

Robert Fisher QC

**REPORT FOR MINISTRY OF JUSTICE
ON COMPENSATION CLAIM BY AARON LANCE FARMER**

25 February 2010

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(1) Introduction

1. By letter of 29 October 2009 you sought my advice on an application for compensation by Aaron Lance Farmer (“the Applicant”). The application followed the quashing on appeal of the Applicant’s conviction and imprisonment for 2 years 3 months for sexual violation by rape and his subsequent discharge under s 347 of the Crimes Act 1961.

2. The questions on which you seek my advice are:

- (a) Whether I am satisfied that Mr Farmer is innocent on the balance of probabilities and, if so, whether he is also innocent beyond reasonable doubt; and
- (b) Any factors particular to Mr Farmer’s case (apart from my assessment of innocence beyond reasonable doubt) that I consider are relevant to the Executive’s assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider his claim.

3. In considering these questions I have been much assisted by the submissions of Simon Shamy, Barrister of Christchurch for the Applicant and Kate Bicknell, Crown Counsel, for the Crown.

4. My conclusions are that:

- (a) The Applicant has established his innocence beyond reasonable doubt.
- (b) No other matters bear upon the Executive’s assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider the Applicant’s claim.

(2) Procedural background

Introduction

5. In this section I set out the sequence from the time that the Applicant was arrested to the date of this report. It explains the process by which I arrived at the factual conclusions that follow.

Police and courts

6. It is common ground that the complainant was raped by someone in Christchurch on 1 September 2003.

7. The Applicant was interviewed by the Police on 4 September 2003. On 17 September 2003 he was interviewed for the second time following which he was arrested and charged with rape.

8. The Applicant was tried before a Judge and jury in the Christchurch District Court on 30 and 31 March and 1 April 2005. The jury found him guilty. He was sentenced on 18 May 2005 to 8 year's imprisonment.

9. On 8 June 2007 the Court of Appeal quashed the conviction and ordered a new trial. The ground for this was that the applicant's then counsel had failed to contact, and consider calling as a witness, a [REDACTED] who provided a partial alibi. The applicant was released from prison on bail pending the re-trial on 29 June 2007. By this time he had spent 2 years 3 months in custody, having surrendered to his bail when convicted on 1 April 2005.

10. While the Applicant was awaiting retrial a new method of DNA testing known as "YSTR" was applied to samples from his case. The new method excluded the Applicant as the donor of the trace amount of additional male DNA located on the Complainant's cervical swabs. It also excluded him as the donor for the trace amount of male DNA found in scrapings taken from her right hand fingernails. In addition the Complainant declined to give evidence at a retrial. At a callover in the District Court on 29 June 2007 the Crown advised that it did not propose to offer

evidence against the Applicant at a new trial. He was discharged under s 347 of the Crimes Act.

Compensation application

11. As the Applicant had served 2 years and 3 months in prison, his barrister applied to the Minister of Justice for compensation on 3 July 2009. By letter of 29 October 2009 the Ministry of Justice referred the application to me for my consideration.

Principal inquiry procedure

12. I received and perused key documents from the Applicant, the Christchurch Crown Solicitor and the Ministry of Justice. At and following a telephone conference with counsel for the Applicant and the Crown on 11 November 2009, I called for a series of videotapes, photographs and other documents and set a timetable for submissions and additional evidence from the Applicant and the Crown. The timetable concluded on 5 February 2010. In addition to reading the resultant submissions, reports and further documents, I have viewed the Police videotapes of interviews with the Applicant and listened to the audio record of the 111 phone call made on behalf of the Complainant on the night of the incident.

13. In more detail I have inspected the following:

- (i) Transcript of Police Video interviews of 4 and 17 September 2003;
- (ii) Summary of Facts dated 22 September 2003;
- (iii) Police Photographic booklet;
- (iv) Notes of evidence taken at Mr Farmer's trial on 30 and 31 March, and 1 April 2005;
- (v) Psychiatric Report of 19 April 2005 from Dr Bill Gordon;
- (vi) Remarks on Sentence of Judge T M Abbot dated 18 May 2005;
- (vii) Affidavit /Statement of [REDACTED] (April 2007);
- (viii) ESR application form (1 page)

