in the Order-in-Council which is:

> "Does the material contained in the petition of Arthur Allan Thomas and the affidavits submitted therewith establish that neither of the bullets of which fragments were found in the bodies of David Harvey Crewe and Jeanette Lenore Crewe could have been assembled with the cartridge case identified as exhibit number 350 in the course of the manufacture of an 0.22 rimfire round of I.C.I. ammunition. "

The material filed in Court in fact included with the affidavits submitted with the petition an additional affidavit by George Leighton. The President noticed that addition and, having observed the limitations of Question (1) as set out in the Order-in-Council, gave instructions that the affidavit of George Leighton should be excluded, and the members of the Court have not looked at it. Mr. Baragwanath submits that Question (1) requires amendment if the Court is to consider that affidavit and also, as he submits would be proper, any relevant evidence that the Crown might wish to submit in reply to the affidavits referred to in the Question, and also to enable the Court to hear cross-examination of deponents.

Mr. Williams, who appears as counsel on the instructions of Mr. Ryan, agrees that Question (1) is too narrow. He says that he would wish, if authorised, to traverse all the evidence given at any stage of the prosecution relevant to cartridge case exhibit No. 350 and to another cartridge case found by a police witness at the Thomas property. He submits that the Court should read Question (1) widely so that, in effect, the words "Does the material contained" which open Question (1) should be read as "Do the issues raised".

It is to be noticed that s.406(b) is in terms much narrower than s.406(a). In the light of that difference the Court is unable to read Question (1) as Mr. Williams submits it should be read. The questions have been referred to the Court by the Governor-General in Council in express and explicit terms, and it is not for the Court to extend the reference beyond those terms. As both parties agree that the Question in its present form presents difficulties the proper course is for them to make their representations to the Governor-General in Council with a view to having the questions framed in a manner which will enable the Court

to consider whatever material the Governor-General in Council thinks it proper to define, in order to furnish its opinion in terms of s.406(b) on the point referred.

If that results in further affidavits being authorised and filed the parties should cooperate in furnishing and exchanging copies so as to avoid any delay.

The matter of expenses for any witnesses to be brought to Court for cross-examination may be taken up with the Department of Justice.

The fixture for 24 September is vacated and application may be made for a fixture when the matter is ready for hearing. Liberty is reserved to each party to apply at any time.

Solicitors:

Crown Solicitor, Auckland, for Crown.

Kevin Ryan, Auckland, for Arthur Allan Thomas.

IN THE COURT OF APPEAL OF NEW ZEALAND

IN THE MATTER of an Order in Council dated at Wellington on the 1st day of July, 1974 pursuant to Section 406(b) of the Crimes Act 1961

A N D

IN THE MATTER of an application by ARTHUR ALLAN THOMAS to quash his convictions on the 16th day of April, 1973 on two counts of murder

---

ORAL JUDGMENT OF THE COURT
DELIVERED BY WILD C.J.

Appendix 19

(6)

29 January 1975

Second Referral –Court of Appeal Opinion

IN THE COURT OF APPEAL OF NEW ZEALAND

Chem Dir Copy

IN THE MATTER of an Order in Council dated the 4th day of November 1974 under s. 405 (b) of the Crimes Act 1961.

AND

IN THE MATTER of an application by ARTHUR ALLAN THOMAS

Coram: Wild C.J.
McCarthy P.
Richmond J.
Macarthur J.
McMullin J.

Hearing: 9, 10, 11, 12, 18 December 1974;
6, 7, 8, 9 January 1975.

Counsel: P.A. Williams and K. Ryan for Applicant
D.S. Morris and W.D. Baragwanath for Crown.

Opinion Furnished: 29 January 1975.

OPINION OF THE COURT

INTRODUCTORY:

This is the fourth occasion on which this case has come before this Court. The applicant Arthur Allan Thomas, to whom we shall refer as Thomas, has been twice convicted by separate juries of the murder of David Harvey Crewe and his wife Jeanette Lenore Crewe. He appealed to this Court unsuccessfully after his conviction at his first trial in March 1971. Then, as a result of representations made on his behalf, the case was referred to this Court in August 1972 by the Governor-General in Council pursuant to s.406 (a) of the Crimes Act 1961. Under that particular provision the Court had power to order a new trial, if in the light of fresh evidence then before the Court, it thought that it should do so. In fact the Court did order a new trial, and when that trial took place Thomas was again convicted, in April 1973. There was an unsuccessful appeal from that conviction.

At both trials a very considerable body of evidence was presented both on behalf of the Crown and on behalf of Thomas. The first trial occupied 13 days and the second 18 days. At the second trial 94 witnesses were called for the Crown and 28 for the defence. In the head of each of the victims was found a .22 bullet, one of them fragmented. At both trials a prominent feature of the case for the Crown was the evidence of a police officer, Detective Senior Sergeant Charles, that in the course of a sieve search of a garden near the back door of the Crewe house on 27 October 1970 he had found a fired brass .22 ICI cartridge case. This cartridge case was produced in evidence as Exhibit 350, and we shall so refer to it, although it is sometimes called the "Charles" cartridge case. The importance of this exhibit was, in the first place, that it was possible to demonstrate by scientific means that the cartridge had been fired by a Browning pump action .22 rifle owned and possessed by Thomas. This was because of the impression left by the firing pin of the rifle. The other point was that the cartridge case was found in a position to which it could have been thrown by the ejection mechanism of that rifle, assuming that that rifle had been fired through the open louvre window of the kitchen. It was demonstrated that a person firing a rifle through those windows would have had an uninterrupted view of a chair in which it was said that Harvey Crewe must have been sitting at the time when he was shot. Each of the bullets recovered bore land-markings consistent with its having been fired through Thomas's rifle, or one other of sixty rifles collected from the neighbourhood.

At the first trial the scientific evidence as to the firing pin impression was challenged by the defence. After that trial the accuracy of the scientific evidence which had been given for the Crown was confirmed by a Home Office expert in England. The result was that at the second trial

this particular evidence was not challenged, but the evidence as to Exhibit 350 was challenged in other ways. The implication was that the cartridge case had been "planted" in the garden by the police. To support this, evidence was called whereby it was sought to show that the spot where Detective Senior Sergeant Charles said that he had found Exhibit 350 had earlier been thoroughly searched by the police. There was also evidence by Dr Sprott, an expert scientific witness retained by the defence, that the physical condition of Exhibit 350, when found, was inconsistent with its having been exposed to the weather and the soil since the date of the murder, a period of some four months. These allegations were strenuously opposed by the Crown. Finally, and when the trial was nearly at an end, Dr Sprott advanced for the first time a theory that it was possible to say from the head stamp on Exhibit 350 (that is to say, the pattern of the letters "ICI" impressed into the base of the cartridge case) that Exhibit 350 could not have been loaded with what is called a pattern 8 bullet. Both the bullets recovered from the bodies of Harvey and Jeanette Crewe, although one was fragmented, had the figure 8 on their bases. Dr Sprott had evidently been making a study of head stamps, and contended, as a result of that study, that it was possible to group head stamps into several categories. He had, he said, never found a cartridge case loaded with a pattern 8 bullet in a case where the head stamp had the same characteristics as the head stamp of Exhibit 350. To rebut this theory the Crown relied on Exhibit 343, said to be a complete round of .22 ammunition found at the Thomas farm by Detective Keith which, on being taken apart, contained a pattern 8 bullet. Dr Sprott had contended in his evidence that Exhibit 343 fell into a different category of head stamp, distinguished by the height of the letter "C". He said he had found in a number of instances that cartridges with

that category of head stamp were loaded with pattern 8 bullets. Dr Nelson, a scientific expert witness for the Crown, gave evidence that he could find no significant difference between the heights of the letters "C" on both exhibits.

We do not know, of course, what weight the jury gave to Exhibit 350 as distinct from the rest of the evidence, in the light of all these rival contentions. However, they found Thomas guilty.

After the appeal against that conviction had been dismissed by this Court (and that appeal in no way involved a consideration of Dr Sprott's theory about head stamps) various persons continued to interest themselves in Thomas's cause. Amongst them was Dr Sprott, who set about the obtaining of further information which might support, or disprove, the theory advanced by him at the second trial. This involved the examination of a great many more samples of .22 ammunition. It also involved enquiries from the Colonial Ammunition Company in Auckland and from IMI Australia Ltd. in Melbourne, both of which companies are members of the ICI group of companies. It appeared that all brass cartridge cases used in New Zealand for the manufacture of complete rounds of .22 ammunition were manufactured in Australia by IMI and imported into New Zealand. The bullets, on the other hand, were manufactured in New Zealand, and up to the month of October 1963 those bullets were of the pattern 8 variety, having the figure 8 stamped on their bases. After that time, however, the use of pattern 8 bullets was discontinued, and a new type of bullet, called the pattern 18, was used as from 13 November 1963, and those did not bear the figure 8. Dr Sprott also gathered information from IMI in Melbourne which led him to believe that brass cartridge cases with a head stamp of the characteristics possessed by Exhibit 350 could not have been

manufactured in Australia in time to be available in New Zealand for loading with pattern 8 bullets.

THE PETITION AND REFERRAL:

The end result of all these further investigations was that Thomas presented a second petition to the Governor-General in Council asking that his conviction for murder at the second trial should be quashed on the ground that Exhibit 350 could not have fired the pattern 8 bullets recovered from the bodies of Harvey and Jeanette Crewe. This petition was supported by affidavits from Dr Sprott, Mr P.J. Booth, a journalist who had interested himself in the case and published articles in the "Auckland Star", members of the staff of the Colonial Ammunition Company and of IMI, and Sergeant B.J. Thompson of the Melbourne Police. It was in effect an appeal to the Royal prerogative of mercy, and not an appeal to this Court.

Section 406 (b) of the Crimes Act 1961 provides as follows:

> "Prerogative of mercy - Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any Court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either -
>
> (a) ....
>
> (b) 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, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly."

It is in pursuance of this particular statutory provision that the case has been referred to us. We have

been asked to express our opinion on certain questions only, to assist His Excellency in Council in arriving at a decision upon the matters raised by the petition. There is no question of our ordering a new trial, nor is this a case, of the usual kind, of an appeal against conviction.

His Excellency in Council has asked for our opinion on two questions which are as follows:

> "1. Has it been established by the Petitioner that neither of the bullets of which fragments were found in the bodies of David Harvey Crewe and Jeanette Lenore Crewe could have been assembled with the cartridge case identified as exhibit number 350 in the course of the manufacture of an 0.22 rimfire round of I.C.I. ammunition.
>
> 2. If it is so established is such a finding inconsistent with the verdict of guilty, on both counts of murder, returned by the jury on the sixteenth day of April 1973 at the trial of Arthur Allan Thomas. "

Having regard to the lengthy history of the case and the fact that three of the Judges of the Court of Appeal were involved in the first referral and the second appeal, it was thought right, for the purposes of this referral, to add to the Court two Judges who have had no earlier connection with the matter.

It is quite plain from the form of Question 1 that the onus rests on the applicant. His counsel submitted that the standard of proof required to establish the proposition stated was proof on the balance of probabilities. As this was accepted by the Crown we say no more on that point.

On the issue of what must be established it is clear that the question was formulated with care and deliberation. The word used is "could" which indicates possibility as distinct from likelihood. In our opinion, therefore, in order to obtain an affirmative answer in his favour on Question 1 the applicant must exclude a reasonable possibility that either of the bullets was assembled with Exhibit 350.

THE EVIDENCE:

As already mentioned, following the second trial and the dismissal of the subsequent appeal against the convictions, Dr Sprott continued his examination of ICI .22 rimfire cartridges and his investigation and study of head stamps. He went to Melbourne and made thorough enquiries from IMI as to the design of head stamps and the production and use of hobs and bumpers. What these are is explained shortly. As his experience and knowledge advanced Dr Sprott found that some preliminary views required to be adjusted but, basically, he considered that his division of relevant patterns of head stamps into four categories was sound and was confirmed by his investigations. Dr Nelson also went to Melbourne and made generally similar and equally thorough investigations. His conclusion was that Dr Sprott's four categories gave an inadequate classification, and that they could be further divided into a greater number of distinct groups. Mr McDonald, the Dominion Analyst, who first came into the matter in connection with the present referral and gave evidence before us, made a different approach. He examined a very considerable number of cartridges and made various kinds of measurements of the head stamps on each one of them. Broadly speaking, the result of his work, as presented in the form of graphs, was to confirm Dr Nelson's conclusion that Dr Sprott's categories were an oversimplificati Professor Mowbray was engaged by the defence to scrutinise Mr McDonald's work. The cartridge cases and other material on which Mr McDonald had worked were made available to him for the period of an adjournment during the hearing. Professor Mowbray was critical of Mr McDonald's method of measuring from the edges of the letters in the head stamps. Variations in these could, in his opinion, be caused by wear on the bumpers. Professor Mowbray's own method was to measure from the centreline of the letters "I" and the

centrepoints of the ends of the letter "C" as he discerned them in magnified photographs of the head stamps. The evidence of these four highly qualified experts occupied several days of the hearing and undoubtedly reflected many days of painstaking work and study on the part of each of them.

All this evidence is entitled to carry weight but the opinions expressed are not all reconcileable. After careful consideration we have found it unnecessary to attempt to resolve the differences between these experts because we think that in the end Question 1 calls for a more direct approach.

Accordingly, we turn to consider the evidence relating to Exhibit 350. It appears that some time after the dismissal of the second appeal this Exhibit, along with others, was destroyed by the police in accordance with current administrative practice. But photographs of it were available and it was common ground that Exhibit 350 was a .22 rimfire brass cartridge case bearing the imprint "ICI" on the outside of its base.

A short explanation of the method of manufacturing cartridges is desirable. The evidence of Mr Cook, Manager of the Sporting Ammunition Division of IMI, was that at all material times all ICI .22 rimfire cartridge cases imported into New Zealand by CAC were manufactured by IMI in Melbourne, and sent to CAC in Auckland to be charged with powder and bullets. IMI's practice was to identify its shell cases during the course of manufacture by indenting the letters "ICI" onto the outside of the base. This was done by means of a heading bumper. These are fitted into machines (of which some 24 were in use at IMI) and bear down vertically onto the unformed cartridge cases, which are successively brought into position under the bumpers by the rotary action of the machine. The bumpers both form the rim of the cartridge

and at the same time impress the lettering into the base of the cartridge case. The bumper is chrome-plated so as to stand up to wear, and the letters protrude from the face of the bumper. They are made on the bumper by a hob which is a steel tool with the letters incused or cut into its surface. At one time hobs were made by impressing the letters onto the surface of a blank hob using a master hob. A master hob is a steel tool with raised or embossed lettering made by engraving the blank surface. Sometimes, however, hobs were made by engraving the letters directly onto a blank hob. The hobs themselves were made by IMI but the engraving of master hobs and of engraved hobs was done for them by Roeszler & Son. Pty. Ltd., a firm of engravers in Melbourne.

The records of IMI show that a master hob and two hobs were received from Roeszlers in October 1963, and that after that 400 bumpers were made in the tool room of IMI, according to an order which was completed on 30 November 1963. These records, whatever they may be, have not been put in evidence. Nor is there any record of the order given for the three hobs. All that we can say about them is that the master hob was probably ordered in terms of a tool drawing P6716 dated 27 August 1963, and that the two other hobs were engraved hobs ordered in terms of tool drawing P4773 dated 16 March 1959. It appears from the evidence that this latter drawing remained current as the effective specification for engraved hobs until some date in 1971 or thereabouts.

Towards the end of 1973, when enquiries were made in Melbourne, both on behalf of Thomas and shortly afterwards on behalf of the Crown, Mr Cook was able to produce five hobs which had been retained by his company, all of them engraved with the letters "ICI" in "modern style" (or "sans serif") lettering. By 1973 none of these hobs was in current use, because the company had abandoned the use of the mark

"ICI" round about 1970 or 1971, in favour of the single letter "I". The five hobs all had certain markings on them. There is no evidence as to what person or persons marked the hobs, but the probability is that it was someone in the tool room of IMI. One only of these hobs was a master hob. This was marked "P3054 Master Hob". P3054 is the number of a tool drawing for a bumper, originally prepared on 13 August 1953. It may be noted here that a tool drawing P4646 for a hob was prepared on 11 August 1958. At some later stage that drawing (which was also for a hob with the letters "ICI" to be engraved sans serif) had written on it the words "Do not use - see P4773". The drawing P3054 also had written on it "Use hob P4773" and a note dated 3 February 1960 - "form of lettering changed to suit hob". So that the only significance of "P3054" being marked on the master hob appears to be that it was to indicate that that master hob could be used to make hobs for the purpose of bumpers ordered in terms of the drawing P3054.

Of the four other hobs retained by IMI two were very similar indeed, as between themselves, so far as the engraving of the letters "ICI" is concerned. One was marked "P3054 - 11/11/63 - in current use". The other was marked "New" but in addition, according to Dr Nelson, there was marked upon it the bottoms only of figures which were consistent with having originally been "P3054", the upper parts of the figures having been removed by grinding. It is common ground between the experts that these two hobs are each capable of producing head stamps of a kind which were first found amongst sample rounds retained by IMI in a batch produced in March 1964. We mention at this point that the earliest samples retained by IMI (as at the time of the investigations carried out in late 1973) were a batch produced in September 1963. We should explain that it was the practice of IMI to take a sample batch, about once a

week, from one of the 24 heading machines, but not the same one, and to store the samples for a period of 10 years under varying conditions of humidity and the like, for the purpose of test-firing the samples at the end of the 10 year period. Thus the samples would disappear after 10 years. The type of head stamp first noticed in the samples produced in March 1964 (falling within what Dr Sprott calls category 4) may accordingly have been in production before that date, as any change in the design of bumpers would spread through the heading machines at random according to the need to replace worn bumpers and the extent of the stock of unused bumpers currently on hand. The position prior to September 1963, so far as retained samples is concerned, is in the realm of speculation.

At this stage we are in a position to draw the threads together to a certain degree. We think it highly probable (though, in the absence of more complete records, not absolutely certain) that the master hob to which we have referred, together with the two hobs marked "new" and "in current use", were in fact the hobs supplied to IMI in October 1963. The fact that one was marked "11/11/63 in current use" and the other "new" suggests that as at 11 November 1963 one hob had been put into use and the other was still new. This all fits in with the date on which the master hob and two hobs were supplied. The close similarity between the engraving on the two hobs suggests that they were engraved at the same time from one template. All three hobs appear to have been marked P3054. Dr Sprott considered they all shared a characteristic grinding pattern on the base. On the probabilities we are therefore prepared to accept the submission made on behalf of Thomas that cartridge cases derived from these two hobs could not have been manufactured and shipped to New Zealand in time to be assembled with pattern 8 bullets.

But two very important questions remain to be answered. In the first place, it is Dr Sprott's contention that Exhibit 350 was one of the "progeny" of these two hobs. This is disputed by Dr Nelson. Secondly, it is the strong submission for the Crown that Exhibit 350 could have derived from a hob of earlier manufacture than the hobs marked "in current use" and "new". We therefore turn to discuss these questions.

Dr Nelson contends that Exhibit 350 must have been the product of a hob (no longer in existence), other than the hobs marked "new" and "in current use", because of two particular features of it. The first was what he called the trapezium shape of the profile of the impressed lettering. Unfortunately, however, Exhibit 350 is no longer available for inspection. As already mentioned, there is a photograph but that was taken for the purpose of showing the mark of the firing pin, and with lighting arranged accordingly. This photograph is not in our view sufficient to demonstrate any distinctive trapezium shape in the lettering. For the rest Dr Nelson depends on his memory of Exhibit 350 as he examined it towards the end of the second trial. Dr Sprott, who examined it about the same time, disputes Dr Nelson's memory on this point. Dr Nelson also produced a cartridge case known as 1964/2 to illustrate what he said was the same type of trapezium profile in the lettering. Photographs were produced to us illustrating the profile of the lettering on Exhibit 1964/2. Whether it should be described as round rather than trapezium, or vice versa, is perhaps a matter of opinion. After hearing evidence as to the effect of wear on the lettering on bumpers we think it as likely as not that any difference in profile between the lettering on 1964/2 and the lettering on the two hobs in question could be accounted for by wear of the bumper. For the foregoing reasons we are not satisfied that the lettering on Exhibit 350 had a

trapezium shape profile which would prevent it from coming from either of those two hobs.

This brings us to the second feature relied on by Dr Nelson. He points out that the photograph of Exhibit 350 shows that the right hand "I" of the letters "ICI" is thicker or wider than the left hand "I". We take the view, however, that this also could have been the result of bumper wear. It also seems highly improbable to us that an engraver would produce a hob with such a conspicuous difference in the width of the two letters "I". All in all we conclude that Exhibit 350, so far as its head stamp is concerned, could have been a product of one or other of the hobs "new" and "in current use". This brings us to what we believe to be the vital question on this referral, namely whether Exhibit 350 could have been the product of an earlier hob which is no longer in existence.

By way of background it should be mentioned again that in earlier years it was the habit of IMI to make their own bumpers from master hobs. They were, of course, at all times interested in improving the clarity of the head stamps on their cartridges, and Mr Cook remembers that at some stage experiments were made with a view to adopting the use of engraved hobs, instead of hobs made from a master hob, in the expectation that the lettering on the bumpers would thereby be improved. Mr Cook thought that this experimentation went on in 1963, and led to the order of the three hobs supplied in October of that year. Mr Cook impressed us as a very fair and honest witness, but he was trying to remember events which had occurred ten years before he was asked to recall them. It must be remembered, too, that until the enquiries in this matter were made in 1973, he had no special reason to recall details of orders, or indeed to take note of any fine distinctions between head stamps derived from different hobs. We are satisfied from the tool drawings already referred to, along with certain other evidence, that the experiments referred to

by Mr Cook began well before 1963. Drawing P4646 was prepared in August 1958, and was for an engraved hob. One of the hobs retained by IMI was marked P4646 and Dr Sprott, in a graph called "Figure Sprott 2" and based on measurements of cartridge cases recently made by Professor Mowbray, places that hob in what he calls category 3 of head stamps. In that category there were various samples of cartridges which were found to be loaded with pattern 8 bullets. Thus it would seem that actual production of bumpers from hobs engraved in accordance with drawing P4646 began at some time before the preparation of the drawing numbered P4773 and dated 16 March 1959. That drawing in turn was clearly used as the basis for the production of one or more hobs at some time earlier than October 1963, because cartridges with what Dr Sprott calls a "Wide-I" head stamp have been found and examined - loaded with pattern 8 bullets. In Dr Nelson's opinion, and we did not understand Dr Sprott to dispute this, the Wide-I head stamp is the product of a hob (no longer in existence) engraved from drawing P4773. It seems highly probable, then, that this was the hob which, for some reason, was replaced by the hobs "new" and "in current use", because the retained samples at IMI from September 1963 to March 1964 were of the Wide-I type. There is no written record of the date of manufacture of that particular hob now missing, and in these circumstances it is impossible to rely on the records as being complete. Mr Cook accepts that his company's records are not complete. Roeszlers have no records at all for the relevant period. Thus it is as likely as not that the "Wide-I" hob itself replaced some earlier hob or hobs engraved to drawing P4773.

What then are the chances of such an earlier hob having been engraved in a manner which would make its progeny, in the way of head stamps, indistinguishable from

progeny of the hobs "new" and "in current use"? Before we can answer this question it is necessary to say something of the mechanical processes involved in the engraving of hobs. On this point we had the benefit of the evidence, given both by affidavit and viva voce, of Mr Leighton, who is the Works Foreman of Roeszlers. He has specialised in engraving for more than 20 years, and has been employed by Roeszlers since 1962.

The tool drawings with which we are concerned specified the use of "modern style" letters. Stock letters of this type were held by Roeszlers. An engraver called on to engrave a hob with the letters "ICI" would select three stock letters accordingly. The stock letters are much larger in size than the actual letters to be engraved - Mr Leighton said that their standard height is ⅝ inch. Accordingly there is need for reduction in size by the use of a pantograph machine. The stock letters are spaced on a type slide on the machine, and clamped in position. The tracing stylus of the machine then follows the shape of the stock letters, thus guiding the cutting tool which, according to the reduction ratio set on the machine, would reproduce the shape of the stock letters in a smaller size. In the case of the hobs with which we are concerned the limited reduction capacity of the machine made it necessary for the reduction process to take place in two stages. The first stage resulted in the making of a template, usually from a piece of scrap metal. The groove cut would be of a size which would accept the tracing stylus of the machine. Then the template would be substituted for the stock letters in the type slide, and by a further process of reduction the actual engraving of the hob would take place. If two hobs were ordered at the same time then it is clear from Mr Leighton's evidence that both would be engraved from the same template. This, we think, is what was done in the case of the hobs "new" and "in current use" - accepting as

we do that these were delivered to IMI at the same time in October 1963. There might, as Mr Leighton said, be small differences between the engraving on the two hobs, brought about by wear of the cutter, varying speed of travel of the cutter, and so on. But any such differences would not be discernible from the examination of a head stamp on a cartridge case, particularly if the head stamp had been made, as we believe to be the case with Exhibit 350, by a bumper which had been the subject of considerable wear. Any such differences could also disappear in the process of cleaning off and re-chromium-plating bumpers, which is carried out from time to time and was explained to us in evidence.

We are also of opinion that if a hob or hobs had been ordered in terms of drawing P4773, say in 1960 or 1961, and the template retained and re-used in October 1963 for the hobs "new" and "in current use", then it would be impossible to say from the head stamp alone whether Exhibit 350 was a product of the earlier or the later of those hobs. In such a case there might well be more chance of variation from the point of view of cutter size, cutter angle and wear, speed of travel, and minor variation in the setting of the reduction ratio of the machine. But in the case of Exhibit 350, and again emphasizing the evidence of bumper wear apparent from the photograph of that exhibit, we think it quite impossible to say that it could not have been the product of such an earlier hob.

This brings us to the evidence relating to the practice of Roeszlers as to the retention and storage of templates. Such a practice was undoubtedly followed to a greater or lesser extent. There was a storage rack for the templates and a system of cataloguing. In late 1973 Mr Leighton was able to produce to Dr Nelson a template which in Dr Nelson's opinion, which we accept, was made for the purpose of

engraving the master hob supplied in October 1963. In an affidavit which he swore in October 1973, and which is exhibited to his affidavit of 27 July 1974 filed in support of the present referral, Mr Leighton said that it had been standard practice at Roeszlers for many years to retain templates for regular customers, so that on receipt of a similar order from such a customer the template could be used to complete the new order. He also said that it was the practice to inspect the retained stock of templates every eighteen months to two years, and to destroy templates not used for some time. He added that the retained stock had been heavily purged when Roeszlers moved to new premises in 1971. The lack of precision in these matters is, however, evident from the retention in 1973 of the master hob template made ten years earlier.

In his subsequent affidavit of July 1974, sworn at the request of those interesting themselves in the case from the point of view of Thomas, Mr Leighton emphasized that templates of the kind used to make engraved hobs (he was not here speaking of master hobs) "are made in a few minutes and are not usually kept because of storage and cataloguing difficulties". He went on to say "To the best of my knowledge a template was never used in the production of more than one hob for IMI at the time of one order, except when two hobs were ordered in the same instruction. The templates were not retained but a new template was made each time a new engraving was made of a hob". These matters were the subject of fairly extensive cross-examination during the hearing before us. Mr Leighton explained that some templates took quite some hours of work to make and were considered very important, while others were easily made and were not considered of particular importance. As to the former type he said "more attention is paid to the retention of these". Our strong impression was that Mr

Leighton could not exclude the possibility of storage of easily made templates. In his affidavit he said that this was in fact the practice if orders were expected on a weekly or monthly frequency. It seems to us that this could also well have been done in the experimental atmosphere which evidently existed in the years immediately following the preparation of drawing P4773 in March 1959. In such an atmosphere further orders for engraved hobs might well have been expected. There are further factors. Mr Leighton cannot speak of the position prior to 1962, when he joined the staff. We do not know how many tradesmen other than Mr Leighton may have been employed at any relevant time, or what their individual attitudes may have been towards the retention of templates. In brief, our impression of this aspect of the case is that the practice as to retention of templates cannot be pinned down in any precise way, and that the hobs "new" and "in current use" may well have been engraved from a template retained after the production of an earlier hob.

We realise, of course, that - with the possible exception of Exhibit 343, to which we shall refer in a moment - no sample has been found of a cartridge case which could have been a product of such an earlier hob and which was loaded with a pattern 8 bullet. But we are now concerned with cartridge cases produced before September 1963, and possibly as far back as early 1960, and with a hob which, for all we can say, may have become useless through damage or metal failure after quite a short life. While the lack of samples militates to some degree against the existence of an earlier hob of the kind which we have been discussing, it is not of sufficient importance, in our view, to remove as a very real possibility the existence of such an earlier hob. Likewise, we appreciate that another hob, namely the "Wide-I" hob, may have been made in the same

period of years without resort to the retained template. But this could easily happen if a different engraver happened to be given the task of fulfilling the order which resulted in the "Wide-I" hob.

If there had not been a real possibility of the retention of a template from an earlier hob then we might well have thought that the chances of two hobs being engraved in a substantially similar way from the drawing P4773 would have been so remote that they should be dismissed. This drawing allows the engraver certain tolerances which are important at the stage when he arranges his stock letters in the type slide of his pantograph machine. There is, first, a question of human error. Dr Nelson suggests as an explanation of the "Wide-I" category that the engraver misread the drawing by interpreting the distances between the two letters "I" as referring to centre distances rather than to the overall distances between the extremities of the letters. Then there are other matters not so precisely specified. A decision is left to the engraver as to whether he should position the letter "C" in such a way that the geometrical centre of that letter would be equidistant between the "I's" or whether he should position the "C" in a way that is more pleasing to the eye. Importantly, the engraver is left to exercise a discretion as to how far he should follow round the standard letter "C" when deciding at what point he should terminate the "horns" of that letter. Lastly, there is the possibility that one of the stock letters used in the pantograph machine might vary in height from the others. These factors are at the root of Dr Sprott's theories, and they have considerable weight. But, in our view, they have no real relevance once the possibility is accepted, as we think it must be, of a number of hobs having been engraved by the use of a common template.

We should make a brief reference to Exhibits 343 and 1964/2 which were the subject of considerable argument before us.

The first of these is often referred to as the "Keith cartridge case". This is because at both trials Detective Keith gave evidence that he had found on Thomas's farm a particular complete round of .22 ammunition. He said that the bullet and the cartridge case were separated and that the bullet was found to have the figure 8 on its base. He also said that the cartridge was then fired in a rifle in order to destroy the propellant charge. He produced what he said were the cartridge case and bullet as Exhibit 343. Towards the end of the second trial both Dr Sprott, on the one hand, and Dr Nelson and Mr Shanahan of the Department of Scientific and Industrial Research on the other, examined the cartridge case which at that time had been produced as part of Exhibit 343. It is common ground that the cartridge case then examined was an unfired one. It no longer exists, having been disposed of along with other exhibits. There is no photograph of it. It was at no time examined in the light of knowledge acquired since the second trial as to the most appropriate parameters by which to classify head stamps into different categories. It is relied on by the Crown as an example of a head stamp said to be indistinguishable from Exhibit 350 being found on a cartridge case which was loaded with a pattern 8 bullet.

In all the circumstances we do not think that on this referral we should place any reliance on Exhibit 343 and we have accordingly disregarded it when considering the probability of Exhibit 350 having been derived from a hob earlier in date than the hobs "new" and "in current use".

The second exhibit, known as "1964/2", is a complete round of .22 ammunition which was not referred to at either trial. It has been produced on this referral by Dr Nelson

who states that he obtained it from the Colonial Ammunition Co. in Auckland at some time between 24 January 1964 and 6 February 1964. This cartridge case was loaded with a bullet which did not have a figure 8 on the base, and which was of a type called either a rifle club bullet or a palma bullet. The cartridge was wet primed and not, as in the case of Exhibit 350, dry primed. It was filled with a powder then only used in experimental type rounds and called "accurex". The only real point about this exhibit is that in Dr Nelson's opinion the head stamp was indistinguishable from that of Exhibit 350, which would mean that, at a date not later than 6 February 1964, a cartridge case had arrived in Auckland, and been loaded as an experimental round, which had on it a head stamp made by a bumper similar to that which made Exhibit 350. The evidence of Mr Cook makes it highly improbable that a wet primed cartridge with such a head stamp could have been in existence at that time. It is also possible that an early batch of cartridge cases derived from hobs "new" or "in current use" could have arrived in Auckland by that date for experimental purposes. We have not been able to derive any assistance from Exhibit 1964/2.

In the same context we should also mention a comparative photograph which was produced as Exhibit "A" to Mr Cook's affidavit. Mr Booth also referred to it in his affidavit, and said that he published it in one of his newspaper articles to illustrate his opinion that Exhibit 350 could not have fired either of the fatal bullets. It displayed a photograph of the head stamp on Exhibit 350 alongside and contrasting with a photograph of the head stamp on what Mr Booth described in his affidavit as "one of the types being used in the manufacture of cartridges by CAC, Auckland, during the period that pattern 8 projectiles were being used in the manufacture of ammunition". The implication was that

Exhibit 350 could never have been loaded with a pattern 8 bullet. In cross-examination, however, Mr Booth agreed that the cartridge bearing the latter head stamp had not been before the Court as an exhibit at the second trial, and he admitted that he was unable to produce it, as requested, for expert examination for the purposes of this referral. Therefore, neither the head stamp nor the cartridge case being identified, or available for examination, the photograph is of no value to the Court on the questions at issue.

Having dealt with those three exhibits we come back to the view earlier expressed, namely, that we are unable to exclude the reasonable possibility that Exhibit 350 was produced in Australia at some time before October 1963 and therefore could have been loaded in New Zealand with a pattern 8 bullet.

In those circumstances our opinion is that Question 1 must be answered "No".

