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ADVICE TO THE MINISTRY OF JUSTICE CONCERNING APPLICATION BY SCOTT WATSON FOR THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

March 2011

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ADVICE ON APPLICATION FOR THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

SCOTT WATSON

EXECUTIVE SUMMARY

1. I have been asked to advise the Ministry of Justice ("the Ministry") whether, if supported by admissible evidence, Mr Watson's application for the exercise of the Royal prerogative of mercy, contains information or raises issues that could justify referral of Mr Watson's case to the Court of Appeal under s 406(a) of Crimes Act 1961. My instructions are not a request to provide an opinion as to whether the matter should be the subject of a referral under s 406(a). My opinion is to assist the Ministry to decide that issue.

2. The Ministry's instructions focus on the availability of 'fresh evidence'. This reflects the longstanding convention that the Royal prerogative of mercy will normally be exercised to re-open a case when new information becomes available that was not able to be properly examined by a court and which raises serious doubts about a person's conviction or sentence. The prerogative of mercy does not operate as another appeal or as an opportunity to relitigate matters already considered by the Courts.

3. Before setting out a summary of my findings I make some general observations.

4. In the course of preparing this advice I received a large number of inquiries from members of the public, many of whom are in one way or another connected to Mr Watson. Because my instructions required me to consider only information relied on and submitted by Mr Watson and his representatives it was not appropriate for me to embark on a wide ranging inquiry into all of the matters referred to me.

However, because of the public interest in this matter I have forwarded all information I received which falls outside that provided by Mr Watson and/or his representatives to the Ministry with a request for instructions as to whether it is material that I should additionally consider. I am aware the Ministry has referred that information to Mr Watson and his representatives for their decision on what material is relied on by him. I have had regard only to material that Mr Watson or his representatives have submitted in support of his application. I mention this to emphasise the limitations of my task and to make it clear it has not been to conduct a general inquiry into every aspect of this matter as appears to have been thought in some quarters.

5. An important aspect of this case concerns the correctness of identifications of Mr Watson made by Mr Guy Wallace as the man with whom and onto whose yacht Ms Hope and Mr Smart boarded from a water taxi in the early hours of 1 January 1998 in Endeavour Inlet. As the Court of Appeal noted, it is beyond question that the case against Mr Watson depended substantially on the correctness of the identification evidence. In making that observation however the Court also noted the visual identifications were but part of the overall evidence relied upon by the Crown as establishing the guilt of Mr Watson and that visual identification may be supported (or weakened) by other evidence.

6. Against that background the evidence of Mr Wallace and to a lesser extent Ms McNeilly (the bar manager at Furneaux Lodge on 31 December 1997) has been an important focus of my consideration. Both have made fresh affidavits. Mr Wallace now maintains that had he been asked to make a dock identification at trial he would have stated that the man in the dock (Mr Watson) was not the man in the bar and the man in his water taxi. Ms McNeilly maintains that had she been shown the *Mina Cornelia* photograph which depicted Mr Watson earlier in the evening of 31 December 1997, she would have told the court she would not have picked out photo three in what became known as montage B, as being the man she described serving in the bar. I have interviewed these witnesses and assessed their

evidence against other evidence given at trial, including against their own evidence. I have concluded, that assessed in the context of all of the other evidence, the new information Mr Wallace and Ms McNeilly have provided does not take me to the point where I consider that information meets the required test for a referral to the Court of Appeal based on "fresh evidence"; namely "*whether [the evidence] is fresh, credible and sufficiently cogent that, if considered alongside all of the other evidence given at trial, there is a reasonable prospect that the Court of Appeal would uphold the appeal*".

7. Both Mr Wallace and Ms McNeilly impressed me as sincere in their belief that what they now say is of importance. They both hold the view their evidence at trial was crucial in leading to the conviction of Mr Watson. While undoubtedly important and the subject of considerable focus at trial, the evidence they gave was but part of the case against Mr Watson, as has been pointed out by the Court of Appeal. In the end it was the combination of a range of evidence that was relied on to support the convictions. This was a circumstantial case where the Jury was invited to consider many aspects of the evidence as significant not only the identification evidence provided by Mr Wallace and other identification witnesses.

8. It could be said that the Crown should not have relied on an inherently unreliable witness (Mr Wallace) who was always uncertain about his identification of Mr Watson and the Defence, for its part, should have been more rigorous in testing that evidence, in particular by requiring Mr Wallace to make a dock identification at trial. The expectation being that Mr Wallace would have been unable to do so as he has confirmed to me now would have been the case.

9. The term 'dock identification' is generally used to describe the situation where a witness is invited to identify an offender in the courtroom and where there is no additional evidence that the witness has, before trial, demonstrated an ability to make a reliable identification of the offender. Here, there is a slight variation

because of the prior photo identification made by Mr Wallace when he picked out Mr Watson's photo (photo three) from montage B. However, Mr Wallace's identification in this regard was always qualified on the basis that it was the eyes of the man in that photo which most resembled the man in question, but the hair of the man in the photo was a different length (too short).

10. Dock identifications can be notoriously unreliable and courts have stated on numerous occasions that the use of dock identification is an undesirable practice in general and other means should be adopted of establishing that the defendant in the dock is the man who was arrested for the offence charged; see for example *R* v *Edward* [2006] UKPC 23 and *R* v *Peato* [2009] NZCA 333.

11. In this case, for the reasons I discuss below, I do not consider that Mr Wallace's dock identification evidence is fresh evidence. Prior to trial Mr Wallace had identified Mr Watson from photo three in montage B. His identification in this regard was qualified, as I have noted. More significantly, the evidence that Mr Wallace went on to give at trial, including his evidence in relation not only to photo three but also the evidence he gave in which he failed to identify Mr Watson from other sources (television footage and the *Mina Cornelia* photograph) allowed the Defence to submit to the jury that Mr Wallace had not in fact made a positive identification of Mr Watson, or put another way, that the evidence Mr Wallace had given ruled out Mr Watson as being the mystery man. Against that background and when considered alongside the other evidence given at trial I do not consider the new dock identification evidence Mr Wallace maintains he would now give (some twelve years later) meets the test for fresh evidence. The evidence does not significantly alter the identification evidence which Mr Wallace gave at trial (which evidence was fully tested and the jury had the benefit of hearing the arguments made about Mr Wallace's reliability) to the point where it could be said to be sufficiently fresh.

12. Further, the Crown and Mr Watson were each represented by experienced counsel who made judgements at the time about how to deal with various aspects of the evidence. It was open to both the Crown and the Defence at trial to have asked Mr Wallace to make a dock identification. The evidence could have been called at trial with reasonably diligence but counsel elected not to do that.

13. Counsel confirmed to me they had made a tactical decision at Mr Watson's trial not to invite Mr Wallace to make a dock identification. They did not know how he would respond. Asking him to make a dock identification carried significant risk. Equally, electing not to ask Ms McNeilly to view and identify (or not) Mr Watson by reference to the *Mina Cornelia* photograph was also a tactical decision. Asking Ms McNeilly about this photograph also carried risk. In my view there is no basis to question those decisions made by experienced counsel. They were matters for counsel's judgement. In assessing those matters I have borne in mind the relevant principles relating to counsel error but note this was not a ground specifically relied on by Mr Watson in his application. Notwithstanding that, it may be helpful to note that in cases where an appellant does rely on counsel error as a ground for appeal the approach taken by appellate courts when examining such allegations is to focus on whether there is a real risk that counsel's conduct affected the outcome of the trial, with the consequence that a miscarriage of justice occurred. As indicated, even if a failure to invite Mr Wallace to make a dock identification (or to ask Ms McNeilly to look at the *Mina Cornelia* photo) was considered to be an error by counsel (which I do not accept), for the reason I have noted, I do not consider it was material. The Defence had success in undermining the effect of Mr Wallace's evidence, to the point counsel were able to submit to the Jury and later to the Court of Appeal that Mr Wallace had not in fact made a positive identification. Ms McNeilly's new evidence, even if fresh (which I do not accept as it was available at the time of trial), I do not consider sufficiently cogent. That is because Ms McNeilly was never able to make the important link between the man she had served at the bar and the man who Mr Wallace later took in his water

taxi with Mr Smart and Ms Hope. It was only Mr Wallace who could make that link.

14. I have considered a significant amount of other material submitted on behalf of Mr Watson. I discuss all matters in detail below. None of that material in my view meets the required test of fresh evidence referred to above. I have interviewed Mr Watson's Defence counsel and discussed a range of matters with them in light of the suggestions made by Mr Watson that certain matters of evidence should have been dealt with differently or additional evidence called on behalf of Mr Watson. In the end I am satisfied that Mr Watson's counsel exercised judgement about certain matters at trial as would be expected and they were required to make decisions about what evidence to call and how to best challenge the evidence led by the Crown. None of the criticisms made by Mr Watson about how the evidence was dealt with at trial or suggestions about additional evidence that might have been called were either valid criticisms or meet the test for fresh evidence. Indeed, with some exceptions (discussed below) many of the matters relied on by Mr Watson and his representatives were known to and considered by him and his counsel at the time of trial.

15. I have made various attempts to interview secret witness A who gave evidence against Mr Watson at trial and who was said to have since retracted his evidence. He was not prepared to meet me. I note Defence counsel also tried to meet with him at various stages after the trial but he also refused to talk to them. I am therefore not in a position to advance that matter further but I note that when he was interviewed by the Police Complaints Authority (now the Independent Police Conduct Authority or "IPCA") in November 2000 he denied any retraction and maintained the evidence he gave at trial was truthful.

16. As I have said, this was a circumstantial case where the Jury was invited to consider many aspects of the evidence as significant. It is impossible to know what the Jury considered important. That said, two hairs were found on a blanket

found in Mr Watson's yacht on 14 January 1998, which through DNA analysis, strongly supported the proposition the two head hairs were those of Ms Hope. This was evidence the Jury was entitled to regard as corroborative of the evidence given by the identification witnesses linking Mr Watson to Ms Hope (and by implication Mr Smart). In that context it needs to be borne in mind that Mr Watson denied Ms Hope and Mr Smart were ever on his vessel. If the Jury accepted the DNA evidence as reliable it must follow that, in the absence of a credible alternative explanation Mr Watson could not have been telling the truth about the two victims having boarded his vessel.