- (ix) Email correspondence (30 October 2007 to 5 April 2008) between Police and ESR, together with ESR reports;
- (x) Memoranda of Crown Solicitor's office, of 5 April 2005, 6 November 2007 and 7 and 8 April 2008;
- (xi) Judgment of the Court of Appeal of 8 June 2007;
- (xii) Letter dated 3 July 2009 from S Shamy to Minister of Justice;
- (xiii) Affidavit of Beverley Thyra Farmer dated 4 September 2009;
- (xiv) Photo montage forwarded by Crown Law Office under cover of letter of 11 November 2009.
- (xv) Letter of 19 November 2009 from Raymond Donnelly & Co enclosing the following:
 - (a) Master video tapes "M1" (Exhibit 5), "M1" and "M2" (Exhibit 7);
 - (b) Video tapes "W1 4/9" (Exhibit 5A), "W1 17/9" and "W2 17/9" (Exhibit 7A);
 - (c) Video tape "Starmart The Crossing";
 - (d) DVD "Starmart (Master Copy)";
 - (e) CD Reference S002058524 (111 call);
 - (f) District Court trial 30 March 2005 - Exhibit 6 (transcript of 4 September 2003 interview) and Exhibit 9 (portion of that interview not originally transcribed) and Exhibit B (black and white stills from Starmart video surveillance) Exhibit 4 (photograph booklet), Exhibit A (original Starmart receipt), Exhibit 1 (Scene diagram drawn by Det. Craig Gilbert) and Exhibit 3 (street map);
 - (g) Colour copies of stills obtained post-trial.
- (xvi) Colour copies of stills taken from Starmart security camera on the morning in question forwarded with Mr Shamy's letter of 17 November 2009.

(3) Criteria affecting eligibility for compensation

14. The fact that in allowing Mr Farmer's appeal the Court of Appeal ordered a retrial means that Mr Farmer does not fall with the Cabinet criteria for automatic eligibility to apply for compensation.

15. However, when establishing the Cabinet criteria, Cabinet agreed that the Crown reserve the ability "in extraordinary circumstances" to consider claims falling outside the guidelines on their individual merits "where this is in the interests of justice". The question is therefore whether in Mr Farmer's case there are extraordinary circumstances which make it in the interests of justice that his claim be considered.

16. Cabinet did not determine what matters would constitute "extraordinary circumstances". Claims of extraordinary circumstances have to be considered on their merits on a case-by-case basis, as does the assessment of the interests of justice. Although there can never be an exhaustive list of the kind of circumstances that might be regarded as "extraordinary", the mere fact that an appeal has been allowed could never, of itself, suffice. To qualify as extraordinary, the circumstances must include some feature which takes the applicant's case outside the ordinary run of cases in which appeals have been allowed. Examples of such circumstances could include, but are not limited to:

- (a) *unequivocal innocence* – i.e. cases in which it was demonstrable that the applicant was innocent beyond reasonable doubt, for example, due to DNA evidence, strong alibi evidence, etc; or
- (b) *no such offence* – i.e. the applicant had been convicted of an offence that did not exist in law; or
- (c) *serious wrongdoing by authorities* – i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper

steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.

17. The test of “extraordinary circumstances” is, however, inherently an open-ended one and the above list cannot be treated as exhaustive. There may be rare cases where there are other extraordinary features that render it in the interests of justice that compensation be paid. The onus is on the claimant to show that his or her case has extraordinary circumstances such that it is in the interests of justice that the compensation claim be considered.

18. I now apply those criteria to the Applicant’s case.

(4) Events surrounding the rape

19. At the Applicant’s trial the events surrounding the rape were undisputed.

20. On the evening of Sunday 31 August 2003 the Complainant and her friend [REDACTED] were staying overnight at the residence of the Complainant’s brother in Southampton Street, in the inner city suburb of Sydenham, Christchurch.

21. In the evening the Complainant and [REDACTED] went to the Rock Pool Bar in Hereford Street, Central Christchurch. There the Complainant had a number of alcoholic drinks while socialising with others. In the early hours of 1 September 2003 [REDACTED] decided to return to the Southampton Street residence. The Complainant stayed on in the bar.

22. When the Complainant decided that it was time to follow [REDACTED] to Southampton Street, she found that she had no money for a taxi. She decided to walk. From Hereford Street she turned right and walked in a southerly direction along Colombo Street in the direction of Sydenham. As she walked south along Colombo Street a motorcyclist rode past her at least twice and then stopped in the vicinity. The motorcyclist alighted, removed his helmet and asked the Complainant if she was “alright”. She said she was and declined his request to come closer.