CONCLUSION:

The Court's answers to the questions are as follows:

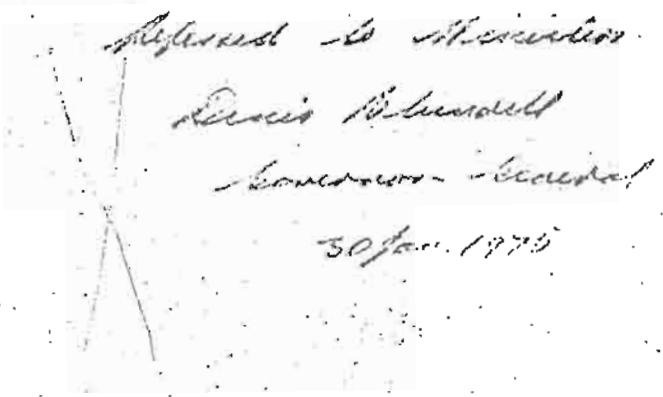
Question 1 No.

Question 2 In view of the answer to Question 1 no answer to Question 2 is required. For that reason, and also because a determination on the applicant's petition is a matter for the Governor-General in Council, the Court refrains from any discussion of the considerable body of evidence against Thomas, other than that relating to Exhibit 350, which was before the jury for their consideration in reaching their verdict.

Solicitors:

For Applicant: Kevan Ryan, Auckland

For the Crown: The Crown Solicitor, Auckland.



Appendix 19

(7)

29 August 1980

Judicial Review – High Court Judgment

Re Royal Commission on Thomas Case

High Court (Full Court) Auckland
4, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 29 August 1980
Moller, Holland and Thorp JJ

Commission of Inquiry — Judicial review — Meaning and effect of a pardon — After Thomas had been granted a free pardon, a Royal Commission was established to inquire into the circumstances of his conviction for the murders of the Crewes — Whether the Commission is subject to the supervisory powers of the Court — Effect of the pardon on the Commission's inquiries — Crimes Act 1961, s 407 — Judicature Amendment Act 1972, ss 3 and 4.

On 17 December 1979 Arthur Allan Thomas was granted "a free pardon" in respect of his conviction on 16 April 1973 for the murders of David and Jeanette Crewe. On 24 April 1980, a Royal Commission was set up to inquire into and report on the circumstances of Thomas's conviction for the murders. The Commission began its work on 21 May. On 30 July, while the Commission was still sitting, the New Zealand Police Association, the Police Officers Guild, Hutton (who had been the police officer in charge of the murder investigations), and Jefferies (a police officer involved in those investigations) applied, inter alia, for judicial review of certain "decisions" of the Commission, for a writ of prohibition prohibiting the Commission from continuing to consider the matters referred to it under the terms of reference, or an order declaring that the Commission was disqualified from continuing to consider the matters referred to it. A motion to strike out was filed by the respondents on grounds that the Court had no jurisdiction to entertain the proceedings.

Held: 1 The Court had jurisdiction to entertain the proceedings:

(a) A Commission of Inquiry, whether it was established by the Executive under a statutory provision or created under the Royal prerogative, was subject to the Court's supervisory powers (see p 611 line 14).

Cock v Attorney-General (1909) 28 NZLR 405 applied.

(b) In performing its functions, the Commission was making an "investigation or inquiry" in terms of the Judicature Amendment Act 1972, as amended in 1977, and, both by its public rulings and pronouncements during the course of the investigation and by its reporting, it would exercise "statutory powers of decision". Regardless of the provisions of the Judicature Amendment Act 1972 the applicants would have been entitled to certiorari or prohibition, and accordingly they came clearly within s 4(1) of the Act (see p 615 line 17).

2 The allegations of bias in the sense of predetermination of issues had not been established (see p 626 line 49).

3 The effect of the pardon was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon

was granted. Thomas, by reason of the pardon, was deemed to have been wrongly convicted, and he could not again be charged with the murders of the Crewes (see p 620 line 15).

4 The applicants had established an error of law relating to the Commission's interpretation of the pardon, and, directly or indirectly from that, errors of law in relation to the admission or exclusion of certain classes of evidence. Although there had been errors of law they were not irreversible. The Court made the following declarations:

(a) The pardon granted to Thomas in no way limited the ambit of the Commission's inquiries pursuant to its terms of reference, that ambit being limited only by the relevance of evidence to the subject-matter of the several terms of reference.

(b) Although any decision as to the relevancy of particular evidence to any particular term of reference was for the Commission, it would be wrong in law to exclude evidence otherwise relevant to any term of reference on the grounds (i) that it might tend to implicate Thomas in the killing of the Crewes or (ii) that it was circumstantial or indirect evidence (see p 623 line 30, p 629 line 33).

Other cases mentioned in judgment

Attorney-General v De Keyser's Royal Hotel [1920] AC 508.
Bennet v Easedale (1626) Cro Car 55.
Bushell v Secretary of State for the Environment [1980] 3 WLR 22; [1980] 2 All ER 608.
Chandler v Director of Public Prosecutions [1964] AC 763; [1962] 3 All ER 142.
Cuddington v Wilkins (1615) Hob 67.
De Verteuil v Knaggs [1918] AC 557.
Furnell v Whangarei High Schools Board [1973] 2 NZLR 705; [1973] AC 660.
Hay v Justices of the Tower Division of London (1890) 24 QBD 561.
Laker Airways Ltd v Department of Trade [1977] QB 643; [1977] 2 All ER 182.
Pergamon Press Ltd, Re [1971] Ch 388; [1970] 3 All ER 535.
R v Boyes (1861) 9 Cox CC 32.
R v Cosgrove [1948] Tas SR 99.
R v Criminal Injuries Compensation Board, ex parte Lain [1967] 2 QB 864; [1967] 2 All ER 770.
R v Dean (1896) 17 NSWR 35.
R v Graham (1865) Col LJ 16.
R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299; [1972] 2 All ER 589.
Royal Commission on State Services, Re the [1962] NZLR 96.
Royal Prerogative of Mercy upon Deportation Proceedings, Re [1933] 2 DLR 348.
Thames Jockey Club v New Zealand Racing Authority [1974] 2 NZLR 609.
Thomas v Howe (1674) Vaugh 330.
Wiseman v Borneman [1971] AC 297; [1969] 3 All ER 275.

Note

Refer 4 Abridgement 313; 1 Abridgement 82.

Application for review

There were two sets of proceedings before the Court: first, an application under the Judicature Amendment Act 1972 for judicial review of the operations of the Royal Commission set up on 24 April 1980 to inquire into and report on the circumstances of the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe; and second, a notice of motion seeking orders that a writ of certiorari should issue to the Commission or that writs of prohibition should be directed to it. In addition, notices of motion had been filed on behalf of the

Commission and Arthur Allan Thomas asking, in effect, that the proceedings be struck out on grounds that the Court had no jurisdiction to entertain them.

D L Tompkins QC and *J H Blackmore* for the New Zealand Police Association Incorporated, the Police Officers Guild Incorporated, Bruce Thomas Newton Hutton and Murray Jefferies (the applicants).

G P Barton and *H C Keyte* for the Royal Commission (the first respondents).

H F Murphy and *N I Smith* for Arthur Allan Thomas (the second respondent).

R P Smellie QC and *D L Schnaeur* for the Attorney-General on behalf of the Department of Scientific and Industrial Research (the third respondents).

J D Shields for the New Zealand Police (the fourth respondent).

Cur adv vult

JUDGMENT OF THE COURT. By 16 September 1970 it had become apparent, as the result of investigations by the police, that Jeanette Lenore Crewe and David Harvey Crewe had been murdered. Her body was recovered from the Waikato River on 16 August of that year, and that of her husband was found floating in it on 16 September. On 11 November one Arthur Allan Thomas was arrested and charged with the murder of them both. Depositions were taken, and Thomas was committed to the Supreme Court for trial. The trial began on 15 February 1971, and, on 2 March, Thomas was found guilty. Over the next two years certain steps were taken which need not be detailed here. However, as the result of a referral to the Court of Appeal under s 406 of the Crimes Act 1961, Thomas faced a second trial. It began on 26 March 1973, and finished on 16 April with, once again, a verdict of guilty. He was, of course, sentenced to imprisonment for life. Many years went by, during which Thomas continued to serve his sentence. But on 17 December 1979 he was granted "a free pardon".

The pardon was in these terms:

> "WHEREAS on the sixteenth day of April 1973 Arthur Allan Thomas was convicted in the Supreme Court at Auckland of the murder of David Harvey Crewe and of Jeanette Lenore Crewe and was sentenced to imprisonment for life:
>
> "AND WHEREAS it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt:
>
> "NOW THEREFORE I, Keith Jacka Holyoake, Governor-General of New Zealand, acting upon the advice of the Minister of Justice, hereby in the name and on behalf of Her Majesty grant a free pardon to the said Arthur Allan Thomas in respect of the said crime:
>
> "AND I command and require the Superintendent of Tongariro Prison Farm and all others whom it may concern to give effect to the said pardon."

As the result of this Thomas was released.

Then, on 24 April 1980, a Royal Commission was set up "to Inquire Into and Report Upon the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe".

The Commissioners appointed were:

(a) The Honourable Robert Lindsay Taylor, a retired Judge of the Supreme Court of New South Wales;

(b) The Right Honourable John Bowie Gordon, a former Minister of the Crown in New Zealand; and

(c) The Most Reverend Allen Howard Johnston, Archbishop of New Zealand.

Of these the first-named was appointed Chairman of the Commission. In the rest of this judgment we shall refer to the Commissioners collectively as "the Commission".

The document of appointment (to which we shall hereafter refer as "the terms of reference") went on to say that the Commission was "to inquire into and report upon" the following matters:

> "1. Whether the investigation by the Police into the deaths . . . was carried out in a proper manner; and, in particular, —
>
> "(a) Whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (Exhibit 350) or in respect of any other matter?
>
> "(b) Whether any matters that should have been investigated were not investigated?
>
> "(c) Whether proper steps were taken, after the arrest of [Thomas], to investigate any matter or information, if any, which suggested that he was not responsible for those deaths?
>
> "2. Whether the arrest and prosecution of [Thomas] was justified?
>
> "3. Whether the prosecution failed at any stage to perform any duty it owed to the defence in respect of —
>
> "(a) The disclosure of evidentiary material which might have assisted the defence?
>
> "(b) Any other matter?
>
> "4. Whether, in respect of the jury list for either trial, —
>
> "(a) The Crown or the Police or the defence obtained preference in respect of the time at which the list was supplied?
>
> "(b) Any persons named on the list were approached by representatives of the Crown or the Police or the defence before the jury was selected?
>
> "(c) Anything was done otherwise than in accordance with normal practice or was improper or was calculated to prejudice the fairness of the subsequent trial?
>
> "5. Whether, after each trial, —
>
> "(a) The Crown or the Police made an adequate investigation into new matters, if any, which may have related to the deaths . . . or to the trial and which were placed before the Crown or the Police by any person or persons?
>
> "(b) Any relevant facts became known to the Crown or the Police which were not known to them at the time of the trial?
>
> "6. What sum, if any, should be paid by way of compensation to [Thomas] following upon the grant of the free pardon?
>
> "7. Such other matters as are directly relevant to the matters mentioned in paragraphs 1 to 6 of these presents:
>
> But nothing in paragraphs 1 to 7 of these presents shall empower you to inquire into or report upon the actual conduct of the trials, whether by the Courts or on the part of the Crown or the defence . . ."

The terms of reference then set out certain powers conferred upon, and certain directions given to, the Commission. The wording of these, as far as it is necessary for our present purposes, is as follows:

> (a) ". . . for the better enabling you to carry these presents into effect you are hereby authorised and empowered to make and conduct any inquiry or investigation under these presents in such manner and at such time and place as you think expedient, with power to adjourn from time to time and place to place as you think fit . . . ";
>
> (b) ". . . you are hereby strictly charged and directed that you shall not at any time publish, save to His Excellency the Governor-General, in pursuance of

these presents or by His Excellency's direction, the contents of any report so made or to be made by you, or any evidence or information obtained by you in the exercise of the powers hereby conferred on you, except such evidence or information as is received in the course of a sitting open to the public:";

(c) ". . . you are hereby directed that where documents of a confidential nature, such as Police files, solicitors' files, and other confidential documents of the Crown or of any other person, are disclosed to you, you shall disclose the contents of those documents, whether in your report or to other persons (including parties to the inquiry), only to the extent that, in your opinion, such disclosure is proper and necessary in the interests of making full inquiry into any of the matters set out in paragraphs 1 to 7 of these presents or of reporting thereon:";

(d) ". . . you have liberty to report your proceedings and findings under this Our Commission from time to time if you shall judge it expedient to do so:".

The Commission began its work on 21 May, and its inquiries are still continuing.

However, on 25 July the first proceeding with which we have to deal was commenced. It consisted of a notice of motion, pursuant to the Judicature Amendment Act 1972, seeking a variety of orders by way of review of the operations of the Commission. This was supported by a statement of claim, and by an affidavit by a certain Detective Chief Superintendent Brian Wilkinson. Then, on 30 July, a further notice of motion was filed, seeking orders, quite apart from the provisions of the Judicature Amendment Act, that a writ of certiorari should issue to the Commission or that writs of prohibition should be directed to it. This too was, of course, supported by a statement of claim, and it specifically mentioned, in respect of the grounds of the application, "the affidavits filed in support of an application for review brought by the plaintiffs against the defendants". This statement included the affidavit of Detective Chief Superintendent Wilkinson, and another affidavit which, by then, had been filed, and which had been sworn by one Brian Sinclair Cooney in connection with an appearance by the Chairman of the Commission on a television programme on 24 July. (As we have mentioned there are two sets of proceedings before us. In the first that was filed the parties appear as applicants and respondents; in the second they appear as plaintiffs and defendants. In the rest of this judgment we shall use the terms "applicant" and "respondent", irrespective of the notice of motion to which we are referring.)

Since the original documents were filed there have been a number of amendments made to some of them, and finally, during the course of the hearing before us, the applicants filed a "second amended statement of claim" which, though it has been filed in the proceedings under the Judicature Amendment Act, is, we understand, intended to summarise the claims of the applicants in both matters.

At this stage we should record that the third applicant and the fourth applicant both gave evidence before the Commission. The third applicant, Bruce Thomas Newton Hutton, was the police officer in charge of the investigation into the deaths; and the fourth applicant, Murray Jefferies, was an officer involved in those investigations. Hutton resigned from the New Zealand Police in May 1976, but Jefferies is still a member of the force. The respective interests of the other two applicants, the New Zealand Police Association Incorporated and the Police Officers Guild Incorporated, will be discussed later in this judgment. To complete this part of the picture we set out that the first respondents are the members of the Commission, that the second respondent is Thomas, that the third respondent is the Attorney-General on behalf of the Department of Scientific and Industrial Research, and the fourth respondent is the New Zealand Police, described in the pleadings as a "Department of State". Counsel for the third and fourth respondents appeared before us when the hearing began, but, since those they represented abided the decision of the Court, they sought, and were granted, leave to withdraw.

In the original notice of motion under the Judicature Amendment Act, relief was sought by way of prohibition, to prevent the Commission "from inquiring into and reporting upon that part of term 1(a) of the terms of reference that relate to the cartridge case Exhibit 350". The major ground advanced to justify this claim was that, since that provision would require the Commission to investigate whether "one or more members of the New Zealand Police had planted . . . Exhibit 350 at the scene under circumstances amounting to a crime", it was "ultra vires His Excellency the Governor-General and therefore ultra vires" the Commission. Very early in the hearing Mr Murphy raised the point that, if the applicants intended pursuing this allegation, Her Majesty the Queen should be joined as a fifth respondent. With this we agreed, and the necessary order was made, notice of it being immediately conveyed to the Solicitor-General by Mr Bridger, of the Crown Law Office in Auckland. In the end, the applicants formally abandoned this part of their claim, and, at the joint request of them and the Solicitor-General, the fifth respondent was struck from the proceedings.

We pass now to a consideration of the final statement of claim. In it there are presented four basic causes of action. The first cause of action arises out of an allegation that the Commission has issued certain "decisions". In the statement of claim the "decisions" referred to are said to be these:

(a) One, of the 21st day of May 1980, that the effect of the pardon is that Thomas is deemed never to have committed the offence; that, in law and in fact, he is to be treated as a person who never was guilty of it; that he did not do the acts which constituted the crime; and that in no sense is the Commission to inquire into any question of Thomas's responsibility for the deaths or for doing the acts that brought them about;

(b) One, of the 8th day of July 1980, that the Commission identifies Exhibit 350 as a dry primed 0.22 long rifle brass cartridge case, manufactured by IMI in Australia after March 1964, bearing the headstamp "ICI", and loaded by CAC in Auckland with a 2 cannelure pattern 18 or 19 projectile; and that it was fired in the Thomas rifle, Exhibit 317, but "when and where we are unable to say at this stage".

Then the Commission went on to say: "This identification of Ex 350 will enable those who are concerned with the first paragraph of the Terms of Reference to be aware of the subject matter and area of the inquiry into whether there was any impropriety on any person's part in the course of the investigation or subsequently, in respect of the cartridge case, Ex 350'";

(c) One, of the 23rd day of July 1980, that the New Zealand Police be not allowed to lead evidence to show that Thomas was present at the scene of the murders and thus could have been in a position to deposit there Exhibit 350; that the New Zealand Police be not allowed to lead evidence put forward at the trials of Thomas to answer the allegations that the investigation by the New Zealand Police was not conducted in a proper manner; and that the evidence brought forward at the trials as to Thomas's motive or "as to wire" is not relevant to the terms of reference into which the Commission is to inquire and upon which it is to report.

In respect of this cause of action the applicants ask that the "decisions" be reviewed, quashed, or set aside; that a declaration be made that the "decisions" are "wrong in law"; and that a direction should issue to the Commission requiring it to reconsider the "decisions". The grounds upon which this relief is sought are numerous. Some of them apply to all three "decisions", and four apply only to that of 8 July. The general ones can be summarised as follows: what the Commission did it did "in excess of or without jurisdiction"; what the Commission did resulted in an error of law "on the face of the record" in that it interpreted the pardon incorrectly;

what it did resulted in the Commission excluding, or proposing to exclude, evidence and submissions "properly admissible within the terms of reference"; and, in what it did, the Commission "acted contrary to the rules of natural justice".

The special grounds having a bearing upon what happened on 8 July are these: the Commission acted contrary to the rules of natural justice in that it did not afford "the parties" an opportunity to be heard in respect of relevant issues; what the Commission said on that day was contrary to its terms of reference in that it was "a final finding amounting to a report", which could not be "published save to" the Governor-General; what the Commission said was said on the basis of "improper consideration" in that it "relied upon communications from persons not participating in the inquiry hearings namely representatives of and members of the New Zealand Government"; and, in saying what they did, they "acted unfairly and were disqualified by bias".

In their second cause of action the applicants ask for "an order by way of, or in the nature of, a writ of prohibition" against the Commission "prohibiting [it] from continuing to consider the matters referred to [it] under the terms of reference", or, in the alternative, an order declaring that the Commission is "disqualified from continuing to consider the matters referred to [it]".

In this connection the grounds are stated to be that the Commission is "disqualified by bias" in that it has prejudged the issue relating to the propriety or impropriety of the police conduct to such an extent that "it is impossible for [it] now properly and fairly to inquire into and report upon" such matters.

There then follow particulars of bias which are applicable not only to this second cause of action but also to the first cause of action in so far as bias is alleged in respect of it. Particulars of bias are then given and these will be referred to in more detail as this judgment proceeds. It is sufficient to say at this stage that the particulars mentioned the "decisions" that we have already set out; the manner of questioning witnesses adopted by, particularly, the Chairman; the asking by the Chairman of rhetorical questions; unjustifiable exclusion of evidence sought to be tendered by the fourth respondent; "manipulation of publicity adverse to the fourth respondent", with particular reference to the interview of the Chairman on television; statements by one or more of the Commission which show, concerning the actions of members of the police, that those members have "committed themselves so firmly" as to make it "impracticable for them to deal fairly with the matters arising in term 1 of the terms of reference".

In the third cause of action the applicants seek an order granting a declaration that the police should not be restricted in any way "from pursuing such inquiries as it thinks fit into the deaths . . . whether or not such inquiries may tend to implicate" Thomas. And the grounds in respect of this are stated as being that the Commission has misinterpreted the pardon and has said that the police should not pursue any such inquiries.

The fourth and last cause of action is one in respect of which the applicants ask for an order granting a declaration "that the manner in which the Crown conducted the trials against [Thomas], and in particular the arguments then advanced as to whether shell case 350 was ejected before or after one of the fatal shots", is irrelevant "as far as the Commission's consideration of, and report upon the matters raised by the terms of reference" are concerned, and particular mention is made of term 1(a). In this instance the grounds set out are that the Commission has, in the course of the inquiry, "referred to the basis on which the trials were conducted in a manner suggesting that this should weigh with [it] when reaching [its] own conclusions"; and further that the question of the conduct of the trials has been a matter expressly excluded from the terms of reference.

Statements of defence have been filed on behalf of the Commission and Thomas; but there is no need at this stage to set out the details of them.

However, we cannot leave this survey of the nature of the proceedings before us without mentioning that, just prior to the commencement of the hearing, there were filed, on behalf of the Commission and Thomas respectively, notices of motion asking, in effect, that all proceedings by the applicants should be struck out, or that certain questions of law should be argued as preliminary matters. Put shortly the grounds stated in these documents refer to the questions whether or not any of the applicants has locus standi, whether this Court has jurisdiction to entertain the applicants' proceedings (either under the Judicature Amendment Act or otherwise), and whether the proceedings are "in derogation of the power reserved to the Governor-General by clause IX of the Letters Patent of 11th May 1917".

We decided that we should, first of all, hear legal argument upon the question of locus standi and upon that of our jurisdiction. This we did, and at the end of the submissions made to us, being of the view that some at least of the applicants had locus standi, that the Royal prerogative did not in itself bar the applications, and that the absence of jurisdiction had not been plainly made out and might well involve a consideration of factual material still not before us, we reserved our decisions in respect of both motions, and passed on to consider the merits of the claims.

Against this background we now deal with the question of locus standi. Although there is a considerable volume of authority to the effect that even a "stranger" to proceedings may apply for, and obtain, the type of relief sought by the present applicants, there is, in our view, no need for them to resort to this principle. In *de Smith's Judicial Review of Administrative Action* (3rd ed, 1973) this is said at p 369:

> "A person aggrieved, ie one whose legal rights have been infringed or who has any other substantial interest in impugning an order, may be awarded a certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing".

And, at p 370, this passage appears:

> "For this purpose, persons aggrieved have been defined as those who 'have a peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public'."

In the present case the third applicant (Hutton) was, as we have already said, the police officer in charge of the inquiries into the deaths, and the fourth applicant (Jefferies) was actively involved in those inquiries. The conduct of both of them has been, and had to be, a matter of investigation by the Commission under some of the terms of reference. There can be no doubt that both of them are "persons aggrieved", or persons capable of being aggrieved, as the result of certain of the inquiries and reports that the Commission is called upon to make. They have a "peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public".

The first applicant is an incorporated association to which there belong all members of the New Zealand Police who do not hold commissioned rank; and the second applicant is another incorporated association to which commissioned members belong. These two associations are, in effect, the "trade unions" of the police officers whose conduct is being investigated. And we are satisfied that they, too, are capable of being "aggrieved" as a result of the operations of the Commission. We are of the opinion that they, too, have a substantial interest in the proceedings of the Commission far greater than that of members of the public. In connection with the locus standi of these two associations, it is convenient to refer to *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; [1972] 2 All ER 589. There are other decisions to a similar effect.

In connection with the matter now being discussed considerable reliance was

placed by counsel for the respondents upon the proposition that none of the applicants had been named as a "party" to the Commission of Inquiry. Reference was made to *Re the Royal Commission on State Services* [1962] NZLR 96. A Royal Commission had been appointed to inquire into, and report upon, State Services in New Zealand, and it stated a case to the Court of Appeal seeking an opinion upon a point of law. The Court of Appeal had to consider s 4A of the Commissions of Inquiry Act 1908 (as that Act was amended by the amending Act of 1958). This section then read:

> "Any person interested in the inquiry shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry."

It was urged upon us that the only tribunal which could determine whether a person came within the boundaries of s 4A was the Commission itself, this being because the section says that the person must "satisfy the Commission". It is true that some support was given for this proposition in the judgment of Gresson P. However, we do not read anything in the judgments of North and Cleary JJ which indicates that, if this Court is satisfied that the interest of a person may be adversely affected by evidence given before a Commission, that person is not entitled to make applications such as are made here simply because the Commission has not given him an opportunity to be heard, or indeed, as in this case, the person himself has not even applied to the Commission for leave to be heard. Moreover, in view of some statements made in some of the reported judgments, it is worth noting again that Hutton and Jefferies were summoned to appear as witnesses before the Commission, and did so appear. Under s 11 of the Commissions of Inquiry Act they are therefore liable to have an order for costs made against them.

On 4 July of this year Parliament passed the Commissions of Inquiry Amendment Act 1980. By it s 4A, in the form that it existed in 1962, was repealed, and a new section enacted in place of it. This read:

> "(1) Any person shall, if he is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.
>
> "(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.
>
> "(3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent."

It is clear that Parliament has extended both the classes of person to whom "rights" are given in respect of Commissions of Inquiry, and the extent of their rights. The new subs (2) obviously includes the third and fourth applicants and probably some other members of the first and second applicants.

After considering carefully all the submissions made by counsel for the parties, we are satisfied that, if the applicants in this case can establish on other grounds, a claim for relief of the kinds sought (that is, leaving aside the question of locus standi), no justification exists for refusing that relief to them merely because of the arguments advanced by the respondents querying their status in the proceedings.

We now turn to another matter. A great deal of argument was presented to establish that this Court has no jurisdiction at all to interfere with this Commission and its operations, this being because the Commission is a Royal Commission appointed under the Royal prerogative, and because, as such, it is immune from our control. The argument was an interesting one; but, with respect to Mr Murphy (who presented it to us very forcefully), we intend dealing with it fairly briefly. This is because the position seems to us to be quite clear.

In the first place this Court is bound by the decision of the Court of Appeal in *Cock v Attorney-General* (1909) 28 NZLR 405. In that case the Court of Appeal issued a writ of prohibition against a Royal Commission. It is true that it did so on the grounds that the appointment of this particular Commission was ultra vires, but it seems to us that the case makes it clear that, as a general principle, the mere fact that a Commission is appointed under the Royal prerogative does not prevent this Court from exercising control over it, and, indeed, prohibiting it if that be the proper thing to do.

In view of the specific circumstances of *Cock's* case, Mr Murphy submitted that the controlling jurisdiction of this Court was limited to the validity of the appointment of a Royal Commission, and that, once such a Commission had been validly appointed then, because of the Royal prerogative, this Court cannot interfere with it. We do not think that such a restriction should be read into the authority of *Cock's* case. In our view that case establishes that a Commission of Inquiry is subject to the Court's supervisory powers; and it makes no difference whether the particular Commission was created under the Royal prerogative or by the Executive under a statutory provision.

Even if the matter were free from authority we should still be of the opinion that the jurisdiction of the Court, in its supervisory capacity, is not ousted merely because the tribunal has been appointed under the Royal prerogative. That is a term used to cover all the powers of the Sovereign which the Sovereign does not share with Her subjects.

As is stated in *Hood Phillips' Constitutional and Administrative Law* (6th ed, 1978) at p 272:

> "The prerogatives that may be classed as executive, administrative or governmental are a relic of the powers which the King had when he really governed the country. The government at the present day is largely carried on under statutory powers — a subject too vast for discussion in a general book on constitutional law. Prerogative powers nowadays are mainly of importance in relation to the Civil Service, the armed forces, colonial administration, Commonwealth relations and foreign affairs. Moreover, they have to be read subject to the principle of ministerial responsibility. The government does not have to consult, or even to inform, Parliament before exercising prerogative powers. This is convenient, for many matters falling within the prerogative are not suitable for public discussion before the decision is made or the action performed. On the other hand, the government must feel assured of parliamentary support afterwards, especially in a matter like war or where money will be required."

However, the Crown may not dispense with the laws of the land or the execution of those laws. The Crown clearly cannot appoint a Commission, or anybody else, to act contrary to the law. If the Crown is subject to the law — as it is — then, a fortiori, a delegate body of the Crown must likewise be subject to it.

An illustration of the increased willingness of the Courts to subject the exercise of the Royal prerogative to tests of "fairness" is to be found by comparing *Chandler v Director of Public Prosecutions* [1964] AC 763, 809-810; [1962] 3 All ER 142, 157-158, with the recent judgment of the Court of Appeal in England in *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182, 193a; [1977] QB 643, 705-706.

Considerable argument took place before us, arising out of *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, as to the effect of the abolition or suspension of a Royal prerogative by an Act of Parliament covering the same ground, or part of the same ground, as the prerogative. Undoubtedly the Commissions of Inquiry Act 1908 and its predecessors have, to some extent,

covered the same ground as the Royal prerogative to appoint Commissioners, but we do not think it necessary, in this case, to rely upon the principle stated in *De Keyser*. There is, in our view, no doubt that this Commission of Inquiry is not exempt from the supervisory role of the High Court just because it was created by His Excellency the Governor-General acting pursuant to the Letters Patent rather than as a member of the Executive Council.

In any event, although the appointment of this Commission appears to be given under the Seal of New Zealand, and in the name of His Excellency the Governor-General, this is said in its penultimate paragraph:

> "... it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, and under the authority of and subject to the provision of the Commissions of Inquiry Act 1908, and with the advice and consent of the Executive Council of New Zealand."

It will therefore be seen that the Commission is a creature of two origins: first, the Royal prerogative (that is to say, it was appointed by the Queen's representative in New Zealand, but on the advice of the appropriate Ministers); and, secondly, it was appointed by the Executive decision of Cabinet under the provisions of the Commissions of Inquiry Act. Counsel for Thomas did not submit that a Commission of Inquiry appointed by the Executive Council under the Commissions of Inquiry Act was immune from the Court's process. What he did submit was that this particular Commission is invested with that immunity because it has been appointed not only in that manner but also under the Royal prerogative. He also acknowledged, that, in order that the Commission could function properly, it had to depend on powers given to it by the Act.

It is, in our view, neither common sense nor law that, merely because there should be added to the terms of appointment a reference to the Royal prerogative, a Commission of Inquiry which would otherwise be subject to the law becomes immune from it.

The more difficult questions arising out of the preliminary arguments are (a) whether the Commission is subject to the control of the Court by way of certiorari or prohibition, leaving aside the provisions of the Judicature Amendment Act 1972 and (b) whether it is exercising a statutory power of decision within the meaning of that Act, as amended in 1977.

Counsel referred us to a number of Canadian and Australian decisions relating to attempts to seek the Court's assistance in supervising the operations of Commissions of Inquiry. There can be no doubt that, in New Zealand, a Commission of Inquiry (whether appointed under the Act or under the Royal prerogative) is merely an inquisitorial body with no power to do other than inquire and report. The position seems to be the same in Canada and in Australia; but the relevant statutes relating to Commissions of Inquiry in those countries, and in the Provinces and States of those countries, are different from ours. All the Australian statutes contain provisions preventing evidence given before Commissions of Inquiry being admissible in other legal proceedings; and at least the majority of the Canadian statutes include either a right for persons interested in the subject-matter of the inquiry to apply to the Court by way of case stated in the event of the Commission itself choosing not to do so, or if they do not contain this type of provision, they supply some other means of reference to the Courts.

We have examined all the cases to which we have been referred, but, in the end result, we do not find it necessary, for the purpose of this judgment, to refer to Canadian and Australian authorities. Suffice it to say that, until the last twenty years, it seems to have been accepted in Commonwealth jurisdictions that prohibition and certiorari will not lie in the case of bodies which have no decisive powers and are not

required to act judicially. However, Canada was perhaps early in recognising the necessity of the Court to exercise some control over inquisitorial bodies to ensure that they acted fairly; and the position in Australia has no doubt been changed by the Administrative Decisions (Judicial Review) Act 1977 and the Administrative Appeals Tribunals Act 1975, this having been substantially amended in 1977.

The prerogative writs of certiorari and prohibition have existed for more than eight centuries, and they were, in their early days, used by superior Courts to ensure that proceedings before inferior Courts were conducted in accordance with the rules of natural justice. In addition to this jurisdiction, there is plain authority for controlling excess of jurisdiction by Commissions of Inquiry, the obvious example being *Cock's* case.

In modern times the issue of the writs has been extended to cover administrative tribunals, and it is trite to say that they will issue against any tribunal which carries out a judicial or quasi-judicial function, and which makes decisions affecting persons or property. But the Courts have also held that tribunals carrying out investigative functions (as a necessary prerequisite to the making of administrative decisions) must also "act fairly".

There is at present some academic debate as to whether the obligation to observe "natural justice" is something distinct from the obligation to "act fairly". The expression "natural justice" is one that is not precise and probably should not be defined. It has two arms, these being embodied in the maxims "nemo judex in causa sua" and "audi alteram partem". The procedure required to be adopted by any given tribunal to ensure that those concepts are properly applied will vary according to the tribunal and the function that it is performing.

As was said by Lord Morris of Borth-y-Gest in *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705, 718; [1973] AC 660, 679:

> "It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules . . . Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration."

This was really no new development because dicta to this effect were included in the judgment of the Privy Council in *De Verteuil v Knaggs* [1918] AC 557, 560, and by the House of Lords in *Wiseman v Borneman* [1971] AC 297, 308; [1969] 3 All ER 275, 277-278.

Then again, the scope of the writ of certiorari was succinctly stated by Lord Parker CJ in *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864, where, at p 882, he said:

> "The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty."

In *Re Pergamon Press Ltd* [1971] Ch 388; [1970] 3 All ER 535, the Court of Appeal held that inspectors appointed under s 167(3) of the Companies Act 1948 to

investigate the affairs of a company and to report thereon were under a duty to act fairly even though there was no duty to act judicially. Lord Denning MR said:

> "It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings . . . They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings . . . They do not even decide whether there is a prima facie case . . .
>
> "But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. . . . Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed . . . When they do make their report, the Board . . . may, in their discretion, publish it, if they think fit, to the public at large.
>
> "Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly" (ibid, 399; 539).