17. In summary, in relation to each of the categories of potentially fresh evidence identified in the material provided in support of Mr Watson's application I have concluded as follows:

- **Mr Guy Wallace's identification of Mr Watson:** Mr Wallace's new identification evidence does not meet the test for fresh evidence; nor is it as significant as Mr Watson has claimed in his application, particularly in light of the evidence Mr Wallace gave at trial. Further, none of the other information provided since my interim advice relating to Mr Wallace's identification evidence (namely matters relating to him choosing photograph 3 in montage B; his description of an early undisclosed formal identification procedure; his repudiation of a statement he had signed when he lived in Australia in 2001 and the provision of a portrait drawn by an artist to Mr Wallace's description of the mystery man) satisfies the test for freshness. Even if considered to be fresh, I do not believe this information to be of sufficient cogency when considered alongside the evidence given at the trial, to raise a reasonable doubt about Mr Watson's guilt;

- **Ms McNeilly's identification of Mr Watson:** The information Ms McNeilly has provided referring to the man depicted in the *Mina Cornelia* photograph is not fresh evidence and nor is it, in my view of sufficient cogency when considered

alongside other evidence to call into question the safety of Mr Watson's convictions. This is particularly so in light of the evidence given by Mr Wallace about precisely the same issue. The information was available at the time of Mr Watson's trial had counsel chosen to ask Ms McNeilly about it. They elected not to do so;

- **Ms McNeilly's evidence about hands and fingers:** Ms McNeilly has said she told Police prior to trial that the man she served in the bar at Furneaux Lodge had all his fingers (I understand Mr Watson has missing fingers). Assuming this to be correct then strictly her evidence meets the test for fresh evidence, as it was not available to the Defence prior to trial. However, even if Ms McNeilly's evidence in this regard meets the test for freshness I am not satisfied that evidence considered separately or taken with other evidence would likely have persuaded the Jury to have reached a different verdict about Mr Watson's guilt;

- **Mr Wallace's description of the location of the boat:** Mr Wallace, on his own admission, does not have any fresh evidence about the issue of the location of the boat as it was at the time Mr Smart, Ms Hope and the lone man disembarked from his water taxi. There is no fresh evidence on this issue;

- **Confession to the murders to secret witness A and the Affidavit of** [redacted] **in relation to the Trial Evidence of secret witness B:** As a consequence of not being able to interview secret witness A (due to him having twice failed to attend arranged interviews with me) I have been unable to assess the credibility of his alleged retraction of the evidence he gave at trial. I have noted that when secret witness A was interviewed as part of an investigation by the then Police Complaints Authority he said that what he had originally told Police and repeated at trial had been the truth. The evidence of [redacted] does not meet the criteria for fresh evidence as his evidence would have been available at the time of Mr Watson's trial had appropriate inquiries been made. While it is not possible to determine precisely what weight the Jury

might have attached to the evidence given by the prison witnesses I am satisfied that had secret witness A or secret witness B not given evidence (or if Mr [...] had been called to refute evidence given by secret witness B) it cannot be said the Jury would have likely reached a different verdict particularly in view of the other evidence before it and the Judge's directions as to the need for caution when considering this evidence;

- **Additional ketch sightings:** The sightings of ketches by Mrs Rowe and [...] do not meet the test for fresh evidence. The information was available at the time of Mr Watson's trial and it had been disclosed to the Defence prior to the trial. Mrs Rowe and [...] could have been called to give evidence by Defence counsel but they were not. That was a matter for Defence counsel. Information provided to me in relation to a further ketch sighting by [...] in the Kaiteriteri area on 2 January 1998 may technically be fresh in the sense it was not available at the time of trial (because it would appear there was no record of it in the files disclosed to the Defence), however in terms of the strength and cogency of the evidence I am not satisfied that had it been before the Jury it would have affected the overall result. There was a substantial amount of other evidence relating to ketch sightings before the Jury, some of which was called by Defence counsel. The affidavit evidence of [...] is clearly not fresh evidence as it was available at the time of trial. [...] gave details of the contacts he had with Defence counsel and an investigator working with the Defence during Mr Watson's trial. [...] could have been called to give evidence but was not. That too was entirely a matter for Defence counsel and Mr Watson. I do not consider the evidence of former Police officer [...] on issues relating to the manner in which Police treated reports of ketch sightings in the early days of Operation Tam, is fresh evidence. Even if it is considered to be fresh evidence or a source of fresh evidence I am not satisfied any of [...] evidence is of sufficient strength or cogency to cause a Jury to entertain a reasonable doubt about Mr Watson's guilt;

- **Timing of trip from Cook Strait to Erie Bay:** The timing 'evidence' is supportive of the Defence case that it was not *Blade* seen by [redacted] in Cook Strait at 4.30pm on 1 January 1998. However, it is not a new matter. It was part of the Defence case throughout, including before the Privy Council, that it was physically impossible for the boat seen by [redacted] to be *Blade* because of a "simple reconstruction of the total evidence". On that basis I do not consider that Mr Hunter's affidavit evidence relating to the timing of the trip from Cook Strait to Erie Bay by *Blade* meets the test for fresh evidence;

- **Evidence of water-taxi driver [redacted]:** No affidavit evidence from water-taxi driver [redacted] has been provided. Nor have I been given a clear indication of Mr Watson's position in relation to [redacted] 's 'new evidence' which Mr Watson alleges [redacted] can now give relating to him remembering having taken a lone man to his boat in the early hours of 1 January 1998. In these circumstances I have concluded that even if this new information satisfies the test for freshness (which I do not accept as [redacted] had been interviewed about this precise matter by a private investigator hired by the Defence in February 1998 and at that time had stated he could not remember such a trip), the information lacks credibility and cogency. For this matter to be relied on now by Mr Watson would mean that the position taken by him and his counsel at trial would be undermined because the Defence contended at trial that Mr Watson had been taken as the only passenger to his yacht by Mr Anderson. No reasonable explanation has been provided as to how the two inconsistent positions can be reconciled;

- **Hatch Scratches and Squab Evidence of [redacted]** do not consider [redacted]'s evidence on these issues meets the test for freshness. Defence counsel made an informed decision that they did not want to call [redacted] as a witness. They were aware of the evidence she could give but considered there were risks in calling her as a witness. In any event, I consider this evidence lacks credibility and cogency sufficient to raise a doubt as to the safety of Mr Watson's convictions;

- **Underwater Sonar Search:** The Crown called no evidence at trial to the effect that incriminating evidence in relation to Mr Smart and Ms Hope would be found in the general area where the Royal New Zealand Navy search was conducted in August 2000, or indeed in any other particular area. The Jury was simply invited to draw an inference that Mr Watson disposed of the bodies of Mr Smart and Ms Hope at a time and place where he knew it was unlikely they would ever be found. While the Navy's report of the underwater sonar search conducted after Mr Watson's trial would, in a strict sense meet the test for fresh evidence, the fact that Mr Smart and Ms Hope were not located during the search is not of such significance to the overall case that it raises doubt as to the adequacy of the Crown's proof of Mr Watson's guilt;

- **Submissions on the DNA Evidence relating to the hairs located on Mr Watson's boat:** It is clear there is no fresh evidence on this matter which would throw doubt on the accuracy or reliability of the DNA testing results as they were put before the Jury at trial;

- **Matters in the Reports of the IPCA:** Mr Watson Sr has made submissions on certain matters that are the subject of the IPCA reports on complaints by Mr Hunter and himself respectively. Those matters relate to the adequacy or otherwise of the Police investigation into the disappearance of Mr Smart and Ms Hope. They are matters of opinion and submission only. Accordingly, they could not, in my view, meet the test for fresh evidence, nor are they the source of any fresh evidence that might justify a referral of Mr Watson's case to the Court of Appeal. If Mr Watson wishes to pursue these matters, that is a matter for him to take up with the IPCA;

- **The 'extra' unidentified vessel**: I am not satisfied the material submitted in relation to this matter is the source of any fresh evidence. It is clear all of the relevant information was available at the time of Mr Watson's trial, (as Mr

Watson Sr conceded) but that Defence counsel made a judgement in the context of the trial not to pursue matters further. That was a matter for Defence counsel;

- **Other matters raised in Mr Watson's submissions:** I am satisfied that none of the other matters which have been raised in Mr Watson Sr's submissions (relating to allegations of "sub-judice reportage" by media of Mr Watson's case, "unfair and improper conduct" by the Crown which led to an "unfair" trial, the alleged concealing by the Crown of certain evidence of Ms McNeilly from Defence counsel and the Court; the Crown "concealment of the murder scenario and the 'two trip theory'", and the submission that these matters are "irrefutable proof" of Mr Watson's innocence) are the source of any fresh evidence.

18. I have considered all the material that has been submitted in support of Mr Watson's application. I am not satisfied that any of that material contains any evidence which could meet the well-established test for fresh evidence, either singularly or cumulatively. I therefore do not consider that any of the new evidence that has been submitted is fresh, credible and sufficiently cogent that, when considered alongside all of the other evidence given at Mr Watson's trial, there is a reasonable prospect that the Court of Appeal would uphold an appeal.

19. In addition to considering whether there is any fresh evidence disclosed in Mr Watson's application, I have considered all of the claimed errors in the Court of Appeal's judgment. As I indicated in my interim advice, in my view there is no basis upon which the Court of Appeal should be asked to reconsider its decision on these matters.

ADVICE ON APPLICATION FOR THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

SCOTT WATSON

1 INTRODUCTION

1.1 Mr Watson lodged an application with the Governor-General on or about 1 November 2008 seeking the exercise of the Royal prerogative of mercy. The Governor-General requested formal advice from the Minister of Justice on 19 November 2008.

1.2 In April 2009 I was instructed by the Ministry to provide preliminary advice on potentially fresh evidence disclosed in the application.

1.3 I was instructed to make a preliminary assessment of whether, if supported by admissible evidence, the documents provided in support of Mr Watson's application, contain any information or raise any issues that potentially justify a referral of Mr Watson's case to the Court of Appeal under s 406(a) of the Crimes Act 1961. Specifically I was asked to:

- Consider Mr Watson's letter of application and statutory declaration, including the book *Trial by Trickery* and the DVD *Murder on the Blade?*
- Read and consider the:
    - Summing up of Justice Heron;
    - Court of Appeal Judgment: *Watson v R* CA384/99 and CA507/99;

- Trial documentation including the notes of evidence and index of evidential references relating to disputed issues at trial; and
- Court of Appeal documentation including submissions for the Appellant and the Crown respectively in CA 384/99.

- Advise on:
  - Whether there is any 'fresh' evidence.
  - If so, whether the fresh evidence (taken either individually or cumulatively), if substantiated, might be sufficiently credible and cogent to raise a real doubt about the safety of Mr Watson's convictions.
  - If the answer to the above two questions is yes, what steps would Mr Watson have to take to provide evidence in an acceptable form that potentially could support a referral of his convictions to the Court of Appeal.
  - My views as to whether any of the alleged errors in the Court of Appeal judgment could justify a referral of the case to the Court of Appeal.

1.4 In support of his application Mr Watson relies on matters outlined in a book entitled '*Trial by Trickery*' and a DVD entitled *'Murder on the Blade?'* written and made respectively by journalist Mr Keith Hunter. In addition to his letter of application, the application is supported by a statutory declaration by Ms Roslyn McNeilly ("Ms McNeilly") taken in the Northern Territory of Australia on 27 November 2000 containing information said to qualify the identification evidence given by Ms McNeilly at Mr Watson's trial. A range of additional material has been provided by or on behalf of Mr Watson in support of the application. This material is referred to later in this advice.

Interim Advice

1.5 In October 2009 I provided interim advice to the Ministry in which I identified seven categories of potentially fresh evidence which I considered required further inquiry before any final assessment could be made as to whether those matters satisfied the test of fresh evidence.