23. The motorcyclist dismounted, grabbed the Complainant from behind, dragged her into some bushes nearby, threw her to the ground and raped her. The Complainant burnt him on the cheek with a lit cigarette and punched him on the chest. The motorcyclist swore, interrupted the intercourse he was having with the Complainant, pulled up his pants and left. He pushed his bike down the road towards the Central City. After some starting difficulties he started the engine and rode off.

24. The Complainant continued on along Colombo Street and Southampton Street to her brother's house, arriving there about 10 minutes after the rape. Her brother's partner, [REDACTED] called the Police.

25. The Police took a preliminary statement from the Complainant and arranged for her to be medically examined.

(5) Applicant opportunity

26. The question is whether the Applicant was the culprit. In the early hours of the same morning, 1 September 2003, he was in the Central City with his motorbike. A video security footage demonstrated that at approximately 1.38 am he entered a Starmart shop at the northern end of Colombo Street. An Eftpos receipt indicated that [at] approximately 1.43 am he purchased a coffee milkshake. Also in the Starmart shop at that time was [REDACTED] who had entered the same Starmart shop to purchase a pie on her way home to the Southampton Street residence.

27. Approximately one hour later the Applicant arrived in the forecourt of the Mobil Madras Service Station in Central Christchurch, pushing his motorbike. The service station attendant, [REDACTED] estimated the time of his arrival in the forecourt at about 2.40 am. After attending to his motorcycle in the forecourt for a period he entered the Mobil Madras store. There he said he was having trouble with his motorcycle and asked for the use of a spanner. The video security footage showed that he entered the Mobil Madras store itself at 2.52 am. For all practical purposes the times at the beginning and end of that sequence, 1.43 am and 2.52 am, can be regarded as reasonably accurate.

(6) Issues

28. The primary inquiry on which you ask me to comment is whether the Applicant is innocent on the balance of probabilities and, if so, whether he is also innocent beyond reasonable doubt. The second question you pose is whether there are any factors particular to this Applicant that are relevant to the Executive's assessment of whether there are extraordinary circumstances such that it is in the interest of justice to consider his claim.

29. Those matters can conveniently be considered under the following headings:

- (7) The Crown's case against the Applicant.
- (8) Inconsistencies between Complainant's description and Applicant.
- (9) The Alibi
- (10) The DNA findings.
- (11) Conclusions as to innocence.
- (12) Other relevant factors.

(7) The Crown's case against the Applicant

30. It is common ground that the Complainant was raped by a passing motorcyclist at some time between 2 am and 3 am on the morning of 1 September 2003 behind some bushes in a garden adjacent to the intersection of Stanley and Colombo Streets in Sydenham, Christchurch. The sole issue is the identity of the rapist.

31. The Crown's case that it was the Applicant rests upon essentially two planks – identification of the Applicant by the Complainant and the coincidence that the Applicant, who was in Central Christchurch at the time, shared a number of features with those of the rapist.

32. The identification by the Complainant came down to her selection of the Applicant from a photo montage of eight broadly similar men nine days after the rape followed by her dock identification of the Applicant at the trial. As to the first, however, the Complainant said of the photograph of the Applicant that she was only “about 90% sure” and that the rapist’s chin was smaller (trial transcript pp 15 and 16). As to the second, it is generally recognised that dock identifications are useful only for elimination purposes. For all practical purposes they can not be treated as positive identifications because there will be strong psychological pressure to choose the only candidate available in the courtroom.

33. Personal identification of suspects who had been strangers to a witness at the time of the offence are notoriously unreliable: *R v Turnbull* [1977] QB224 and *R v Russell* [1977] 2 NZLR 20 (CA). For this reason, s 126 of the Evidence Act 2006 requires a judge to warn a jury of the special need for caution whenever a case against a defendant depends wholly or substantially on the correctness of a visual identification of the defendant. The judge must warn the jury that a mistake in identification can result in a serious miscarriage of justice and alert the jury to the possibility that a mistaken witness may be convincing. Of course the fact that the warning is given is no guarantee that the jury will necessarily adhere to it. That is particularly so in a case like the present one where, on first seeing the Applicant in court, the Complainant had an immediate physical reaction to him in the jury’s presence.

34. The second positive plank in the Crown’s case was the series of coincidences that:

- (i) The Applicant, who was in Central Christchurch at the time, had a moustache and, arguably “rat-like” features (sunken cheeks and “pointy nose”), both being characteristics reported by the Complainant to the Police before any attempt to identify him by reference to photographs.