Sachs LJ said:

> "To conclude that there must be an appropriate measure of natural justice, or as it is often nowadays styled 'fair play in action', in the present case is thus easy. That was, indeed, something which was well recognised by the inspectors, who expressly so stated more than once in the course of the proceedings. The real issue, however, is whether that measure should . . . be reduced by the courts to some set of rules, or whether it should be left to the inspectors, who are men of high professional qualifications, in their discretion to proceed with that fairness of procedure that is appropriate to the particular circumstances of the case as it may develop.
>
> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasised in a number of authoritative passages in the judgments cited to this court . . .
>
> "It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate . . . the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective" (ibid, 403; 542).

And Buckley LJ said this:

> "It is not a judicial function. But having regard to the circumstances which may lead to the appointment of an inspector . . . and to the fact that under the Act a copy of the report must be furnished to the company, a need for due regard to fair treatment may arise if inspectors propose to report adversely on the conduct of any director or officer. If it is found that a director or officer has made some default or acted improperly in relation to the conduct of the company's affairs, this may well prompt the company to institute proceedings against him, or it may prompt others to institute proceedings against him. In those proceedings the person proceeded against would have the full protection of a judicial process, but, particularly since the company is entitled to a copy of the report, he should not be exposed to the risk of such proceedings without being given a fair opportunity by

> the inspectors to forestall an adverse report. If inspectors are disposed to report on the conduct of anyone in such a way that he may in consequence be proceeded against, either in criminal or civil proceedings, the inspectors should give him, if he has not already had it, such information of the complaint or criticism which they may make of him in their report and of their reasons for doing so, including such information as to the nature and effect of the evidence which disposes them so to report, as is necessary to give the person concerned a fair opportunity of dealing with the matter, and they should give him such an opportunity" (ibid, 407; 545).

The matter has recently been before the House of Lords in *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608; [1980] 3 WLR 22. That was a case where an inspector was appointed by the Secretary of State to inquire into objections concerning a proposed motorway and to report to the Minister. Although the final decision was not a unanimous one, all the learned Law Lords were of the view that the inspector was under a duty to act fairly, even though he was merely carrying out an investigation and then reporting.

In the light of the authorities to which we have referred, we are satisfied that dicta in earlier cases to the effect that a Commission of Inquiry is immune from certiorari or prohibition because it is doing no more than inquiring and reporting are now out of date, and are not in accord with the Court's responsibility to ensure that all tribunals carrying out functions (either investigative or decisive, or both) which are likely to affect individuals in relation to their personal civil rights, or to expose them to prosecution under the criminal law, act fairly to those concerned.

It is clear that the Judicature Amendment Act 1972 did not repeal the existing law as to the prerogative writs. It did, however, provide a simpler procedure; and it widened substantially the nature of the relief that the Court could grant once the applicant established his grounds. Section 4(1), however, provided that only applicants who would otherwise have been entitled to relief by way of mandamus, prohibition, certiorari, declaration or injunction should obtain the benefits of the Act.

"Statutory power" and "statutory power of decision" were both defined in s 3. Then, following the decision of the Court of Appeal in *Thames Jockey Club v New Zealand Racing Authority* [1974] 2 NZLR 609, an additional paragraph was added to the definition of "statutory power" by the amending Act of 1977. This is to be found in para (e) in the Act as it now stands, and it is in these terms:

> "To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person".

At the same time, the definition of "statutory power of decision" was enlarged to include not only decisions "deciding or prescribing . . . the rights, powers, privileges, immunities, duties, or liabilities of any person", but also those "affecting" such matters.

We are satisfied that the Commission, in performing its functions, is making an "investigation or inquiry" in terms of the Act, and that, both by its public rulings and pronouncements during the course of its investigation and by its reporting, it will exercise "statutory powers of decision" in the extended meaning of that phrase to which we have just referred.

In the light of our finding that the applicants would have been entitled to certiorari or prohibition regardless of the provisions of the Judicature Amendment Act, they accordingly come clearly within s 4(1) of it, and it is unnecessary for them to rely upon the provisions of subs (2A) of s 4, a provision that was also inserted by the amending Act of 1977. That subsection reads:

> "Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari

> or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section."

At first sight it appears that this subsection purports to enlarge the jurisdiction under the Act, but that, by its final phrase, takes that enlargement away. Counsel for all parties referred to the subsection, but they were unable to assist us with its precise meaning.

The intention of the 1972 legislation was not to widen the grounds on which the Court could grant relief, but to extend the nature of the relief that could be granted once those grounds were established, and then to improve the procedure by which that relief could be obtained.

Once this concept is emphasised, s 4(2A) is, in our view, clarified. It is merely a recognition that certiorari or prohibition is now available independently of the Act, even though there is no duty to act judicially; but, ex abundanti cautela, the legislature has provided that this statutory recognition shall not mean that there has been any enlargement of the grounds which would otherwise justify such relief.

A further factor which has reinforced our view that a Commission of Inquiry must be subject to control by the Court is the fact that, while this Commission has been sitting, Parliament enacted the Commissions of Inquiry Amendment Act 1980, to which we have already referred.

We are satisfied that the new s 4A, as it appears in this latest amendment, means that the Commission has duties towards certain persons, and, that being so, we are equally satisfied that the Court has a duty to ensure that those persons are adequately protected, and that any failure to act fairly towards them should be corrected by the issue of certiorari or prohibition, or by other relief under the Judicature Amendment Act.

The jurisdiction which the Court has in these present proceedings is three-fold: first, to ensure that the Commission acts fairly to persons likely to be aggrieved; secondly, if in its discretion it thinks it proper so to do, to prohibit the Commission from acting in excess of its jurisdiction by committing errors of law which prevent it from correctly carrying out its appointed task, or by rejecting evidence which it should take into account, or by taking into account evidence which it should not consider; and, thirdly, to exercise the powers given to the High Court on an application for review under the Judicature Amendment Act 1972.

Having dealt with the preliminary matters that were argued before us, we consider that we should immediately decide this question: "What is the true meaning and effect of the pardon?" We say this because the principal complaint made by the applicants is that the Commission has misconstrued that meaning and effect, and, by reason of this initial error, has misconceived the scope of its inquiries.

In New Zealand the source of the power to grant pardons is, and always has been, the Royal prerogative of mercy delegated initially to the Governor of the country, and, latterly, to the Governor-General. In 1874 a continuing delegation was made by Letters Patent to avoid the necessity of renewed delegations on each new gubernatorial appointment; and, in 1892, Royal Instructions were issued requiring the Governor to obtain the advice of the Executive Council in capital cases, and that of one of his Ministers in other cases, before granting a pardon or reprieve. The current delegation is in the Letters Patent and Royal Instructions issued in 1917. The operative and relevant portion of clause VIII of the Letters Patent, and that of clause VII of the Royal Instructions read:

Clause VIII:

> "When any crime has been committed within the Dominion, or for which the offender may be tried therein, the Governor-General may as he shall see

occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court, or before any Judge, or other Magistrate, within the Dominion, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor-General thinks fit; and further may remit any fines, penalties, or forfeitures, due or accrued to Us."

And clause VII:

"The Governor-General shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers . . .".

There were brief references to pardons in s 2 of the Public Offenders' Disqualification Act 1882 and in s 452 of the Crimes Act 1908, both being in relation to the restoration of civil rights to convicted persons who had "endured the punishment" to which their convictions had subjected them. Then s 17 of the Criminal Appeal Act 1945 (which statute was to be read together with, and deemed part of, the Crimes Act 1908), after declaring that "Nothing in this Act shall affect the prerogative of mercy", gave to the Governor-General, when he was considering an application for the exercise of the prerogative, the right to refer to the Courts, for their decision or opinion, any questions arising from the case under review.

However, it was not until the replacement of the Crimes Act 1908 by the Crimes Act 1961 that any statutory attempt was made to define the effect of a pardon. In the Act of 1961, s 406 gives to the Governor-General in Council the same sort of powers as had been given to the Governor-General in 1945; and there then appears, under the title of "Effect of free pardon" a new s 407. It is in these words:

> "Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence:
>
> "Provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

As in any statute which is intended both to consolidate and amend the existing law, it is necessary to consider to what extent this provision was intended to be declaratory of the existing law, and to what extent it was intended to amend it. The language itself suffers the inevitable obscurity involved in a "deeming" clause. On a normal construction, having regard to the previous legislative history, the proviso and the "deeming" clause can be recognised as an attempt to cope with difficulties in the nature of residual attainders, which had been experienced in New Zealand in *R v Graham* (1865) Col LJ 16. There the Court of Appeal had to construe the provision of the Imperial statute 7 and 8 Geo IV c 28, ss 11 and 13, which remained in force in New Zealand until it ceased to have effect by virtue of the provisions of s 412 of the Crimes Act 1961. Section 13 of the Imperial statute provided that a free pardon given under the Sign Manual shall, upon the discharge of the offender from custody, "have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted: Provided always that no free pardon . . . shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the

granting of any such pardon". Arney CJ, delivering the judgment of the Court, said at p 18:

> "Although it seems formerly to have been doubted whether a pardon did anything more than protect the person of the prisoner from punishment, it is now settled that it removes all the consequences of the conviction, such as infamy and forfeiture. . . .
>
> "But the obviating of the consequence of a conviction is something very different from getting rid of the conviction itself. That can only be effected by quashing it on demurrer or otherwise, or by reversing it in error. This has not been done in the present case, and, therefore, the conviction remains in full force and unreversed."

Such an interpretation could not survive the terms of s 407.

In order to consider intelligently whether any other reformative intention is disclosed by s 407 it is necessary to consider next the effect and meaning of a prerogative pardon. Because of the conflicts between the King and Parliament, the subject of the extent and effect of pardons was of great significance in the early seventeenth century, and it is the subject of a lengthy discussion in *Coke's Institutes*, Part 3, at pp 233 to 239, in which he describes certain limitations already claimed to fetter the prerogative. Certainly it is clear that, after the Act of Settlement 1700, no pardon could be pleaded in bar of an impeachment by the House of Commons.

During his discourse, *Coke* notes the numerous varieties of relief which can be granted by exercise of the prerogative, and he also comments upon the use of statutes, from time to time, to effect what the prerogative could not. It is significant that he refers to many problems in the way of residual disadvantages which could affect persons pardoned; and, at pp 238 and 239, he speaks of persons who had refused to accept pardons, and insisted on trial. "These men", said *Coke*, "thought that the taking of the pardon should be an implied confession of the fault, and therefore went a new way": but this he thought unwise — "for there is no man but offendeth God and the King almost every day, and the pardon is the safest and the surest way".

Prerogative pardons could be absolute or conditional. The absolute or "free" pardon could "forgive" the crime specified, and could restore any attainder, "but if by the attainder the blood be corrupted, that must be restored by authority of parliament".

A convenient review of the effect of the free pardon at this period is contained in the judgment of Pollock B in *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561, which contains a reference to a statement by *Hale* that the pardon takes away, "poenam et culpam" — the penalty and the guilt. The same judgment mentions a comment by *Hawkins* that the pardon "does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness"; and it also takes, from *1 Chitty's Criminal Law* this proposition — "the effect of a pardon like that of the allowance of clergy, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character".

Pollock B also refers to the frequently cited case of *Cuddington v Wilkins* (1615) Hob 67, where a man pardoned after a conviction for stealing sheep sued in defamation a person who had said of him: "He is a thief". The Court held that the action for defamation could proceed in that a pardon "cleared the person of the crime and infamy". Then, at p 565 in *Hay's* case, the learned Judge said: "It was forcibly argued that this does not shew that to all intents and purposes the pardon is to be an absolute purgation of everything. That is quite true"; and he cited in support *Bennett v Easedale* (1626) Cro Car 55.

In *2 Hawkins' Pleas of the Crown,* (8th ed), at p 549, it is also asserted that no man was required to, or compellable to, accept a pardon, and the disadvantages that might flow from his doing so are again noted. The most recent instance of an objection to the receipt of a pardon is *R v Boyes* (1861) 9 Cox CC 32, in which a man who was offered a pardon is reported to have replied: "What have I done to deserve a pardon?"

However, the question whether a person, by refusing to accept a pardon, could alter his liability to deportation was discussed by the Canadian Supreme Court in *Re Royal Prerogative of Mercy upon Deportation Proceedings* [1933] 2 DLR 348. There it was held that the effect of a prerogative pardon was not in any event to release the person pardoned from liability to deportation, this being on the basis that liability to deportation did not arise automatically from conviction as a penalty, but from a separate administrative decision.

In *8 Halsbury's Laws of England* (4th ed) para 952, it is said that:

> "The effect of a pardon under the Great Seal is to clear the person from all infamy, *and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction.* It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted".

The authorities suggest that this statement may be an accurate one of the present position in England; but, to the extent of the passage that we have italicised, it probably overstates the effect of the pardon in some Commonwealth countries, and would have overstated it in New Zealand prior to the passage of s 407. The same authorities also indicate that pardons were strictly construed according to their terms, and that the "consequential effect" of a pardon on inheritance and other rights of the person pardoned made construction of it a matter of importance.

Two relatively recent examples of residual disabilities following the grant of a free pardon are *R v Dean* (1896) 17 NSWR 35, and *R v Cosgrove* [1948] Tas SR 99.

The first of these, a man was convicted of using poison with the intention of killing his wife, and he received a pardon following conviction. He was then charged with perjury committed during the course of the trial for the offence in respect of which he had received the pardon. It was held that, when a pardon under the Great Seal referred to one crime, its consequences were limited to that particular crime, this to be contrasted with Acts of Parliament granting general pardons for all felonies and misdemeanours.

In the second case, an accomplice of the accused was granted a pardon, and the question was whether Cosgrove could nevertheless be charged with conspiring with the person receiving it. At p 105, Morris CJ noted that the accused's contention was "that a pardon wipes out the crime ab initio". He referred to *Hawkins' Pleas of the Crown* and said: "I think they do not go as far as he contends". The Court took the view that the result of the pardon was not so much to restore the person's former character as to give him a new one; that a pardon was not the equivalent of an acquittal; and that it "contains no notion that the man to whom the pardon is extended never did in fact commit the crime".

Indeed, none of the authorities cited to the Court, or since discovered, suggests that a pardon granted pursuant to the exercise of the prerogative had the effect of altering the facts as distinct from the legal consequences of those facts.

The nearest approach to the creation of a factual fiction (that is to say, a pardon going beyond the wiping out of the criminality) is found by reference to specific statutes, the most notable being the Act of Oblivion (1660) 12 Car 2 c 11, an Act passed to try to bring to an end the discords resulting from the Civil War. It is indicative of the lengths to which Parliament was prepared to go to achieve its aim

that, in s 24, it imposed penalties on any person or persons who, during the next three years, "maliciously called alleged or objected against any other person or persons any name or names or other words of reproach in any way tending to revive the memory of the late differences or the occasions thereof". The section more directly relevant to the present topic is s 1. This declared that "all manner of treason, misprisions of persons, murders, fellonies, offences, crimes, contempts and misdemeanours" occuring during the period of the disturbances under colour of instructions from Charles I or Charles II or persons deriving or pretending to derive authority from both or either of them, were to be "pardoned, released, indemnified, discharged and put into utter oblivion".

There are other instances of statutes being passed to obtain special results, but the pardon under the Great Seal was limited according to its terms and by the Act of Settlement, and at no stage appears to have done more than is indicated by the statement in *Halsbury* that we have cited.

In other words, its effect was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon was granted.

Against that background, the language of s 407 does not indicate any intention to create any such radical departure from the normal effect of a prerogative pardon as would be involved in reading into the language an intention to create a statutory fiction, the obliteration by force of law of the acts of the person pardoned. It is much more sensibly read to be as, first, a reaffirmation of the basic effect of the prerogative pardon, and, secondly, an attempt to minimise residual legal disabilities or attainders.

It is in any event necessary, when considering an alternative construction which would justify reading "deemed never to have committed the offence" as altering not only the legal consequences of the actions but also the actions themselves, to take account of the effect on third parties.

In the terms of the pardon Thomas is to be considered to have been wrongly convicted, and he cannot be charged again with the murder of either Harvey or Jeanette Crewe.

From the transcript of the proceedings before the Commission, it appears that, after the initial three months of their investigation into the murders, the police had satisfied themselves that there was not sufficient evidence against any person other than Thomas to justify the view that they had, in any real sense, an alternative suspect. However, it may yet be that further evidence comes to light which indicates that some other person may have committed the crime.

In that event, if the effect of the pardon and s 407 is to establish automatically that Thomas as a matter of fact did not commit the crimes, then, if the other person is charged with the murders, it follows that he would be severely restricted in his defence in that he would not be allowed to produce evidence at his trial seeking to establish that it was Thomas and not he that was the culprit. Any construction of s 407 which deprived a citizen of the right to be tried on the basis of the whole of the relevant evidence would so offend the usual canons of common-sense and justice that it could be accepted only if the language of the section plainly required it. It does not.

The same construction would also be in breach of the general rule that pardons cannot deprive a third party of his or her acquired rights: see Vaughan CJ in *Thomas v Howe* (1674) Vaugh 330.

It follows that the effect of the pardon granted to Thomas is that of a prerogative pardon, with such relief from residual legal disabilities (if any) as he may gain from the revocation of the rule in *R v Graham* (1865) Col LJ 16, and the words of the proviso to s 407.

He is, by reason of the pardon, deemed to have been wrongly convicted. Although it is not open to the Court to consider the terms of the pardon itself in interpreting s 407, it clearly is appropriate to consider those terms once the effect of s 407 is determined, this being in accord with the well-established rule that the pardon extends only so far as its language runs. In this case the pardon recites that it has been granted for the reason that it has "been made to appear that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt". Those words certainly do not indicate any contention of factual innocence, such as might well have been inferred from a recital that some third person had been found guilty of the crimes, and that the convictions of Thomas had accordingly been proved not to have any basis in fact. It follows, as a separate issue from that arising from the automatic consequences of the granting of a pardon under s 407, that there is no other circumstance relating to the pardon which would give rise to any necessary inference as to the factual innocence of Thomas, as distinct from his complete discharge from any criminal liability.

During the course of the hearing before us, Dr Barton, as counsel for the Commission, submitted that the effect of s 407 was "to make it clear beyond any doubt that a pardon completely wipes out the criminality of the acts for which the person was convicted". On being asked to elucidate this statement, he agreed that it was the criminality of the acts which was wiped out, not the acts themselves. He added that, in his view, the Commission was entitled to, and should, receive evidence relevant to any issues it had to determine, even though that evidence might implicate Thomas.

At this point he submitted that the Commission had acted correctly and properly in excluding evidence tendered for the purposes of proving Thomas's guilt. When asked if his objection was to the tendering of the evidence "for the purposes of proving guilt", he agreed. By way of example of his interpretation of the section, he stated that, if, difficult though it was to conceive at this late stage, some person of unquestioned probity and reliability came forward and said that he had been present on the night in question, and had seen Thomas fire the rifle through the window and then eject a cartridge case from it into the garden, that evidence should certainly be accepted by the Commission.

Mr Tompkins, for the applicants, said he accepted Dr Barton's primary submission on the meaning of s 407. As to two secondary submissions put forward by Dr Barton, namely,

(1) that the word "deemed" means "conclusively to be considered by everyone for all purposes", and

(2) that the pardon was effective against all persons,

Mr Tompkins said that he found both propositions acceptable so long as they were read in the context of the primary proposition.

Mr Smith, as counsel for Thomas, said that he adopted Dr Barton's arguments as to the legal effect of the pardon in their entirety.

Accordingly, had it not been for the central importance of this issue, it would have been open to the Court simply to have said that the agreement of all counsel as to the proper interpretation of s 407 had its blessing. However, in the special circumstances of the importance of the point in this case, and its constitutional significance, the Court has thought it better to review the authorities, even though, at the end, the result is, in no essential matter, different from that accepted by counsel for all the parties, including Thomas.

We turn next to consider the merits of the claim by the applicants that the Commission has construed the pardon very differently, by accepting that it necessarily involves the factual innocence of Thomas, and it thereby prevents them from examining evidence which points the other way.

The result of our examination of the record shows that there is indeed a sound basis for the essential complaint made by the applicants. Equally, as appears from an analysis of the various rulings made by the Commission from time to time, there is no doubt that it has been troubled as to the effect of the pardon on its inquiries, and has frequently received evidence of a type which, on other occasions, it has felt, by reason of its interpretation, that it must exclude. Its task has not been assisted by a lack of precision in the terms of reference; by its belief that, at the inquiry, counsel for the police were in effect trying to conduct a re-trial of Thomas; or by the apparent opinion of counsel assisting the Commission that it could departmentalise its investigations, and could consider, in particular, term of reference 1(a) without, on that topic, allowing evidence to be given of a circumstantial nature indicating that Thomas fired the shots.

At the opening session of the Commission on 21 May, the Chairman, in addressing those present, said:

> "The effect of this pardon was by virtue of the provisions of section 407 of the Crimes Act, that Thomas was deemed never to have committed the offence and it follows that in law and in fact he is to be treated as a person who never was guilty of that offence nor did he do the acts which constituted the crime.
>
> "You will readily perceive from this that no question of the guilt or innocence of this man can ever again arise, nor can it ever be asserted that he did the acts that brought about the death of these people. The slate has been wiped clean."

If the Chairman merely meant by this that Thomas could not be asserted to have murdered the Crewes, then he was clearly correct. But if he meant what he appears to have said, that it can never be asserted that Thomas did the acts that brought about the death of these people, then his interpretation of the effect of the pardon was in error, and one which, if systematically applied, would seriously limit the ability of the Commission to carry out the task for which it was established. If the Commission enters upon its consideration of the question whether there was impropriety on the part of the police on the basis that it has been established, as a matter of fact, that someone other than Thomas fired the shots that killed the Crewes, it thereby adopts a factual fiction which so limits its inquiry as to make the results of doubtful value. The issue before the Commission must be whether there was impropriety on the part of the police, whether or not Thomas fired the shots in question, and it is essential that the Commission conduct its inquiry without accepting any such limitation on its considerations as such an interpretation implies. Fortunately, it becomes clear, from an examination of what followed during the course of the proceedings before the Commission, that no such limitation was applied by it for the greater part of the hearing.

On 4 July, the Commission appeared to indicate, through its Chairman, that, in the unlikely event of Thomas being willing to give evidence that he fired the shots, such evidence could not be given because of the effect of the pardon. He said: "Whether or not he did it cannot be inquired into". However, later in the same day and at the same session, he said, in relation to certain evidence to be called: "If it is relevant to proof in this particular case, that it came there by police hands or it did not come there, it will be received. The fact that that points to the guilt or innocence of Thomas at the same time is irrelevant".

This Court respectfully concurs with what the Chairman there said, and we note that it is little different from a statement which he made on 25 June. However, on two subsequent occasions, the assumption of factual innocence arising from the pardon was re-asserted in clear terms.

On 23 July, the Commission gave a ruling as to the evidence it was prepared to hear on terms of reference 1 and 2, and the Chairman made a statement which

occupies four pages of the Commission's record. It commences with a reference to the repeated requests by counsel for the police that they be permitted to produce evidence to show that Thomas was present at the Crewe property on the relevant date and thus could have deposited upon it the cartridge case, Exhibit 350, contrary to the allegations that had been made that it had been "planted" there by the police. The statement then considers the fact and nature of the pardon, which the Commission considers is relevant to a proper understanding of its terms of reference. And the Chairman then said: "We are required to investigate the police, not Mr Thomas, who is in any event deemed not to have committed the murders by virtue of the pardon, and s 407 of the Crimes Act 1961". At a later stage in the same ruling he stated that the Commission would not accept evidence produced at Thomas's trials as to his alleged motive, and as to certain wire which was found on the bodies and which was said to be traceable to Thomas's farm. Finally, in connection with this incident, this statement was made: "We repeat that he is innocent".

The second occasion when the same construction of the pardon was plainly put forward was during a television interview given by the Chairman on the national programme "News at Ten" on the evening of 24 July.

The evidence before us in connection with this matter is contained in the affidavit of Brian Sinclair Cooney, to which reference has already been made. The accuracy of this affidavit was not questioned in any way. The deponent says that the announcer stated that the Chairman would "[expand] on his reasons for publicly declaring that Mr Thomas was wrongly convicted". A full transcript of what was then said appears in the affidavit. It is not, we think, unfair to select the following passage from it as setting out the essential argument of the Chairman:

> "Now, if you go to section 407 of your Crimes Act, that provides the effect of a free pardon granted to a person, is that he shall be deemed not to have committed the offence. And to me, that means in law and in fact that he did not do it; he is innocent".

For the reasons that we have already stated this Court does not agree with that interpretation. We take the view, again for the reasons given, that:

> (1) The fact of the pardon is irrelevant to the ambit of the Commission's inquiries, which are limited only by the relevance of the proposed evidence to the subject-matter of the several terms of reference; and
>
> (2) While the question of what is and what is not relevant to such matters is ultimately one for determination by the Commission, it would be quite wrong to make any distinction between "direct" and "indirect" evidence, or between "circumstantial" and "other" evidence, in determining what should be received; and in particular, since the evidence received by the Commission pointing towards conclusions unfavourable to the police has been almost wholly "circumstantial", there will of necessity be an appearance of unfairness if evidence which may point the other way is excluded because it is "circumstantial" or "indirect".

At this point we find that there are two matters upon which we can conveniently give final decisions. They are the third and the fourth causes of action.

The third seeks a declaration that the New Zealand Police "be not restricted in any way from pursuing such inquiries as it thinks fit into the deaths of David Harvey Crewe and Jeanette Lenore Crewe, whether or not such inquiries may tend to implicate" Thomas. As indicated near the beginning of this judgment the grounds for seeking this relief are said to be:

> (a) That the Commission has stated to the police that it should not pursue inquiries that could implicate Thomas in the deaths; and

(b) That the pardon does not at law restrict the police from pursuing such inquiries.

This claim no doubt stems from exchanges disclosed in the transcript between the Commission and the Commissioner of Police, during which the Commission expressed views as to the propriety of what they regarded as harassment of Thomas. We do not consider that any benefit would be served by analysing these exchanges. It is sufficient to note that the transcript shows that, at the resumption of the hearing on 25 July, Archbishop Johnston took the opportunity to comment that, whilst the Commission had been concerned about evidence that further investigations were being made by the police relating to Thomas, it was not "the case that the Commission takes to itself any power to direct the police in their duties"; and that, when, later in the same day, counsel for the police asked whether it was the Commission's view that the police should not investigate the murders any further, each of the Commissioners in turn immediately denied being of any such opinion. It is, of course, perfectly clear that the Commission has no more power than has this Court to instruct the police as to the manner in which they carry out their statutory duty to investigate unsolved crimes.

Consequently, it is not surprising that counsel for the applicants was unable to refer the Court to any jurisdiction entitling it to grant the declaration sought. Even if there were jurisdiction, the Court would certainly not have been satisfied that they should exercise their discretion in favour of the applicants. For these reasons we dismiss this cause of action.

In the fourth cause of action a declaration is sought

> "... that the manner in which the Crown conducted the trials against [Thomas], and in particular the arguments then advanced as to whether shell case 350 was ejected before or after one of the fatal shots, is irrelevant to the [Commission's] consideration of and report upon the matters raised by the terms of reference and in particular term of reference 1(a) as to any impropriety with respect to cartridge case Exhibit 350."

We repeat that the grounds set out in support of this are:

(a) That the Commission has, in the course of the inquiry, referred to the basis on which the trials were conducted in a manner suggesting that this should weigh with it when reaching its conclusions; and
(b) That the basis on which the trials were conducted is irrelevant to the inquiry and is expressly excluded by the terms of reference from the Commission's consideration.

This second ground refers to the paragraph in the terms of reference which we have recorded earlier, and which, for convenience, we now repeat:

> "... nothing in paragraphs 1 to 7 of these presents shall empower you to inquire into or report upon the actual conduct of the trials, whether by the Courts or on the part of the Crown or the defence".

Particulars were given of four occasions on which the Commission was said to have referred to the basis on which the trials were conducted. An examination of the transcript in respect of them shows that they all relate to comments by the Chairman to the effect that one of the theories put forward by the police by way of explanation of the fact that the cartridge case concerned was found in the garden of the Crewe home was first advanced at the referral to the Court of Appeal after the two trials.

In our view, each of these comments is clearly directed not to the mode of conduct of the trials, but to the time when the particular construction sought to be placed upon the evidence was first put forward. In no sensible way can it be urged that the Commission is not entitled to place such weight as it thinks fit on the time

when evidence is first produced or a particular construction of the evidence is first put forward, such matters being normal factors in the assessment of the worth of evidence or argument.

This cause of action accordingly fails, in any event, for lack of proof. However, even if it were considered that the references also involve, in some indirect way, a comment upon the actual conduct of the trials (and we certainly do not intend to indicate that we think that such is the case), we should have exercised our discretion against granting the relief sought on the basis that any such declaration could serve no useful purpose. The fourth cause of action is accordingly also dismissed.

There remain for determination the first and second causes of action. Full details of the relief claimed and the grounds alleged are set out at the commencement of this judgment.

In essence, the applicants ask, in the first cause of action, that three pronouncements made by the Commission during its hearing, which are described by the applicants as "decisions", be quashed, set aside, or declared contrary to law, or that they be referred back for reconsideration. The eight grounds set out as justifying those claims will shortly be considered in turn. At this stage it is sufficient to indicate that the most significant are the first three, (dealing with the associated topics of excess of jurisdiction, error of law, and wrongful exclusion of evidence or submissions), and the last ground which alleges bias by predetermination.

The second cause of action seeks orders prohibiting the Commission from continuing its inquiry, or orders to similar effect, upon the single ground of bias by predetermination. Paragraph 14 of the statement of claim in its final form asserts, in that regard, that the members of the Commission have so prejudged the particular issue that they cannot properly and fairly inquire into those aspects of the terms of reference that involve assessment of the propriety of police conduct.

The central themes urged by counsel for the applicants on this head were:

(a) That, by reason of its assumption that the pardon necessarily involved acceptance of Thomas's factual innocence, the Commission had closed its mind to a significant portion of the relevant evidence, and, in doing so, had been led into a series of false conclusions unfavourable to the police; and

(b) that an examination of the record of the Commission's hearings would disclose, in respect of these topics, both that the Commission was now incapable of interpreting the evidence fairly, and that the likelihood that the police would be unable to obtain a fair hearing of their side of the case would be apparent to any reasonable observer.

Since the issue of bias by predetermination comes into both causes of action it is convenient to consider it first.

From the outset Mr Tompkins made it clear that the applicants' case was limited to bias in the sense of predetermination of issues, and in no way involved any personal criticism of, or any allegation of bad faith on the part of, any member of the Commission.

Counsel were agreed that the test to be applied in determining whether this kind of bias has been established is to ask whether an observer of the proceedings would have formed the conclusion that there was a likelihood that it existed. It is also common ground that the hypothetical observer must not only be a reasonable observer but also one sufficiently informed of the nature and conduct of the proceedings to be able to form a sound opinion.

Obviously, the members of this Court could not hope to qualify as informed observers without studying a substantial part of the record of the Commission's business. For that purpose we were supplied with some 1100 pages containing a record of the oral evidence received at the hearings, together with copies of all written statements and all documentary exhibits which counsel for the various

parties (including the Commission) considered relevant to these proceedings. Only quite a small portion of this material was relied on by the applicants. All the passages to which counsel specifically referred have been read by all members of this Court. In addition each member has considered a much wider area of the record, and the whole of the material submitted has been read by one or more of our members. This proved necessary because there were plain indications of difficulties and conflicts arising during the Commission's hearings, and because we should have to pay proper regard to them when there came to be considered what view the reasonable observer would have formed.

Such an observer would have entered upon his observations with a proper understanding of the nature and purpose of Commissions of Inquiry, and of the rights of persons likely to be affected by their operation. He would therefore have appreciated from the outset:

(1) That the essential purpose of such a Commission is to obtain information, and that accordingly its function and mode of operation are essentially inquisitorial and informal, as distinct from the adversarial and formalised procedures appropriate to a Court or judicial tribunal;

(2) That it is entitled to obtain its information where and how it thinks most appropriate to its function. Though the value of the final report of a Commission is likely to be enhanced by its inquiry being held in public, particularly in matters of wide public interest where there is an apparent desire held by a significant number of persons to obtain clarification of a matter of controversy, no Commission is under any obligation to obtain by way of public session the information on which its report is ultimately based. This point was emphasised by Cleary J in *Re the Royal Commission on State Services* [1962] NZLR 96, 117, where he said:

> "Finally, I think it is beyond dispute that Commissioners may hear evidence or representations in private, for such a power is inseparable from the functions of a body set up to initiate an investigation and inquiry, unless the instrument of appointment otherwise provides."

There is, of course, no such restriction of its powers in this Commission's Warrant.

(3) That a Commission of Inquiry is in general the master of its own procedure, subject to the specific provisions of the Commissions of Inquiry Act; subject to the obligation to advise persons likely to be affected by its report of the substance of any allegations made against them, together with the opportunity to answer such allegations; and subject to the general duty to act fairly in all the circumstances, this last-mentioned aspect having been discussed earlier in this judgment.

In this connection, we consider that a second statement by Cleary J in *Re the Royal Commission on State Services* is still a convenient and accurate summation of the legal position. Again at p 117 he said:

> "Likewise I think it is plain that in the regulation of their own procedure they may prescribe or restrict the extent of participation in the proceedings by parties cited or persons interested, the one limitation being that such persons must be afforded a fair opportunity of presenting their representations, adducing their evidence, and meeting prejudicial matter."

Commencing his observations at the opening session with the basic knowledge that we have just outlined, and maintaining reasonably regular attendance thereafter, the reasonable observer would, we consider, have noted the following matters as being relevant to the question of bias by predetermination:

(1) The procedure selected by the Commission and announced at its opening session granted, to counsel for the police and Thomas alike, opportunities to

participate in its hearings, to cross-examine witnesses, and to seek the introduction and recall of witnesses to an extent substantially in excess of the strict rights of either the police or Thomas. In saying that, we are in no way suggesting that the Commission was unwise or ill-advised in taking such steps. On the contrary, it is our opinion that the nature of the inquiries on which it was required to embark raised situations of an adversarial nature, and, accordingly, made it desirable that the rights afforded to persons likely to be affected were reasonably generous.