1.6 In summary, those categories related to evidence about the following matters: Mr Guy Wallace's identification of Mr Watson; Ms McNeilly's identification of Mr Watson; Mr Wallace's identification of the location of the boat; Mr Watson's alleged confession to Secret Witness A; additional ketch sightings; the timing of a trip by Mr Watson's vessel *Blade* from Cook Strait to Erie Bay on 1 January 1998; and evidence of water-taxi driver [redacted]. I refer to the details of the potentially fresh evidence relating to these matters later in this advice.

1.7 As noted in my interim advice, the information presented to me at that stage was insufficient to reach any final view as to the freshness and/or cogency of each of the seven categories of evidence I had identified. I recommended that further inquiries be made as follows:

- Mr Wallace should be interviewed (and any new evidence recorded in an affidavit) concerning the identification evidence and the evidence relating to the location of the boat he gave at trial;

- Inquiries should be made as to whether Mr Wallace discussed with the Police (prior to depositions or trial) matters relating to his new evidence concerning the exact location of the boat;

- Ms McNeilly should be invited to clarify on what basis she maintains she was "tricked" into identifying Mr Watson in photograph 3 on montage B produced at trial;

- Secret Witness A should be interviewed and his alleged retraction formally recorded;

- Mrs Betty Rowe and [illegible] should be invited to make affidavits confirming their alleged sightings of a ketch at the relevant times and the alleged reports of those sightings to the Police including information as to the timing of those reports to Police;

- Evidence (including affidavits from other people who allegedly reported sightings of a ketch to Police) should be provided to support the criticisms made by Mr Hunter that the Police failed to follow up other sightings of a ketch at the relevant times;

- Mr Watson should be requested to clarify his position regarding the significance of new evidence from [illegible] in light of the way his case was presented at trial and if appropriate an affidavit should be provided from [illegible] setting out the new evidence he maintains he is now able to give.

1.8 In my interim advice I concluded it was premature to reach any final view about the overall significance of the seven categories of potentially fresh evidence until the inquiries referred to above had been concluded. However, I advised that it was likely some of the matters identified, if substantiated, may meet the test of freshness although I could not at that point reach any conclusion as to cogency of those matters either separately or cumulatively. I advised that other matters relied

on by Mr Watson were unlikely to meet the test of freshness or if fresh, be of sufficient cogency to raise a reasonable doubt about the safety of Mr Watson's convictions.

Further information provided

1.9 Subsequent to my interim advice I was provided with a substantial amount of material which had been presented by or on behalf of Mr Watson for consideration as part of his application. Some of that material disclosed matters additional to those which I had identified, and which were raised by or on behalf of Mr Watson on the basis that it constituted fresh evidence.

1.10 I was instructed by the Ministry to consider these matters to the extent relevant. I discuss these matters below.

1.11 The further inquiries I identified as necessary have now been made and I am in a position to provide my advice about the freshness and cogency of the new evidence which has been presented, including the additional matters I have referred to above.

1.12 In addition to the matters of fresh evidence relied on in support of this application, Mr Watson Sr made submissions on other matters he claimed contributed to a miscarriage of justice including the:

> "media frenzy, the political involvement and pressure on Police to perform, the early involvement of the Trial judge in an investigative capacity, the misinformation put before the Jury by the prosecution and the actions of the appeal court in creating a body of evidence that does not exist to justify its rejection of Mr Watson's appeal regarding the two trip theory".

1.13 On 8 December 2010 the Ministry confirmed its instructions to consider all material provided by or on behalf of Mr Watson against the established fresh

evidence principles that apply to applications for the exercise of the Royal prerogative of mercy.

1.14 In addition to the issue of fresh evidence I have been asked to consider and advise on Mr Watson's submissions relating to alleged errors in the Court of Appeal's judgment. My conclusions are set out below.

1.15 All relevant information that I have concluded can properly be considered as part of Mr Watson's application has now been provided in a satisfactory form. I do not consider there are any outstanding procedural or admissibility requirements.

2. CRITERIA FOR THE EXERCISE OF THE ROYAL PREROGATIVE OF MERCY

2.1 When considering Mr Watson's application and preparing this advice I have had regard to the relevant legal criteria for the exercise of the Royal prerogative of mercy. The assessment of fresh evidence needs to be made in that context.

2.2 In determining whether to exercise the Royal prerogative of mercy, the Governor-General acts on the advice of the Minister of Justice. The central issue in respect of Mr Watson's application is whether the Minister should advise the Governor-General to exercise his powers to refer the case back to the Court of Appeal pursuant to section 406 of the Crimes Act 1961.

Section 406 of the Crimes Act 1961

2.3 In general terms, section 406 of the Crimes Act 1961 allows the Governor-General in Council to refer the question of an applicant's conviction or sentence to the Court of Appeal. The power of the Governor-General to refer the question of a conviction back to the Court of Appeal under section 406 is a statutory addition to the Governor-General's power to exercise the prerogative of mercy. The Court is empowered to hear and determine the case as if it were a normal

appeal (*R v Flower* [1963] 3 All ER 669; *R v Barr (Alistair)* [1973] 2 NZLR 95; *Collie v R* [1997] 3 NZLR 653; *R v Bain* [2004] 1 NZLR 638).

2.4 While there are no specific limits on the use of the Governor-General's powers under the Royal prerogative of mercy, strong conventions have been developed that reflect the respective roles of the Judiciary and the Executive branch of government in the administration of justice.

2.5 The starting point is that determinations of criminal responsibility are made by the courts. The Royal prerogative of mercy does not operate as another appeal or a further opportunity to re-examine facts and arguments that have already been considered by the courts. A case will normally be re-opened when new information becomes available that was not able to be properly examined by a court and which raises serious doubts about a person's conviction or sentence.

2.6 Historically, two key criteria have therefore been applied in determining whether a case should be re-opened under section 406(a). The two criteria are as follows:

- New evidence is raised by an applicant that is "fresh" in the sense that it was not available at the time of trial, or is otherwise of such a nature that it would give rise to grounds for a normal appeal; and
- The evidence must be so compelling that it is capable of pointing to a likely miscarriage of justice, ie there is a reasonable prospect that the Court of Appeal would uphold an appeal.

Fresh evidence

2.7 In order to assess whether the applicant would have a reasonable prospect of success in the Court of Appeal, the Governor-General's advisers must therefore consider the legal principles that the Court of Appeal would apply in "fresh

evidence" cases. They were recently summarised by the Court of Appeal in *R v MacDonald* [2008] NZCA 315 at 37:

> "The jurisdiction to allow an appeal on the ground of discovery of fresh evidence arises from s 385(1) (c) Crimes Act 1961. An appeal against conviction shall be allowed if the Court is of the opinion there was a miscarriage of justice. The overriding test is the interests of justice. Admission of new evidence is governed by criteria in *R v Bain* [2004] 1 NZLR 638 at [22] – [27] (CA), affirmed on appeal by the Privy Council in *Bain v R* (2007) 23 CRNZ 71 at [32] (PC) and discussed in *R v Hutton* [2008] NZCA 126. The principles are well established and need no detailed discussion. They are:
>
> - The proposed evidence must be "sufficiently fresh". If it could have been called at the trial with reasonable diligence it will not qualify as sufficiently fresh. But it is not always necessary that the evidence be fresh before the Court will consider it. If it is strong and demonstrates a real risk of miscarriage of justice, the requirement that it be fresh is of less importance.
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> - The proposed evidence must be sufficiently credible or sufficiently cogent: see, for example, *Hutton* at [27(b)].
>
> - Once the first two filters are satisfied, the third enquiry is whether the new evidence, if considered alongside the evidence given at the trial, might have caused a reasonable Jury to entertain a reasonable doubt about guilt. This Court is not the arbiter of guilt, and is not to take upon itself the task of deciding that issue."

2.8 The final statement in the above quotation relating to the impact of the new evidence and the role of the Court on appeal has since been modified by the Supreme Court in its decision in *R v Matenga* [2009] NZSC 18. *Matenga* concerned the interaction between s 385(1)(c) and the proviso to s 385(1) which provides that the appeal Court may nevertheless dismiss an appeal if it is satisfied that "no substantial miscarriage of justice has actually occurred". The Supreme Court observed at paragraph 29:

> "Following conviction, after a fair trial by Jury, Parliament has given the appeal courts an ability to uphold the conviction despite there being a miscarriage of justice in some respect.

> While the Jury is in general terms the arbiter of guilt in our system of criminal justice, the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal be the ultimate arbiters of guilt in circumstances in which the proviso applies."

2.9 After reviewing New Zealand, United Kingdom and Australian law, the Supreme Court determined that, subject to two qualifications, New Zealand should adopt the approach of the High Court of Australia in *Weiss v R* [2005] HCA 81. That is:

- Irregularities that plainly could not, either individually or collectively, have affected the result, do not amount to a miscarriage of justice;

- To constitute a miscarriage of justice for the purposes of section 385(1)(c) Crimes Act something must have gone wrong with the trial that was capable of affecting the result of the trial;

- However, the task of the appeal Court under the proviso is then to consider whether that potentially adverse effect on the result may actually have occurred. To do this, the Court must make its own assessment of the evidence without reference to what a Jury would or might have done. In other words, the appeal Court should itself decide whether a substantial miscarriage of justice has actually occurred;

- The appeal Court may then exercise its discretion to dismiss an appeal if the Court, after reviewing all the admissible evidence, considers that notwithstanding the error or defect in the trial, a guilty verdict was inevitable in the sense that it was the only reasonably possible verdict. To come to this view, the appeal Court must itself feel sure of the appellant's guilt;

- The Court must consider whether any limitations associated with assessment of the honesty and reliability of witnesses on the transcript alone mean that it is unable to feel sure of the appellant's guilt;

- The proviso should not be applied unless the appeal Court is also satisfied that the trial was, in overall terms, fair.

Other preconditions

2.10 Other preconditions that normally apply in considering whether a referral to the Court of Appeal under s 406 of the Crimes Act 1961 based on fresh evidence is justified are:

- The applicant must have already appealed to the Court of Appeal on other grounds on at least one other occasion and that the new ground is not a legal issue which would be better addressed in the Supreme Court;

- The evidence advanced in support of the application must be included in valid affidavits and be admissible in a court of law or it must be apparent that the applicant could satisfy those requirements in the Court of Appeal;

- It must be apparent the applicant could provide his or her deponents for cross examination if required.

Summary

2.11 In light of the Supreme Court's recent dicta in *R v Matenga* (supra) the key question when assessing applications for the exercise of the Royal Prerogative of Mercy on the basis of fresh evidence is:

Is the new evidence fresh, credible and sufficiently cogent that, if considered alongside all of the other evidence given at trial, there is a reasonable prospect that the Court of Appeal would uphold the appeal.

2.12 This assessment should take into account that strict adherence to the "freshness" requirement may not be necessary if the evidence is especially cogent and that an appeal Court may, under the proviso to section 385(1) of the Crimes Act 1961, dismiss an appeal if the Court, on its own view of all the admissible evidence considers that notwithstanding a significant error or defect in the trial, a guilty verdict was inevitable in the sense that it was the only reasonably possible verdict.

2.13 As stated, I have had regard to these legal principles when considering Mr Watson's application and when preparing my advice. I have also borne in mind the relevant principles relating to counsel error but note this was not a ground specifically relied on by Mr Watson in his application.