- (ii) The type of motorcycle the Applicant was riding was a trail bike, this also being the type reported by the Complainant (a “moto-x type” reported to Detective Hamilton on the night and written statement taken by Detective Bracegirdle on the morning of 1 September 2003).
- (iii) The rapist had trouble starting his motorcycle and the applicant also had mechanical problems with his one. It is certainly a coincidence that both found it necessary to push their bikes by hand in central Christchurch that night. As the Court of Appeal pointed out, however, on closer examination this coincidence was not as significant as it first appeared. The evidence was that the problem with the Applicant’s motorcycle was a loose chain or sprocket while the problem for the rapist appeared to be difficulty in starting the motor itself.
- (iv) Both the rapist and the Applicant had grey and black in their clothing. On the other hand it could not be said that this is coincidence is particularly remarkable, especially when there is no evidence that other aspects of the clothing matched.

35. In summary, it has to be said that even before turning to the various obstacles to the Crown’s case, the positive evidence upon which it relied was remarkably thin. It relied upon nothing more than a visual identification by the Complainant of a kind which is notoriously unreliable and some rather unremarkable coincidences.

(8) Inconsistencies between Complainant’s description and Applicant

36. There were six significant inconsistencies between the man observed by the Complainant and the Applicant:

- (i) *Clothing* – The Complainant said the rapist was wearing a top of which the upper part was grey and the lower part white, another black top underneath, and black dress pants (transcript pp 13 and 29). The Applicant was wearing a grey and black full piece motorcycle suit

and a Billabong backpack (see transcript p 188 and video security footage)..

- (ii) *Motorcycle helmet* –The Complainant said the rapist’s helmet was white with blue stripes along the top (transcript p 13). The Applicant’s helmet was white with no stripes.
- (iii) *The motorbike* – The Complainant said the motorbike had white mudguards (transcript p 13). The Applicant’s motorbike was entirely blue with a black engine and seat (exhibited photo 9).
- (iv) *Alcohol and cigarettes* – The Complainant said that the rapist smelled of alcohol and cigarettes (transcript p 29). There was unchallenged evidence from the Applicant’s mother, Beverley Thyra Farmer that he did not smoke or drink alcohol.
- (v) *Burn on the cheek* – The Complainant pushed a lit cigarette against the rapist’s cheek causing him to scream (transcript pp 11 and 27). There was no evidence of a burn mark on the cheek when the Applicant was observed three days after the incident.
- (vi) *Inconsistent conduct* – The Complainant said that after the rapist had removed her pants he started to undo his pants and he pulled them down. After the rape he got up and pulled his pants up. The next thing he did was to get his helmet and start pushing his bike down the road towards town (transcript pp 10, 11 and 12). There is no suggestion that the rapist had shrugged off a backpack and undone a one-piece motorbike suit before or during the attack. It is not contested that the Applicant was wearing a one-piece motorcycle suit and over that a small backpack.

(9) Alibi

37. The evidence suggests that the rape occurred at some time between 2.00 am and 2.40 am.

38. The 2.00 am time is derived from the fact that [REDACTED] arrived at the Starmart almost immediately after leaving the Rock Pool bar at 1.45 am, that the Complainant stayed on in the bar for approximately 15 minutes after [REDACTED] had left, that on Police estimates it would have taken the Complainant approximately 10 minutes to walk from the bar to the intersection of Colombo and Stanley Streets where the rape occurred and that 10 minutes should be subtracted for potential human error.

39. The 2.40 am time is derived from the fact that the 111 phone call commenced at 2.53 am and that this was preceded by the Complainant's trip from the rape to the house plus a period at the house before the call was made. On the Complainant's evidence it took her about 10 minutes to go from the rape scene to her brother's house from which the 111 call was made. The Complainant did not know how long after her arrival in the house it was that [REDACTED] called the Police but [REDACTED] estimated it as "maybe 10 minutes at the most" (transcript p 46). If that were so, the rape would need to have occurred before 2.33 am in order to be a total of 20 minutes before the 111 phone call was made.

40. Some of those time estimates are approximate only but they do have unusually accurate datum points in the Starmart security footage time (1.45 am) and the 111 phone call commencement time (2.53 am). Even allowing for human error in the other estimates, it seems clear that the rape must have occurred no earlier than 2.00 am and no later than 2.40 am.