(2) From the outset counsel for the police took the position that, to protect their clients' interests, they should receive notice in advance of any allegations which might be made against the police, and, indeed, that they should receive proofs of all evidence in respect of them. In view of the very great volume of material now in existence in relation to the matters at issue, and in view of the age of much of that material, the concern of counsel that allegations should be defined is understandable. However, we have no doubt that the Commission was right in two comments which it not infrequently made in this connection:

(a) that, to carry out its inquisitorial function, it should, if it seemed appropriate to it, be able to hear the evidence of witnesses given freshly from the witness box; and that it might on occasions be helpful, if not necessary, to the discovery of the truth to do so; and

(b) that it was justified in refusing to recognise the alleged rights to have notice of allegations in advance, its obligations in that regard being, as indicated by the statement of Cleary J, to give a fair opportunity to answer any allegations of unfairness by advising parties against whom such allegations had been made of the substance of them, and giving adequate opportunity to answer them, by evidence or argument, prior to the Commission's reaching any final decision, and prior to its completing and publishing its report.

(3) Although a number of rulings as to admissibility of evidence were made against the police (some of these being related to the interpretation placed upon the pardon), there are many instances where the Commission, on reconsideration, has reversed such rulings and permitted evidence to be led; and there are many other occasions on which it allowed evidence to be adduced which, if their criticised interpretation of the pardon had been rigidly applied, it would have excluded.

(4) The observer would certainly have noticed the rigorous manner in which police witnesses were cross-examined by the Chairman, and would also have noticed the number of rhetorical questions used by him as a method of criticism of those witnesses; but, no doubt, the observer would also have had regard to the nature of the inquiry, and to the fact that those witnesses were generally much more experienced in giving evidence than the average citizen. Then, again, he may well have wished that the Chairman had not yielded to the pressure of television in order to explain to the public, while the Commission was still sitting, its views upon the interpretation of the pardon. But, at the same time, he would, we think, have felt sympathy for the Commission as a whole because of the many difficult exchanges which developed as the result of the repeated requests by counsel for the police for the supply of particulars and briefs of evidence to which they, no doubt, would have been entitled if the Commission had been a Court of criminal jurisdiction, but to which they clearly were not entitled as persons appearing before a Commission of Inquiry.

(5) Most importantly on this question of bias by predetermination the observer would undoubtedly have regarded (as relevant to the contention that the

> Commission's mind had, by reason of its acceptance as a fact that Thomas was innocent, become closed on the question of the propriety of the actions of the police) the fact that, immediately before the issue of these proceedings, it agreed to hear certain evidence which would clearly not have been acceptable if, on this topic, the minds of the members had been closed. And, in this connection, we consider it proper for us to take notice of the advice that we received from counsel to the effect that, while the hearing of argument before this Court was proceeding, the Commission did, in fact, provide a full opportunity for the evidence just mentioned to be placed before it.

There are, of course, many other facts disclosed by the record which bear on the allegations of bias by predetermination. The matters specified in para 14 of the final amended statement of claim have received particular attention. Looking at them in the context of the five matters just discussed, although we believe (as will appear from our consideration of the first cause of action) that, in the matters raised by particulars (a) and (d), the applicants can point to errors of law, we do not regard those as irreversible, nor do we find that bias by predetermination has been established.

Therefore, we find against the applicants on the second cause of action; and, for the same reasons, we hold that the allegation of bias which appears in the eighth ground in respect of the first cause of action is not made out.

We turn finally to the main cause of action, and we must then consider whether the term "decision" is an appropriate description of the three pronouncements (to use a very neutral phrase) set out in para 10 of the last statement of claim.

Only one of these pronouncements is asserted by the applicants to constitute a "report" by the Commission, that being the one of 8 July concerning identification of the cartridge case. In respect of it (about which the record of the hearing shows that many discussions have taken place since it was made) we note that various assurances have been given to counsel for the police which we consider are incapable of reconciliation with the assertion that the pronouncement is a final decision on the part of the Commission. For an example of this we point to the assurance, given on 21 July and recorded at p 913 of the transcript, that further evidence would be accepted by the Commission in this regard.

Our decision therefore is that none of the three pronouncements can properly be classified as a "report" as that term is used in the Commission's terms of reference.

Referring back specifically to the two pronouncements other than that of 8 July, we are satisfied that both of them are bound up with the ruling of the Commission as to the meaning of the pardon; and we have already indicated that that meaning is not correct as a matter of law. They also include consequential rulings as to the admissibility of evidence, and these rulings, too, we regard as incorrect. Neither pronouncement, however, purports to be a decision as to matters of fact, nor to be a final determination in respect of any term of reference. They can be described more appropriately as "rulings" than as "decisions" of the Commission.

Having reached these decisions, we must now look at the various grounds that remain and are presented in support of the first cause of action.

We see no advantage in endeavouring to treat separately the first three grounds, namely:

> "(1) That such decisions were made in excess of or without jurisdiction.
> "(2) That such decisions resulted in an error of law on the face of the record of the decisions in that they wrongly determined the consequences of the pardon of the second respondent.
> "(3) That such decisions resulted in the first respondents having erred in excluding or proposing to exclude evidence and submissions properly admissible within the terms of reference."

It is already clear that we regard as an error of law the various pronouncements and rulings made by the Commission asserting that, as a consequence of the pardon and s 407, the Commission must proceed on the basis of Thomas's factual innocence; and that it would equally be an error of law to limit the admissibility of evidence by reason of such an interpretation, or, in considering whether evidence is admissible, to distinguish between circumstantial evidence and other types of evidence, or between "direct" and "indirect" evidence. And therefore we consider that, to that extent, the applicants have made out the three grounds which we have just set out.

The fourth ground says that "the decision of the 8th July 1980 was made contrary to the rules of natural justice in that it was made without affording the parties an opportunity to be heard in respect of the issues relevant to the decision". And it follows from our ruling as to the nature of the three pronouncements, and, in particular, that of 8 July, that this ground cannot be supported. We are content to let the matter stand on the basis that the assurances latterly given by the Commission will be implemented by its giving to the police, before any final determination is made, fair advice of any allegation against any present or past member of the force, and also giving to any such person a proper opportunity to rebut it.

The fifth ground asserts that the Commission has acted contrary to the rules of natural justice "in that they have in arriving at such decisions and in considering the admissibility of evidence taken into account material received by them but not the subject matter of evidence given before them nor made available to the second, third, or fourth respondents". From what we have already said about the manner in which the Commission is entitled to obtain its evidence, and from our rejection of the submission that the pronouncements are final decisions in respect of any of the questions to be determined by it, it follows that, in our opinion, this ground is misconceived.

The sixth ground seeks to establish that the decision of 8 July was contrary to the Commission's terms of reference in that it amounted to a "report". We hold, for the reasons already stated, that that ground cannot be supported.

As to the seventh ground we are quite satisfied that it is not supported by any evidence whatsoever.

Therefore, of all the grounds presented by the applicants for our consideration, the only ones which have been made out are the first three in relation to the first cause of action; and this is to the extent that they have established an error of law relating to the interpretation of the pardon, and, directly or indirectly flowing from that, errors of law in relation to the admission or exclusion of certain classes of evidence. It is true that the question of error in interpretation of the pardon was asserted by counsel for the applicants as the fault from which all other difficulties have flowed. That submission has not been accepted by us, this being indicated by our disallowance of other claims made by the applicants. At the same time, the error in respect of the pardon is unquestionably one of major significance in connection with the Commission's operations, and it is very necessary indeed that the correct construction be established. However, we cannot avoid commenting that, if the applicants considered this problem to be the critical issue from which all difficulties have arisen, it is a pity that they did not apply to the Commission to state a case to this Court for the purpose of determining that very question, a proceeding which would have involved only a fraction of the time and expense that the present case has occasioned. In our opinion, now, the appropriate course for this Court to take is one which will, as nearly as may be, approximate to that which would have resulted if a case had been stated in the way that we have just mentioned.

Before we set out the formal judgment of the Court, there are two matters to which we should refer. They should not, however, be expressly made part of that judgment. This is because we are not satisfied that we have a sufficient knowledge of

the facts to decide whether or not that would be an appropriate course.

Among the many issues raised as to the admissibility of evidence there are two classes of circumstantial evidence which appear to have been excluded by the Commission from its consideration. Each of these is, however, of a nature that would normally allow of its being considered to fall within the usual range of relevance, and, therefore, to be properly receivable by the Commission. These are:

(1) In connection with questions as to whether or not police officers have acted properly (as, for example, in respect of the making of searches or the keeping of records), evidence of standard police instructions and practice current at the particular time; and
(2) In connection with Exhibit 350, circumstantial evidence which would bear on the question of Thomas's presence or otherwise at the Crewe property on 22 June 1970.

It is our opinion that, at its future hearings, the Commission should give further consideration to the advisability of their receiving evidence of these two kinds.

Finally, for the various reasons that have been stated, and in pursuance of, and in exercise of, its jurisdiction under the Judicature Amendment Act 1972, the Court declares:

(1) That the pardon granted to Arthur Allan Thomas in no way limits the ambit of the Commission's inquiries pursuant to its terms of reference, that ambit being limited only by the relevance of evidence to the subject-matter of the several terms of reference: and
(2) That, although any decision as to the relevancy of particular evidence to any particular term of reference is a matter for the Commission to determine, it would be wrong in law to exclude evidence otherwise relevant to any term of reference
    (a) Upon the ground that it might tend to implicate Arthur Allan Thomas in the killing of David Harvey Crewe or Jeanette Lenore Crewe; or
    (b) Upon the ground that it is circumstantial evidence or indirect evidence.

The circumstances of the matter do not appear to us to be such as to justify an award of costs in favour of any of the parties before us, and therefore we make no such order.

Declarations accordingly.

Solicitors for the applicants: *Nicholson, Gribbin & Co* (Auckland).
Solicitors for the first respondents: *Wallace, McLean, Bawden & Partners* (Auckland).
Solicitor for the second respondent: *Kevin Ryan* (Auckland).
Solicitors for the third respondents: *Brookfield, Prendergast, Schnauer & Smytheman* (Auckland).
Solicitor for the fourth respondent: *Departmental Solicitor* (Auckland).

Appendix 19

(8)

30 July 1982

Judicial Review - Court of Appeal Judgment

Re Royal Commission on Thomas Case

Court of Appeal Wellington
15, 16, 17, 18, 19, 22, 23, 24, 25, 26 March; 5, 6 April; 30 July 1982
Davison CJ, Cooke, Richardson, Somers and Casey JJ

Commission of Inquiry – Judicial review – After Thomas had been granted a free pardon, a Royal Commission was established to inquire into the circumstances of his conviction for the murders of the Crewes – Whether the appointment of the Commission was beyond the jurisdiction of the Governor-General – Whether certain findings by the Commission of criminal misconduct by individual police officers were outside the terms of reference contained in the warrant of appointment – Meaning and effect of a pardon – Whether Commission had given the police a fair hearing – Whether Commission had acted with bias by predetermination – Crimes Act 1961, s 407 – Commissions of Inquiry Act 1908, s 2.

On 17 December 1979 the Governor-General granted a free pardon to Arthur Allan Thomas in respect of his conviction on 16 April 1973 for the murders of David Harvey Crewe and Jeanette Lenore Crewe. On 24 April 1980 a Commission of Inquiry was set up to inquire into and report on the circumstances of Thomas's conviction for the murders. The Commission began its work on 21 May 1980. On 30 July, while the Commission was still sitting, the conduct and expressed attitudes of the Commissioners were challenged in the High Court in judicial review proceedings. In a judgment delivered on 29 August 1980 the Full Court ruled that the Commissioners' interpretation of the pardon was erroneous but did not regard this as irreversible. The Full Court also held that the allegations against the Commission of bias in the sense of predetermination of issues had not been established. The Commission hearing continued and the Commissioners reported on 11 November 1980. In their report the Commissioners stated, inter alia, that two police officers, Detective Inspector Hutton and Detective Sergeant Johnston had planted the shellcase exhibit 350 in the Crewe garden and that the officers had done so to manufacture evidence that Thomas's rifle had been used for the killings.

On 18 November 1980 the New Zealand Police Association, the Police Officers Guild, Hutton and Jefferies (a police officer involved in the Crewe murder investigation) appealed against the judgment of the Full Court on the bias question. On 25 August 1981 the Commissioners cross-appealed.

On 14 April 1981 further proceedings were commenced by the New Zealand Police Association, the Police Officers Guild, Hutton and Mrs Johnston (as executrix of her late husband's estate). These proceedings were removed in full into the Court of Appeal. Four causes of action were pleaded in the removed proceedings, namely: (1) that the appointment of the Commission to inquire into and report on whether a person had committed a crime was beyond the jurisdiction of the Governor-General; (2) that certain findings made by the Commissioners of criminal misconduct on the part of Hutton and Johnston were outside the terms of reference contained in the warrant of appointment; (3) that certain findings were made contrary to the principles of natural justice and in a manner unfair to Hutton and Mrs Johnston; and (4) there was a real likelihood or reasonable

grounds for suspecting that the Commissioners had been biased against the members of the Police Association, the Police Officers Guild, Hutton and Johnston during the course of the inquiry and in the preparation of the report.

Held: 1 The Court had jurisdiction to determine whether the terms of reference of a Commission were lawful and whether or not it was acting within its terms of reference. Further, the Court would intervene to ensure that the requirements of natural justice were met and that persons interested were afforded a fair opportunity of presenting their representations and meeting prejudicial matters. The Court would also intervene in the case of bias or predetermination (see p 258 line 11).

Cock v Attorney-General (1909) 28 NZLR 405, *Re Royal Commission on Licensing* [1945] NZLR 665 and *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 applied.

Lower Hutt City Council v Bank [1974] 1 NZLR 545 referred to.

2 The Thomas Commission was constituted both in exercise of the powers conferred on the Governor-General by the Letters Patent of 11 May 1917 and under the powers contained in s 2 of the Commissions of Inquiry Act 1908. Paragraph 1(a) of the terms of reference in effect required the Commission to inquire into and report on whether one or more members of the police had planted the cartridge case (exhibit 350) in circumstances amounting to the crime of fabricating evidence. While the Letters Patent of the Governor-General did not justify the constitution of a commission to inquire into a crime, the inquiry was authorised by the Commissions of Inquiry Act 1908, as amended in 1970. Accordingly the Commissioners had jurisdiction to make findings of criminal misconduct (see p 267 line 12).

Cock v Attorney-General (1909) 28 NZLR 405 distinguished.

3 The Commission had not acted in breach of the obligations of natural justice as to affording a fair hearing. The Court was not satisfied that any of the challenged findings of the Commission (apart from one acknowledged mistake) were based on evidence which the Commission were not entitled to regard as having probative value. The weight of the evidence was a matter for the Commission and not the Court (see p 270 line 11).

4 Section 407 of the Crimes Act 1961 deals with the effect in New Zealand of a free pardon. On the true interpretation of that section and his pardon, Thomas could never again be charged in any Court with having murdered either of the Crewes. It could not be implied from the free pardon that the Executive accepted that he had committed the offence but was forgiving him. While Thomas was deemed never to have committed the offence, the position of other persons who might have been involved was not prejudiced. The police were free before the Commission to attempt to show that it was not one of their number, but Thomas, who left the cartridge case (exhibit 350) in the Crewe garden. The Full Court had correctly interpreted the pardon, and the cross-appeal by the Commissioners was dismissed (see p 274 line 33).

5 The test for determining whether or not bias by predetermination had been established in the case of a Commission inquiring into and reporting on allegations of impropriety was whether an informed objective bystander would form an opinion that a real likelihood of bias existed. Applying that test to the two sets of proceedings before it, the Court of Appeal concluded:

(a) The appeal against the Full Court's decision must be determined as at the date of that hearing. The Full Court had thought that the Commission's approach was not irreversible and that bias by predetermination had not been established at the stage that the Full Court were considering the case. The Court of Appeal

were not prepared to say that the three Judges of the Full Court were wrong and the appeal was dismissed.

(b) The police had reasonable grounds for issuing the proceedings that had been removed into the Court of Appeal, but on balance the case of bias by predetermination was not clear enough to justify a finding that they had discharged the burden of proof (see p 276 line 41, p 282 line 53). The application for review was dismissed.

Other cases mentioned in judgment

Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508.
Attorney-General for New South Wales v Perpetual Trustee Co (Ltd) [1955] AC 457; [1955] 1 All ER 846.
Case of Commissions of Enquiry (1608) 12 Co Rep 31; 77 ER 1312.
Clough v Leahy (1904) 2 CLR 139.
Deynzer v Campbell [1950] NZLR 790.
Lewisham London Borough Council v Lewisham Juvenile Court Justices [1980] AC 273; [1979] 2 All ER 297.
McGuinness v Attorney-General of Victoria (1940) 63 CLR 73.
Manson, Re [1964] NZLR 257.
R v Whitelocke (1613) 2 State Tr 765.
Rayner, Re [1948] NZLR 455.
Reynolds v Attorney-General (1909) 29 NZLR 24.
Royal Commission on State Services, Re [1962] NZLR 96.
Simpson v Attorney-General [1955] NZLR 271.
State of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1982) 41 ALR 71.
Walker, Ex parte (1924) 24 SR (NSW) 604.

Appeal and application for review

There were two sets of proceedings before the Court of Appeal: (1) an appeal and cross-appeal from part of the judgment of the Full Court reported at [1980] 1 NZLR 602; and (2) an application for review of the proceedings before, and the report of, the Royal Commission which was appointed on 24 April 1980 to inquire into and report on the circumstances of the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe. The proceedings for review had been removed in full into the Court of Appeal by the High Court (Auckland, A 354/81, 4 September 1981, Moller J).

For reports of some of the earlier proceedings see:

[1972] NZLR 34 – Court of Appeal judgment of 18 June 1971 (reported in part);
[1974] 1 NZLR 658 – Court of Appeal judgment of 11 July 1973 (reported in part);
[1978] 2 NZLR 1 – Privy Council advice of 4 July 1978.

D L Tompkins QC, J K MacRae and *S C Dench* for the New Zealand Police Association Incorporated, the Police Officers Guild Incorporated, Bruce Thomas Newton Hutton (the first, second and third appellants and applicants), Murray Jefferies (the fourth appellant), and Margaret Ethel Johnston as executrix and trustee of the estate of Lenrick James Johnston (the fourth applicant).

J T Eichelbaum QC and *M P Crew* for the Royal Commission (the first respondents).

K Ryan for Arthur Allan Thomas (the second respondent).

A G Keesing and *K I Murray* for the Attorney-General (the fifth respondent

in the review proceedings), and for the New Zealand Police (the fourth respondent in the appeal, abiding the judgment of the Court).

(There was no appearance for the Department of Scientific and Industrial Research (the third respondent in the appeal) as, before the hearing, the Department had been granted leave to withdraw.)

Cur adv vult

JUDGMENT OF THE COURT.

Introduction

No criminal case in recent times has caused such controversy and stirred the public conscience as much as the convictions of Arthur Allan Thomas for the murders of Jeanette and Harvey Crewe on 17 June 1970. He was found guilty of the murders by a jury in the Supreme Court at Auckland on 2 March 1971 and his appeal against those convictions was dismissed on 18 June 1971. A petition to the Governor-General seeking a new trial was considered by Sir George McGregor, a retired Judge of the Supreme Court, who on 2 February 1972 recommended against the granting of a new trial. A further petition led to a referral of the matter to this Court which on 26 February 1973 ordered a new trial. At the conclusion of the second trial on 16 April 1973 Mr Thomas was again found guilty by a jury of the murders. His appeal against those convictions was dismissed on 11 July 1973. Following a further petition to the Governor-General a narrow question as to whether, on the materials then before this Court, Thomas had excluded a reasonable possibility that shellcase exhibit 350 found at the Crewe property contained a pattern 8 bullet (that being the type of bullet fragments which were found in the heads of the Crewes) was answered in the negative on 29 January 1975. On 4 July 1978 the Judicial Committee of the Privy Council held it had no jurisdiction to entertain an appeal against that judgment.

There was no slackening of efforts on the part of those concerned with the Thomas case. Books and articles were written about it; a film based on the book *Beyond Reasonable Doubt?* was produced. In the meantime there were other inquiries within the Government and the Prime Minister also obtained *two* reports from R A Adams-Smith QC, the second of which dated 3 December 1979 expressed doubt as to whether it could properly be contended that the case against Thomas at the second trial was proved beyond reasonable doubt.

Against that background and pursuant to s 407 of the Crimes Act 1961 a pardon in respect of the crimes was granted to Thomas by the Governor-General on 17 December 1979. Thomas was immediately released from prison after having been in custody from 11 November 1970. Agitation over the circumstances of his conviction did not cease and on 24 April 1980 a Commission of Inquiry was constituted with the following terms of reference:

"1. Whether the investigation by the Police into the deaths of David Harvey Crewe and Jeanette Lenore Crewe was carried out in a proper manner; and, in particular, —

"(a) Whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (Exhibit 350) or in respect of any other matter?

"(b) Whether any matters that should have been investigated were not investigated?

"(c) Whether proper steps were taken, after the arrest of Arthur Allan Thomas, to investigate any matter or information, if any, which suggested that he was not responsible for those deaths?

"2. Whether the arrest and prosecution of Arthur Allan Thomas was justified?

"3. Whether the prosecution failed at any stage to perform any duty it owed to the defence in respect of —

"(a) The disclosure of evidentiary material which might have assisted the defence?

"(b) Any other matter?

"4. Whether, in respect to the jury list for either trial, –

"(a) The Crown or the Police or the defence obtained preference in respect of the time at which the list was supplied?

"(b) Any persons named on the list were approached by representatives of the Crown or the Police or the defence before the jury was selected?

"(c) Anything was done otherwise than in accordance with normal practice or was improper or was calculated to prejudice the fairness of the subsequent trial?

"5. Whether, after each trial, –

"(a) The Crown or the Police made an adequate investigation into new matters, if any, which may have related to the deaths of David Harvey Crewe and Jeanette Lenore Crewe or to the trial and which were placed before the Crown or the Police by any person or persons?

"(b) Any relevant facts became known to the Crown or the Police which were not known to them at the time of the trial?

"6. What sum, if any, should be paid by way of compensation to Arthur Allan Thomas following upon the grant of the free pardon?

"7. Such other matters as are directly relevant to the matters mentioned in paragraphs 1 to 6 of these presents:

But nothing in paragraphs 1 to 7 of these presents shall empower you to inquire into or report upon the actual conduct of the trials, whether by the Courts or on the part of the Crown or the defence:"

The Commissioners were the Honourable Robert Lindsay Taylor, a retired Chief Judge at Common Law, Supreme Court of New South Wales, the Right Honourable John Bowie Gordon, former Minister of the Crown, and the Most Reverend Allen Howard Johnston, Archbishop of New Zealand.

The hearings of the Commission extended over 64 days. It heard evidence from over 130 witnesses. The transcript of the proceedings occupies some 3600 pages. The Commission also received 210 exhibits and in addition considered 1800 pages of evidence given in the judicial proceedings, some 5000 pages of police files and various books, articles and other documentary material. Counsel assisting the Commission had the primary responsibility for calling witnesses who were also questioned by counsel for various interests – Mr Thomas, the New Zealand Police, the Department of Scientific and Industrial Research and the Justice Department and, to a limited extent only, counsel for Mr D S Morris, the Crown Prosecutor at the Thomas trials – and to a greater or lesser extent by the Commissioners, particularly the chairman. The Commission presented its report on 11 November 1980, 10 years to the day after the arrest of Thomas.

While its inquiry was in progress the conduct and expressed attitudes of the Commissioners had been challenged in the High Court in review proceedings under the Judicature Amendment Act 1972. The applicants were the Police Association, the Police Officers Guild, former Chief Inspector Hutton and Detective Sergeant Jefferies. They raised various grounds as to bias and breach of natural justice on the part of the Commission and as to alleged errors of law by the Commission in interpreting the effect of the pardon. In its judgment delivered on 29 August 1980, and reported in [1980] 1 NZLR 602, the Full Court ruled that the Commissioners' interpretation of the pardon was erroneous but did not regard that as irreversible and it declined to grant relief in the form of orders of prohibition and declaration on the various grounds which had been raised. The hearings continued and the Commission reported on 11 November 1980. On 18 November the applicants in the High Court proceedings appealed against the judgment of

the Full Court on the bias question, and in response the Commissioners on 25 August 1981 gave notice of their intention to contend that the decision of the Full Court be varied, setting out three grounds of cross-appeal: one relating to the standing of the applicants in the High Court proceedings was later abandoned; another relates to the jurisdiction of the Courts concerning the Commission and the report; the third relates to the effect of the pardon. Then on 14 April 1981 further proceedings in relation to the Commission's report were commenced in the High Court by the Association and the Guild, Mr Hutton and Mrs M E Johnston as executrix and trustee of the estate of her late husband, Detective L J Johnston. These proceedings were moved into this Court by Moller J by a judgment delivered on 4 September 1981.

Four causes of action are pleaded. The first is that the appointment of the Commission was beyond the jurisdiction of the Governor-General. The second is that certain findings made by the Commissioners of criminal misconduct on the part of Mr Hutton and the late Detective Johnston were outside the terms of reference contained in the warrant of appointment. The third is that certain findings were made contrary to the principles of natural justice and in a manner unfair to Mr Hutton and Mrs Johnston. The fourth is that there was a real likelihood or reasonable ground for suspecting that the Commissioners had been biased against the members of the first and second applicants, the third applicant and the late Mr Johnston during the course of the inquiry and in the preparation of the report. We thus have before us two sets of proceedings: the appeal and cross-appeal against the judgment of the Full Court and separate proceedings for review of the Commission, its proceedings and its report.

It is important that we emphasise at the outset that this Court has no jurisdiction in either proceedings to adjudicate on any factual questions which were committed to the Commissioners for inquiry and report. This is not an appeal against the conclusions which they reached. There is no right of appeal against reports of Commissions of Inquiry. As was recently emphasised by this Court in *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 findings by Commissioners are in the end only expressions of opinion which in themselves do not alter the legal rights of the persons to whom they refer. But, as the majority judgment went on to say:

> "Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commission of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice" (ibid, 653).

Again, as also emphasised in *Erebus,* the issues with which this Court is properly concerned cannot be considered in isolation from the issues and evidence before the Commission. In that regard we have of course not had the advantage of seeing and hearing the witnesses or of experiencing the atmosphere of the proceedings before the Commission. These are very important constraints on the evaluation of the written record which a Court in our position must always keep in mind.

We propose to consider the issues before us in the following sequence: (1) The jurisdiction of this Court to consider the matters raised; (2) The lawfulness of the warrant issued to the Commissioners; (3) The jurisdiction of the Commissioners to make findings of criminal misconduct; (4) Natural justice and fairness; (5) The effect of the pardon; and (6) Bias. Issues 1, 3 and 5 can be dealt with quite shortly; 2, 4 and 6 require extended discussion.

Jurisdiction of the Court

A number of submissions was made by Mr Keesing, counsel for the Attorney-

General, concerning the jurisdiction of the Court in relation to the prerogative and statutory powers to constitute Commissions of Inquiry, the conduct of an inquiry, and the content of any report made. The general tenor of his submissions was to deny the existence of any substantial supervisory jurisdiction in such matters although recognising that jurisdiction exists where an order for costs is made in exercise of the powers in s 11 of the Commissions of Inquiry Act 1908.

We do not consider it necessary or desirable to enter into any lengthy review of this topic. In the present case the relief sought by the applicants raises questions of jurisdiction in four areas two of which are closely linked. We propose to do no more than set out our conclusions.

The Court has jurisdiction to determine whether the terms of reference of a Commission are lawful. That is illustrated by *Cock v Attorney-General* (1909) 28 NZLR 405 which was concerned both with the power to constitute a Commission contained in the Commissions of Inquiry Act 1908 and with the powers of a like nature conferred on the Governor-General by the Letters Patent constituting his office. Plainly the jurisdiction of the Court will reach to the terms of reference of Commissions established under other statutes.

So too the Court has jurisdiction to determine whether a Commission is acting within or without its terms of reference. See *Re Royal Commission on Licensing* [1945] NZLR 665, 680. *Re Erebus (No 2)* is another such case.

Next the Court will intervene to secure that the requirements of natural justice are met or to condemn the result if they are not – that is to say that persons interested (apart from any interest in common with the public) are afforded a fair opportunity of presenting their representations and meeting prejudicial matters: see *Re Royal Commission on State Services* [1962] NZLR 96, 117; *Re Erebus (No 2)*. In that area the Court is concerned with the reality of fair play.

The final matter upon which we touch relates to the case of bias whether it arises from interest or predetermination. In such cases the disqualifying feature cannot be accurately measured nor the mind of the tribunal directly ascertained. Its presence or absence in the case of interest will be assumed on proof of certain circumstances and in the case of predetermination will be gauged by outward appearance – in a case such as the present by the Court's impression of the attitude of an informed onlooker. But although the means of ascertainment may differ this issue too is ultimately concerned with the reality of fairness. So, as in the case of a breach of natural justice arising from a failure to hear interested persons, the Court will intervene in the case of bias or predetermination – cf *Lower Hutt City Council v Bank* [1974] 1 NZLR 545.

In the cases mentioned the common law provides a remedy. Its nature may depend upon the type of issue raised and the point of time at which relief is sought. The limitation on the availability of certiorari or prohibition mentioned in *Reynolds v Attorney-General* (1909) 29 NZLR 24 is not applicable to the discretionary remedy by way of declaration: see *Re Erebus (No 2)*.

The proceedings with which we are concerned are an appeal from applications brought both under the Judicature Amendment Act 1972 and at common law and similar originating proceedings removed into this Court from the High Court. As jurisdiction exists at common law we do not find it necessary to determine some of the difficult issues which arise in relation to the Act. In particular we express no opinion on the much debated question of whether the words "rights" in the definitions of "statutory power" and "statutory power of decision" in s 3 of the Judicature Amendment Act 1972 are wide enough to include findings of a Commission of Inquiry the effect of which is to damage reputation or expose a person to risk of prosecution.

Lawfulness of the warrant

In paras 350 and 402(a) of its report the Commission said:

"350. We conclude that on the occasion referred to by Mr and Mrs Priest, Mr Hutton and Mr Johnston planted the shellcase, exhibit 350 in the Crewe garden, and that they did so to manufacture evidence that Mr Thomas's rifle had been used for the killings.

"402(a). The shellcase exhibit 350 was planted in the Crewe garden by Detective Inspector Hutton and Detective Sergeant Johnston."

That was in substance a finding that the persons named had committed the crime of fabricating evidence: s 113 of the Crimes Act 1961. The Commission's conclusions flowed from its understanding of para 1(a) of its terms of reference, viz:

". . . to inquire into and report upon —

"1. Whether the investigation by the Police into the deaths of David Harvey Crewe and Jeanette Lenore Crewe was carried out in a proper manner; and, in particular, —

"(a) Whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (Exhibit 350) or in respect of any other matter?"

The applicants do not disagree with the Commission's view of the scope of para 1(a). What they claim is that para 1(a) in effect requires the Commission to inquire into and report upon whether one or more members of the police force had planted the cartridge case in circumstances amounting to the crime mentioned and that the appointment of a Commission for such a purpose is not authorised either by the Commissions of Inquiry Act 1908 or by the Letters Patent of 11 May 1917 empowering the Governor-General to appoint Commissioners.

It is convenient to begin by disposing of a submission made on behalf of the Attorney-General, and supported in another context by Mr Eichelbaum QC for the Commissioners, that the finding of a criminal activity was no more than reasonably incidental to other legitimate purposes of the inquiry and hence not open to any such attack: see *Re Erebus (No 2)*. That is to ignore reality. The suggestion that exhibit 350 was planted was first made in 1970, that is before the first trial early in 1971, was developed at the second trial in 1973, and thereafter dominated all discussions about the case. And rightly so. For if the cartridge case was in fact planted it is possible that no prosecution of Thomas would ever have taken place and, if tried, that a verdict in his favour might have been found. On another level the allegation that the police had fabricated evidence was to strike at one of the main arms of the administration of justice. Thus it must have seemed to those who drew the terms of reference; and so the Commission and counsel who appeared before it saw the matter from the outset.

The terms of reference included numerous other matters of inquiry many of which are upon their true construction severable from that related to exhibit 350. But it seems clear that para 1(a) expressed the, or at least a, main object of the inquiry and that such object included an inquiry into the possible commission of a crime. By its nature it was a matter of great public importance and the findings made under that head of reference cannot properly be viewed as merely incidental to a more general and wider inquiry into impropriety.

It is therefore necessary to identify the authority by or under which the Commission was constituted and to determine whether in law such authority justifies the inquiry which was set afoot.

A Commission of Inquiry may be constituted under Letters Patent, under the Commissions of Inquiry Act 1908, and under any other enactment authorising the same. A list of many such miscellaneous statutes follows s 2 of the 1908 Act in 1974 *Statutes*, vol 3, pp 2268-2273; but as no reliance was or could be placed on any of them they need not be further mentioned.

By para VII of the Letters Patent of 11 May 1917 constituting the office of Governor-General (*Gazette* 24 April 1919 pp 1213-1214) it is provided:

> "The Governor-General may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of the Dominion as may be lawfully constituted or appointed by Us."

In the instructions to the Governor-General of the same date (*Gazette* 24 April 1919 pp 1214-1215) it is provided in para V that in the execution of the powers and authorities vested in him the Governor-General shall be guided by the advice of the Executive Council but for sufficient cause may dissent from the opinion of the Council and act in the exercise of his powers and authorities in opposition to such opinion, reporting thereon to the Sovereign.