3. BACKGROUND

Circumstances Surrounding Convictions

3.1 The circumstances surrounding Mr Watson's convictions, his trial and appeals are summarised below.

3.2 The deceased, Mr Ben Smart (aged 21 years) and Ms Olivia Hope (aged 17 years), attended a New Year's Eve celebration at Furneaux Lodge, Endeavour Inlet, Marlborough Sounds on the evening of 31 December 1997. They were last seen boarding a yacht in Endeavour Inlet in the early hours of 1 January 1998 in the company of a lone male. Neither their bodies nor any trace of their belongings have ever been found.

3.3 After five months of intensive Police investigation since their disappearance, Mr Watson was arrested and charged with the murders of Mr Smart and Ms Hope on 15 June 1998.

3.4 Mr Watson faced two charges of murder. His trial was held before Justice Heron in the High Court at Wellington in the period 10 June 1999 to 11 September 1999. Mr Watson was represented by Messrs Bruce Davidson (now District Court Judge Davidson), Michael Antunovic and Ms Nicolette Levy. Mr Watson did not give evidence at trial however the Defence called 26 witnesses.

3.5 A key issue at trial was whether Mr Smart and Ms Hope accompanied Mr Watson and boarded his yacht on the last occasion of their sighting.

3.6 The Crown case was that Mr Watson was the man last seen with Mr Smart and Ms Hope, and that he extended an invitation to them to sleep on his yacht in the early hours of 1 January 1998. Counsel for Mr Watson argued that Mr Watson returned to his yacht at about 2am on 1 January 1998 and remained there until he sailed away from Endeavour Inlet at about 7am that day. Approximately 488 witnesses were called by the Crown to give evidence at trial.

Summary of evidence presented at Trial

3.7 Mr Watson was the owner of a sloop, a single masted 26 foot steel yacht named *Blade*. He sailed it alone to Furneaux Lodge on 31 December 1997. When he arrived in the early afternoon he rafted his vessel to the port side of another yacht, the *Mina Cornelia*. The yacht *Bianco* was rafted up to the starboard side of the *Mina Cornelia*.

3.8 Ms Hope had come to Furneaux Lodge in the yacht *Tamarack*. Mr Smart and Ms Hope knew each other and met up at Furneaux Lodge in the late afternoon or evening of 31 December 1997.

3.9 In the early hours of the morning of 1 January 1998, Mr Smart and Ms Hope were taken back to *Tamarack*, only to find there was no sleeping accommodation available. A water taxi driven by Mr Guy Wallace called at *Tamarack*, leaving two of its passengers there (Ms Hope's sister Amelia and her friend, Mr Goddard). Ms Hope asked to be taken ashore by the water taxi, and as a result, she and Mr Smart both boarded the water taxi, which was occupied by three other people ([redacted], [redacted] and a lone male) and the driver Mr Wallace. Ms Hope enquired about accommodation at the Lodge which brought an offer from one of the occupants of the taxi (the lone male) of a bed on his yacht. This was accepted and Mr Smart and Ms Hope were then taken to the yacht and the three of them boarded it. The time was approximately 4am. The other two passengers were still on the water taxi (as was the water-taxi driver, Mr Wallace) when Mr Smart and Ms Hope were dropped off. Mr Wallace, [redacted] and [redacted] all gave evidence at trial.

3.10 The Crown case was that the man with Mr Smart and Ms Hope was later identified by Mr Wallace from a photograph montage as Mr Watson, but the reliability of this identification was strongly challenged by the Defence. Mr Wallace's evidence was that the person he took to the yacht was the same person he had observed earlier in the evening at the Lodge. Mr Wallace also described the yacht the three people boarded as being a ketch (two-masted), with distinctive characteristics that did not match *Blade*, but which was moored in or around the same area as *Blade*.

3.11 The *Blade* left its mooring at Endeavour Inlet probably before 6am, unnoticed by those aboard the vessels to which it had been rafted (*Mina Cornelia* and *Bianco*). There were two confirmed sightings of *Blade* later that morning; one at Marine

Head at approximately 9am (with one male occupant; the Defence accepted this was Mr Watson) and the other at 10.15am near KuraKura Point. *Blade* was later identified as being in Cook Strait near the entrance to Tory Channel at about 4.30pm. [redacted] and [redacted] were travelling on the inter-island ferry from Wellington to Picton when they observed a single masted yacht in that area, not under sail or motor, "wallowing". [redacted] gave a description of the yacht which was consistent with it being *Blade*. He also selected a photograph of *Blade* as being the yacht he had sighted. Under cross-examination he said he was certain the yacht was the one in the photograph. [redacted] gave evidence of sighting a yacht generally of the description of *Blade* but was less positive about it being the one in the photograph. Neither witness observed any person on board the yacht. Defence counsel contended that there were very real reservations about this identification. Another witness said *Blade* arrived in Erie Bay probably some time shortly after 5pm with Mr Watson as its sole occupant.

3.12 *Blade* was seized by Police on 12 January 1998, and subjected to forensic examination. This revealed the vessel had been repainted since 1 January 1998, changing its colour. The Defence maintained Mr Watson had had plans to paint his boat for some time and there was nothing unusual about that. The interior had been wiped, removing fingerprints. Radio cassette tape covers had also been wiped, and the self steering gear wind vane had been taken from its usual position on the stern and stowed away. The Defence said the Crown evidence about the internal cleaning of *Blade* was overstated. The inside of the hatch cover was found to have 176 scratch marks, which trial witnesses said were likely to have been caused by fingernails. The Defence maintained the scratch marks had been made by children ([redacted]) and could not have been made with the hatch cover closed. Two of the squabs had recently had pieces cut or ripped out of them. A corresponding hole in the cover of one of the squabs was found, but when first seen the cover had been reversed thereby obscuring the hole in the squab. There were burn marks on the edges of the hole in the squab cover and some of the foam beneath the burn hole had been affected by the burning. One

squab cover was missing. The Defence contended there had been paint spilled on one squab cover, there had been a burn hole in another and the other had simply been mislaid.

3.13 The Police took a blanket from the vessel, from which a number of human hairs were later recovered. They included two hairs that were the subject of later positive scientific testing which was strongly indicative of them having come from Ms Hope.

3.14 The Crown case was that extensive Police enquiries resulted in the elimination of all of the 176 identified yachts in the vicinity at the relevant time as being the vessel boarded by the two victims after delivery by Mr Wallace's water taxi. The Crown maintained that enquiries had failed to locate a ketch of the description given by Mr Wallace, or any similar ketch which was reported as having been sighted in the area at the relevant time but not excluded from involvement. The Defence called evidence of ketch sightings in particular relating to sightings of an unidentified ketch departing Queen Charlotte Sound on the morning of 1 January 1998. A shirt which Mr Watson had worn while at the Lodge was not recovered.

3.15 When interviewed by the Police, Mr Watson denied any responsibility or involvement in the disappearance of Mr Smart and Ms Hope. Mr Watson maintained that he had been taken to his yacht by a water taxi at about 2am and that he had not left it again before departing Endeavour Inlet at about 7am, and arriving at Erie Bay about 9.30 to 10am.

3.16 There was evidence given by a naiad water taxi driver, Mr Donald Anderson, of having taken a lone male matching Mr Watson's description, to a vessel with a name of a sharp-edged weapon, which he agreed was probably *Blade*, between 2:00am and 4:00am on 1 January 1998. Some of the occupants of *Mina Cornelia* and *Bianco* gave evidence of being woken up by Mr Watson in the early hours of the morning as he was looking for a "party". In the final address to the Jury, the

Crown conceded that Mr Watson had returned to his boat in the early hours of the morning, but contended that it could be inferred Mr Watson had then returned to Furneaux Lodge. This became known as the "two trip theory", the second trip being back to *Blade* on Mr Wallace's water taxi in the company of Mr Smart and Ms Hope and the other couple. There was evidence that Mr Watson was involved with other people on shore, probably between 3am and 3.30am. There was evidence of inappropriate behaviour by Mr Watson during the course of the evening including approaches with sexual overtones to young women. There was also evidence of some aggressive behaviour by Mr Watson including in respect of a young man, Mr Ollie Perkins (this became known as "the Perkins incident"), and that he was adversely affected by alcohol.

3.17 Mr Watson was in custody at Addington prison following his arrest. He allegedly made statements to two inmates (known as secret witnesses A and B) on separate occasions, each of which was said to constitute an admission of responsibility for the killing of Mr Smart and Ms Hope. In one instance he gave a graphic description and demonstration of how the young woman met her death. There was also evidence that in the period November 1996 to March 1997 Mr Watson had expressed a hatred of women in general, referred to killing a woman, and again in November 1997 he had spoken of killing people.

3.18 On 11 September 1999 the Jury found Mr Watson guilty on two counts of murder. He was sentenced to life imprisonment and was ordered to serve a minimum period of 17 years' imprisonment.

Appeal to the Court of Appeal

3.19 In December 1999 Mr Watson filed an appeal against his convictions to the Court of Appeal. His appeal was based on one claim of fresh evidence and six allegations of trial errors which when taken cumulatively were said to have led to a miscarriage of justice. The Court of Appeal decision records that Mr Watson did

not pursue as a separate ground of appeal a contention that the verdicts were unreasonable and could not be supported by the evidence. The length of the non-parole term of imprisonment was also challenged.

3.20 The appeal was heard on 10 and 11 April 2000. The Court of Appeal decision was delivered on 8 May 2000.

3.21 The trial errors alleged by Mr Watson were:

The admissibility of statements Scott Watson made prior to 31 December 1997

3.22 The Crown called three witnesses who gave evidence of statements made on two separate occasions by Mr Watson expressing a desire or willingness to kill people. This was known as the "three-E evidence". The first, Mr A knew Mr Watson when Mr Watson was building *Blade*. The statements were said to have been made between November 1996 and March 1997 when the men were commiserating over their personal difficulties. The evidence was that Mr Watson said his unhappiness caused him to have "almost like a hatred towards women". He went on to talk about killing a woman (without referring to any particular woman). He was described as very angry and when Mr A suggested he was talking rubbish Mr Watson responded, shouting "keep an eye on the papers then" at which point the conversation ended.

3.23 The second incident concerned Mr and Mrs B who went to Endeavour Inlet in their yacht on 31 December 1997. While anchored there Mr Watson, who was previously known to them, came to their vessel where some liquor was consumed. Shortly after Mr Watson's arrival Mrs B went below deck. She said she did that because she felt uncomfortable in Mr Watson's company as a result of a previous experience with him. That related to an occasion in November 1997 when Mr Watson had called at their home and he and her husband drank beer and then went to a hotel. When they returned, a discussion occurred concerning some annoying

behaviour by a woman earlier at the hotel. Mr Watson said he should have killed her, and got rid of "them", indicating other people. This talk contained specific reference to the woman at the hotel. Mrs B described Mr Watson as vocal and intense. He continued to talk about killing people and asked Mrs B if there was anyone she wanted killed, and that he knew how to do it. His ability to carry out the killing to avoid detection was implicit. Mrs B was unable to deflect him from continuing to talk in this fashion and she took him seriously. Mr B then recalled the November 1997 occasion when Mr Watson called at his home and they both then went to a hotel where "out of the blue" Mr Watson started talking about killing people in the bar. Mr B was unable to change the subject. When back at the house, Mr Watson again brought up the subject of killing people and offered to kill someone for Mrs B. Mr B confirmed the substance of his wife's evidence about this incident.