41. The next question is whether the Applicant would have had time to commit the rape between 2.00 am and 2.40 am.

42. Again, there are reliable datum points at each end of the period in which the Applicant's movements can be traced. Video security footage indicated that he

entered a Starmart shop at the northern end of Colombo Street at 1.38 am and an Eftpos receipt indicated that he purchased a coffee milkshake at 1.43 am. There seems no reason to question his statement that he drank the milkshake before leaving the vicinity. Accordingly, it is difficult to see how he could have left the Starmart before about 1.50 am.

43. There is uncontested evidence that almost immediately after leaving the Starmart the Applicant met an acquaintance, [REDACTED], nearby. In an affidavit and Police statement [REDACTED] says that at around 2 am he was with two friends in a car driving south along Manchester Street close to the Avon River Bridge. They saw the Applicant standing by his motorbike on the other side of the road facing north. [REDACTED] did a U-turn and pulled in behind the Applicant. The Applicant told [REDACTED] he had a loose chain or sprocket and needed a spanner to fix it. Some time was spent in conversation. One of the passengers in [REDACTED] vehicle, [REDACTED] checked the bike for the Applicant. [REDACTED] suggested to the Applicant that he go to a nearby garage to see whether he could borrow a spanner there. When [REDACTED] and his friends left the scene the Applicant was heading north along Manchester Street. North is the direction opposite to the rape scene which lay to the south.

44. [REDACTED] estimates the time spent with the Applicant as "a good half an hour". He recorded this in a signed statement to the Police on 12 September 2003, well before he knew of the various automated timings that night. He also confirmed his evidence in an affidavit subsequently filed in the Court of Appeal. The Applicant had referred to his encounter with [REDACTED] in his first Police interview on 4 September 2003, although the Applicant's own estimate of the time spent with Mr [REDACTED] and his friends was only 5 – 10 minutes.

45. [REDACTED] was the attendant at the Mobil Service Station on the corner of Madras and Tuam Streets, also in Central Christchurch. The video security footage showed his arrival in the store itself as 2.52 am. [REDACTED] evidence was that the Applicant arrived in the forecourt at about 2.40 am and came into the shop at about

2.45 am. Before coming into the store he had pushed the bike into the forecourt and had done some work with the chain on the bike.

46. If those times were taken literally, the movements of the Applicant over the critical period would be fully accounted for. If the Applicant had left the Starmart at about 1.50 am, spent about 5 or 10 minutes going from the Starmart in Colombo Street to Manchester Street and standing for an unknown period beside his bike before meeting ██████████ spent about half an hour with ██████████ and then another 5 or 10 minutes travelling to the Madras Mobil Service Station, he would have reached that address at about 2.40 am which is precisely ██████████ estimate of his time of arrival.

47. In fact, of course, the only objectively established times in that sequence are the Starmart video security footage, the Starmart Eftpos machine and the Madras Mobil Service Station shop video. The others are merely human estimates. The fallibility of these estimates is illustrated by the difference between the Applicant's estimate of 5 to 10 minutes spent with ██████████ and ██████████ own estimate of "a good half hour".

48. However even a sceptical view of the human estimates makes it difficult to see how the Applicant could have had time to commit the rape. To commit the rape he would have needed time to travel from the central city to the scene of the rape, circle the Complainant on his motorbike two or three times, dismount and drag her into the bushes, shrug off his pack and all or part of his one-piece motorcycle suit, rape her, restore his clothing, start his motorcycle, and then return to the Madras Mobil Service Station in time to attempt some repairs in the forecourt of the Service Station.

49. That possibility is even less likely when it is considered that when last seen by ██████████ the Applicant was heading north (away from the direction of the rape scene) with a bike which was clearly giving trouble in the chain or sprocket and immediately after a suggestion to him that he find the nearest Service Station.

50. The alibi evidence is a powerful argument in favour of innocence.

(10) DNA Analysis

51. On the day of the rape a doctor qualified in sexual abuse matters, Dr Pollard, took relevant samples from the Complainant. The samples were analysed by Catherine McGovern, a forensic scientist with the Institute of Environmental Science and Research Ltd (ESR). Using DNA analysis techniques in use at the time (2003), Ms McGovern found a DNA profile matching that of the Complainant's boyfriend (who had had intercourse with her to ejaculation about 18 hours before the rape) and no other male DNA profile in her vaginal swabs. On the methods in use at the time, that was not unexpected whether or not semen from an additional male had also been present.

52. A partial male DNA profile was located in fingernail scrapings taken from the Complainant's right hand. Samples had been provided by both the Applicant and the Complainant's boyfriend. Both were excluded as possible donors of the fingernail samples. This alone seems significant. It suggests that the Complainant had scratched some man other than her boyfriend and the Applicant.