But for one paragraph there could be little doubt that the instrument appointing the Commission was in exercise of the Governor-General's powers under the Letters Patent. Its commencement, the use of the royal We, the testimonium, the use of the Seal of New Zealand, and other features all point to that conclusion. The exception is the last paragraph:

> "And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His Late Majesty King George the Fifth, dated the 11th day of May 1917, *and under the authority of and subject to the provisions of the Commissions of Inquiry Act 1908*, and with the advice and consent of the Executive Council of New Zealand" (the emphasis is added).

Ex facie that is a resort not only to the prerogative but also to the statutory power to appoint Commissions.

Section 2 of the Commissions of Inquiry Act 1908 empowers the Governor-General, by Order in Council, to appoint any person or persons to be a Commission to inquire into and report upon any question arising out of or concerning a range of matters. They include "(d) The conduct of any officer in the service of the Crown" and "(f) any other matter of public importance". Subject to what is implied in the argument of the applicants para 1(a) of the Commission's terms of reference fall well within those paragraphs.

The use of such a declaration of authority as is set out above in a document establishing a Royal Commission has been common for many years. It has been said that the reference to the statute is a matter of practice and is inserted to emphasise that the powers contained in the Act are powers enjoyed by a Commission appointed under the prerogative powers — that explanation is given in the paper *Royal Commissions and Commissions of Inquiry* compiled by Messrs E J Haughey and E L H Fairway and published by the Government Printer in 1974. It is repeated, without it seems any independent consideration, in para 26 of the 13th Report (on Commission of Inquiry) of the Public and Administrative Law Reform Committee in May 1980.

We are not able to accept that the words in question have that limited precautionary effect. Section 15 of the Commissions of Inquiry Act 1908 provides that the Act shall extend and apply to all inquiries held by Commissioners appointed by the Governor-General under the Letters Patent. If the paragraph in the appointment was intended to convey the same thing it is superfluous. If it was intended as a reminder of the statutory powers the words used are far more extensive than was necessary to achieve that end.

The real question under this head is whether the instrument consituting the Commission is an Order in Council by which means alone the statutory authority can be invoked. If it is effect should be given to the declaration as to authority according to its tenor. Definitions are contained in s 4 of the Acts Interpretation Act 1924. An Order in Council is an Order made by the Governor-General in

Council. The Governor-General in Council means the Governor-General acting by and with the advice and consent of the Executive Council of New Zealand. The prerogative Instructions require the Governor-General in the execution of the powers and authorities vested in him to be "guided by the advice" of the Executive Council. The present warrant refers to advice and consent. It also contains a certificate that it was "Approved in Council". Can it be said to be made *by* as well as with the advice and consent of the Council? In our view it can.

An Order in Council is the normal way of exercising statutory powers conferred on the Crown but is also used in respect of matters within its prerogative: *8 Halsbury's Laws of England* (4th ed) para 1088; and see too the form of warrant in *Cock v Attorney-General* set out at (1909) 11 GLR 543, 544-545. The mode adopted in this case is an appropriate and practical way of lawfully invoking both sources of power. The form of the commission in *Re Royal Commission on Licensing* [1945] NZLR 665 contained a declaration as to authority similar to that in the instant case and Myers CJ in referring to it seems to have accepted that there was a dual source of power (see p 678). That was also the view of the Full Court in the case of this Commission: *Re Royal Commission on Thomas Case.*

We are of opinion that the instant Commission was constituted both in exercise of the powers conferred on the Governor-General by the Letters Patent and under the powers contained in s 2 of the Commissions of Inquiry Act 1908.

As the appointment invokes the plenitude of the Governor-General's powers under the Letters Patent and those in s 2 of the Commissions of Inquiry Act 1908 it is not necessary to consider the difficult question as to how far, if at all, the prerogative power is abridged or put into abeyance by the enactment. That type of issue is discussed in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, in *Deynzer v Campbell* [1950] NZLR 790 and *Simpson v Attorney-General* [1955] NZLR 271, in this Court, and more generally in (1974) 48 ALJ 434. It could arise if a Commission were to be appointed solely under the Letters Patent to inquire into any of the matters listed in s 2 of the Act.

The consideration of whether either the prerogative power or the statute authorises the appointment of a Commission to inquire into a crime must begin in New Zealand with *Cock v Attorney-General.* The pleadings and the questions for the decision of the Court are recorded in the report of the case at (1909) 11 GLR 543. Allegations had been made that money had been paid to some members of a Licensing Committee as bribes to support an application. The instrument recited that fact and constituted a Commission:

> ". . . in the exercise of the powers in this behalf conferred by 'The Commissions of Inquiry Act 1908' and of all other powers and authorities enabling me in this behalf . . . for the purpose of inquiring by all lawful means into the allegations aforesaid and also as to the necessity or expediency of any legislation in the premises. . . .Provided that if any charge is made against any person it shall not be inquired into until at least forty-eight hours after a copy of the charge has been served on him the charge to be in such form and to be served in such manner as you direct."

Members of the Licensing Committee commenced proceedings for the purpose of having the Commission quashed. The action was removed into the Court of Appeal for hearing. Three questions were submitted for decision. They were, so far as material to the instant case, (1) whether the Governor in Council was authorised by the Act to appoint a Commission to inquire into and report upon the allegations of bribery; (2) assuming the Order in Council was issued under the Letters Patent whether the Governor was thereby authorised to appoint a Commission for such purpose; and (3) whether the Commissioner had jurisdiction to make such inquiry.

The judgment of the Court comprising Williams, Denniston, Edwards, Cooper and Chapman JJ was delivered by Williams J. On the first question the Court reached these conclusions. Elected members of a licensing committee who accept a bribe are guilty of a crime; elected members are not officers in the public service; and as the statute (at that time) only authorised the Governor in Council to appoint a Commission to inquire and report upon any question arising out of the administration of the Government or the working of any existing law or regarding the necessity or expediency of any proposed legislation or concerning the conduct of any officer in the public service it did not authorise the inquiry directed. The Court then, "in view of the further questions raised", considered some of the effects of the Order in Council if acted on and concluded that it directed a charge to be made and investigated in a manner unauthorised by law.

The Court then turned to the second question — whether the Commission was justified under the Letters Patent.

In *Clough v Leahy* (1904) 2 CLR 139 it was held that while the Crown might not interfere with the administration of the course of justice and might not constitute a new Court with coercive jurisdiction yet an inquiry into the guilt or innocence of an individual set on foot by the Crown was not unlawful; for the bite of such an inquiry — the obligation of the individual to attend and answer questions — was provided by statute. In *Cock v Attorney-General* it was held that a prerogative inquiry into such a matter was unlawful by reason of the statute of 42 Edw 3, c 3 which provides:

> ". . . that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land: And if anything from henceforth be done to the contrary, it shall be void in the law, and holden for error."

(The text of Chapter 3 including the important recitals can be seen translated in *8 Halsbury's Statutes* (3rd ed) p 16. The equally important Chapter 4 can be similarly seen in *4 Halsbury's Statutes* (2nd ed) p 69).

The Court in *Cock* concluded by saying:

> "If the question of guilt or innocence of an individual arises in the course of a legitimate inquiry and is necessary in order to answer that inquiry, a Commissioner might well be justified in considering the question of guilt or innocence in order to enable him to report. Thus an inquiry into the alleged misconduct of a public officer is authorised by the Act. Such an inquiry is in order to ascertain whether he should be retained in the service, or dismissed, or be otherwise made subject to official discipline. Although the alleged misconduct amounted in law to a crime the Commissioner might nevertheless investigate it, because it would be merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry. In the present case the real, and in effect the sole, object of the inquiry is to ascertain whether certain named individuals who occupy no official position have committed a specified offence" (28 NZLR 405, 424-425).

Cock v Attorney-General has been considered or referred to in a number of later cases. In both *Ex parte Walker* (1924) 24 SR (NSW) 604 and *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73 the decision was not followed. The reasoning is clearly stated in the judgment of Dixon J in the latter case at pp 93-102. In summary it is that the interpretation of the statute of 42 Edw 3, c 3 in *Cock* is historically and constitutionally erroneous its object not being to prevent inquiry but to preclude the setting up under the prerogative of Courts or Commissions having a coercive or penal power; that the *Case of Commissions of Enquiry* (1608) 12 Co Rep 31; 77 ER 1312, relied upon in *Cock* is of doubtful

authority but properly understood accords with the distinction between Commissions of Inquiry and those with purported judicial authority mentioned in the case of *Whitelocke* (see *Acts of the Privy Council in England 1613-14* (1921) and 2 State Tr 765); that writings referred to at 63 CLR 100 and 102 and particularly an article by Sir W Harrison Moore, "Executive Commissions of Inquiry" (1913) 13 Columbia Law Review 500 published after *Cock* support a view contrary to that case.

The issue has been re-examined and the decision in *McGuinness v Attorney-General* confirmed by the High Court in *State of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (Murphy J dissenting) in judgments recently delivered and as yet unreported. [Ed: Now reported at (1982) 41 ALR 71.] So Australian Courts have, since *Clough v Leahy* (1904) 2 CLR 139, consistently upheld the Crown's right to have an inquiry into the question of whether a criminal offence has been committed. The powers to compel attendance of witnesses and to require answer by them have been annexed to that right by the intervention of Parliament.

Some of the contentions in support of the view taken in *Cock* are marshalled by Dr D R Mummery in "Due Process and Inquisitions" (1981) 97 LQR 287. While accepting that the expression "put to answer" in the statute of 42 Edw 3, c 3 means "put on trial" his thesis is that the later statute of 16 Car 1, c 10 (mentioned in *Cock*) interpreted and expanded the earlier and that, in effect, constitutional history points to the conclusion that a man is put on trial if he is charged with an offence before a Commission which may find he committed it.

That article serves to emphasise what is apparent from a reading of the material, namely that the question of the Crown's power in this area depends upon the view that is formed of constitutional history law and practice. That the report of the *Case of Commissions* in 12 Co Rep 31 is not wholly trustworthy is evidenced by what is said about it in (1852) *15 Law Review and Quarterly Journal of British and Foreign Jurisprudence* p 269 at p 281 and pp 284-292 and in Sir W Harrison Moore's article "Executive Commissions of Inquiry" in (1913) 13 Columbia Law Review 500 at 514-515. On *Coke's* Twelfth Part generally reference can be made to Mr J H Baker's article on "Coke's Note-Books" in [1972A] CLJ 59. But as was pointed out in *Cock* both *Hale* and *Hawkins* assert that Commissions of Inquiry into offences only are unlawful; and *Holdsworth* in *5 History of English Law* 433 seems to take a like view.

These are shifting sands having no firm bottom. It cannot be asserted that the view expressed in *Cock v Attorney-General* is not tenable.

That this Court may decline to follow a previous decision of its own is evident from *Re Rayner* [1948] NZLR 455 and the discussion in *Re Manson* [1964] NZLR 257, 271-272. As yet no general statement of the principles upon which the Court will so act has been enunciated. Nor is any such statement necessary in this case in which the important features are these.

The decision in *Cock* has stood for 73 years. It is not a case, as was *Re Manson*, in reliance upon which people may be supposed to have ordered their affairs; and there is much force in the suggestion that the public interest from time to time requires that a Commission should have the type of powers exercised in this case. The opposing considerations reflect some expressed opinions about stare decisis and other features. A preference for a different conclusion is not a sufficient ground to overrule: *Re Manson* [1964] NZLR 257, 271. Thus even if *McGuinness* could be regarded as preferable to *Cock* that would not be enough. The very issue was referred to in this Court in *Re Royal Commission on Licensing* [1945] NZLR 665. Myers CJ observed:

> ". . . I find it unnecessary to consider or endeavour to reconcile the decisions of this Court in *Cock v Attorney-General* (1909) 28 NZLR 405 and the

subsequent Australian cases *Ex parte Walker* and *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73. All that need be said about these authorities is that if they did apply and were found not to be reconcilable, this Court would be bound by its own decision in *Cock's* case, so long as that decision stands unaffected by any judgment of the Privy Council or the House of Lords" (ibid, 679).

So too Kennedy J at 684. Callan J agreed with both. And there are wider considerations. Doubts as to the scope of the prerogative power particularly where they arise from differing decisions are best met by legislative intervention. We think that has happened in this case. It is not unreasonable to suppose that the decision in *Cock* has to some extent influenced amendments to the Commissions of Inquiry Act over the years. The subject matters of inquiry were extended in 1970. In 1958, and again in 1980, the rights of persons to be heard were enlarged. We think that these changes indicate a view on the part of Parliament that, subject to proper safeguards, the public interest is from time to time served by such an inquiry.

For those reasons we are of opinion that this Court should follow *Cock v Attorney-General.*

The Letters Patent of the Governor-General not justifying the constitution of a Commission to inquire into a crime it is necessary to see whether the Commissions of Inquiry Act 1908 provides authority. At the time *Cock v Attorney-General* was decided s 2 provided:

> "The Governor-General in Council may appoint any person or persons to be a Commission to inquire into and report upon any question arising out of the administration of the Government, or the working of any existing law, or regarding the necessity or expediency of any proposed legislation, or concerning the conduct of any officer in the public service."

At the time the Thomas Commission was established s 2 of the Act provided:

> "The Governor-General may, by Order in Council, appoint any person or persons to be a Commission to inquire into and report upon any question arising out of *or concerning* –
>
> "(a) The administration of the Government; or
> "(b) The working of any existing law; or
> "(c) The necessity or expediency of any legislation; or
> "(d) The conduct of any officer in the *service of the Crown;* or
> "(e) *Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury:*
> "(f) *Any other matter of public importance."*

The emphasis has been added to point to some of the differences from the original section. Apart from para (f) the whole of the present s 2 was substituted for the original section in 1958 at which time a reference to proceedings or judgment of any Court Martial which had been added in 1920 was omitted. Paragraph (f) was added in 1970.

In *Cock* the statute did not apply because the persons whose conduct was a matter of inquiry were not officers in the public service. The first term of reference in the instant Commission is whether the police investigation was carried out in a proper manner. It was not disputed, rightly in our view, that the police are officers in the service of the Crown: see eg s 37 of the Police Act 1958; *Attorney-General for New South Wales v Perpetual Trustee Co* [1955] AC 457; [1955] 1 All ER 846. It was suggested however that as by the time the Commission was constituted Mr Johnston was dead and Mr Hutton had resigned from the police force, neither

was relevantly an officer in the service of the Crown. Section 2(d) is concerned with conduct. The relevant time for ascertaining status is that at which the conduct in question took place.

But there is a more fundamental objection to reliance on s 2(d) in that part of para 1(a) of the terms of reference which speaks of "impropriety on any person's part in the course of the investigation or subsequently". The investigation is the police investigation and the person must in relation to the investigation have been either a police officer or some other person such as a forensic or scientific expert making investigations on behalf of the police. In respect of the period "subsequently", ie after the investigation, it may include Crown solicitors or other agents. It follows that the propriety to be inquired into under para 1(a) was not confined to the conduct of the police but extended to persons who are not properly described as "officers in the service of the Crown". In short while s 2(d) of the Act embraces police conduct it does not include that of other persons whose activities would under the terms of reference require to be scrutinised.

Section 2(f) refers to "any other matter of public importance". Plainly the matter to be inquired into by the Commission under its terms of reference 1(a) was a matter of public importance involving as it did the propriety of investigations by the police and others into the murders in respect of which Mr Thomas was convicted and pardoned and into other conduct.

It is not necessary to decide whether the authority for para 1(a) of the terms of reference was s 2(f) alone or a combination of s 2(d) and s 2(f). That is because if both paragraphs permit or both preclude an inquiry into the commission of a crime that is an end of the matter; and if s 2(f) permits and s 2(d) does not the inquiry is into an *other* matter of public importance — that is to say one not within s 2(d). (It was not ever suggested s 2(d) might relevantly authorise and s 2(f) preclude.) In short if s 2(f) justifies an inquiry into the commission of a crime the commission in this case is lawful.

It is right to begin an examination of that issue by referring to the passage, already cited, from *Cock* (1909) 28 NZLR at 424-425. It was there said that an inquiry into alleged misconduct authorised by s 2 was to ascertain whether the officer concerned should be retained, dismissed or otherwise disciplined and that:

> "Although the alleged misconduct amounted in law to a crime the Commissioner might nevertheless investigate it, because it would be merely incidental to a legitimate inquiry and necessary for the purpose of that inquiry."

That limitation, which was treated as applicable to s 2(d) as now enacted, was submitted by the applicants to be binding on this Court and from its very nature and manner of articulation to extend to all parts of the section including para (f) which was enacted 60 years later. Each of these points requires consideration, the second being, upon the approach mentioned above, the more important.

While the consequences of giving effect to the Order in Council in *Cock*, which are set out in (1909) 28 NZLR at 420, touched on the conclusion reached as to the prerogative power, nevertheless, the expressed limitation on the statutory provision was not a necessary part of the decision for it had already been determined that the members of the Licensing Commission were not officers in the public service. Nor in our view does anything said in *Re Royal Commission on Licensing* [1945] NZLR 665 preclude the Court from reaching a different conclusion if that be warranted. Obviously however considerable weight must be accorded to what was said in *Cock* which has gone uncriticised by decision in New Zealand for so long.

Section 2(f) was enacted in 1970. Whether and to what extent its passing affects the true construction of the earlier parts of s 2 need not be explored — on that *Lewisham London Borough Council v Lewisham Juvenile Court Justices* [1980] AC 273; [1979] 2 All ER 297 is material. We incline to the view that s 2(f) proclaims

that the earlier paragraphs relate to particular matters of public importance and that other matters of that nature not covered by the earlier paragraphs are now included.

In the balance between two public interests, that of safeguarding the rights and reputation of individuals and that of public inquiry into issues of national concern there are occasions when the first must give way to the second. That was recognised in England by the Tribunals of Inquiry (Evidence) Act 1921 which provided that where it was resolved by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the resolution as of "urgent public importance" and a tribunal is appointed for the purpose, that tribunal has the power of enforcing attendance of witnesses, and refusal to answer is made an offence (subject to the same immunities and privileges witnesses have in the High Court). The safeguard is contained in the requirement of the resolution describing the matter as of urgent public importance.

More importantly for present purposes that conflict of public interest was referred to in the *Report of the Royal Commission on Tribunals of Inquiry* of November 1966 (Cmnd 3121) – the *Salmon* report. In paras 22 and 27 the Commission reported:

> "22. The history of inquiries to which reference has been made shows that from time to time cases arise concerning rumoured instances of lapses in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety."
>
> "27. The exceptional inquisitorial powers conferred upon a Tribunal of Inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence. In such cases we consider that no other method of investigation would be adequate."

Prior to the addition of para (f) to s 2 of the Commissions of Inquiry Act 1908 the remarks made in *Cock* as to the scope of what is now s 2(d) must at least have made it doubtful whether the statutory power extended to authorise an inquiry into the possible commission of a crime. If that doubt were well founded cases of great public importance could never be investigated in a manner likely to produce public confidence. The present case would have afforded such an example involving as it did an inquiry into police investigations which if ever held by the domestic tribunal of the police could hardly have allayed public concern.

While it cannot be supposed that Parliament had the Thomas case in mind in 1970 nevertheless the doubt engendered by *Cock*, the need for inquisitorial power in exceptional cases of public concern, and the recent publication of the *Salmon* report drawing attention to the issues and values involved all suggest that the words of s 2(f) should receive their natural meaning as including an inquiry into the commission of an offence. The provisions of s 4A earlier introduced and later enlarged are at least consistent with this construction. But it needs to be said that while the question of whether an offence has been committed is always a matter of public interest and concern such criteria will not answer the statute which applies only to such cases as can be described as of public importance.

In England the protection of the rights of the individual is safeguarded by the necessity for a resolution of both Houses of Parliament that the matter is of urgent

public importance. In New Zealand the security is more tenuous. It may be permissible to hope that feature will be included in the intended review of the Act recently announced by the Attorney-General. As the matter stands at least it may be said that where an inquiry is properly directed into the commission of a crime it is to be expected that to the extent a report thereon is justiciable it will be viewed with care by the Court.

The words "public importance" in s 2(f) have the meaning attributed to them in common understanding and their content is a matter of fact. The present case is plainly one of public importance and the precise scope of the jurisdiction of the Court to determine whether a matter is of public importance can be left until it arises.

We are of opinion that the Thomas inquiry was authorised by the provisions of the Commissions of Inquiry Act 1908. The restrictions upon s 2(d) suggested in *Cock* have no application to s 2(f) and for the reasons already mentioned that is enough to determine the present issue.

The first cause of action fails.

Jurisdiction of the Commissioners to find misconduct

Upon the assumption that the terms of reference did not require or permit the Commission to inquire into and report upon whether any persons were guilty of criminal conduct and were valid by reason of that exclusion, it was submitted that the findings in paras 189 and 350 were unlawful as being within the vice hypothesised and ultra vires the Commission.

As the premise upon which that submission was made cannot for the reasons already mentioned be sustained nothing further need be said about this submission.

The applicants fail on their second cause of action.

Natural justice and fairness

The third cause of action is pleaded on behalf of Mr Hutton and Mrs M E Johnston. It is contended that the Commissioners were guilty of breaches of natural justice or fairness. In essence what is said under this head is that due notice was not given of allegations of misconduct against the two police officers which are reflected in a number of specific "findings" in the report of the Commission with the result that adequate opportunity to answer was not given. Put more broadly, the argument is that the findings were not fairly made. There was also an associated submission that the evidence relied on to support certain "findings" was so insubstantial and tenuous that taken together with the failure to give due notice it was unfair to make those findings.

The 13 findings impugned under this head are identified and summarised in para 25A(a) of the amended statement of claim in the review proceedings. They are as follows:

> "(i) In paragraph 350 of the report, that the third applicant and the deceased had –
> 'planted shell case exhibit 350 in the Crewe garden and that they did so to manufacture evidence that Mr Thomas's rifle had been used for the killings'.
>
> "(ii) In paragraph 189 of the report, that –
> 'An unfired category 4 shell case was deliberately substituted by the Police to the knowledge of at least Mr Hutton for the unfired category 3 cartridge case examined by Dr Sprott between Dr Sprott's examination on the 12th day of April 1973 and Dr Nelson's examination on the 13th day of April 1973'.
>
> "(iii) In paragraph 351 of the report, that the alleged planting of shell case exhibit 350 by the third applicant –

'explains why Mr Hutton described shell case 350 as containing blue black corrosion when in fact it did not. It also explains his odd behaviour at the Supreme Court upon discovering Dr Sprott examining one of the shell cases. Furthermore it provides an understandable motive for the switching of exhibit 343 after it had been examined by Dr Sprott'.

"(iv) In paragraph 347 of the report that –
'The conversation of 26 October, looked at in the light of all the above circumstances, forces us to the conclusion that it was staged for the purpose of providing the excuse for sending Parkes and Charles back to the particular garden to find the shell case'.

"(v) In paragraph 51 of the report, that the inconsistencies referred to therein are significant and relevant in considering the third applicant's evidence as to the degree of corrosion.

"(vi) In paragraph 163(b) of the report that the third applicant had in a report dated 24th October 1973 deliberately misrepresented or fabricated his account of shell case exhibit 343 having been fired in the Otahuhu Police Station for the reason that –
'At that stage it was important to Mr Hutton to establish that Mr Keith was wrong'.

"(vii) In paragraph 174 of the report, that the remarks attributed to the third applicant and allegedly made to Dr Sprott while he was examining exhibit 343 were –
'quite improper because the exhibits were in any event in the custody of the Court and not in the custody of the Police. They also offend the vital principle of our system of justice that the defence should have full and unrestricted access to the exhibits. We accept that Mr Hutton made the remarks attributed to him, and we find his action improper'.

"(viii) In paragraph 178 of the report that –
'It is quite apparent to us that considerations of honesty, fairness to the defence and proper practice, were of no weight whatsoever to Mr Hutton in his desire to see Mr Thomas convicted for a second time'.

"(ix) In paragraph 365 of the report, that in relation to the disposal of exhibit 350 and exhibit 343 at the Whitford Tip on the 27th July 1973 –
'Hutton's statement that he was present with Keith when they were taken to the dump and distributed was false. His description of the manner of their destruction was false to his knowledge. Hutton had both these exhibits destroyed because he knew exhibit 350 had been planted and exhibit 343 was a suspect exhibit for which an unfired shell had been substituted'.

"(x) In paragraph 361 of the report –
'Patently many of the statements in the telex were false and could only have been designed to misrepresent the position to the Assistant Commissioner'.

"(xi) In paragraph 366 of the report –
'We find the disposal of these exhibits and the reasons for it has an added significance. It strongly supports the case against Hutton of planting 350 to procure the conviction of Thomas. The destruction of exhibits 350 and 343 and the telex report from Hutton constitute impropriety on the part of the Police. The telex sent by Hutton to Assistant Commissioner Walton was in part false and intended to misrepresent the position so that a further search for exhibits 350 and 343 would not be undertaken by the Police'.

"(xii) In paragraphs 257, 258 and 261 of the report, the implication that the deceased may have planted the stub axles found on Mr Thomas' farm.

"(xiii) In paragraph 344 of the report that –
'at some stage during the Police investigation Mr Johnston held both the Thomas rifle and the packet of ammunition in his possession'

and the implication, resulting from the findings in paragraph 349 and 350 of the report that the deceased did so for the purpose of firing and planting shell case exhibit 350."

Apart from (xii), which is concerned with stub axles found by Detective Johnston in a tip on the Thomas farm and which matched an axle beam attached to and recovered with Harvey Crewe's body, they are all relevant to two major conclusions reached by the Commission: that Hutton and Johnston planted shell case exhibit 350 in a garden at the Crewe house and that Hutton was party to the switching of shellcase exhibit 343. They are interrelated matters and the switching issue is an element of the wider planting issue for the motive suggested for the deliberate switching of the shellcase was to eliminate the possibility of an argument by the Thomas defence based on the switched case that exhibit 350 had been planted. Subparagraph (i) is the primary allegation that Hutton and Johnston planted shellcase exhibit 350. Closely allied with it are the allegations that Johnston procured the Thomas rifle and cartridges exhibit 318 from the Otahuhu Police Station for that purpose (subpara (xiii)); that Hutton and Detective Sergeant Jefferies staged a conversation at the squad conference on 26 October 1970 to provide an excuse for a further search of the Crewe garden (in order to bring to light the shellcase exhibit 350 which had recently been planted there) (subpara (iv)); that Hutton fabricated his account of the degree of corrosion evident on exhibit 350 when it was found in the garden to support the inference that it had been there since the night of the murders (subparas (iii) and (v)); that he was party to the switching of shellcase exhibit 343 at the second trial (subparas (ii), (vi), (vii) and (viii)); that following the dismissal of the appeal by Thomas after the second trial Hutton had exhibits 350 and 343 destroyed because he knew the evidence had been fabricated (subpara (ix)); and that he subsequently fabricated an account of their destruction to prevent an attempt being made to recover them (subparas (x) and (xi)). Although impugned in the pleadings only by implication para 348 of the report was also challenged in argument under this head. It refers to an incident testified to by Mr and Mrs Priest who lived near the Crewe farm that they heard shots from the direction of the Crewe house. Shortly afterwards Hutton and Johnston came along in a car and there was a conversation about the shots. In his evidence before the Commission Hutton agreed there was such a conversation but denied firing the shots. The Commission did not believe him and found that Hutton and Johnston fired two shots at the Crewe farm. The Commission went on in the challenged para 350 to conclude that the police officers had planted exhibit 350 there on that day in order to manufacture evidence that Thomas's rifle had been used for the killings.

We mention the Priest evidence at this point in this detail only because of a further finding which was made by the Commission in para 348 but resiled from at the hearing before us. It was that in the conversation with the Priests and in answer to Mr Priest's assertion that the policemen had just fired two shots at the Crewe farm Mr Johnston said "How do you know?" Now, Mr Priest had attributed the reply to Mr Hutton and there was simply no evidence before the Commission to support that "finding" as against Johnston. In fairness to Mr Johnston's reputation we place on record that in argument before us counsel for the Commission eventually acknowledged that that was a mistake on the part of the Commission and consequently that the imputation against Johnston that he admitted the firing of shots cannot stand.

It was common ground that the principles of natural justice and administrative fairness were applicable to this Commission and obliged the Commissioners to act fairly in conducting their inquiry under the terms of reference. The requirements of natural justice and fairness must of course depend on the circumstances of the particular case and the subject matter under consideration. That this is true of

Commissions of Inquiry is clear from the decisions of this Court in *Re Royal Commission on State Services* [1962] NZLR 96 and in the *Erebus* case. In the *Erebus* judgments we noted that in the amendments made to the Commissions of Inquiry Act 1908 Parliament has shown an increasing concern that natural justice should be observed by Commissions. We also emphasised the point stressed by Cleary J at p 117 in the *State Services* case that, while Commissioners have wide powers of regulating their own procedure, there is the one limitation that persons interested (that is apart from any interest in common with the public) must be afforded a fair opportunity of presenting their representations, adducing evidence and meeting prejudicial matter.

The principles involved are neither new nor complex. On an inquiry of this kind persons whose conduct is in question must be given a fair opportunity to put their case before being condemned. And for their part Commissioners must fairly allow that opportunity and must base their conclusions on the material before them. On this branch of the argument it is a matter of applying reasonably well settled general principles to the particular circumstances of the case.

Mr Hutton, Mr Henry QC (senior counsel for the police at the inquiry) and Mr Keyte (counsel assisting the Commission), all of whom had made affidavits in these proceedings, were cross-examined at considerable length before us. We also had the advantage of having very comprehensive submissions from Mr MacRae for the applicants and Mr Crew for the Commission on this branch of the case. In the result we are satisfied that the breach of natural justice argument must fail. It is no disrespect to the arguments that we heard that we feel able to deal with this ground quite shortly.

The Commission was constituted as the result of representations by supporters of Mr Thomas and public disquiet and unease as to the circumstances of the convictions. There had been several reviews of the Thomas case. Public controversy over the conduct of the police continued. The Commission noted (report, para 34) that from 1970 onwards there had been allegations that the shellcase had been planted at the Crewe farm by the police in order to secure the conviction of Thomas. Against that background para 1 of the terms of reference directed the Commission to inquire into and report whether the investigation by the police into the deaths of the Crewes was carried out in a proper manner and, in particular, whether there was any impropriety on any person's part in the course of the investigation or subsequently, either in respect of the cartridge case (exhibit 350) or in respect of any other matter. That was the intended thrust of the inquiry. Under para 1(a) the spotlight was on exhibit 350. The terms of reference clearly envisaged the possibility of findings of serious misconduct on the part of individual police officers involved in the investigation.

In his address at the beginning of the hearing Mr Keyte listed a number of issues to which he intended to direct evidence. At the forefront was exhibit 350 and Mr Keyte observed that it was common knowlege that the major allegation of impropriety made about this exhibit was that the cartridge case had nothing whatever to do with the occurrence of the murders, but rather was "planted", at the scene either by police officers or else by some unknown person for the presumed purpose of framing Mr Thomas. Amongst the other issues referred to by him was whether there was any truth in the suggestion that exhibits 343 and/or 350 were switched or interfered with during the course of the hearings; and whether there was any impropriety on any person's part involved in the destruction of some exhibits by burying them in the Whitford tip.

It was against that background that the inquiry began; that Mr Keyte called evidence; and that other counsel conducted their cases and cross-examined witnesses. Thus on the second day of the hearings Mr Henry for the police stated his view that probably the only two real alternatives on the exhibit 350 issue were either that the police manufactured that piece of evidence or that the shellcase

was ejected from the Thomas rifle at the Crewe house on the night of the murders. And that issue was put in those same stark terms by counsel for the police on two later occasions, 25 June 1980 and 21 July 1980.

There was considerable argument before us as to the precise nature and terms of the representation of the police by Mr Henry and Mr Fisher. They were given leave to appear "for the New Zealand Police". They did not appear separately for Mrs Johnston or Mr Hutton or other individual police officers. For their part Mr Hutton and Mrs Johnston did not formally apply under s 4A of the Commissions of Inquiry Act to be represented at the hearings. But Mr Henry readily agreed in this Court that his responsibility for the collective interests of the police necessarily involved protection of the interests of individuals including Chief Inspector Hutton and Detective Johnston. A reading of the transcript shows that he and Mr Fisher carried out what soon became an arduous responsibility with care and considerable tenacity. Throughout the inquiry and both in cross-examination and in exchanges with the Commission they consistently sought to protect the interests of individual police officers, including Hutton and Johnston, and in their final submissions they specifically dealt with allegations of impropriety involving Hutton and Johnston. In those important respects they did everything that Hutton and Mrs Johnston might reasonably have expected their counsel to do. But Mr Henry said, as did Mr Hutton, that he did not anticipate that the Commission would make findings of criminal misconduct against individual police officers. He, Mr Henry, said that before the end of the hearing he considered it inevitable that on the major issue the Commission would make a finding that exhibit 350 had been planted by the police, and he also considered that they might make findings of less serious impropriety on the part of individual police officers. But, he said, he had not contemplated that the Commission would make findings of criminal misconduct against them as individuals and he observed that he would have faced potential conflicts of interest had he been defending police conduct in general and at the same time answering charges of criminal misconduct against individual officers.

We do not consider that the answer to the natural justice issue turns on technical questions as to legal representation in a narrow sense. A broader view is required in order to determine whether the inpugned findings were plainly raised during the inquiry and a fair opportunity given to answer them. On that broader test there can be only one answer. It must have been perfectly obvious as the inquiry proceeded that a considerable volume of evidence, much of it from police records which had not been before the Courts at the earlier trials and referrals, was building up a case against Hutton and Johnston and that within their role of counsel for the police Mr Henry and Mr Fisher were rightly testing and challenging that evidence.