3.24 The Court of Appeal considered there was a sufficient discernible link to make the above evidence admissible in relation to question of the identity of the killer of Mr Smart and Ms Hope, finding that the evidence went well beyond mere propensity and was supportive of the Crown case in identifying who, among the lone yachtsmen present in the relevant area at the relevant time, was the offender. The Court found the evidence had probative value in that it was a factor (but no more than one factor) in the overall picture leading finally to identification. The Court was satisfied the possibility of the Jury being improperly influenced was not sufficient to outweigh the potential value which could be given to the evidence. This ground of appeal was accordingly dismissed.

Identification warnings

3.25 In the course of his summing up the Judge directed the Jury of the need for special caution as required by s 344D of the Crimes Act 1961 (identification warning). The first complaint under this heading was that the Judge was wrong to give a s 344D warning in respect of the purported identification by Mr Wallace of Mr

Watson as the man in the water taxi who boarded the yacht with the two victims. The Defence submitted that on a proper analysis of the evidence Mr Wallace had not made a visual identification of Mr Watson, but rather had given evidence which excluded Mr Watson as the man in question. The effect of the warning, it was submitted, was to undermine that exclusion to the wrongful disadvantage of Mr Watson. The evidence in support of the submission that the descriptions given by Mr Wallace could not have been Mr Watson was:

- A photograph which included Mr Watson, taken on board *Mina Cornelia* early in the evening of 31 December 1997; and
- Mr Wallace's agreement under cross-examination that Mr Watson's appearance in that photograph ruled him out as the person in the water taxi.

3.26 The Court of Appeal noted (paragraph 24) that the difficulty with that approach was that Mr Wallace had "nevertheless made a positive visual identification of the appellant as the person in question. This was by selecting his photograph (no. 3) from a montage he was asked to view in April 1998." Further, the Court of Appeal recorded that "although the concession as to the *Mina Cornelia* photograph had also been extracted from Mr Wallace at depositions, at trial he confirmed in evidence in chief that the no.3 photograph was the person in the water-taxi. When asked how sure he was, he said "I am pretty definite" and later said "that is correct, that is the (same) person." Further confirmatory evidence was given by Mr Wallace when he was re-examined. Based on that evidence, the Crown placed considerable weight on Mr Wallace's identification of Mr Watson and analysed his evidence in some detail in their closing address. The Jury was invited to conclude that Mr Wallace had recognised and identified Mr Watson as the person in the water-taxi, and his identification received some support from other occupants of the water-taxi. As recorded in the Court of Appeal decision (paragraph 25), Defence counsel referred repeatedly to Mr Wallace's purported

identification of Mr Watson and strongly countered the Crown's contentions for accepting there had been a reliable identification.

3.27 It is clear from the Judge's summing up that he treated Mr Wallace's evidence as visual identifications of Mr Watson not only in the water-taxi but also on earlier occasions at Furneaux Lodge. The Court of Appeal reasoned that it was therefore apparent the Crown, Defence and the Judge all regarded Mr Wallace as having made a visual identification of Mr Watson. The Court noted that "it is beyond question that the case against him depended substantially on the correctness of those identifications, because if they were incorrect the Crown case was seriously undermined. In making that observation it must also be noted that these visual identifications were but part of the overall evidence relied upon by the Crown as establishing to the required standard of proof that the appellant was the offender. As so often happens, visual identification may be supported (or in some cases weakened) by other evidence". The Court held (paragraph 26) that in those circumstances it was incumbent on the Judge to direct in accordance with s.344D, notwithstanding an indication from the Defence that such a direction was not desired. The Court did not regard the direction as being to the disadvantage of the Defence as it was made clear by the Judge that special caution was required before convicting in reliance on identification evidence. The Court of Appeal recorded that it was unable to see how the direction detracted from either the Defence criticism of the reliability of the positive identification, or the Defence contention that the evidence positively excluded Mr Watson.

3.28 The second matter raised under this heading concerned the evidence given by [OIA] and his son of *Blade* being sighted in Cook Strait near the entrance to Tory Channel at about 4.30pm on 1 January 1998. The Defence contended that a s.344D warning was required on the basis that identification of the yacht was identification of its known occupant, Mr Watson. The Court of Appeal was not persuaded the Judge erred in not giving a more explicit direction warning as to the need for caution by the Jury before accepting this identification of Mr Watson's

yacht. The Judge did discuss this sighting in his summing up and expressly referred to the "identity question, as to whether (Mr Watson) was identified as being on the boat out in Tory Channel". He went on to refer to the Defence contention there were very real reservations about the identification.

3.29 The third matter under this heading was a submission that the Judge's directions may have wrongly been taken by the Jury to apply to Mr Wallace's description of the vessel finally boarded by the victims as being a ketch and to sightings by various witnesses of ketches which were either of a similar description to that, or were of vessels not located by the Police and therefore not excluded from involvement. The Court of Appeal found this point had no substance (paragraph 30). Mr Wallace's evidence did not purport to identify any particular vessel and was no more than a description of his recollection of what the vessel looked like as he viewed it on that one occasion. Similarly as regards the evidence of sightings of ketches not located. They were observations by people of vessels seen by them on a particular occasion, and could not in any way be construed as specific identifications which were the subject of the summing up. On that basis the Court reasoned there is no danger the Jury may have been deflected as suggested.

Defence Opening

3.30 When opening the Defence case on 30 August 1999 Defence counsel Mr Antunovic was interrupted by the trial Judge on three occasions. On appeal the Defence contended that as a consequence of the interruptions Mr Antunovic desisted from opening as fully as he had intended and this was a matter that could properly be taken into account in conjunction with the other grounds of appeal supporting the overall submission that there had been a miscarriage of justice. The Court of Appeal was not persuaded the Judge erred in intervening when he did to indicate the parameters within which Defence counsel should then operate. The Court reasoned that viewed objectively, in context and when finally before the

Jury for deliberation, there was no reason to suppose the Defence was in any way prejudiced or disadvantaged by what happened when the Defence was opening its case (paragraph 40).

The Two Trip Theory

3.31 It was submitted that the Defence was prejudiced when the Crown introduced the notion of the "two trip theory" for the first time in the course of its final address. The reason the theory was put forward was to counter the Defence contention that Mr Watson had been taken as the only passenger to his yacht by Mr Anderson, that he remained there, and therefore could not have been in the water taxi operated by Mr Wallace when Mr Smart and Ms Hope were last seen. The Defence alleged that up until closing, the Crown presented its case on the basis that Mr Watson returned only once to his yacht after leaving it to go ashore and that was with Mr Wallace and the victims. The Defence argued it was unexpected and unfair for the Crown to accept at a late stage in the trial that Mr Watson had returned to his yacht with Mr Anderson but had again gone ashore before the last trip back with Mr Wallace.

3.32 The Court of Appeal considered the background to this matter in some detail. At issue was the lone yachtsman in the Wallace water taxi. Mr Watson had told the Police he returned to his yacht at about 2 am and remained there. He had been taken from the Lodge by a water taxi driver as the only passenger by an "old guy with a hat on". That description did not fit Mr Anderson. Mr Anderson gave evidence at the preliminary hearing and was cross examined, with the object of establishing he had taken Mr Watson to *Blade*, consistent with Mr Watson's Police statement. At trial the Crown led evidence from Mr Anderson directed to a trip on which he had carried a lone person to a rafted up yacht in the area where *Blade* was moored. He recalled the name of the yacht reminding him of a sharp edged weapon. He was unable to identify the man from a Police montage. When questioned further he indicated the man did not look like the news footage of Mr

Watson he had seen in a television news programme some time later. Under extensive cross examination Mr Anderson accepted the yacht in question was *Blade*. The consequential inference was that the male person was Mr Watson.

3.33 The Court of Appeal reasoned that it must have been apparent to the Defence throughout that if they hoped to establish from use of the depositions and the series of statements Mr Anderson made to the Police, that Mr Watson had been returned to his yacht in the early hours of that morning by other means (ie other than aboard Guy Wallace's water taxi) the Crown would seek to show that was still consistent with its basic theory. The Court observed that the Crown case was not at any time wholly dependent on the Anderson trip excluding Mr Watson and nor was it presented in opening in that way; the fact that Mr Watson had or might have gone to his yacht in Mr Anderson's taxi between 2am and 4am must always have been a scenario anticipated by both the Crown and Defence.

3.34 The Court found there was a possibility that there was opportunity for Mr Watson to return to the Lodge after the Anderson trip and before the Wallace trip; apparent not only theoretically but also in a practical sense because there was evidence of sightings of Mr Watson at the Lodge around 3.00 am-4.00 am, and of his acquisition of a jersey at a late stage of the festivities. The two trip theory must therefore have been a possible Crown contention from the outset.

3.35 The Defence alleged the 'late acknowledgement' by the Crown on this issue adversely affected the Defence; it was submitted more extensive cross examination of the witnesses who were on board *Mina Cornelia* and *Bianco* as to the timing of Mr Watson's return with Mr Anderson would have been undertaken and as regards the Perkins incident ashore and the absence of evidence as to how Mr Watson may have returned to shore. The Court stated an examination of the transcript showed there was "an extensive cross-examination on those issues"; it was always apparent that the timing of the Anderson trip had to be important to the Defence if in the final address the Jury was to be invited to conclude the

possibility of a return to shore was excluded; and the suggestion Mr Watson may have made a different decision as to the giving of evidence himself is "without evidential foundation", and in the circumstances of the case "has the air of unreality". The Court concluded it was unable to see anything unfair in the way in which the Crown case was finally presented to the Jury.

The Summing Up

3.36 The Judge's summing up was the subject of several complaints. The Court of Appeal considered these separately.

- The "three-E evidence"; The Defence submitted the Judge's summing up about the evidence of these witnesses (as to the issue of identity) was confusing and possibly misleading. The Court held that when read in its totality the passages in question made it clear that the evidence of these witnesses was not used on a stand alone basis as being indicative of guilt. It could assist the identity issue which still had to be proved positively by other evidence.

- The two trip theory; The Defence submitted the Judge had not given sufficient attention to the evidence relied on by the Defence to support the contention there had been no second trip by Mr Watson to the Lodge. The Court held the summing up was neither unbalanced nor inadequate in this respect. The timing of the "Anderson trip" to *Blade* and the Defence claim that it was substantially later than 2 or 2.30am, leaving insufficient time to fit Mr Watson into the Wallace water taxi trip "were canvassed in general terms". Although the specific points relied on by the Defence had not been expressly adverted to, the Court of Appeal found that absence had not led to any unfairness because Crown and Defence had each covered the evidence relied on and it was not incumbent on the Judge to repeat those details.