53. By 2007 ESR had access to an additional method of DNA analysis known as "YSTR". On 4 April 2008 Ms McGovern advised that the YSTR testing had excluded the Applicant as the donor of the trace amount of additional male DNA located on the Complainant's cervical swabs if it were assumed that this DNA component had originated from one male. It also reinforced the earlier conclusion that he was excluded as a possible donor of the trace amount of male DNA found in scrapings taken from her right hand fingernails if it were assumed that that DNA component had originated from one male.

54. On 10 January 2008 the Complainant again confirmed to the Police that in the relevant period she did not have sexual contact with anyone other than her boyfriend and the rapist. That meant that only two males had contributed to the DNA profiles found in her vagina, her boyfriend and the rapist. The fact that only

one male other than the boyfriend was involved meant that the unknown male could not have been the Applicant.

55. The DNA evidence therefore indicates that on the night in question an unknown male had intercourse with the Complainant. Since the only unknown male to have intercourse with the Complainant was the rapist, and the Applicant has been excluded as the donor of that DNA, the DNA evidence indicates that the Applicant was not the rapist.

(11) Conclusions as to innocence

56. Even before considering the many obstacles to the Crown case, the evidence positively supporting the Applicant's guilt was particularly thin. It came down to nothing more than a visual identification by the Complainant (notoriously unreliable and in this case only "90% sure") together with the modest coincidences that at the time of the rape the Applicant, who had some similar facial features, was in Central Christchurch on a similar category of motorcycle, wearing clothing with grey and black in it, and that his motorcycle was giving trouble (albeit of a different kind).

57. Against that background the non-forensic evidence includes many reasons for positively concluding that the Applicant was not the man responsible. The key points are a series of inconsistencies between the man observed by the Complainant (clothing, helmet, motorcycle colour and likely cigarette burn), the fact that the particular kind of clothing and backpack worn by the Applicant were inconsistent with her account of events at the scene, and strong alibi evidence. The alibi evidence is only partially reliant upon human estimates of time. It has underpinnings of scientific accuracy (video security footage and Eftpos recording), is supported by a number of different witnesses, and is generally believable.

58. Against that background the DNA evidence confirms that the Applicant was not the rapist.

59. My conclusion is that the Applicant has established his innocence beyond reasonable doubt.

(12) Other considerations

60. For the sake of completeness I deal briefly with the suggestion that other matters brought the Applicant's case into the extraordinary circumstances category.

61. In the course of his interview with the Applicant on 17 September 2003 Detective ██████ falsely implied that the Applicant had been identified as the rapist through DNA analysis and that the Complainant had accurately described the Applicant's own clothing. In other circumstances this deceptive Police conduct would have been relevant but in the present case it did not contribute to the Applicant's conviction. The object of the misrepresentations was clearly to bluff the Applicant into confessing. It did not have that effect. The Applicant has been steadfast in maintenance of his innocence throughout. The result is that although there were deceptions, they did not cause the Applicant any harm.

62. Mr Shamy suggested as a relevant consideration that the Applicant's first trial counsel, Mr Fournier, failed in his duty to follow up the alibi witness Mr ██████ and potentially his passengers. The Court of Appeal accepted that there was a breach of duty in that respect and ordered a retrial in consequence. There is good reason for believing that that error played a major part in the Applicant's conviction. I assume that Mr Fournier was acting on Legal Aid. However no argument has been, or should be, advanced on behalf of the Applicant that the State should compensate persons wrongly convicted as a result of inadequacies of Legal Aid defence counsel. It is unnecessary to come to any conclusion on that matter in the present case but it seems unlikely that it would ever be accepted as a relevant consideration.


63. Mr Shamy also advanced as a relevant consideration the ██████ ██████ which were said to have made him particularly vulnerable. Whatever relevance this may or may not have to quantum of compensation, I do not consider that it has any bearing upon the Executive's discretion whether or not to grant compensation.

64. It follows that in my view there are no factors in the present case bearing upon the exercise of the Executive's discretion other than proof of innocence beyond reasonable doubt.

(13) Conclusions

65. In my view:

- (a) The Applicant has established his innocence beyond reasonable doubt.
- (b) No other matters bear upon the Executive's assessment of whether there are extraordinary circumstances such that it is in the interests of justice to consider the Applicant's claim.



Robert Fisher