We turn now to consider Mr Hutton's position. He had been officer in charge of the Crewe investigation. He prepared his statement of evidence and was examined before the Commission on 12, 13 and 16 June. It was a vigorous examination and from the nature and tone of the Chairman's questions which occupy 19 pages of the transcript Hutton can have been in no doubt that his own conduct was under scrutiny in numerous respects. Subsequently he was one of the applicants in proceedings in the High Court in which a limited natural justice argument was raised against the Commission. It was that a ruling by the Commission identifying exhibit 350 as a cartridge case manufactured after March 1964 and fired in the Thomas rifle was made without affording the parties an opportunity to be heard in respect of the relevant issues. The significance of the ruling was that it eliminated the possibility that exhibit 350 matched the bullets (manufactured only up to 8 November 1963) recovered from the heads of Mr and Mrs Crewe. Accordingly the ruling drew attention to the question arising under the first paragraph of the terms of reference as to whether there was any impropriety

on any person's part in respect of exhibit 350. In its judgment of 29 August 1980 the Full Court rejected the allegation of breach of natural justice to which we have referred but, referring to assurances in that regard that had been given by the Commission at the hearings of the Commission, it went on to say:

> "We are content to let the matter stand on the basis that the assurances latterly given by the Commission will be implemented by its giving to the police, before any final determination is made, fair advice of any allegation against any present or past member of the force, and also giving to any such person a proper opportunity to rebut it" ([1980] 1 NZLR 602, 629).

Mr Hutton was to return to give evidence before the Commission in September 1980. Following an earlier discussion with Mr Hutton, on 27 August 1980 Mr Keyte sent Mr Fisher, junior counsel for the police, a schedule listing some 21 subjects which Mr Keyte considered would have to be covered by Mr Hutton. Specifically included in the list as relevant to terms of reference 1(a) were the Priest evidence as to the rifle shots and the conversation with Hutton and Johnston; whether exhibit 343 was fired on 21 October 1970; the finding of the axle and "a general overview of Johnston's activities regarding the axle"; and the disposal of the exhibits. Mr Hutton was questioned at some length before the Commission. The whole of the Priests' evidence was put to him and he was specifically asked by counsel assisting the Commission whether he had planted exhibit 350 at the Crewe property.

The next step is the identification of issues for the final addresses of counsel. Mr Keyte and his junior prepared a statement of issues which was circulated to other counsel. Importantly for present purposes it expressly raised as issues under terms of reference 1(a) whether exhibit 350 was planted by the police; whether exhibit 343 was switched and if so when and by whom; whether there was any impropriety in the destruction of exhibits; and whether the stub axles were planted in the Thomas tip by the police. In discussion before the Commission on 16 September 1980 Mr Henry accepted that those issues raised allegations of police impropriety. He was concerned at the possibility that there might be other issues as to police impropriety not similarly identified. As to that, the Chairman observed that if there was any new matter of significance affecting any particular person not readily encompassed by the issues document which would be the subject of a finding by the Commission then counsel for that person would be advised. It is apparent, too, from the detailed final submissions presented by the police that counsel had carefully considered each of the stated issues and that they specifically dealt with allegations of impropriety affecting Hutton and Johnston. To illustrate the point. On the dominating question as to impropriety in relation to exhibit 350 which, as Mr Henry noted, was probably the most important term of reference in the whole inquiry, he emphasised that the Commission was inquiring "whether any member of the police has committed acts which would amount to a crime under s 113 or s 116 of the Crimes Act 1961" and submitted that it should not be the subject of a positive adverse finding "unless the allegation be clearly and definitely established to the Commission's satisfaction". Section 113 relates to fabricating evidence and s 116 to conspiring to defeat or pervert the course of justice.

It is not suggested that any of the challenged findings were not fairly foreshadowed in the issues document. The factual matters on which those findings were based were thoroughly canvassed at the hearing and it is not suggested that Mr Hutton was not questioned on those matters or could not have been recalled for further questioning had counsel for the police thought that course desirable. For ourselves we are satisfied that the Commission did not act in breach of the obligations of natural justice as to affording a fair hearing. And in view of the nature and thrust of the inquiry and the admitted existence of evidence material

to the findings under challenge we do not consider it necessary or helpful to explore the difficult question as to the relationship of insufficient evidence to natural justice. It is enough to say that, apart from the acknowledged mistake regarding Detective Johnston with which we have already dealt, we have not been satisfied by the applicants that any of the challenged findings of the Commission were based on evidence which the Commission were not entitled to regard as have probative value. The weight of the evidence was a matter for the Commission, not for this Court in these proceedings.

We reject the third cause of action pleaded.

Before parting with this branch of the case we add that it emerged in evidence before us that, after the Commission concluded its hearings, counsel who had assisted the Commission at the inquiry took part with the Commissioners in the conferences on the contents of the report, which were arrived at by a process of seeking consensus, and in the actual drafting of the report. When a Commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutors. It is not right that they should participate in the preparation of the report. But, as this was not made a ground of complaint by the applicants in the present proceedings, we merely draw it to attention so that it is not treated as a precedent.

The effect of the pardon

The pardon granted to Mr Thomas on 17 December 1979 reads:

> "WHEREAS on the sixteenth day of April 1973 Arthur Allan Thomas was convicted in the Supreme Court at Auckland of the murder of David Harvey Crewe and of Jeanette Lenore Crewe and was sentenced to imprisonment for life:
>
> "AND WHEREAS it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC that there is a real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt:
>
> "NOW THEREFORE I, Keith Jacka Holyoake, Governor-General of New Zealand, acting upon the advice of the Minister of Justice, hereby in the name and on behalf of Her Majesty grant a free pardon to the said Arthur Allan Thomas in respect of the said crime:
>
> "AND I command and require the Superintendent of Tongariro Prison Farm and all others whom it may concern to give effect to the said pardon."

Section 407 of the Crimes Act 1961 provides:

> **"Effect of free pardon** — Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence:
>
> "Provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

The Full Court dealt with the interpretation of s 407 and the effect of the pardon in [1980] 1 NZLR at pp 616 to 621. Their most important conclusion was that a free pardon does not obliterate by force of law the acts of the person pardoned. As a result of discussion during the argument before them the Court understood that counsel then appearing for all parties were agreed on the true interpretation of the section. They gave effect to the interpretation which they accepted by making the following declarations, p 630:

Bias

1. *The issues*

One of the most difficult branches of the case concerns this subject. We propose to deal with it in two stages. First we will explain the issues that arise and summarise the relevant facts. Secondly, we will state our conclusions. Further, for ease of reference, we will reproduce in an appendix to this judgment the main statements by the Chairman and members of the Commission that have to be taken into account. However, this necessarily long appendix contains no comment or statement of our views, and it is not essential to read it to understand our judgment.

We should begin the explanation of the issues by repeating that in the High Court proceedings commenced on 25 July 1980 and culminating in the judgment of the Full Court delivered on 29 August 1980 and reported in [1980] 1 NZLR 602, the applicants sought, among other things, orders prohibiting the Commission from continuing their inquiry, or declaring that they were disqualified from doing so, on the ground of alleged bias by predetermination. The Full Court, while holding that the Commission had made errors in law as to the effect of the pardon of Mr Thomas, said ". . . we do not regard those as irreversible, nor do we find that bias by predetermination has been established" (p 628 of the report). Accordingly prohibition was refused.

The Commission's hearings had been continuing in the meantime. They continued after the Full Court judgment. The main hearing of evidence was completed on 18 September 1980. Counsel's final addresses began on 19 September and concluded on 24 September, some further evidence from Dr D F Nelson being interposed on 22 and 23 September. On the morning of 30 October the Commission reconvened for some hours to hear the evidence of Mr P S Prescott, Principal Scientific Officer in the Nottingham Forensic Research Laboratory. Their report was submitted to the Governor-General on 11 November. A notice of motion on appeal to this Court by the applicants in the High Court proceedings against the Full Court's findings on the bias question was filed on 18 November. In response the Commissioners some nine months later, in August 1981, gave notice of their intention to contend that the decision of the Full Court be varied, setting out three grounds of cross-appeal. The third relates to the effect of the pardon.

Particulars of what the Commissioners would contend on this head were given in a memorandum by counsel for the Commissioners dated 15 February 1982. Certain statements by the Chairman are there quoted. The first is his statement on the opening of the Commission's hearings on 21 May 1980 in which he said that an effect of the pardon was that Thomas was to be treated as not having done the acts which brought about the deaths; this could not "ever be asserted . . . . The slate has been wiped clean". Another statement quoted was one made by the Chairman on 24 July 1980 when, having referred to s 407 of the Crimes Act, he said ". . . to me, that means in law and in fact that he did not do it; he is innocent". The memorandum records that the central submission for the first respondents on the cross-appeal will be that the interpretation of the pardon reflected in the statements quoted was correct and that the interpretation of the Full Court was wrong and contrary to s 407.

We have considered the effect of the pardon in the preceding section of this judgment. As explained there, during the hearing in this Court counsel for the Commissioners did not feel able to support the interpretation of the pardon reflected in those quoted statements by the Chairman. The reason why these matters have to be mentioned again when dealing with bias is that it is apparent from the decision of the Commissioners to cross appeal that during a considerable period after the Full Court judgment they wished to contend that the Full Court had been wrong about the pardon and that the quoted statements by the Chairman were right.

We have to consider whether this has a bearing on whether they appear to have reversed their previous approach as a result of the Full Court judgment, as the Full Court thought they could.

A possible trace of persistence of the idea that the pardon has a significant bearing was this. Senior counsel for the Commissioners was not prepared to assent in this Court to the proposition that, in the unlikely and purely hypothetical event of Mr Thomas wishing voluntarily to give evidence before the Commission that he had fired the bullets and ejected the cartridge case, the Commission should have received that evidence. The question had not been raised in this Court for the first time. It is specifically mentioned in the judgment of the Full Court, [1980] 1 NZLR at p 622. Normally answers by counsel to questions from the bench do not necessarily reflect the views of his clients. But in the circumstances of the present hearing it seems to us that there was ample opportunity for consultation and for taking a more definite position if so instructed. Nevertheless we wish to stress that we do not regard the present as a major point. It is only a detail in a much larger picture.

Developments after the Full Court judgment are relevant to the bias issues because of the second set of proceedings now before this Court. As mentioned at the outset of the present judgment, on 14 April 1981 proceedings relating to the Commission's report were commenced in the High Court by the Association and the Guild, Mr Hutton and Mrs M E Johnston, and these were moved into this Court by Moller J. Among other relief the applicants seek the quashing of certain findings in the report – including the finding in para 402(a) "The shellcase exhibit 350 was planted in the Crewe garden by Detective Inspector Hutton and Detective Sergeant Johnston". They claim that there has been a real likelihood or reasonable grounds for suspecting that the first respondents have been biased against the members of the first and second applicants, the third applicant and the fourth applicant's late husband during the course of the inquiry and in the preparation of the report.

It is pleaded that the Commissioners prejudged the issue of the involvement of Mr Thomas in the murders of Mr and Mrs Crewe; that they indicated a degree of partisanship during the conduct of the inquiry and in the report, by expressing opinions antagonistic to the persons already mentioned; and that they thereby rendered themselves unable fairly to inquire into and report upon the matters referred to in their commission of appointment in so far as those matters related to those persons. Particulars are pleaded. They include factors relied on in the earlier proceedings and in the appeal. They also include passages in the report itself, and rulings and other developments which occurred after the matters complained of in the earlier proceedings. Consequently the Commissioners elected not to pursue an argument of res judicata.

It is necessary to keep in mind that there are thus two sets of proceedings concerned with alleged bias. The appeal has to be considered as at the date of the Full Court hearing, and with appreciation that the appellants bear the ordinary onus of showing that the decision under appeal is wrong. The proceedings that have been removed into this Court have a wider scope. In these we have to consider the Commission's inquiry and report as a whole. The applicants have the usual onus of making out their claim, but our position as regards questions of fact is that of a Court of first instance – except that we may derive help from the views of the Full Court on any points that are common to both sets of proceedings. In argument both sets were largely taken together. It is convenient to approach the bias question in that way, but in doing so we do not overlook the distinctions just mentioned.

Counsel on both sides suggested that there is variation and even confusion in the authorities as to precisely how the test for bias by predetermination should

be put. In the case of a Commission inquiring into and reporting upon allegations of impropriety, we accept that the right approach is that put forward by Mr Eichelbaum: whether an informed objective bystander would form an opinion that a real likelihood of bias existed. This approach derives support from decisions of this Court, among which particular mention may be made of *Lower Hutt City Council v Bank* [1974] 1 NZLR 545, a case concerned with a local Council's function of inquiry into objections to the closing of a road.

In this case as in that, what is under scrutiny is not the conduct of a Court. However grave the allegations which are being investigated, under the New Zealand system of law an inquiry is different from a trial. As a Commissioner has an inquisitorial role, it is natural that he should take the initiative more freely than a Judge traditionally does. His role is to report to the Executive which has selected him personally to carry out the particular inquiry. The Commissioner is not acting as a Judge, and he is not to be expected to project the same standards of detached impartiality. The standards expected of Courts may require the application to them of a different and stricter test, such as whether there is a real suspicion of bias; but we are not now called on to consider how the bias test for Courts should be formulated. For the present kind of case, the real likelihood test is enough.

The test postulates an informed and objective observer. One important point about this is that it is appearances that matter. Often it would be impossible, and probably almost always it would be undesirable, to try to ascertain the actual state of mind of the several members of a tribunal said to be biased. While ultimately this branch of the law of natural justice seeks to ensure as far as possible true fairness, its immediate aim is no more than the modest one of trying to ensure that justice should appear to be done. And in the case of a Commission appointed to inquire and advise the Government considerable latitude must be allowed.

Accordingly we fully agree in principle with what was said by the Full Court in [1980] 1 NZLR at p 625 as to the approach to be applied:

> "Counsel were agreed that the test to be applied in determining whether this kind of bias has been established is to ask whether an observer of the proceedings would have formed the conclusion that there was a likelihood that it existed. It is also common ground that the hypothetical observer must not only be a reasonable observer but also one sufficiently informed of the nature and conduct of the proceedings to be able to form a sound opinion."

The application of the approach is less easy. Mr Tompkins relied in argument on three main factors, which he summarised as, first, the Commission's "fixed view that Thomas was innocent" – in developing his argument he associated this with the Commission's view of the effect of the pardon; second, the Commission's attitude to evidence favourable to the police and the manner in which it received such evidence; third, the report. He made it clear that principal reliance was placed on the first factor, accepting that the attitude of the Commission to witnesses was not of itself evidence of bias.

It is convenient to refer to the treatment of witnesses first. The applicants draw attention to sundry strong expressions used by the Chairman in his interrogation of police witnesses. A few examples, not exhaustive, are the following. To Mr Hutton he said: "Do you think he [the murderer] might have dug a little hole and put it [the shell case] in?" (p 134); "Is that an honest answer?" (p 137); "Who was searching, blind men?" (p 138). "Is that a serious answer or a desperate explanation?" (p 139). "Comparing the one with the other, which would occupy more space? – Naturally the axle. [Chairman] By about 10,000 times. You kept that and destroyed the shellcase" (p 141). The witness replied that he had given the reasons why he kept it. Referring to the police theory at the trials that the first of the fatal shots was fired through a louvre window, the Chairman said "Let

me put this to you, to make this theory of yours good you had to have a series of near miracles, didn't you? Wasn't it a near miracle it would be deposited the full distance, the shell on to the bed?" (p 142).

Then to Detective Jefferies, "All men of good vision?" (p. 198). "Why did you lie about it [in a job sheet] . . . Are you lying to protect Hutton in the witness box?" (p 201). "I don't understand this, are you deliberately creating lying records, is that what you are saying . . . Answer my question. Do you deliberately create lying records? — No". "It is a lying record" (p 215); "Is that one of your better days?" (p 229).

And to Police Commissioner Walton, with reference to the latter's answer that statements made by persons volunteering information inculpating Thomas would be filed away, "Under what file, fairy tales?" (p 1126).

There were also occasions when the Chairman made comments to counsel for the police, the tone of which not surprisingly caused concern and even occasionally offence. We give some examples, again not exhaustive. A comment about proposed evidence from prison inmates allegedly inculpating Mr Thomas was "There must be a limit to the ratbaggery, if I may use that word, that we can entertain on this Commission" (p 664). And again "If the police wish to go on and question a man in this condition we shall not prevent them at this stage, but we do say, in light of our expressed opinion, we will be amazed if that course is taken . . . I would not have thought there would be such a thing as a right time . . ." (pp 1652-1653, comments to Mr Fisher, junior counsel for the police, on their wish to call evidence from a prison inmate, with a history of mental illness, of alleged confessions by Mr Thomas). "If it had been left to me, and I speak only for myself, the gentleman who I am charmed to have met, would still be in England" (p 2976, an observation during the evidence of the Home Office expert, Mr Prescott).

The applicants acknowledge that the witnesses and counsel subjected to such questions and comments were experienced in Court proceedings and able to look after themselves. But they say that evidence supporting the Commission's attitude that Thomas did not do the acts that constituted the crimes was received courteously with a minimum of interruption and with apparent acceptance; whereas evidence to the contrary was "often but certainly not invariably" received discourteously with frequent interruptions and a general air of disbelief. They speak of a derisory and antagonistic attitude to police evidence. Counsel who appeared for the police at the inquiry certainly felt that there was such an attitude, and at one stage withdrew from the hearing on that account, later to return. In argument in this Court Mr Tompkins, rightly we think, did not seek to lay major weight on that episode or on the contemporary reactions of counsel handling a difficult case. He asked rather for a detached assessment.

It is trite to say, but perhaps it needs to be said again, that to maintain public confidence in any kind of adjudication justice must be seen to be done. While we have accepted that inquisitorial tribunals, such as this Commission, are not subject to quite the same strict responsibilities as Courts, it is obvious that they should be scrupulous to avoid any appearance of real unfairness. We need not labour the point.

How what happened in the present case is seen depends on the observer's point of view. Admirers of the Commission's conclusions and methods would characterise them as robust, forthright, fearless, probing and the like. Others might well deprecate the Chairman's comments in such terms as offensive, overbearing, intemperate, one-sided. It is partly a matter of individual style; allowance has to be made for a habit of colourful speech. Moreover, while the role of this Court regarding the facts of the police investigation into the Crewe murders is a very limited one in these proceedings, it is evident that some of the police evidence is at least open to the adverse views taken by the Commission. Evidence which the Commission genuinely saw as seriously unsatisfactory tended to provoke, almost instantly, strong reactions.

The mere fact that conduct is open to the second of the two views abovementioned is disquieting. But before this Court can intervene it must be satisfied that a reasonable and objective observer would have thought that, at the crucial stages when findings were being made, there was a real likelihood of bias. Certainly he would deprecate a good deal of what was said to witnesses and counsel. But he would remember that different people have different ways of going about the same task, though equally conscientious, and that probing of the police and other evidence was called for by the terms of reference. Also that first reactions are not always the same as final judgments. So we do not consider that he would see the Chairman's questions and comments as themselves showing a real likelihood of ultimate bias. Nor, we repeat, did Mr Tompkins so contend. The real question raised by his submissions is whether the observer would see the manner in which the police case was approached by the Commission as simply one symptom of a deep source of predetermination, namely the Commission's attitude to the pardon.

As the complaint is of bias by predetermination, we should say something more about what this means and what it does not mean. Emphatically, there is no allegation against the good faith of the Commissioners. Their motives are unquestioned. They are of course distinguished men of complete integrity. Nor is there any suggestion that any of them had the kind of close association with a party or direct personal interest in the outcome that could in advance have disqualified him from acting as a Commissioner. The starting point is that they are assumed to be capable of evaluating and determining the issues fairly and with minds not closed to argument.

What is said against them is, in part, that until the Full Court judgment they misunderstood the law about the effect of the pardon. But the complaint is of more than a mistake of law, which would be reversible. It is that, quite apart from that initial mistake, their strong views about the status of the pardon, and the unfairness in their eyes of an attempt by the police to go behind it, would be seen by an informed observer as colouring their whole approach to the inquiry and the assessment of evidence; and as significantly lingering on even after the Full Court decision.

Before a Court would be justified in finding a complaint of that kind against Commissioners proved, the evidence against them would have to speak with a loud, clear voice. A tribunal cannot sit on the fence forever. It must reach a conclusion. It must take sides in the end. There is no reason why it should not express tentative views. That is done everyday in the Courts. And in inquisitorial processes it may be reasonable and in some cases necessary for the tribunal to confront witnesses with the possibilities; to probe vigorously in order to get at the truth. The airing of views by the Commissioners during the hearing was not necessarily to prejudge the issue, for it does not follow that other views and the evidence already admitted or to be admitted would be disregarded at the end of the day. Nor is it vitiating predetermination to form and act on a view of the facts or the law which some other person or the Court thinks wrong. Where the Court can and must intervene, for example, is where the tribunal demonstrates by its utterances and conduct that it has adopted a fixed view, ceasing to be amenable to proper argument. Has it been established that the minds of the Commissioners were foreclosed in that way; or that it would have appeared to a detached informed observer that there was a real likelihood that they would not bring, or did not bring, to the resolution of the questions arising under the terms of reference fair and unprejudiced minds?

The pardon was granted on 17 December 1979. The Commission was appointed on 24 April 1980. Possibly those who pressed for such an inquiry, and even those who authorised it, did not fully take into account that inevitably the inquiry must to a large extent become the equivalent of another trial of Mr Thomas. For its main purpose was to inquire into whether the police had planted the cartridge case, exhibit 350; and to resist that allegation the police would naturally seek to

show that it had been ejected from the rifle of Mr Thomas on the occasion of the murders. So any evidence tending to show, directly or indirectly, that Mr Thomas was at the Crewe house on that occasion was undoubtedly relevant to the inquiry. And logically this would extend to any evidence indicating that he had motive or opportunity to commit the killings.

It should be said at once that, as Mr Eichelbaum rightly stressed, and as Mr Henry (senior counsel for the police before the Commission) substantially accepted in cross-examination in this Court, the Commission did not in the end exclude any relevant evidence. Moreover, from time to time during the inquiry the Chairman made statements to the effect that any relevant evidence tendered would be received, no matter whether or not it might tend to show that Mr Thomas fired the fatal shots.

The difficulty is that from the opening of the inquiry onwards the Chairman also made a considerable number of statements inconsistent with that approach. These statements were to the effect that in some way the pardon was relevant to the question of police impropriety; that Mr Thomas was factually as well as legally innocent; and that the inquiry was not a third trial of him. The Chairman and another member of the Commission were highly critical of the police for continuing, after the pardon, to seek evidence tending to point to Mr Thomas as the person who fired the shots. It is not, we think, an overstatement to say that their questions and remarks showed that they felt strongly on this matter and were indignant at what they regarded as oppressive police tactics. The Chairman even went on television, broadcasting his views to the public in forceful language. He spoke of the police actions as "indecent". Next day at the inquiry itself Mr Gordon spoke of them as "morally wrong".

There is nothing before the Court to suggest that those strong feelings of the Commission ever changed. It would be unrealistic to suppose any fundamental change. Senior counsel for the Commissioners, in powerfully presented submissions in this Court, brought home to us how deeply they had deplored the actions of the police in what they regarded as unfair harassment of Mr Thomas.

References to the pardon by the Commission during the hearing of evidence, however, virtually ceased once the 1980 High Court case was commenced. And in that case the Full Court held that the pardon in no way limited the ambit of the Commission's inquiries pursuant to its terms of reference; and that it would be wrong in law to exclude evidence otherwise relevant to any term of reference on the ground that it might tend to implicate Arthur Allan Thomas in the killing of David Harvey Crewe or Jeanette Lenore Crewe, or on the ground that it was circumstantial or indirect evidence.

On 1 September 1980 the Chairman announced that the Commission had received the High Court judgment and would take time to consider it. He asked that any submissions as to its consequences be made in writing as early as possible. No such submissions were made, and indeed the judgment speaks for itself. The Commission received certain evidence which they had previously ruled out; it related to a comparison of wire found round the bodies and wire on the Thomas farm, and to incidents in the life of Mr Thomas regarded by the Commission as remote and indirect but contended by the police to support the view that he had a motive for the murders. Further, the Commission on 10 September received in evidence the whole of the transcript of the second trial.

On 22 September in the course of the address of Mr J H Wallace QC, counsel for Mr D S Morris, Crown Prosecutor at the Thomas trials, the Chairman said that the Commission had "always ruled" that relevancy was the only test for the admissibility of evidence as to the alleged planting; that it was immaterial whether the evidence "incriminated the police or exculpated Thomas" (p 2782); and that having been told by the High Court that they were wrong not to accept evidence

about the wire or the so-called motive, the Commission had accepted all the evidence at the second trial tending to show that Thomas was at the Crewe house on the night of the murders.

On 30 October at the request of counsel for the police the Commission reconvened to hear the evidence of Mr Prescott, a Home Office forensic scientist. Manifestly this was important evidence in that he expressed the opinion that it was highly probable that the bullet found in Jeanette Crewe's body came from the rifle owned by Mr Thomas. When it came to the turn of Mr Henry for the police to question Mr Prescott, Mr Henry sought to bring out specifically Mr Prescott's reasons for his opinion. The questions and answers with interruptions occupy eight pages of transcript (2971 to 2979). The Chairman indicated impatience at Mr Henry's approach, saying that it was "burning daylight", that the matter was a "dead duck" and that Mr Prescott's opinion was really no different from that of his predecessor, Mr Price, who had put it in 1972 that the rifle "could well" have fired the fatal bullet.

After an adjournment Mr Henry asked whether the Commission accepted Mr Prescott's conclusion themselves, as opposed to his having given his opinion. The Chairman said Yes, and the other members made observations to the same effect (although those of Mr Gordon are a little less specific than those of Archbishop Johnston). Mr Henry accordingly desisted from asking questions to develop Mr Prescott's reasons, believing that he had an assurance from the Commission.

The Commission's report, dated 11 days later, contains few references to the pardon and only one to the High Court proceedings – and that in the part dealing with compensation, not in the part dealing with the alleged planting. This comparative silence in the report is perhaps a little surprising in itself. Bearing in mind the at times stormy and controversial history of the Commission's proceedings, and the emphasis that the Commission had given to the pardon in the earlier stages and on television, it might have been expected that the Commission would have been at pains to make it explicitly clear that they had approached their report on the basis established as correct by the Full Court.

The furthest they go in that direction, however, is in para 35, where they say regarding the planting issue "We do not wish there to be any suggestion that we have excluded from our consideration any evidence *which the Police, or any other party for that matter, considered relevant to this or any other issue.* We admitted, subject to relevance, the whole of the evidence given at the second trial . . .". The words that we have italicised stop short of indicating the Commission's own criterion of relevance.

One of the few explicit references to the pardon in the report (para 280) apparently harks back to their criticism of the police during the hearing for not accepting it – criticism which the Chairman had voiced forcibly to Commissioner Walton and other officers. The reference is "It was but another instance of the Police being unwilling to accept the pardon". The paragraph is concerned with the evidence of two prison inmates, which the Commission dismissed as "a tissue of lies", that Mr Thomas had confessed. The Commission express "grave concern that very senior Police officers were so obviously ready to place credence on such unreliable, self-interested, and, in the case of the first inmate, deluded evidence". As an example of the kind of police evidence to which the Commission was apparently alluding, we note that Detective Inspector P J O'Donovan said of the inmate last mentioned "And although I agree he was an inveterate liar, I felt that there was an element of truth in what the man had told me" (p 1688).

The opinion that this man had been telling the truth had been expressed by Detective Inspector O'Donovan in a report dated 30 October 1978; that is to say, more than a year before the pardon. The man had initially told the police of the alleged confession in February 1978. In January 1980, after the pardon, Detective Inspector O'Donovan was sent to Christchurch to interview him in prison again.

The Chairman had been strongly critical of the police, in his questions to the Detective Inspector during the latter's evidence, for seeking to confirm the inmate's original story after the pardon (pp 1685-1686, "Confidential" part of transcript). The criticism in para 280 of the Commission's report appears to go further by suggesting that the opinion held by senior police officers of the inmate's account should have been altered or influenced by the pardon.

With regard to Mr Prescott's evidence, in substance the Commission's report correctly records his opinion. (In para 235(a) it does say that his view was that it was highly probable that the Thomas rifle fired the fatal bullets recovered from Jeanette Crewe. This use of the plural "bullets" does not appear to be strictly accurate, but the inaccuracy is of no importance for present purposes.)

The report goes on, however, to make various points apparently tending to discount Mr Prescott's opinion, including a reference to "the rather myopic criteria" adopted by the police in collecting rifles for testing. The section ends with a paragraph in which the Commission "conclude that it is not proved that the Thomas rifle fired the fatal bullets". They add that in any event persons other than Thomas could have used the rifle. The report does not state that the Commission accepted Mr Prescott's conclusion that it was highly probable that the rifle fired the Jeanette Crewe bullet.

Mr Eichelbaum said to us that the Commission meant that it was highly probable but not proved beyond reasonable doubt. The relevant paragraphs in the report are set out in full in the appendix to this judgment. The question that arises is whether an objective observer would understand the report to indicate that the Commission had accepted Mr Prescott's conclusion, merely adding a refinement about the standard of proof; or whether he would think, comparing the report with what had occurred when Mr Prescott's evidence was given, that the Commission were experiencing some difficulty in dealing with that evidence fairly.

The other passages in the report calling for some mention in this outline are in the part relating to compensation. After quoting the terms of the pardon, s 407 of the Crimes Act and an extract from the Full Court judgment, the Commission say that they approach the question of compensation in the light of the Full Court guidance and their own findings. They continue "The pardon alone makes it clear that Mr Thomas should never have been convicted of the crimes, since there was a real doubt as to his guilt. He should accordingly have been found not guilty by the juries" (para 482). They add that their own findings go further: the police should never even have charged him, the conviction was obtained by false evidence. In their context the words from para 482 just quoted seem to suggest that the terms of the pardon (which included ". . . there is a real doubt whether it can properly be contended that the case was proved beyond reasonable doubt") settled for the purposes of the Commission's proceedings that the case at the trials was not proved beyond reasonable doubt; that the juries were wrong; and that this should be the starting point from which the Commission should go on to consider the evidence.

Finally from the report it has to be noted that in para 486 there is the statement that Mr Thomas was "released by the ultimate Court of a democratic system — what Lord Denning calls 'The High Court of Parliament'". On television likewise the Chairman had spoken of the pardon as if it had been granted by Parliament. That is of course not correct. The overstatement can be regarded as trivial or mere rhetoric. On the other hand it may be said to show a tendency to magnify the importance of the pardon.

Bias

2. *Conclusions*

From a review of the whole course of the inquiry certain points stand out.

(a) It is not and could not be suggested that the Commission excluded any relevant evidence. Any limitations on the reception of evidence which they had in mind earlier in the inquiry were not applied after the Full Court judgment. The bias question turns wholly on the way in which they approached the evidence which they admitted.

(b) The Commission saw the pardon as an important decision which they should take into account, although in a way not clearly defined. They emphasised its importance more during the inquiry and before the Full Court judgment, but their report contains indications that they had not changed their basic thinking. In particular they had felt very strongly that because Mr Thomas had been pardoned it was wrong for the police, even in resisting allegations of impropriety, to try to show that he had fired the fatal shots. There is no evidence, and no likelihood, that this feeling on the part of the Commission ever changed. There is some positive evidence in the report that it persisted.

(c) This feeling led to regrettable developments. The most unfortunate were the Chairman's television statements. It is unthinkable that in the midst of trying a case a judicial officer should broadcast his views on the law to the general public and criticise the conduct of one of the parties as indecent. It is our duty to say that it is undesirable for a Commissioner to do so. The fact that the views of the law broadcast on this occasion were wrong only makes the matter worse. Having said those things, we repeat that a Commissioner has more latitude than a Judge. The Full Court thought that the Commission's approach was not irreversible, and that bias by predetermination had not been established at the stage at which that Court was considering the case. On a question of this kind, where a great deal depends on discretionary evaluation, we are not prepared to say that the three Judges in the Full Court were wrong. Accordingly the appeal must be dismissed.

(d) It is also regrettable that the Commission treated Mr Prescott's evidence as they did: indicating when it was given that they accepted that it was highly probable that the Thomas rifle fired the fatal shots; yet in their report not saying that, but bringing up arguments against it. We do not overlook the submissions of counsel for the Commissioners to the effect that they were merely making a point about the onus of proof. But we do not think that the ordinary reader of their report, or the objective bystander, would see it so. Rather, reading the report as a whole, he would think that its tone could well have been very different if the Commission had taken the approach that it was highly probable, although not proved beyond reasonable doubt, that the Thomas rifle had been the murder weapon.

The way in which the report disposes of Mr Prescott's evidence appears to reflect a concern to protect Mr Thomas, as the Commission go out of their way to add that his rifle could have been used to commit the murders by someone else. But that does not advance the allegation of planting against the police, as the use of the rifle by the murderer, whoever he was, for the fatal shots would make it more likely that at about the same time he also ejected the cartridge case exhibit 350 from the rifle. We note here one of the possibly important matters apparently still unexplained. The evidence of Mrs Priest, who undoubtedly appears to have been regarded by the Commission as a reliable witness, was that she heard three shots on the night.

On the other hand Mr Prescott's evidence, even if accepted unreservedly, is certainly not inconsistent with the possibility that the case was planted. So the rather disturbing treatment of his evidence does not undermine the whole report.

Those four outstanding points have to be weighed with what has dominated the whole Thomas case since 17 December 1979, namely that the Government had granted him a free pardon on the ground that the case against him had not been proved beyond reasonable doubt. The pardon directed "all others to whom it may concern" to give effect to it. The pardon was recited early in the Commission's terms of reference. Naturally enough the terms do not include the question whether the pardon had been rightly granted. It is understandable, too, that the Chairman in his prepared statement at the opening of the inquiry should put the pardon in the forefront of his remarks. Obviously the Commission appreciated the risk that the police would try to turn the inquiry into a third trial of Mr Thomas. No less obviously, that would mean an indirect challenge to the pardon. The truth is that, once Mr Thomas had been pardoned, any Commission of Inquiry into allegations of police impropriety was in a position of extreme difficulty.

The part of the case concerned with alleged bias is finely balanced and has caused us anxiety. In the end we have come to the following conclusion. An informed and objective observer, called upon to say whether there was a real likelihood of bias on the part of the Commission, would take into account the facts just mentioned in our last paragraph. We think that he would see, as we ourselves see, that this Commission was faced with a task that must without exaggeration be described as extraordinary. He would regard the Commission's view of the importance of the pardon as understandable, even if illogical, rather than as indicating bias in the ordinary sense of the word. Bearing in mind, not only those considerations, but also all the evidence suggesting that exhibit 350 may have been planted, we do not hold that the objective observer would have thought that there was a real likelihood of bias. In short, we hold that the police had reasonable grounds for issuing the proceedings that have been removed to this Court, but that on balance the case is not clear enough to justify a finding that they have discharged the burden of proof.