- Identification Issues; Several of the Defence complaints about the summing up related to the identification of Mr Watson as the lone yachtsman in the Wallace water taxi. The Court held that, to the extent they were based on the contention there was in fact no identification of Mr Watson by Mr Wallace, the complaints had no substance for the reasons set out above. To the extent they were directed to the balance and adequacy of the Judge's treatment of that issue, the Court was not persuaded they had any force as "the Defence case was adequately traversed in this respect". Further, the Court was not persuaded there was any substance in the criticism of the way in which the Judge discussed the issue of whether or not it was in fact a ketch to which Mr Wallace had delivered the victims. In respect of the Cook Strait ferry sighting by [redacted] and his son, the Court of Appeal agreed it would have been preferable for attention to have been given to the reliability of the visual identification; but it was not possible to conclude this omission had led to any miscarriage. The Court did not discern any imbalance in respect of the timing issue (that is, the possibility or impossibility of *Blade* having been in Cook Strait at the time of the sighting by [redacted] and also arriving in Erie Bay some time shortly after 5pm). The Court found the other criticisms including that relating to possible actions of Mr Watson ashore and sightings of unidentified ketches, even in combination were insufficient to establish a sustainable ground of appeal.

- General Imbalance and Unfairness; The first matter was the Judge's final comments before inviting the Jury to retire. He said "this is an important case as all cases are involving criminal justice, but you apply the same rules to this case as juries do to all cases, as I have directed you. It would be, of course, of considerable benefit, if you could put this dreadful event, in the life of our country, to finality by a verdict according to law, but only in accordance with the oaths and affirmations you have taken." The Court concluded the Jury could have been "under no possible illusion as to the true nature of their task, and the real likelihood is that the observation would have been seen, as no doubt intended, as an encouragement to reach a verdict" (rather than as a direction to a guilty

verdict). The second matter concerned the scratches to the hatch cover. According to the evidence of a former girlfriend of Mr Watson, he had told her in March 1998 that the scratches had been made by [...]. The Defence complained the Judge wrongly suggested that some evidence as to this having occurred could have been expected. The Court concluded the passage in the summing up covered relevant matters in a balanced and fair way. There were other complaints made concerning what were described as the Judge unfairly answering Defence contentions as he was discussing aspects of the Defence case. The Court of Appeal concluded there was "nothing untoward in the comments or observations which have been drawn to our attention. There was no unfair "undermining" of the Defence case. Possible errors of fact which were referred to in submissions were minor in nature, and of no overall concern."

Fresh Evidence

3.37 At trial, the Crown called expert scientific evidence to show that two head hairs recovered from the blanket on board *Blade* when it was seized by the Police had probably come from Olivia Hope. They were subjected to examination in New Zealand, Australia and the United Kingdom. Microscopic examination showed no distinguishable difference from sample hair sourced to Ms Hope. DNA testing also indicated a match in respect of each of the hairs, although one of the tests for one hair disclosed a mixed DNA profile.

3.38 The Court of Appeal recorded that at the time of the trial a report arising from a Ministerial Inquiry (concerning a different case) had been commissioned concerning the presence of a DNA profile at two crime scenes (one was in Porirua and one was in Christchurch) matching that of a person "N". N was proved not to have been at either crime scene and a purpose of that Inquiry was to explain how the match was obtained. The report dated 30 November 1999 (*Report on DNA Anomalies For Hon Tony Ryall, then Minister of Justice by Rt Hon Sir Thomas Eichelbaum, former Chief Justice of New Zealand, and Professor Sir John Scott,*

President of the Royal Society), concluded that on the balance of probabilities there had been accidental contamination of the DNA extracted from the scene samples in that case, at the ESR laboratory in Auckland. At Mr Watson's trial there was some cross-examination of a Crown ESR witness (Dr S Vintiner) on this matter, it being known at the time of trial that contamination had likely occurred in the case the subject of the Ministerial Inquiry (the Defence had access to two preliminary reports of the Ministerial Inquiry which formed the basis of cross examination of Dr Vintiner on this issue). The cross examination was primarily directed to possible laboratory contamination accounting for the mixed DNA profile obtained in England from one of the hairs found on Mr Watson's vessel. The Court of Appeal recorded that "even if that occurred, it was not demonstrated how that would have undermined in any significant way the matching evidence which was obtained."

3.39 The Court of Appeal rejected Mr Watson's argument that the final Report from the Ministerial Inquiry would have been of assistance to the Defence in this case. The Court was satisfied there was no new evidence which would tend to throw doubt on the accuracy or reliability of the DNA testing results as they were placed before the Jury in Mr Watson's case. As I state below, having assessed all of the information presented to me in the context of my assessment of this matter that remains the position.

Jury Vetting

3.40 Mr Watson applied for an order preventing the Crown from determining through the use of the Wanganui computer whether any of the Jury panel summoned for the trial had criminal convictions. The Judge declined to make the order. The refusal of the order was included as a ground of appeal but not pursued.

Court's Conclusion

3.41 The Court's judgment noted that Mr Watson's counsel did not pursue as a separate ground of appeal a contention that the verdicts were unreasonable and could not be supported having regard to the evidence. It is recorded in the judgment that rather, counsel "responsibly" accepted that it was open to the Jury to conclude on the evidence that Mr Watson's guilt had been established beyond reasonable doubt.

3.42 In respect of the convictions, the Court of Appeal concluded at paragraph [56]:

> "[We] are satisfied that there has been no wrong decision in law. We are also satisfied that no miscarriage of justice has been demonstrated under any of the separate grounds of appeal agreed in this Court. Neither do matters relevant to those grounds in their cumulative effect constitute a basis for impugning the verdicts. We repeat, that absent trial error or the availability of fresh evidence which in either case has led to a miscarriage of justice, it was accepted by counsel for the appellant that on the totality of the evidence findings of guilty were open to the Jury. The appeal against conviction must therefore fail."

3.43 The Court of Appeal also held that, while the term of 17 years' imprisonment could be described as high, it was not persuaded that the term imposed was excessive.

Application for Special Leave to Appeal to Privy Council

3.44 In 2002 Mr Watson filed an application for special leave to appeal his convictions to the Privy Council. The Privy Council declined to grant special leave to hear the appeal, on or about 6 November 2003. I requested a copy of the written submissions made by the Defence and the Crown on the leave application. I have considered those written submissions.

3.45 The principal grounds on which the application for special leave to appeal was based were grounds relied on in the Court of Appeal. The grounds the Defence relied on were:

- The alleged wrongful admission by the trial Judge of the "three-E evidence" against an existing background of "substantial prejudice" against Mr Watson (it was submitted this evidence only went to propensity, had no probative value and overwhelming prejudicial effect);

- the directions on identification given by the trial Judge and in particular the identification warning given to the Jury in the summing up (based on similar submissions to those made to the Court of Appeal); and

- the alleged failure to give a separate identification warning pertaining to the vessel seen by [redacted] in Cook Strait (again based on similar arguments made to the Court of Appeal);

- An alleged error of law by the Judge warning the Jury to apply special caution before accepting the correctness of the Defence evidence relating to the sightings of a ketch within the Marlborough Sounds on the morning of 1 January 1998 and elsewhere (when, it was submitted, this evidence was "crucial" to the Defence and supported the evidence given by Mr Wallace and [redacted] – as to the identity of the vessel they described Mr Smart and Ms Hope boarding with the mystery man); and

- The trial Judge's final comment to the Jury to the effect "it would be of course, of considerable benefit, if you could put this dreadful event, in the life of our country to finality by a verdict according to law, but, only in accordance with the oaths and affirmations you have taken." The Defence submitted this amounted to an "improper judicial steer" towards a guilty verdict.

4. CONSIDERATION OF FRESH EVIDENCE

4.1 I have been asked whether there is any fresh evidence disclosed in Mr Watson's application.

4.2 From my review of the documentation that was initially submitted in support of Mr Watson's application and as recorded in my interim advice I identified seven categories of information which potentially could justify a referral to the Court of Appeal on the basis of fresh evidence, namely:

- **Mr Guy Wallace's identification of Mr Watson**; a purported qualification of Mr Wallace's 'identification' of Mr Watson as the man in the bar at Furneaux Lodge on the evening of 31 December 1997, and the man in his water-taxi early in the morning of 1 January 1998 who was last seen with Mr Smart and Ms Hope (DVD and book). This qualification was said to amount to a retraction;

- **Ms Roslyn McNeilly's identification of Mr Watson**; a purported qualification of Ms McNeilly's 'identification' of Mr Watson as the man in the bar at Furneaux Lodge on the evening of 31 December 1997 (DVD, book and Statutory declaration). This qualification was said to amount to a retraction;

- **Mr Guy Wallace's description of the location of the boat;** Mr Wallace is said to now claim he can identify the exact location of the boat in Endeavour Inlet that he took the lone man and Mr Smart and Ms Hope to in the early hours of 1 January 1998 (DVD and book);

- **Confession to murders to Secret Witness A**; a purported retraction of evidence given by Secret Witness A about Mr

Watson's alleged 'confession' to the murders of Mr Smart and Ms Hope during the time he and Mr Watson shared a cell in Addington Prison (book);

- **Additional "ketch sightings"**; references to numerous sightings of a large two-masted ketch matching the description given by some witnesses including Mr Wallace, at Furneaux Lodge on 31 December 1997 and at other relevant times and a suggestion that the Police ignored reports of these sightings (book and DVD);

- **Timing of trip from Cook Strait to Erie Bay on 1 January 1998;** evidence from Mr Hunter about the timing of the alleged trip from Cook Strait to Erie Bay which is said to indicate that Mr Watson could not have been sighted in Cook Strait and in Erie Bay at the times given by Crown witnesses at trial (book and DVD);

- **Evidence of water-taxi driver** [redacted] ; statements by [redacted] that he took a person resembling Mr Watson out to Mr Watson's boat in the early hours of 1 January 1998 (book and DVD).

4.3 In June 2009 the Ministry wrote to Mr Watson asking that he supply further information from Mr Wallace relating to his identification of Mr Watson and his evidence about the location of the boat to which he took Ms Hope and Mr Smart early in the morning of 1 January 1998. Mr Watson was asked to provide an affidavit from Mr Wallace addressing any changes to the evidence given at trial.

4.4 Mr Watson's father replied to the Ministry on 5 September 2009. He enclosed further documents in support of his son's application which I have considered. Mr Watson raised concerns about the suggestion that he obtain the information requested as any information obtained might be thought to lack independence and

therefore be less credible or reliable. While it is usual for an applicant to provide evidence in support of the claim of miscarriage, it was accepted that the nature of some of the inquiries suggested in this case might be better obtained otherwise than by Mr Watson himself for the reasons identified by Mr Watson Sr. Accordingly, as matters progressed some of the inquiries were made by Ministry officials and/or by me rather than by the applicant. These matters are addressed further below.