The overall result of the case is accordingly that the appeal and the cross-appeal are both dismissed, and so are the various applications in the judicial review and prerogative writ proceedings. All questions of costs are reserved.

Appeal, cross-appeal and application for review dismissed.

Solicitors for the appellants and applicants: *Nicholson, Gribbin & Co* (Auckland).

Solicitors for the first respondents: *McVeagh, Fleming, Goldwater & Partners* (Auckland).

Solicitor for the second respondent: *K Ryan* (Auckland).

Solicitors for the third respondent in the appeal: *Brookfield, Prendergast & Co* (Auckland).

Solicitor for the fourth respondent in the appeal: *Legal Officer, New Zealand Police* (Auckland).

Solicitors for the fifth respondent in the review proceedings: *Crown Law Office* (Wellington).

Appendix

The Commission's statements

In this section we reproduce without comment and in chronological order the main statements by the Chairman and members of the Commission, during the hearing and in the report, whose impact has to be assessed in deciding whether there appeared to be a real likelihood of bias.

21 May; Opening Statement of Chairman
(pp 1 to 2 of transcript)

To all people present in this hall and indeed to all the public of this nation I wish to make it clear what, in our view, these terms of reference involve.

Mr Arthur Allan Thomas was, on 17th December 1979, under the signature of Her Majesty's representative, the Governor-General and the Minister of Justice, granted a free pardon in respect of his conviction for the murder of David Harvey Crewe and Jeanette Lenore Crewe. The effect of this pardon was by virtue of the provisions of section 407 of the Crimes Act, that Thomas was deemed never to have committed the offence and it follows that in law and in fact he is to be treated as a person who never was guilty of that offence nor did he do the acts which constituted the crime.

You will readily perceive from this that no question of the guilt or innocence of this man can ever again arise, nor can it ever be asserted that he did the acts that brought about the death of these people. The slate has been wiped clean. He stands in law precisely where he stood before these acts were committed. It is appropriate to point out that he has always asserted his innocence of this offence and denied any complicity in the acts that brought it about.

The duly elected Parliament, through its responsible Minister, exercising its ultimate powers, have in effect overruled the decisions of the Court and this has been done to correct what Parliament no doubt felt was a wrong that this man has suffered.

I say this for the purpose of making it clear that in no sense is this Commission to inquire into any question of Thomas's responsibility for the death of these people or for the doing of the acts that brought about this crime. There will be no third trial of those issues before this Commission or anywhere. Thomas's position in law is in fact as I have stated. However the Parliament has concerned itself with the system of administration of criminal justice in the Courts. It has, as I understand it, in effect said, "If our system was working properly then the necessity for a pardon should not have arisen" and we are called upon to inquire whether or not there was some defect in the functioning of the system in relation to the investigation of these crimes. . . .

9 June; Submissions of Mr Henry and Mr Williams
(pp 19 to 29)

MR HENRY: If the Commission pleases, there are some preliminary points I wish to raise following Mr Keyte's opening address to the Commission. In the course of it he has indicated it is the intention to deal with the terms of reference separately, commencing with that part of item 1(a) referring to the cartridge case, exhibit 350. The reasons for such a procedural approach are appreciated but moving straight into that issue makes it necessary for me at this juncture to ask the Commission, because I won't have the opportunity of giving a formal opening to it, to bear carefully in mind three matters as the evidence which will be called on this aspect is put before you.

1. The circumstances of the finding of exhibit 350 cannot properly be considered, particularly now some 10 years after the event in isolation, but only in the full context in which they existed in 1970.

THE CHAIRMAN: What do you mean by that?

MR HENRY: I mean that the Commission will need to have a knowledge of the development and the changing facets of the investigation, and the emergence of facts as it proceeded from 22 June, right through to 27 October, when the case was located. Without that full picture, it is my submission that the Commission cannot reach a proper conclusion on this issue.

THE CHAIRMAN: I think you will perhaps have to be more explicit than that. If you mean emergence of facts which bear directly on this question of 350, well no doubt of course we will. But I do not know what you mean by the full picture. Do you mean we have to take into account all the evidence, all evidence which does not go to this question of this finding.

MR HENRY: What goes to the question of the finding is the whole circumstances of the investigation as it proceeded. Unless you have that before you, you cannot properly look at the circumstances in which it was found.

THE CHAIRMAN: What do you mean by that? Say eg there is a question arising in this case, whether some witness saw a little girl at the gate at a certain time, has that anything to do with the finding of this exhibit 350?

MR HENRY: No Sir.

THE CHAIRMAN: As long as it is limited to facts which bear on this finding that took place, I suppose we will be given them all. I suppose we will be given evidence of the scene —

MR HENRY: I am uncertain just what in its totality is being put forward to the Commission under this head. I have not seen the briefs, other than the police ones we have prepared and forwarded to Mr Keyte. I am anxious the Commission and each of its members understand that the finding of 350 has to be taken in its full context. That is my point.

THE CHAIRMAN: I think we are all well aware of that Mr Henry. If you mean by that we should not consider it until we have heard all the evidence, certainly we won't. That is all relevant evidence and bears on this issue, but we are doing this in this departmentalised fashion because that is the logical way of doing it, because the terms are self-sufficient.

MR HENRY: I just wanted to make that point, there are probably only two real alternatives on this issue, either the police manufactured this piece of evidence, or it was ejected from the Thomas rifle on the evening of 17 June 1970. It is my strong submission that all, and I stress the word all, evidence which tends to establish the latter of those two alternatives, must be relevant to this issue, and must be taken into account by the Commission in its determination.

MR GORDON: Would there not be a third alternative that somebody, other than the police, manufactured the evidence?

MR HENRY: That is a possibility Sir, but it would seem fairly remote.

THE CHAIRMAN: When you say it was ejected from the Thomas rifle, as I understand the counsel assisting's opening, it is a fact that what was found there was ejected from the Thomas rifle.

MR KEYTE: Yes, that is the way I opened, and I think it is common ground between everyone in this room that the scientists are satisfied as a matter of scientific comparison and analysis that 350 can be shown to come from the Thomas rifle. The firing pin from the rifle corresponds with the firing pin impression on the cartridge case.

THE CHAIRMAN: That would seem to overcome your difficulty Mr Henry.

MR HENRY: No Sir. The Commission under this head will need to take into account all evidence which tends to show that the cartridge case was ejected on the evening on 17 June 1970. And I mean all evidence.

MR CHAIRMAN: I gather that the Crown will be putting forward all the evidence it has on this matter.

MR HENRY: Yes, if you have any other evidence.

THE CHAIRMAN: If the Crown is not putting it forward you can take the course I indicated.

MR WILLIAMS: From what Mr Henry said, he would seek leave to adduce evidence that might relate to the proposition that the shell case came from the Thomas rifle on the night of the homicide, it is only a step from that to seek evidence that it was Mr Thomas who fired the rifle, which would turn it into a retrial.

THE CHAIRMAN: That is statutory and inadmissible.

MR WILLIAMS: That does not flow from that?

THE CHAIRMAN: There will be no retrial. I can see the difficulty in drawing the line, and it will be very difficult.

13 June; Examination of Mr Hutton by Mr Henry
(p 87)

Now may I turn to the 2nd search. To get this in context, in your evidence. I think that you say on page 6 that you ordered this second search immediately it became known to you that Jeanette Crewe had been killed with a .22 bullet – Yes.

Would there be a job sheet for this instruction you gave on that occasion – There would be no job sheet concerning any instruction from the OC.

16 June; Statement of Chairman
(p 124)

THE CHAIRMAN: I have considered over the weekend the tendered report which was made at the last conclusion of the proceedings on Friday. That report is rejected. It is a report prepared apparently at the instigation of the Assistant Commissioner, Mr Walton, from his offices, as to the question of whether or not exhibit 350 was said to be found or whether it was planted. That is a matter which is a direct requirement for the Commission to inquire into. The preparation of reports by other people, the expression of opinions of police officers concerning this report, are not on this issue acceptable evidence. The evidence in this issue will be called from the witness box viva voce, and will be subject to the usual test of cross-examination. The report is rejected.

MR HENRY: If I may address you on that Sir.

THE CHAIRMAN: No, you may not. I have rejected the report. I have refrained from saying anything about the last paragraph in it.

MR HENRY: I would have hoped the Commission might have heard me on it prior to rejection.

THE CHAIRMAN: No, this is hearsay evidence, and I am not going to receive it; the matter is concluded.

16 June; Cross-examination of Mr Hutton by Chairman
(pp 125 to 138)

Let me quote to you the conference on 19 October, which is the last conference here recorded. "Conference considered that apart from Thomas and Demler from the inquiries there does not appear to be any other person remotely involved. Conference concluded that every effort must be made immediately either to confirm Thomas as a suspect or exclude him altogether from the inquiry." – Yes.

THE CHAIRMAN: Doesn't that mean that at that time you were considering the question of whether or not he should be dismissed as a suspect on 19 October? – Not dismissed, because we had found some of the timber from that –

I am not asking what you found, I am asking what that means. "Conference concluded that every effort must be made immediately either to confirm Thomas as a suspect or exclude him altogether from the inquiry". You had to get further evidence from him than what you had on 19 October, or he was not even a suspect; that is right isn't it? – Not exactly a suspect.

That is your words. – There was a suggestion of a suspect. The next day there was the search warrant and the tip was searched.

You must not be evasive. You must answer my questions directly, otherwise I will be loath to accept you. Does this correctly record the conclusion to which conference had come on 19 October? "Conference concluded . . . from the inquiry." – That is correct.

That means if you did not get more evidence Thomas was out, doesn't it? – No it does not.

Doesn't it mean that – what do the words "exclude him altogether from the inquiry" mean? – Confirm him or exclude him.

Confirm him as a suspect. – Find other evidence as to how this trail came to be on the farm.

Find other evidence to implicate him further on the crime, or he was no longer a suspect. That was the frame of mind on 19 October. – Don't define my frame of mind please.

Did you attend these conferences? – Yes.

Detective Inspector Hutton, the senior officer there. – Yes.

What went down at the conclusion of the conference was at your dictation. – There is the shorthand typist present.

Who said at the conclusion of the conference "Every effort must be made . . .". Who said that? – I don't remember. If it is down there as I said it, I said it.

If it is down there at all, you as the person in charge of the conference, the senior officer there, held that opinion. – I held that opinion, and as I have told you, either confirm or exclude him.

As a suspect. – For the inquiries, certainly.

. . .

Would you tell me this. You decided at some time in October having heard a theory propounded by Det Sergeant Johnston, to test that theory out. – Yes.

That was a theory put forward by Johnston that the bullet that killed Crewe was fired through the open louvre windows. – Yes.

Of course from where the bullet was fired has no significance – alone that is – as to the identity of the murderer. Wouldn't advance it at all. – Not really, no.

It is only of course if the firing of the bullet produced some evidence like a shell that from where it was fired was significant. – The evidence against the offender, yes.

Up to 19 October, or the date that Johnston put this theory forward, you have already told me the police theory was and all the searches were conducted on the basis both these people had been murdered by shots fired inside the house. – That is right.

This theory of Johnston's was somewhat startling, wasn't it? – Yes.

It involved the proposition that on the night in question the louvres were open. – Yes.

That was startling wasn't it? – Not when you look back at photographs.

Never mind the photographs. What about the weather. Do you remember that night, it rained and blew, and there was a 30 mph gale. – I don't remember the night, but I remember the inquiries. The louvres were open, or could have been.

THE CHAIRMAN: The weather was described as diabolical. – It was winter weather.

It involved of course, accepting as a fact Crewe and his wife would be sitting in front of the fire, no doubt to get warm, and behind them would be three louvres open with a howling wind outside, and rain and sleet. — Open, or able to be opened.

No open. It had to proceed on the basis they were open. — No sir.

Where did Johnston ever advance to you they could have been opened if they were closed? — He did not have to do that surely. That is the purpose of reconstruction.

If they were open how far were they open. — I am only guessing, surely.

You did the reconstruction. — Anything from ¼ inch to 1 inch.

In the reconstruction were they open ¼ inch? — Yes, we tried from all angles.

I am not talking about angles. I am asking you to what extent were they open; you said ½ inch. — At one stage, yes.

Dr Nelson stood with one foot on the window sill and the other on the top of the parapet, and aimed the rifle through the gap. — That is in the shoot. We tried different positions.

So the Johnston theory had to be the louvres were sufficiently open to allow a rifle to be fired through, to allow a bullet to hit a man in the chair. — Or opened to that.

Is that what he suggested to you, they were closed or could have been opened. — He did not suggest that at all.

Didn't he suggest he could have been shot through the open louvre windows? — At the time of firing.

The police photographs show the louvres open. — That is the way we found them.

You said you did not know they were open. — I did not notice that.

Your did not notice that for something like 60 days. — The other experts did not either.

THE CHAIRMAN: Never mind experts, ordinary humble people like constables did not notice it either. — No.

But Johnston put to you it was a theory he could have been shot through the open louvre windows. — Yes.

. . .

So they are wide enough to get your fingers in. . . . You had the louvres in the position you could put your fingers in, pull them up. — Yes.

Did you think that was a fair reconstruction as to how they would be on this night? — Yes.

THE CHAIRMAN: It did not occur to you that on this night with this weather they would be securely locked? — They could have been, but they could have been opened by the offender afterwards.

If they were securely locked, he could not have opened them. — No.

Doesn't that make nonsense of your reconstruction? — Whether or not they were locked.

Whether it ever took place that way. If you assume they were unlocked, that they were sufficiently open for the person to open them from the outside. — As long as they are in the unlocked position they can be opened.

You have to assume that. — Yes.

And you have to assume they were open wide enough to get a sighting from the rifle. — Yes.

Until they were open he could not tell where Crewe was. — Yes he could. He could see from the window immediately behind Harvey Crewe's back.

With the light on. – Which light.

The light outside. – No, the light inside, he could see through the window.

You would have to assume of course that in that situation he opened them. – He could also see from the back steps.

As soon as he opened them there would be a draught of cold air would go into the place. – I don't know sir.

Is that an honest answer. – There would be a movement of air.

What sort of movement on this night with a 35 mph wind blowing in that direction, it would be a rapid movement. – If it was going straight in that window, yes.

Wouldn't that have attracted Crewe's attention. – It is possible yes.

If he had made any noise opening these, that would have attracted his attention. – That is possible.

It would have been much safer from the murderer's point of view to go in the kitchen door softly and shoot him from there, standing in the kitchen, or through the telephone hatch.

MR HUTTON: Not from the telephone, that is impossible. The trajectory of the bullet where it entered above Harvey Crewe's ear, came out his ear hole on this side, the trajectory of the bullet itself dispels that.

THE CHAIRMAN: That would depend where his head was when it was fired. – Whether he was standing up or sitting down, but it would not account for the trajectory of the bullet when it entered his head.

But you won't have a bar of the theory that both these shots were fired from the inside. – Not on reconstruction.

Because if they were 350 was planted. – I don't accept that and I have already explained it. It is pure guesswork.

17 June: Evidence of Detective Inspector O'Donovan
(pp 189 to 190)

FISHER: Was there a formally recorded conference on 19 October 1970 at which you and Mr Baker summarised your views on the case. – Yes.

I ask the leave of the Commission to produce as an exhibit the conference file which contains the police conference.

CHAIRMAN: If that was a complete file I would accede to it but it is evident it isn't. He has told you his views. They were to summarise that these detectives had become preoccupied with Mr Demler and not open to any other suspect. Is that fair?

WITNESS: Yes Sir.

FISHER: The reason for the conference file produced as a formal exhibit is that it is evidence of the points of time at which the police knowledge and think was developing.

CHAIRMAN: That is not relevant. This is an enquiry to a part phase, the discovery of exhibit 350.

FISHER: The Commission may think the stages at which police took part view of the case and evidence to corroborate that would be helpful to establish this term of reference as showing the times at which the police had the knowledge to do certain things. If you rule that the conference notes may not be produced as an exhibit.

CHAIRMAN: I am not prepared to allow them to be produced at this stage. You can refer to any particular one of them. I reject them.

FISHER: Can I ask whether in respect of the other homicides you have been involved in have any of those other cases involved the preparation of formal conference notes in a written form. — They have.

CHAIRMAN: I am unconcerned with other homicides, not even this one. Only the matters in our terms of reference.

FISHER: Do I take it from that ruling that I am precluded from asking about the practice as to the decrease in the number of conference notes formally recorded as an enquiry progresses.

CHAIRMAN: You are precluded from asking about other homicides. It has been asked of the man who kept the notes and he has given reasons.

FISHER: Go now to the question of qualification courses for detectives you have run.

CHAIRMAN: What has this to do with us. How does it bear on term 1A whether there was any impropriety . . . Exhibit 350 or any other matter.

FISHER: My question just was can I take you to the question of detective qualification courses you have run.

CHAIRMAN: How does that bear on what I read out.

FISHER: If permitted to say I would explain what this witness would say on the topic.

CHAIRMAN: I don't propose to receive the topic of qualification courses for detectives.

FISHER: I wish to explain the relevance of this evidence.

CHAIRMAN: You have convinced me it is not relevant.

CHAIRMAN: I rule this matter does not concern us.

17 June; Evidence of Detective Sergeant Jefferies
(pp 216 to 219)

You see why I am putting these questions to you. First of all in an endeavour to find the truth. It seems to me a remarkable trend had developed in this case. I would have thought at this stage, or at any stage, you were responsible police officer skilled, honest and reliable engaged in endeavouring to solve a brutal murder of 2 people. But you would not have been prepared to be slovenly, to skimp your work and not to do it to the very best of your skill. That would have been my approach to the police evidence in this case, and that is the evidence I expected to hear. Ever since police evidence started there has been constant thrust from their counsel to create the opposite impression, to minimise the skill of those engaged in, to suggest they didn't care very much about their task, that things were done badly, with the result, that the most important evidence in this case, was never discovered. You tell me why that should be so. — A human failing.

That is exactly what happened to your evidence. You are on the record as a man having done his job, who on 18th searched every ground, sieve searched every ground, which is what a proper search would involve for a shell to have been missing since 4 months what a proper search would have involved. Do you find some trouble in answering that. — No.

Answer that. — That is correct.

How does it come about you are not in a position to concede that your search wasn't proper. You don't know. — From the reconstruction I was instructed to do a certain area and carry out those instructions.

Is it because it no longer suits police to have this search done properly. Isn't that the position. — No.

. . .

XXD MR HENRY

I was restless because of your inference in the remarks that counsel were responsible. — I wasn't referring about counsel.

The remark I am referring to was thrust by counsel. — I made no reference to counsel I am talking about police officer talking about testimony.

Did you understand me to be referring to counsel. — I understand it to be referring to counsel and to the police generally.

I had no intention of doing that. I was asking you question. As a responsible police officer, when I asked you about doing this work properly you knew I was referring to the police officer. — I don't know.

Who else. — The inference was the police. That inference came out loud and clear.

I ask you the question again. Are you aware that there has been in the witness box, given by policemen a deal of evidence that tends to show that this task was not done as efficiently I am not only referring to, it was done in a slovenly fashion. — I haven't been present in Court, I heard this inference.

Do you agree in the record you made, that you recorded the search as being done properly. That is so isn't it. — Yes.

Now you saying it was not done properly. How does that come about. — I consider it was done properly as I was directed to do.

Are you not aware other police officer developed the same tendency. To disclose parts of the investigation were done slovenly, or not properly. — It is very easy to criticise it at this stage.

If I said it had no intention of involving counsel you know that, how could I involve counsel, they didn't give any evidence.

MR HENRY: Clear inference, counsel was involved.

. . .

18 June; pp 222 to 229

XXD MR FISHER

I wish to clear up a misapprehension which has arisen regarding the police evidence in which counsel for the police were involved in. Your Honour is recorded as having said you would have thought at any stage during the Crewe investigation the police officers involved would be responsible men of skill honesty and reliability engaged in endeavouring to solve brutal murders who would not be prepared to be slovenly.

CHAIRMAN: We will check it with the transcript. It is available.

KEYTE: We have the transcript to page 144.

CHAIRMAN: This is on page 161. This covers all that was said and could be the subject of the report. "You see why I am putting . . . a human failing". That is the only occasion on which I used counsel. Clearly I meant evidence used by counsel. I include all counsel. Chairman reads next piece of transcript ". . . no suggestion sir" then Mr Henry rose and made this statement. There is no mention of counsel then.

HENRY: I was referring to the statement Your Honour made earlier as you had told me not to interrupt. Your Honour said you had not used the word.

CHAIRMAN: I will read page 161 again. "You see why I am putting these questions briefs handed up here are all directed to show that there were mistakes. Counsel drew the proofs and they are clearly directed to show that the explanation as to why it was not found is that the police didn't do their job properly". Hutton agreed it was incompetent that the police didn't notice the louvres open. That concludes the matter. I am having it checked on the tape.

HENRY: You have criticised me for not interrupting you at the point when you used the words.

CHAIRMAN: You had no right to interrupt. I never said it. The reason you interrupted was that you claimed I was saying you were party to alter that evidence.

HENRY: That is how I interpreted it.

CHAIRMAN: If that is so you are thick in the head.

HENRY: Please withdraw that last remark.

CHAIRMAN: No I won't. It had an if in front of it.

. . .

CHAIRMAN: Weren't you shown photo 7 by Mr Ryan when he asked the question. — I was.

7 only shows only the first panel of the fence. — I understood his question to refer to the whole of the garden area.

That's why he showed you photo 7. He showed a photo of a bit and you took it to refer to the whole. — It was my answer to refer to the whole of the garden.

He showed you photo 7 — Yes.

Is that one of your better days.

. . .

18 June; Evidence of Inspector Parkes
(p 236)

CHAIRMAN: I think I said earlier to our Mr Henry that you would be thick headed. I should not have used that expression, I mean you were being obtuse, would you accept my apology.

HENRY: I receive them your Honour. I do not accept them.

The hearing resumed at 11.45 am after adjournment.

HENRY: May it please the Commission, Mr Fisher and I have conferred over the adjournment, and I wish to advise the Commission that we are not prepared to be treated as we feel we have been, or to remain involved in this inquiry in the way in which it is being conducted. We feel it is obvious that we as counsel can achieve nothing to ensure that the police are fairly heard, and accordingly, we now withdraw.

CHAIRMAN: Are you suggesting they have not been fairly heard?

HENRY: I am suggesting sir that we feel we can do nothing to ensure —

CHAIRMAN: Are you suggesting they have not been fairly heard?

HENRY: I am saying nothing more than I have.

CHAIRMAN: If you wish to leave you may go Mr Henry and Mr Fisher you may go too.

25 June; Discussion on return of counsel for police
(p 371 to 382)

CHAIRMAN: . . . I want to say something about an impression that appears to be current and an erroneous impression about these proceedings. That is from what I have read in the press and at times from what I have heard there seems to be an impression abroad that this is some sort of a trial, and that there are parties to it, and that I am being unduly critical of one side to the advantage of another. This is not a trial, and I am not sitting here as a Judge. I am not discharging judicial functions, I am sitting here in terms of a Royal Commission, and our role is not a judicial role it is the role of inquisitors. We are here to inquire, to ascertain the truth of the matter the subject of this Commission. To do that we

are entitled, and indeed bound in my view, to question evidence if it appears to us to be questionable, to cross-examine witnesses if we believe they need to be cross-examined, and I make no apologies for the fact I have cross-examined, I have at times been abrupt, I have been derisive when I think evidence I have heard is worthy of that term. To those who find this displeasing I say that they will have to bear with it for the time of this Commission, because I believe to properly discharge the task I undertook, I am to do my best to find out the truth, to find out the truth from witnesses who give evidence; they need to be cross-examined and that task is given to me. It is true I have counsel appointed to assist, but that in my view does not relieve me of the responsibility if I believe what I am being told from the witness box is to be challenged, and I propose to continue to do it. I am unrepentant. I am not here to be applauded or denigrated. Criticism I don't mind, I have been putting up with it for a few years. I am here to do my duty. Now may we proceed.

HENRY: The Police have asked me to advise the Commission that they do not wish the hearing of this inquiry to be delayed unless that be completely unavoidable. They have made an express request that both Mr Fisher and I continue as their legal representatives for this hearing, a function which we are prepared to undertake. I understand sir, that the Commission is prepared to hear at this stage, submissions in respect of what we regard as important legal problems which have arisen during the course of this hearing. For those reasons I now ask leave for Mr Fisher and myself to continue as counsel for the police.

CHAIRMAN: That leave is granted Mr Henry, and may we say welcome back.

HENRY: We have a number of matters on which we would like to be heard, and they are of importance to the way in which the hearing continues.

. . .

HENRY: The second major consequence which will result from the minutes is

(b) The Commission will consider the issues on the basis that Thomas did not in fact do the acts constituting the crimes.

CHAIRMAN: You can disabuse your mind on that, because the Commission will consider the issues, the question of whether Thomas is guilty will not be considered by this Commission.

HENRY: If I can follow this through, and I am sure the members of the Commission will appreciate the point I am endeavouring to make, and which is of concern to us; it was if that be so, then the police are in an impossible position and unable to put forward a full and proper defence to the allegation of having planted exhibit 350.

CHAIRMAN: If the police to defend themselves, require to prove Thomas's guilt, and they regard that as intolerable, they will have to put up with it. They will not be allowed before this Commission to prove his guilt because the Governor-General and Parliament have said you can't.

. . .

HENRY: It is therefore submitted:

1. That the free pardon is irrelevant to the inquiry of the Commission into the facts necessary to be ascertained by it to properly answer the terms of reference.

. . .

CHAIRMAN: Let me say this to you straight away, that these are most misguided submissions, because you are determining now what evidence we will allow to be given under these various terms of reference. We have already made it perfectly clear, and we have spent days hearing evidence which goes to show that Mr

Thomas's rifle was not only on the scene, but it was the murder weapon, and we are still part heard with a Crown witness, and now a witness called at this inquiry, Mr Nelson, who will give evidence of a whole series of reconstructions, as to how this shot was fired through the window, how it killed Harvey Crewe, and how the shell, admittedly coming from the Thomas rifle, was ejected to where it was found. Is that not receiving evidence which goes to show that the Thomas rifle was there? Of course it is. I will answer the question for you. It is also evidence, which if it were not for the pardon, would go to show that Thomas fired the shot. We have been hearing that for days. You misunderstand the position. This ruling, if it was a ruling, this statement of mine to the public, as well as to those concerned, is not going to inhibit the evidence that is going to be called under this term of reference which we are dealing with. Indeed, I think four police officers have already given evidence, the whole thrust of which is to show that this bullet came from this rifle, was put there after the shot which killed Crewe was fired and which caused the murder. I don't know what other evidence there is.

. . .

CHAIRMAN: If on the other hand the shell was planted there by the police, then Thomas was not there, the rifle was not there, and Thomas had nothing to do with it.

HENRY: Quite. But surely it is necessary for the Commission to have evidence to show that the rifle was in fact there. What concerns us was the assumption, which you attribute to the effect of s 407 which means you are starting from the premise he was not there.

CHAIRMAN: Is this the real issue, that you want to lead evidence on this issue about Thomas's girlfriends when he was 15-16, about his financial affairs and so on.

HENRY: It is essential for us to lead evidence to establish he was on the property.

CHAIRMAN: What is the answer to my question — would it include that sort of evidence?

HENRY: I think it must sir, and that is inherent in my submissions to the Commission.

CHAIRMAN: Yes. Now I come back to my first point. Do you dispute we have not been receiving evidence, ever since this Commission started, some of which went to show that the shell that was found there was ejected from Thomas's rifle that night. That it contained the bullet which killed Harvey Crewe or his wife, and beyond peradventure if that is so, it was fired by Thomas. On the other hand, we have received evidence to show that that is not possible; the evidence being as you will know of course, that that bullet and that cartridge case were not around at the same time, and if that bullet did not form part of that cartridge case, then equally it is beyond peradventure it was planted there by the police. That is the way this Commission of inquiry has developed today.

. . .

CHAIRMAN: There will be trouble if you seek rulings in advance. You want me to rule now on an item we have not come to. Offhand I would say that that item entitles the police to put before the Commission, every scrap of evidence they had at that time, which pointed to the guilt of Thomas. They must be able to do that because the question is were they justified. What evidence did they have and what inferences were drawn from it. But as we have not come to it I will not give a ruling on it. I don't see any conflict between our task here and the free pardon. If evidence is relevant under these terms of reference, the fact it may also point to the guilt of Thomas will not be grounds for rejecting it.

HENRY: That certainly clarifies —

CHAIRMAN: There has been plenty so far. If it goes to a question raised by these terms of reference it will be admitted. There will of course never ever be any finding on it, nor will we hear any argument or submissions on it. I am sure you would not want to make them. You accept the pardon.

HENRY: Without reservations sir. The indications I had through Mr Keyte were that much of the evidence we considered relevant to 350 and the placing of the rifle on the property, would not be dealt with under this term of reference.

CHAIRMAN: That will be dealt with when it is tendered, but there is some evidence which appears to be quite irrelevant. I notice in the trial evidence was led to show the Crewe house at one time was burgled, once set on fire, and once a haystack was set on fire. I have been unable to find any evidence whatsoever that Mr Thomas did any of those acts, so that would not be received in evidence here in the absence of any evidence that he did those acts. I make no comment about its reception at the trial because that is not my business.

HENRY: Do I take it the Commission does not propose to make any rulings on these matters at the moment, and we can adduce such evidence we think relevant to these issues.

CHAIRMAN: No, we are the judges of relevancy, and that is the way we conduct it.

HENRY: We can put forward such evidence as we consider relevant and it will be ruled on.

CHAIRMAN: Of course you can. But the whole thing is important to get across, because there is public misapprehension about this, that this is not a contest between Thomas and the Police. Whatever the contest was it is over and done with. Thomas's status is governed by the terms of his pardon. In finding ourselves stricken to these terms of reference, we will receive all such evidence as is relevant to it, ie it goes to show that the police were guilty of impropriety, or which goes to show they were not guilty of impropriety in the investigation in the investigation, or subsequently in respect of the cartridge case. What else that evidence tends to prove will not be a ground for rejecting it.

HENRY: I am obliged to the Commission for that indication.

CHAIRMAN: That disposes of your need to argue about the pardon?

HENRY: At this stage, yes.

4 July; Discussion at closed session
(pp 661 to 681)

KEYTE: . . . I have not listed there the witnesses which relate to the . . . material.

CHAIRMAN: That does not go to this first issue.

KEYTE: I think it does, with respect.

CHAIRMAN: We will have to have a further sitting to inquire and to decide whether we admit that sort of evidence. It is highly suspect isn't it.

KEYTE: With respect, my submission to you is that if the evidence is to be believed it is certainly relevant to the issue, and I certainly submit that therefore it should be called, and it is therefore for the Commission to decide whether they wish to place weight on it then or not. It would be further my submission that because of the nature of the evidence, from what we know of it, that the hearing, when it is heard, should be in camera. If it is to be believed, it contained admissions by Thomas that he did the crime and how he did it.

CHAIRMAN: If it contained no more than that we would not receive it. – and how he did it, it is a curious point that, isn't it? He himself, having been given a pardon, whether or not he did it cannot be inquired into. But on the question of whether 350 was put there or not, you say he can give evidence that he can

be called for instance to say he did not put it there. That would be a waste of time because he said 10 times he was home in bed.

KEYTE: I am not on the subject of whether Mr Thomas is called for a moment, I am on the subject that here are two gentlemen, . . . and another inmate of the prison who say Thomas told them not just that he did it, but how he did it.

CHAIRMAN: That must be tested on the basis that Thomas himself could not give that evidence, should we receive his admission or his alleged admission. I don't think in this case, eg that some counsel for another party could say I want Thomas called, I want to ask him this. And if he asked him, did you shoot them through the window that night and leave the bullet behind, I don't think that would be received in the light of the pardon.

KEYTE: In my submission, it would be quite unfair to the police if you were to decline to receive evidence which purported —

CHAIRMAN: From Thomas?

KEYTE: Declined to receive evidence from others which purported to show that Thomas has said how he did it in a way consistent with 350 being a genuine exhibit and not planted. In my submission, it must be of direct relevance if his statements were true about the way he did it, was consistent with the police finding of 350.

CHAIRMAN: It really is another trial of Thomas.

. . .

WILLIAMS: Our submission is this person lacks credibility. He has a history of psychotic behaviour and is a confidence man by trade. His evidence is of no value whatsoever, but it is a further turmoil for Thomas to have to go through.

CHAIRMAN: That concerns me, but I don't know that we can reject it out of hand. There must be a limit to the ratbaggery, if I may use that word, that we can entertain on this Commission. That is a fair description of this man, and we probably would not entertain him at all, but we have to hear him, see him and have it tested. I don't think we can leave the thing up in the air.

. . .

CHAIRMAN: You have supplied the list to Mr Keyte, and he will call such as he thinks, evidence within my ruling, ie that it is relevant to the issues raised by the first term of reference, and we will receive it, whether it tends to establish Thomas's guilt or innocence, that is not a material matter.

. . .

HENRY: Yes

CHAIRMAN: You could equally say — it looks as if it is shaping up this way, you insist on everybody being called whose testimony bears on the question of whether or not Thomas was there that night. I suppose you are going to argue that puts in the question of the wire, the whole lot.

HENRY: Yes Your Honour.

CHAIRMAN: I don't think it ever was the intention of those who drew these terms of reference, I am sure it was not.

HENRY: I had no hand in their compiling.

CHAIRMAN: I did really; I was responsible for the one which said we would not inquire into the trials; I said I would not come here to do that, now it looks as if I am.

. . .

CHAIRMAN: . . . We can rule simply on the evidence you will lead, whether it is relevant to the specific term of the inquiry, and the test will be what I have

said. If it is relevant to proof in this particular case, that it came there by police hands or it did not come there, it will be received. The fact that points to the guilt or innocence of Thomas at the same time is irrelevant. The same test will be applied to all the others.

. . .

CHAIRMAN: How do you decide what is absurd in this case. Direct evidence would put him there, and would possibly be admissible on that issue; indirect evidence such as the wire on the bodies, wouldn't. That would not have anything to do with him being there, the fact an axle was found tied to one of the corpses. That is the dividing line. If we keep that dividing line firmly in mind we ought to be able to rule fairly well on the evidence. But on which side of the dividing line falls the evidence which shows Thomas could have been there? What about the man who said he saw his car there two days after the 17th? That would be on the admissible side.

. . .

CHAIRMAN: The next step is ergo, that there is not any evidence that the Thomas we are concerned with was on the farm when the murder was committed. That is the whole point of the circumstantial evidence, no piece of circumstantial evidence proves anything on its own beyond that the thing happened. It always has to be taken with others. That is where the fallacy comes in that we have to receive it. We have thrown some light on the subject. We will have to think about it, and if anybody wants to put what they said in writing, we would be indebted to that.

. . .

CHAIRMAN: We will continue with the hearing of the evidence and I think we have made some progress, and created some enormous difficulties.

21 July; Discussion relating to ruling of Commission given on 8 July, Appendix 1 in Report, identifying exhibit 350 as not having contained either of the fatal bullets
(p 1005 to p 1011)

HENRY: I again inquire, can I please be advised what consequences is it the Commission says flow from this identification.

CHAIRMAN: You mean advised in detail of the effect it will have on the Commission's findings, of course you can't because we have not heard all the evidence, and we are not in a position to give any final analogy or make a report, all we have done is make a determination, to what category this bullet belongs. If we had not done it now, we could be here for ever. It is your function as counsel to work out yourself what consequences flow from it. I have indicated to you some of them which necessarily follow. If that bullet which killed Crewe did not come out of that shell, well then there is no evidence so far we have heard, that Thomas was ever present that night. That is the only thing on the evidence we have heard which ties Thomas to this murder.

HENRY: I take it from that the Commission will receive all other evidence which will tend to show that very thing.

CHAIRMAN: To show what?

HENRY: That Thomas was on the property.

CHAIRMAN: No. We will receive all evidence which is relevant to the issues which arise under the terms of reference. If that evidence is relevant to an issue which arises under them it will be received, whether it affects Thomas being there or not is immaterial. I am not prepared to rule, as I have told you so often. If you call evidence we will rule on it.

HENRY: We are at liberty to cross-examine any of these witnesses on those aspects.

CHAIRMAN: No, I will not do that, and I will not be persuaded to tell you what you can cross-examine about . . . .

. . .

CHAIRMAN: You attempting to show that Thomas was there is seeking to show he committed the murder. What is the relevancy of that.

HENRY: Simply to show the source of 350.

CHAIRMAN: We are familiar with the source of 350, where it was found, where it was made, when it was married up with the projectile, the rifle it came from. When it was fired from that rifle we don't know.

HENRY: What we are endeavouring to convey is how it got to the position it was found in on 27 October.

CHAIRMAN: Whether Thomas was there on 17 June it doesn't have much to do with that.

HENRY: In our submission it does.

CHAIRMAN: The question has been rejected and what you have said since doesn't persuade me it wasn't.

HENRY: Is it irrelevant for us to establish that Thomas was on the property.

CHAIRMAN: I have ruled on it. You want a ruling whether you are permitted to show by evidence, cross-examination, that Thomas was present on the Crewe farm the night the murder was committed.

HENRY: Yes.

CHAIRMAN: You have never suggested this in your evidence. The Crown case always was that the way you proved Thomas was there was that the bullet which killed Crewe was by the bullet which came out of the shell. That has been destroyed.

HENRY: I am not concerned with the 1st or 2nd trial. I am concerned with this Commission and whether there was any impropriety in relation to 350 on the part of the police.

CHAIRMAN: If you can submit evidence that Thomas was there on the night of 17 June, it will be admitted.

HENRY: We have already endeavoured to do that by including such evidence in briefs earlier submitted to Mr Keyte.

CHAIRMAN: Before the ruling.

23 July; Prepared ruling of Commission
(pp 1084 to 1087)

Towards the conclusion of Monday's proceedings, counsel for the police again raised a question of their right to lead evidence to show that Arthur Allan Thomas was present at the scene of the Crewes' murders, and thus could have been in a position himself to deposit the shell which subsequently became 350. As indicated, the Commission proposes to rule on the evidence which it will hear in relation to terms of reference 1 and 2. This Commission is bound by its terms of reference and will receive only evidence relevant to those terms. Therefore, it is necessary to consider precisely the matters that we are required to investigate.

The pardon itself is a fact to be considered in the context in which these terms of reference are drawn. After recitals, it provided, "Now therefore I Keith Jacka Holyoake, Governor-General of New Zealand, acting upon the advice of the Minister of Justice, hereby in the name and on behalf of Her Majesty grant a free pardon to the said Arthur Allan Thomas in respect of the said crime, and

I command and require the Superintendent of Tongariro Prison Farm and all others whom it may concern to give effect to the said pardon".

. . .

We are required to investigate the police, not Mr Thomas, who is in any event deemed not to have committed the murders by virtue of the pardon, and s 407 of the Crimes Act 1961. There is no power in our terms of reference to conduct a third trial of Mr Thomas, and we do not propose to do so.

. . .

There is no nexus between the notion of Thomas's guilt or innocence and the planting or otherwise of ex 350. For this reason we reject the submission that the police should be allowed to lead all the evidence put forward at the trials to answer the allegation that their investigation was not conducted in a proper manner.

It seems desirable that we be very specific about the evidence with which we are concerned. We do not regard the evidence brought forward at the trials as to Mr Thomas's alleged motive, or the evidence as to wire, as relevant to term of reference 1. We shall receive evidence of the axle because it is the subject matter of specific allegations of impropriety.

. . .

Under term of reference 2 we are not concerned, as at a trial with the ultimate truth of what persons said to the police, and consequently whether Mr Thomas is guilty. We repeat that he is deemed to be innocent.

23 July; Evidence of Commissioner Walton
(pp 1125 to 1127)

CHAIRMAN: You know there has been a free pardon. — I accept that.

You know what that means, he is deemed never to have committed the act. — Yes.

If you have police officers going round getting evidence that Thomas made admissions of guilt. — I believe they were checking on issues that were raised.

On what authority does any police officer go around now checking on Thomas in relation to this crime. — Allegations could be made we were neglecting our duty.

Has anybody raised with you an issue that Thomas committed this murder since his pardon. — Not with me.

Once a man is given a free pardon in law he is deemed not to have committed the act. — I accept that, but we can't ignore any issue regarding any person. I would expect it would be our duty to check on those issues.

If a man comes to you with a story that some highly disreputable criminal is prepared to give evidence that Thomas confessed to him you should investigate that.

Why would you record it. — We are bound to later on questions could be asked and we could not say we ignored it.

If you know somebody is perfectly innocent and is so held by the Courts would you entertain evidence that in the light of that he is guilty. — We would record the evidence. We would investigate it as far as is necessary to establish the position.

If a jury brings a verdict of not guilty to a man who is charged, in law there is no way of re-opening. Would you spend the time of your police force listening to statements made to the effect he is guilty. — I would expect to record it, but you could not make use of it.

Under what file, fairy tales. — No, we could be faced with having to answer questions at any time on that.

Couldn't you say "please don't waste our time; we have better things to do solving unsolved murders". On 2 July 1980 a man reputable citizen was approached by

a policeman who identified himself with a police ID card. He has a suave persuasive manner and the gentleman approached described him like an insurance salesman. He didn't give name, rank or number. He asked this man if he knew A A Thomas, disc the fact he worked with him, then said Thomas had made certain statements that his conduct towards Jeanette Demler at school some 25 years ago. The man PP said he never heard of it. The policeman then asked him if he could give any other names of people who worked with him during the same period. Did you know that happened. — No and I don't think we should pursue a case when a pardon has been granted.

That is a highly commendable attitude. You know Thomas has made complaints police have been to jails where he was stationed, going to inmates and asking questions that he may have confessed. Have you authorised that to be done. — No.

Do you approve of it. — I can't see the point of pursuing it.

Do you approve of it. — I don't approve of it, it is not necessary.

Wouldn't you accept the fact this man by law and an Act of Parliament in a democratic society which can override the Courts has been declared innocent.

Isn't he entitled to be treated as innocent, not to be hounded. — There is no reason to pursue it, nothing to be achieved.

Hasn't he the right to be free from police pestering. — Certainly.

Have you read the statement Thomas made complaining about it in the press.

Have you read of the complaint he made about the policeman going to jail and interviewing a man there serving a life sentence with a view to getting an admission that Thomas said something to him. — I understand the man had something to say to them.

Why are they going round seeking in the jails, people who will give them information tending to show Thomas committed this offence. — There would be no point pursuing this in the light of the pardon.

Do you make a distinction between no point between something that is wrong, grossly wrong. — It depends what they are seeking. There is no point in obtaining that now, or pursuing that.

Is that your only criticism of police conduct. What about it being indecent hounding a man who spent 10 years in jail wrongly convicted. He was wrongly convicted and you know it. — I won't speculate on that.

Wasn't it because he was wrongly convicted that the Parliament pardoned him. — I can't say that. There is other evidence beside 350.

No police officer should seek anything to show that he committed this crime. I will tell the police that they must not pursue or harrass Mr Thomas.

I think it is a dreadful thing that a man who in my view was wrongly convicted and in the view of Parliament he was wrongly convicted should be harrassed. — I don't disagree with that.

24 July; Chairman's television interview (on "News at Ten", channel 2)

The announcer stated that Mr Justice Taylor had expanded on his reasons for publicly declaring that Mr Thomas was wrongly convicted. The following exchange then took place.

Mr Justice Taylor — It goes back to the effect of the pardon that was granted to him and if you look at the recital that preceded the actual grant, it says, that there is a real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas

was proved beyond a reasonable doubt. And, it goes on to say, that the Governor-General, acting upon the advice of the Minister of Justice, hereby in the name and on behalf of Her Majesty grant a free pardon to the said Arthur Allan Thomas in respect of the said crime. Now, if you go to section 407 of your Crimes Act, that provides the effect of a free pardon granted to a person, is that he shall be deemed not to have committed the offence. And to me, that means in law and in fact that he did not do it; he is innocent. And, it is for those reasons that I assert that the Parliament has said he is innocent of the crime. And it is also for those reasons that I say I believe that he's to be declared innocent. You appreciate of course that in this inquiry of ours the guilt or innocence of Thomas does not arise. This is an investigation into the conduct, broadly speaking, of those who were concerned with investigating the offence alleged to have been committed by Thomas.

Q. But isn't there a difference between innocence and a pardon?

Mr Justice Taylor Well, innocent means, I suppose, that you never did it, you are innocent of the crime. The section of the Crimes Act says you are deemed never to have committed it. Now, if you can find a distinction between those two, in any practical terms, I'm afraid I can't. I suppose you can always argue on philosophical grounds that, to be deemed not to have committed the act is in some way different from, in fact, not having committed the act, but I don't think there's any real distinction.

Q. You claim it's indecent that the police are continuing to seek out information on Thomas after his pardon but should they be precluded from obtaining new evidence in this way?

Mr Justice Taylor New evidence of what? New evidence that he murdered the Crewes, but the Parliament has said he didn't and the answer to that is really to be found in the answer to the first question. The police are required, as everybody is, to obey the law and the law says that he is deemed not to have committed the offence. Well, to go around trying to collect evidence and going to various spurious quarters to get it, as I understand has been done, is, I think, properly described as indecent. You may choose a better or more elegant word.

Q. And that is your word?

Mr Justice Taylor That's right, that's my word.

Q. The Police Commissioner has said that he hopes the Commission hearings will reveal new evidence; have you hopes in that direction?

Mr Justice Taylor — Well, I have hopes but I don't see that the actual carrying out of its tasks by the Commission is likely to do that because we are, in fact, investigating those who investigated the crime; the alleged offence. The only way that it is likely that we would turn up anything new by way of throwing light on who did it is the publicity that has been given to it may attract somebody to come forward who hitherto hasn't come forward.

Q. — But there is no sign of that yet?

Mr Justice Taylor — No; there's no sign of that yet.

Q. — As a judicial officer you're very outspoken by New Zealand standards; is this normal in Australia?

Mr Justice Taylor — Well, what do you say, that the standards, New Zealand standards, are wrong or am I wrong. I suppose I am outspoken when I think I should be outspoken. I think that in our country it's the custom for Judges to be outspoken on matters that call for comment — public comment — perhaps more so than they are here, I don't know.

Q. — But, when you've got something to say, you'll say it?

Mr Justice Taylor — When it needs to be said I will say it and I will say it in appropriate terms. If, as has happened in the past, there is some conduct of some officer of the Court member of the profession that has resulted in delay or hindrance of the Court's business, I will say so — I will say so in harsh language if it's called for.

25 July; Statements of other Commissioners following Chairman's television interview
(p 1188)

The hearing resumed at 9.30 on Friday 25th July 1980.

JOHNSTON: In light of current publicity on certain actions of this Commission, but without entering into any prior discussion of its findings or taking part in a public debate, I am of the opinion that one or two things ought to be said.

The Commission — which means the three members acting in agreement — thinks it wise to draw attention to the facts of the matter which were taken up with the Commissioner — Mr Walton, regarding the further investigation of Mr A A Thomas.

Documents in the possession of the Commission show without doubt that police officers have been engaged in making such further investigation of Mr Thomas since the granting of the pardon. It was the wish of the Commission that the matter be taken up with the Commissioner of Police, and that he be asked to determine the further policy of the police in this matter. It is not the case that the Commission take to itself any power to direct the police in their duties.

GORDON: In light of some publicity, but without promoting further controversy, I wish to make it clear that on all major issues so far commented on by the Commission or the Chairman, the Commission as a body have had prior discussion, consideration, or reached a consensus view.

The Commission as such was disturbed to learn from its perusal of some appropriate police files that after the granting of the pardon, some police activity was being undertaken, attempting to get alleged confessions and further evidence sourced to Thomas.

The Commission by its terms has studied the law on the pardon and the Crimes Act, and unanimously had felt before Commissioner Walton was cross-examined, that since Thomas can never again be tried; such actions are not only unwarranted, but morally wrong.

. . .

CHAIRMAN: It is no concern of ours what the police investigate but we would have thought it an obvious injustice in my opinion in attempting to gather evidence again by way of Thomas, that Thomas had some part in these murders, that they would have the decency to stop. The man has been pardoned. Parliament has said he is deemed to have never committed the act.

8 August; Evidence of Detective Inspector O'Donovan
("Confidential" transcript, pp 1684 to 1686)

CREW: Bringing you forward a bit, but in that report on 30 October 1978, you expressed the view that . . . was telling the truth when he described the confession allegedly made by Thomas. — I did.

You expressed that view in the absence of any psychiatric report. — What I was looking for, knowing . . .'s background, was some corroboration of what he had to say.

CHAIRMAN: The answer to Crew's question is yes, you had no psychiatric report. — No.

CREW: And your evidence is that quite properly the Superintendent of Porirua Hospital was not to give the police access to the files. — That was his general practice.

You may not be able to answer this, but would it be fair to say it was your opinion, formed on the evidence available to you in October 1978 that really dictated the subs attitude the police have taken with regard to this material. — I won't say so at all.

You wrote a comprehensive report didn't you. — Yes.

You said you believed him. — Yes.

That report went to your superiors didn't it. — It did.

They presumably made the decision whether the police would seek to put this evidence before the Commission. — You recall that in January 1980 I was sent to Christchurch again to interview . . . .

CHAIRMAN: January 1980 — after Thomas was released. — Yes.

You were sent there. — By the Department.

Was that sending the subject of a document. — I think there is a file note on the file from the Director of Crime that I was sent to Christchurch.

You were sent there to continue with the obtaining of evidence from . . . .

I regard that as curious because by this stage Thomas had been pardoned. — Yes sir.

And to confirm . . .'s original story was to confirm it was accepted an admission by Thomas he was guilty. — Yes.

If you as a senior officer tell me what concern it was of the Department to try and get such evidence after he was pardoned. — It wasn't a matter of getting such evidence, but confirming evidence given in 1978 to see if he still held to the story.

Why did the man want that confirmed after he was pardoned.

FISHER: Mr Henry and I take responsibility for this, because by May 1980 we were being consulted regarding the Inquiry.

CHAIRMAN: This is January 1980.

FISHER: Then I am off beam, because it was May 1980.

CHAIRMAN: Thomas had been twice convicted, his appeals rejected, and by 1978 he had served about 8 years in gaol. What motivated the Police Department in the first instance to endeavour to collect evidence of admissions by Thomas of his guilt in 1978. — I think where anybody comes forward with information we will investigate it whether the person is serving time or not. At this time the Retrial Committee's activities were still an on going thing.

22 September; Address of Mr Wallace
(p 2782)

WALLACE: I understand you have adopted all except some of that evidence in the form of statements that were made at the trial.

CHAIRMAN: Always we have ruled we would accept any evidence that went to show that they did not plant 350 and that if that evidence incriminated the police or exculpated Thomas it was an immaterial matter. The only test was relevancy. As I understand it that is the course we follow. We have been told by the High Court as I read that part of their judgment we were wrong when we indicated we would not accept any evidence about wire or the so-called motive because we thought that was too remote. So we have accepted all the evidence given at the second trial that tended to show that Thomas was at the scene of the Crewe house the night of the murder and thus all the evidence of the trial is before us and had to be before us as I understand the High Court ruling.

. . .

30 October; Evidence of Mr P S Prescott
(pp 2971 to 2979)

HENRY: You were asked about the contents of your report which you put in earlier this year. — Yes.

Did you give as your opinion not that it was probable that the bullet 234 came from ex 317 but that it was highly probable. — I did sir, yes.

. . .

With your experience Mr Prescott, do you consider that you are able to express an opinion on the subject matter we are in the course of discussing here, from photos when you have not seen the actual fragments. — I do think I can express an opinion on the photographs.

CHAIRMAN: Without the test bullet fragments. — Provided I am sure what I am looking at, I have sufficient knowledge to assess.

CHAIRMAN: You would not call that an opinion by comparing the test fired bullets with another bullets. — It is not the same.

It is an opinion, a comparison between a test fired bullet and some photographs. — That is true sir.

I thought he had given his opinion. You got it out of his report haven't you.

HENRY: I was not sure whether you had received that in evidence or not.

CHAIRMAN: He said it.

HENRY: I am trying to explore this question of the photographs sir, in view of —

CHAIRMAN: It does not matter about the photographs, because he said he saw it, they are part of my opinion and my opinion is highly probable. No more and it never will be. Aren't we burning daylight.

HENRY: With respect I thought you had queried the propriety of an opinion based on photographs, and I was wanting to explore that with this witness.

CHAIRMAN: I know perfectly well what he has done. He is a perfectly frank and perfectly honest man. He will not go beyond. He has said it three times, and I don't think you should trouble him by asking again.

HENRY: I am not asking that question again sir, I am asking him to deal with the question of the reliability of the photographs for useful comparison purposes.

CHAIRMAN: He said they were reliable enough for him to say highly probable. That is right isn't it. — Yes sir.

And that is as far as he will go, for the fourth time. — Yes.

I won't ask you again, I promise.

HENRY: I just want to develop it.

CHAIRMAN: Develop what?

HENRY: I want to develop his answer and explain to the Commission the reasons for arriving at that conclusion.

CHAIRMAN: I know his reasons, it is plain as daylight. He has had photographs taken, he has looked at the photographs, he doesn't have the fragments, but on those photographs he is prepared to go as high as saying highly probable, and his predecessor 8 years ago said "could well have been". Perhaps you would like to tell me as an exercise in semantics the difference between could well have been and highly probable. — Between two different people I would not like to evaluate it.

CHAIRMAN: They are both uncertain. Let me illustrate it this way. Supposing there were two men in the street talking about football, and a third man came along and said "The Welsh will beat the All Blacks next Sunday, what do you say about that", and the second man said "They probably will", and he said to the third man "What do you say" and he said "It could well be that they will" — what is the difference.

WILLIAMS: They are both wrong. . . . Dare I say I don't really mind who wins. We are talking about degrees of something which cannot be quantified.

CHAIRMAN: It cannot be quantified and you can't quantify the difference, if there is a difference.

HENRY: Now in arriving at your —

CHAIRMAN: You are not trying to make me cross are you. This is a dead duck, if I might use the expression. The man has said this is as far as I will go and if we stay until tomorrow he will never go any further. You have got it, you have got it in evidence. What more do you want.

HENRY: Do I take it then the Commission accepts it.

CHAIRMAN: I accept his report, what he says, whatever he has had available to him, including the photographs which have been placed in evidence, if that is what he says — that I accept.

HENRY: Does the Commission not want to hear the basis for his expressing that opinion.

CHAIRMAN: He told me the basis.

HENRY: He told you he looked at photographs, I was going to explain by reason of the fine markings which exist and which are shown on the photographs which can be matched up.

CHAIRMAN: We will accept he is as highly qualified a man as you can get, as highly qualified as his predecessor, and it is his opinion honestly given on all the facts available to him, including the material before Mr Price, that it is highly probable – that is his word – that we accept. That is not in any way different, so far I can see from what Mr Price said back in 1972.

HENRY: Just referring to the absence so far as you are concerned of the actual fragments, Mr Prescott, would their existence have assisted you in coming to a conclusion. – Yes.

To what extent do you consider you were disadvantaged by not having that access.

CHAIRMAN: Are you trying to get him to alter his opinion Mr Henry.

HENRY: No sir I am not. – Obviously the actual objects are better to look at than photographs of objects. There is obviously some loss of detail in photographs. A good photograph show the details of the object, but a bad photograph can make it even worse.

From your experience do you think the existence of the fragments for your examination would have firmed up your opinion or otherwise.

CHAIRMAN: Without having seen them.

HENRY: Well he can answer it as he wants to, he is an expert.

CHAIRMAN: An expert in things he hasn't seen – can you answer that question. – As far as what I have seen in the photos I think I would have seen the same thing in the original fragments, I would have had the advantage of completely eliminating areas where there might be disagreement or not, as the case may be. I think thoughts and opinion I would probably have come to the same conclusion only slightly – I would have pushed it further up the scale, which is impossible to qualify.

CHAIRMAN: You would have added perhaps an extra highly probable. – That is right.

HENRY: Did you observe anything on test fired bullets you would have expected to be reproduced in the fatal bullets but which was not evident in the photographs of that fatal bullet. – The only thing I saw on any of the test fired bullets was the test fire – in one of the grooves, this is the photograph that was allegedly taken in Nottingham in 1970. I saw test bullet "F" and in my opinion the score mark is still present there today. That mark did not appear on the pho. 234 and that did not appear on any other test fired I looked at. The test fires done in Nottingham in 1970, the 2 bullets in this container, and the test fire done in NZ this week, only on the one test fire, was there mark of this score.

Does that indicate that that score mark is not a characteristic of the rifle. – In my view yes.

So then answering my earlier question as to whether there were any distinctive marks left on the test fired bullets, which you would have expected to be on any bullet fired from that rifle, was there any such mark missing on the photographs of 234. – No.

HENRY: Your ruling was I cannot go through the photographs to indicate –

CHAIRMAN: Of course you can't. The man has said what he has said and he never altered it and he will never go any higher. I wish you would realise that Mr Henry and stop wasting everybody's time.

HENRY: I was seeking the ruling sir –

CHAIRMAN: I am not going to give you any rulings, except to tell you you are wasting time. The man has said it 3 times – 4 times. You had him brought here.

HENRY: I thought it was the Commission's decision to bring him.

CHAIRMAN: Yes, at your request, your clients' request, and very very reluctantly on my part.

GORDON: It was a formal request, not a casual request, it was a formal request from the NZ Police as I understood it. That was the information supplied to me.

CHAIRMAN: And to me.

HENRY: Well in fact it is not correct sir.

CHAIRMAN: If it had been left to me, and I speak only for myself, the gentleman, who I am charmed to have met, would still be in England.

HENRY: The report was made available with the advice from us that Mr Prescott was available to come to New Zealand.

CHAIRMAN: He came here as a result of a telephone conversation – anyhow I am not going to debate that. The point is the witness has been called, he is a highly skilled expert, he has been allowed to give his opinion on the comparison between the test fired bullet and the fragments, and he has given it four times. Might we now adjourn. You don't want to ask any more questions do you?

HENRY: Can I ask the Commission to take its morning adjournment now to see if I wish to renew my earlier application as to admission of photographs.

CHAIRMAN: He told you he has used the photographs. I will adjourn now.

THE HEARING ADJOURNED AT 11 am.

HEARING RESUMES AT 12.05 am.

HENRY: Unless the Commission has accepted the conclusions and opinions expressed by Mr Prescott, I feel I must ask him to go through the reasons for that.

CHAIRMAN: Without hesitation we accept it. We accept Mr Prescott's conclusions that the most he can ever say is probable or highly probable.

HENRY: Do you accept that conclusion yourselves as opposed to Mr Prescott having given that as his opinion; do you accept his opinion.

CHAIRMAN: Yes.

GORDON: So that it does not appear that it is just the Judge, I accept Mr Prescott's answer this morning as confirming the previous report from Mr Price, and what troubles me a little bit, and I speak obviously as a layman without a legal background, is that unless you are sure you are going to get an alteration in the answer from Mr Prescott, I have to say it, the costs of this Commission are starting really to concern me as a taxpayer. I accept his answer this morning; he has said he has seen the photographs, he has seen the Home Office file, we have got that in, he has said right, and the Judge's analogy of the Welsh test was a pretty fair answer. What concerns me, unless you and Mr Williams can resolve your legal argument of what is admissible and what is not admissible – to me it does not matter, I accept his answer.

HENRY: I take it from that you accept his opinion also.

GORDON: Yes, that is his answer.

HENRY: If you don't accept his opinion as such it is a matter of evaluating it, and I have to go through the reasons.

GORDON: I accept the reasons that were given earlier, that his is in fact an endorsement of Price, which has stood the test of time and has been through a Supreme Court. The Home Office report has been through, and I suggest has been subject to what appropriate examination it could have had, and I accept unequivocally Mr Prescott's endorsement, I put it in that way of Mr Price's opinion. Slightly different words but the same meaning.

HENRY: I was anxious that his words be accepted too.

GORDON: I did not want to leave the impression that it was the Judge dealing with legalities only. I am trying to look at it as a New Zealander, and above all I want to see justice done — let me be quite clear about that, but at the same time if we are going to go on exhaustively in detail, and still end up with the same answers, I become very concerned.

HENRY: So long as that answer is accepted, that really clarifies the matter so far as I am concerned.

JOHNSTON: There is no question about it not being accepted.

HENRY: Can I then revert to the question of the photographs, and ask that those be received.

CHAIRMAN: Why do you want them received? Because the witness has said after examining these photographs it was part of the basis of his opinion, I can say no more than highly probable.

I had it played back on the tape. We have the benefit of his opinions based on the photographs.

HENRY: On that assurance I do not think I need take the matter any further.

Commission's Report, dated 11 November

35. We do not wish there to be any suggestion that we have excluded from our consideration any evidence which the Police, or any other party for that matter, considered relevant to this or any other issue. We admitted, subject to relevance, the whole of the evidence given at the second trial of Mr Thomas.

. . .

230. The Nottingham Laboratory's Chief Forensic Officer, Mr Price, test fired some more bullets through the rifle. He compared the fragments of bullet recovered from Jeanette Crewe with bullet "F" (test fired through the Thomas rifle in August 1970), and with his test fired bullets. A number of photographs were taken. Mr Price's major conclusion, as stated in a written report dated 2 August 1972 was:

> "I have microscopically examined the bullet (referring to the Jeanette Crewe fatal bullet). Although I have been unable to establish conclusively whether or not it was fired in the rifle exhibit 317, the limited individual bore characteristics it shows indicate that it could well have been fired in this rifle."

231. In late September 1980 a representative of the New Zealand Police made contact with the Nottingham Laboratory seeking to know whether any information was still available from the investigation carried out in 1972. Mr Price having retired, the inquiry was dealt with by the Laboratory's present principal Scientific Officer in Charge of Firearms, Mr Prescott. The inquiry in due course led to Mr Prescott examining the photographs on the laboratory file, and the bullets test fired by Mr Price in 1972. Mr Prescott then made a written statement, dated 30 September 1980, which we have read, the major conclusion of which is:

> "I have formed the opinion that it is highly probable that the rifle (317) fired the bullet (234) (ie from Jeanette Crewe)."

232. On 13 October 1980, Detective Chief Superintendent Wilkinson handed this statement to counsel assisting us, and formally requested on behalf of the Police that Mr Prescott be brought to New Zealand to give evidence before the Commission. We agreed to this request, somewhat reluctantly, because it seems to us that Mr Prescott was really saying the same as Mr Price had said in 1972.

233. To assist Mr Prescott we requested DSIR to produce the other two bullets test fired through the Thomas rifle in 1970, and also the three bullets test fired through the Eyre rifle at the same time. We were informed that they could not be found, although those test fired through 58 of the other rifles in 1970 were still in the possession of DSIR.

234. On his arrival in New Zealand Mr Prescott test fired further bullets through both the Thomas and Eyre rifles, and examined these and all other bullets available through a comparison microscope.

235. Mr Prescott's major conclusions, as given in evidence before us were as follows:

(a) He remained of the view as expressed in his report of 30 September 1980 that it was highly probable that the Thomas rifle fired the fatal bullets recovered from Jeanette Crewe.

(b) He agreed that he was not in as good a position to form a view as was Mr Price in 1972, for he had not had the opportunity of a direct examination of the fatal bullets, having come to his conclusion only from photographs. He agreed there was no difference between his conclusions and those of Mr Price; they were simply expressed in different words.

(c) On his examination of bullet "F" he saw the score mark referred to by Dr Nelson, but it did not appear on any of the other bullets he examined which had been test fired through the Thomas rifle in New Zealand in 1972, in Nottingham in 1972, and in New Zealand in 1980. Therefore, he concluded that the score mark was not a rifling characteristic of the Thomas rifle. That conclusion brings into question whether Dr Nelson did see the score mark on the other two bullets test fired in August 1970, and if he did not, why he proceeded as if the score mark was a rifling characteristic.

(d) That the Eyre rifle (a Remington model 12) fired a bullet with only 5 lands and grooves; and therefore could definitely not have fired the fatal bullets. This conclusion (which is now agreed with by counsel for DSIR as being correct) makes nonsense of Dr Nelson's statements and evidence that the Eyre rifle had 6 lands and grooves. In this Dr Nelson made a fundamental error of observation which was perpetuated throughout the trials.

236. In paragraphs 398-401 we consider the rather myopic criteria the Police adopted in collecting the 64 rifles test fired in 1970. In the context of there being approximately 800 000 firearms in the Auckland Police District alone, we regard the sample as being so limited that there is no benefit derived from a conclusion that of those 64, the Thomas rifle was the only one which could have fired the fatal bullets. How many more might there have been in the Auckland Police District, or in New Zealand?

237. We conclude that it is not proved that the Thomas rifle fired the fatal bullets. Further, even if the Thomas rifle did fire them, there is no evidence putting the rifle in the hands of Arthur Allan Thomas at the time. We are satisfied there was opportunity for others to have used the Thomas rifle.

. . .

280. We are satisfied that the "prison confessions" never took place, and that the evidence of the two prisoners was a tissue of lies. It causes us grave concern that very senior Police officers were so obviously ready to place credence on such unreliable, self-interested, and, in the case of the first inmate, deluded evidence. It was but another instance of the Police being unwilling to accept the pardon.

. . .

478. The free pardon granted to Arthur Allan Thomas on 17 December 1979 included the following words:

> "And whereas it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC, that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt."

479. Section 407 of the Crimes Act 1961 states:

> **"Effect of free pardon** — Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

480. We have now been given some guidance by a full Court of the High Court of New Zealand concerning the effect of this pardon. In their decision dated 29 August 1980 the full Court stated:

> "In the terms of the pardon Thomas is to be considered to have been wrongly convicted, and he cannot be charged again with the murder of either Harvey or Jeanette Crewe."
>
> "He is, by reason of the pardon, deemed to have been wrongly convicted."
>
> "The language of section 407 does not indicate any intention to create any such radical departure from the normal effect of a prerogative pardon as would be involved in reading into the language an intention to create a statutory fiction, the obliteration by force of law of the acts of the person pardoned. It is much more sensibly read to be as, first a reaffirmation of the basic effect of the prerogative pardon, and, secondly, an attempt to minimise residual legal disabilities or attainders."

481. We approach the question of the compensation in the light of that guidance, and also in the light of our findings as set out earlier in this report.

482. The pardon alone makes it clear that Mr Thomas should never have been convicted of the crimes, since there was a real doubt as to his guilt. He should accordingly have been found not guilty by the juries. Our own findings go further. They make it clear that he should never even have been charged by the Police. He was charged and convicted because the Police manufactured evidence against him, and withheld evidence of value to his defence.

. . .

486. This Commission is not in an adversary situation. We have searched for the truth, probed, inquired, and interrogated where we thought necessary; made our displeasure apparent at prevarication and reluctance to speak the truth. We have not been content with so much of the truth as some saw fit to put before us. With the aid of scientists we were able to demolish the cornerstone of the Crown case, exhibit 350, and demonstrate that it was not put in the Crewe garden by the hand of the murderer. It was put there by the hand of one whose duty was to investigate fairly and honestly, but who in dereliction of that duty, in breach of his obligation to uphold the law, and departing from all standards of fairness fabricated this evidence to procure a conviction of murder. He swore falsely, and beyond a peradventure, was responsible for Thomas being twice convicted, his appeals thrice dismissed, and for his spending 9 years of his life in prison; to be released as a result of sustained public refusal to accept these decisions. The investigation ordered by the Government led finally to his being granted a free pardon and released by the ultimate Court of a democratic system — what Lord Denning calls "The High Court of Parliament". Common decency and the conscience of society at large demand that Mr Thomas be generously compensated.