4.5 In the period subsequent to the issue of my interim advice the Ministry provided copies of further correspondence from Mr Watson Sr in support of his son's application. This correspondence comprised:

- Letter dated 7 December 2009 attaching affidavits of [redacted] (x 2) (sworn 2 September 2005);
- Letter dated 14 February 2010 attaching affidavit of [redacted] and a copy of a letter from [redacted]
- Letter dated 30 April 2010 enclosing affidavits of Keith Mervyn George Hunter, [redacted] (duplicates) and [redacted] (duplicate);
- Submission dated 25 May 2010 regarding [redacted]'s evidence;
- Letter dated 21 June 2010 enclosing an affidavit of Guy Wallace sworn in May 2010, a submission on the alleged 'fresh evidence' of [redacted] ("Hatch scratch and squab evidence"), and a submission on the evidence of Mr Wallace (and Ms McNeilly) ("The Identification Evidence");

- Letter dated 5 July 2010 enclosing a submission on "the alleged Cook Strait trip" and material in support, including Operation Tam documents relating to *Blade* speed trials, a yacht profile of *Dau Soko*, details of weather conditions on 1 January 1998, a statement of Mr Roberts, Police correspondence with the Coroner, and a Navy report on a Cook Strait search undertaken in July 2000. Mr Watson Sr made reference to Mr Hunter's affidavit and "the alleged Cook Strait/Erie Bay Voyage of *Blade* on 1 January 1998" including alleged "further fresh evidence" in the form of "no results" from a private search conducted after the Navy search "possibly visibly using the remote controlled camera used to maintain the Cook Strait power cable" from which he maintained that "it can be inferred that no bodies or evidence detrimental to Scott Watson were found.";

- Letter dated 6 August 2010 enclosing a submission and material in support of the affidavit of [000] and a CD containing a copy of an interview with Secret Witness B by Detective Tom Fitzgerald and news items relating to Operation Tam. The CD was submitted on the basis that it should be considered alongside the affidavit of [000]. It was submitted [000] 's evidence undermines Secret Witness B's evidence;

- Letter dated 2 September 2010 enclosing a copy of the report of the IPCA dated 17 May 2010 about a complaint made by Mr Hunter in relation to Operation Tam; commentary by Mr Hunter into the IPCA report; and a copy of the suspect profile for Mr Watson (dated 11 January 1998) referred to in the IPCA report;

- Letter dated 12 October 2010 enclosing a summary of submissions dated 14 October 2010, a CD containing news articles published during the Police investigation and a letter from the Police dated 28 September 2010

in response to a request under the Official Information Act 1982 together with commentary on that response;

- Letter dated 7 November 2010 enclosing an affidavit from [...] sworn on 28 October 2010 regarding a ketch sighting in Auckland in March 1998, a letter from the Deputy Solicitor General to Defence counsel dated 6 July 2001, a Police job sheet dated 2 February 2000 regarding a visit by Senior Sergeant Breach to Secret Witness A, a copy of the IPCA report on Mr Watson Sr's complaint about Operation Tam and associated correspondence and copies of correspondence concerning Mr Watson Sr's complaint to Police and the then Police Complaints Authority;

- Letter dated 12 January 2011 regarding the construction of Mr Wallace's affidavit and attaching a commentary on the affidavit of Police officer Thomas Fitzgerald, correspondence from Mr Hunter to Mr Wallace regarding the preparation of his affidavit and a transcript of an interview of Mr Wallace undertaken by Mr Hunter on 3 December 2009;

- Letter dated 8 February 2011 enclosing material (including photographs, Police job sheets and a Police statement of [...]) and submissions concerning an 'extra' unidentified vessel seen at Furneaux Lodge anchorage on the morning of 1 January 1998; and

- Spreadsheet provided by Mr Watson Sr in March 2011 relating to extra unidentified vessel submission.

4.6 Some of the above material disclosed matters additional to those which I had identified, or which were raised by or on behalf of Mr Watson as constituting fresh evidence. I discuss these matters in detail below, however in summary the matters were: evidence from [...] which it was said explains the presence of scratches on the hatch of *Blade* and the excision of a piece of foam

from the squab in the saloon of the vessel; evidence from [redacted] in support of the allegation that Police failed to investigate ketch sightings in the early days of Operation Tam; evidence from Mr Hunter regarding the timing of the Cook Strait-Erie Bay trip; information relating to an underwater sonar search by the New Zealand Navy in 2000; evidence of the cellmate of Secret Witness B at the time of the alleged confessions made by Mr Watson to Secret Witness B; evidence from a [redacted] relating to a ketch sighting in Auckland in late March 1997; matters arising in the reports of the IPCA in May 2010 on complaints by Mr Watson and Mr Hunter and material concerning an 'extra' vessel seen at Furneaux Lodge on the morning of 1 January 1998 which evidence Mr Watson Sr submitted called into question the Crown's submission that all of the vessels at or near Furneaux Lodge at the relevant time had been identified and eliminated from the Police inquiry.

4.7 I considered all of the information provided to the Ministry by Mr Watson Sr. Where I considered it relevant to the matters I have been specifically asked to address I refer to the material below.

Assessment of Fresh Evidence

4.8 I have considered whether the evidence referred to above meets the test for freshness and if so, if substantiated, whether it might be sufficiently credible and cogent to raise a real doubt about the safety of Mr Watson's convictions.

4.9 When considering credibility and cogency it is appropriate to consider the items of fresh evidence against the background of other evidence relied on in support of the convictions and/or which was before the Jury at trial. In a case such as this examining the fresh evidence in isolation would be artificial and contrary to established principles.

4.10 This reflects the approach followed by the Privy Council in *Barlow v R* [2009] UKPC 30 where their Lordships (following the Supreme Court's guidance given in *R v Matenga* (supra)) examined the evidence at the trial and the significance of the new evidence on which Mr Barlow relied. The Court considered the removal of a material element from the body of circumstantial evidence before the Jury must in principle be capable of affecting the result of the trial. Their Lordships considered the available evidence minus the unacceptable evidence of the expert witness. They concluded that notwithstanding the error that occurred (of admitting an unsustainable part of an expert witness's evidence) the guilty verdict was inevitable in the sense of being the only reasonably possible verdict in the light of all the admissible evidence which was called at the trial.

4.11 Accordingly, I set out the various matters relied on by the Crown in support of the case against Mr Watson. I then summarise the Defence case.

Summary of Crown Case

The Crown case relied on the cumulative effect of the following circumstances;

- Mr Watson's reason for going to Furneaux Lodge/Endeavour Inlet was expressly stated as being to pursue "babes" or women;

- The fact that Mr Watson was present at Furneaux Lodge from the afternoon of 31 December 1997 to the early morning of 1 January 1998, the period within which the missing pair disappeared;

- Mr Watson was alone at Endeavour Inlet/Furneaux Lodge;

- Mr Watson arrived at his destination and stayed on his yacht which was moored at Endeavour Inlet off the Furneaux Lodge jetty together with the other yachts *Mina Cornelia* and *Bianco*;

- The area in which Mr Watson's yacht was moored was the area where three persons were dropped onto a yacht by water taxi driver Guy Wallace;

- Mr Watson's conduct at Furneaux Lodge during the night of 31 December 1997 indicated his motive/intention to find a woman with whom to engage in sexual activity – as exemplified by his statement to [redacted] of "come down onto my boat, I'll do things to you you have never imagined or dreamed of" (T: 1503) and towards [redacted] on board *Bianco* when he stated "Give her to me mate, I'll look after her" and "I'll show her a good time" (T: 1873);

- Motive (the "three E evidence" of statements Mr Watson made between November 1996 and March 1997 when he expressed a desire or willingness to kill people);

- The 'identification' made by Guy Wallace of Mr Watson as being the lone man on the naiad who was dropped onto his yacht with Ms Hope and Mr Smart;

- Mr Watson's alleged "suspicious and unusual" behaviour in the period from early 1 January 1998 commencing with his very early departure from the mooring on 1 January 1998, it being a departure in circumstances where he had no pressing reason to leave early;

- Mr Watson's departure was such that he left behind one of his yacht's fenders that had been placed between other yachts in the raft. Further, his departure was undertaken apparently very quietly in contrast to his lack of concern about disturbing others prior to that;

- Mr Watson's behaviour as observed by the [redacted] family in the vicinity of Marine Head at around 9 am on 1 January 1998;

- The sighting of Mr Watson and his yacht by a known acquaintance off Kurakura Point at 10.15 am on 1 January 1998;

- The sighting of a vessel consistent with the appearance of Mr Watson's yacht at the Southern end of Arapawa Island at the Queen Charlotte Sound end of Tory Channel during the period before midday on 1 January 1998;

- The sighting of what [redacted] identified as Mr Watson's yacht in Cook Strait near the entrance to Tory Channel at around 4.30 pm in circumstances where it was wallowing (apparently not being sailed or motored). The Crown maintained the reliability of this sighting was strengthened by the evidence of other witnesses in and about Tory Channel and, in particular, Erie Bay who did not see or observe Mr Watson's yacht during the time it was sighted in Cook Strait;

- Mr Watson's arrival at Erie Bay during the late afternoon/early evening on 1 January 1998 as contrasted with his statement to the Police that he had arrived at Erie Bay on 1 January at about 9.30-10.00 am;

- Mr Watson's action of returning briefly to Picton on 3 January 1998 and collecting [redacted] before proceeding once again into the Marlborough Sounds, during which time his yacht was observed in Ratamira Bay and the behaviour of those aboard (a male and female) seen to be "unusual if not suspicious";

- The painting of Mr Watson's boat to change its colour from a terracotta red/brown to blue, having the effect of both altering its appearance and possibly the concealment of any evidence of forensic significance;

- The appearance of the cushions/squabs in Mr Watson's yacht when seized by Police and, in particular, the significance of the missing parts of the squab covers, the gouging or digging out of foam from the squab in positions corresponding to the holes in the cover and the total absence of a material cover of the squabs, all of which the Crown relied on as being indicative of attempts by Mr Watson to destroy or remove evidence of potential forensic significance;

- The cleaning and wiping of the interior of Mr Watson's yacht such as would likely remove evidence of forensic significance such as fingerprints. Such cleaning extended to the wiping of cassette tape covers;

- The removal and storage of the self-steering gear wind vane from the stern of his yacht, that being a notable and recognisable feature of Mr Watson's vessel;

- Mr Watson's appearance on 1 January 1998 – in particular a scratch to the bridge of his nose as observed by the witness [redacted] (name suppressed and pseudonym used);

- Mr Watson's apparent attempt to set up a false and misleading alibi for his whereabouts during the crucial period of 1 January 1998. An arrival at Erie Bay at around 10 am, if accepted, would obviate the need for any explanation as to his whereabouts between 10 am and his actual arrival time. It was during this period that the Crown alleged he had an

opportunity to have concealed items including the likely disposal of the bodies of the two victims;

- The appearance of the interior foam lining of the forward hatch cover of Mr Watson's yacht on which were found traces of 176 scratch marks which were later considered by an ESR forensic scientist (Wilson) to be consistent with the marks made by adult fingernail scratches;

- The missing glass chimney to the kerosene light in Mr Watson's yacht which had been previously present in late 1997 but which was missing when the yacht was examined by the Police on 14 January 1998;

- The presence of an area on the hull of Mr Watson's yacht (on the starboard side at the stern) consistent with very selective cleaning (a patch only), it also being the location where Mr Watson was concentrating his attention during the Marine Head observations of him by the [sic] family;

- The presence of two hairs on a blanket found in Mr Watson's yacht on 14 January 1998. These hairs were connected by DNA analysis with Ms Hope and provided results which strongly supported the proposition that the two head hairs were those of Ms Hope and in respect of which the Crown maintained were head hairs of Ms Hope;

- Mr Watson's possession of handcuffs being an article that could have been used to restrain a victim;

- Mr Watson's conduct in response to Police requests to boaties at Furneaux Lodge for information: before speaking to the Police (in the end at their specific request) he returned to Picton on 3-4 January 1998

but set off again with [...] until 7 January 1998. It was only at this point that he ultimately responded to the Police request;

- Mr Watson's "lies" to the Police concerning his whereabouts on 1 January 1998; he advised the Police (in his second statement on 12 January 1998) that he had arrived at Erie Bay at about 9.30-10.00 am. The evidence of the occupants of the Erie Bay house, whom he saw shortly after his arrival, was that he did not arrive until after 5 pm. Further, Mr Watson had telephoned the witness [...] before speaking to the Police on 8 January 1998 and in that conversation discussed with [...] the time that he had arrived at Erie Bay on 1 January 1998.

- The contents of Mr Watson's statements to the Police all of which the Crown maintained were the actions of a person motivated to deflect Police attention away from himself:

    - Not seeing Mr Smart and Ms Hope;
    - Not seeing a person like the suspect sought by the Police.
    - Not seeing a ketch like the one being searched for by the Police;
    - By falsely describing the clothing he wore on 31 December 1997;
    - By failing to advise the Police in his statements of having changed the appearance of his yacht.

- The apparent disposal by Mr Watson of his favourite blue "Country Road" shirt, that being the item of clothing worn by him whilst ashore during the earlier part of 31 December 1997;

- Mr Watson's inconsistent explanations to a former girlfriend regarding the cause of the hole in the squab cover (a hot pot or a cigarette – different explanations on different occasions);

- Mr Watson's explanation to a former girlfriend that he had painted his yacht with paint that he had been given a year beforehand, that being an explanation contrary to the evidence that he acquired it from [redacted] at Erie Bay on the morning of 2 January 1998;

- Mr Watson's statements to the witness [redacted] to the effect that he should not speak to the Police or co-operate with them;

- Mr Watson's statements to [redacted] to the effect that he accepted and was resigned to being sent to jail as a result of his connection to the disappearance of Mr Smart and Ms Hope;

- The admissions made by Mr Watson to two fellow prison inmates which acknowledged his involvement and responsibility for the deaths and disappearance of Ms Hope and Mr Smart;

- The elimination of all other boats moored and/or anchored in Endeavour Inlet during the night of 31 December 1997 – 1 January 1998. This fact coupled with the circumstance that any ketch with the features described by Guy Wallace was of a type which was remarkable and likely to be noticed by the hundreds of people on boats and ashore in the vicinity;

- The elimination of all other lone yachtsmen present on yachts at Furneaux Lodge on 31 December 1997 – 1 January 1998. One other such person was present but he had his boat moored in a location well away from the area where Guy Wallace dropped the three people to a

yacht. Further, this yachtsman's physical appearance was distinctly different to that of the lone male on Guy Wallace's naiad;

- The general conduct of Mr Watson when he was under suspicion from the Police.

Summary of Defence case

4.12 The Defence case was that only three of the matters relied on by the Crown were capable of showing an association between Mr Smart and Ms Hope, and Mr Watson; and these three factors were "explicable, weak and unconvincing". The three matters were:

- Mr Wallace's "purported identification";
- The two hairs located on Mr Watson's vessel; and
- The "so called" cellmate confessions.

4.13 The Defence maintained, in answer to those factors, as follows:

- Mr Wallace's "purported identification" of Mr Watson as being the man in his naiad was "weak" and in fact excluded Mr Watson both by the description of the person and the description of the boat to which the couple were delivered as a two masted ketch as opposed to a sloop;

- There was a strong possibility of inadvertent transfer of the hairs at the ESR Laboratory in Auckland on 7 March 1998 when both the reference hairs from Ms Hope (STO5) and the hairs from "the tiger blanket" (YA69) on Mr Watson's boat were examined. Reference was made to the fact there was an "unexplained cut" in bag STO5 and hairs of Ms Hope could have inadvertently escaped from that

bag. The Defence contended that by 7 March 1998 the YA69 hairs had already been screened on two previous occasions without any examiner noticing "the two crucial blonde hairs". The Defence maintained that the DNA evidence which showed the two hairs were from Ms Hope was inconclusive and unconvincing. They also contended there was a strong possibility, which could not be excluded by the Crown hair expert, of secondary hair transfer given that Ms Hope and Mr Watson had attended the same New Year's Eve function at Furneaux Lodge;

- In relation to the "cellmate confessions" the Defence contended that one secret witness had a "significant purpose of his own to serve" and the other secret witness "had little opportunity to develop any close relationship with [Mr Watson] such that a confession might be made".

4.14 In relation to the other items of circumstantial evidence presented by the Crown the Defence case was that these were also capable of explanation:

- Lies in respect of Mr Watson's movements on 1 January 1998; in claiming that his arrival time at Erie Bay was 10.00am, Mr Watson relied on information he was provided with by the caretaker of the Erie Bay property. Mr Watson maintained the information he gave to Police on this issue was a mistake rather than a deliberate lie as the Crown contended;

- Alleged sighting of *Blade* off Tory Channel entrance in Cook Strait at 4.30pm on 1 January 1998; Mr Watson maintained [redacted] 's identification of his boat was mistaken and could not safely be relied on because of the other evidence presented at trial as to tidal movements in and out of Tory Channel and of other sightings of Mr

Watson's sloop at Erie Bay. It was contended Mr Watson's boat could not have exited Tory Channel into Cook Strait on 1 January 1998;

- Changes to the outward appearance of Mr Watson's boat; Mr Watson's position was that he had been planning to repaint his boat prior to New Year. The fact the wind vain had been removed was not unusual as it was not an item usually used in the Marlborough Sounds (rather it was reserved for offshore sailing);

- Interior cleaning of the boat; Mr Watson's position on this matter was that his boat had been through a significant sea storm in Cook Strait on 11 and 12 December 1997 while he had been returning from Tauranga to Picton and cleaning afterwards was not unusual. His explanation for the presence of spots of blood on the interior carpets was that these were consistent with a bleeding foot injury and with no cleaning after 1 January 1998. Mr Watson had cut his foot on 2 January 1998 while at Erie Bay;

- Presence of scratch marks on the interior lining of the forward hatch; Mr Watson's case was that these were misleading and little testing had been done by ESR to determine if the scratching could necessarily be made only by fingernails as opposed to other objects. He contended the scratching of the outer perimeters of the hatch was not possible when the hatch was closed and the hatch could not be secured in any event. Mr Watson had explained to his former girlfriend that the scratching had been made by [redacted];

- Missing squab cover and holes on other cover and squab material; the Defence explanation for this factor relied on the evidence of Mr Watson's former girlfriend who referred to Mr Watson having told

her there had been a burn hole in one squab cover and the other had simply been mislaid;

- Missing blue shirt; Mr Watson told Police in April 1998 they would have had his shirt as he had left it on his boat; the Defence contended this statement Mr Watson made to Police was not consistent with a deliberate destruction of the shirt by Mr Watson;

- The motive evidence (the "three-E evidence"); the Defence contended this was an attempt by the Crown to blacken Mr Watson's character and to paint him in as prejudicial light in the eyes of the Jury as possible.

4.15 The other significant aspects of the Defence case were;

- The boat described by Mr Wallace and [xxx] could not be Mr Watson's boat and therefore the couple were never delivered to his yacht;

- The Crown's late two trip theory was not supported by the evidence, either directly or inferentially;

- Mr Watson had been delivered alone to his boat by water taxi driver Mr Anderson, as Mr Watson had told Police; and

- There was a substantial body of evidence to support the existence of an unidentified ketch at Furneaux Lodge on the evening of 31 December 1997.

Mr Wallace's Identification of Mr Watson

4.16 A significant aspect of the case related to the correctness of identifications of Mr Watson made by Mr Wallace as the man with whom and onto whose yacht Ms Hope and Mr Smart climbed from a water taxi in the early hours of 1 January 1998 in Endeavour Inlet. As discussed above, the Crown case was based on a combination of circumstances all of which the Crown maintained pointed to Mr Watson being the man responsible for the disappearance and deaths of Ms Hope and Mr Smart in circumstances where the only explanation was murder. It needs to be remembered that Mr Wallace's identifications of Mr Watson were only part of the overall evidence relied on by the Crown as establishing that Mr Watson was the man whose yacht Ms Hope and Mr Smart boarded.

Potentially Fresh Evidence

4.17 In the television documentary (recorded on DVD) which screened on Television One on 7 November 2003 Mr Wallace is filmed speaking about his recollection of the 'mystery man'. Transcribed, the relevant section reads:

> *Narrator (Keith Hunter):* If someone had pointed, not at the photograph in Montage B but at Watson himself in Court and then asked Guy Wallace if this was the mystery man what would he have said-
> *Guy Wallace*: I would have said obviously no.
> *Narrator:* Why?
> *Guy Wallace*: Because he is not the mystery man.
> *Narrator:* Was Scott Watson the man in the water taxi that night or not?
> *Guy Wallace*: Definitely not

4.18 In his application Mr Watson characterised these statements as follows

- "Wallace has now publicly and repeatedly stated that I am not the man last seen with Ben and Olivia.

- Had he told the Court I was not the man in the water taxi with him and Ben and Olivia, as he has now made plain, I could not have been convicted.

  .....

- Wallace can be seen clearing me in his own words and person in *Murder on the Blade?*... His words are reprinted in *Trial by Trickery* at p 89. These clear me unequivocally."

4.19 The potentially fresh evidence is said to be the categorical statement by Mr Wallace (made around the time the television documentary was produced in 2003) that Mr Watson, being the man in the dock, was not the man in his water taxi, and had Mr Wallace been asked at trial to make a dock identification he would have said that Mr Watson was "definitely not" the man.

4.20 Because the information about this issue from Mr Wallace (presented at the time I provided my interim advice) lacked detail and was in an unsatisfactory form, I recommended that Mr Wallace be interviewed or asked to provide an affidavit. On 28 June 2010 Mr Watson Sr provided the Ministry with an affidavit sworn by Mr Wallace (dated 1 May 2010). I subsequently received instructions to interview Mr Wallace.

4.21 I interviewed Mr Wallace in Picton on 3 November 2010 in the presence of a Ministry official. Mr Wallace was accompanied by Mr Rob Harrison, Barrister of Blenheim. The interview was recorded and a transcript of the interview was provided to Mr Watson's representatives, and to Mr Wallace. Related to this issue I also considered an affidavit (dated 1 November 2010) by Thomas Fitzgerald, a Police officer from Christchurch. Mr Fitzgerald's affidavit was made in response to some specific comments Mr Wallace made in his affidavit and was subsequently provided to Mr Watson for comment. I also considered the evidence which Mr Wallace gave at depositions in 1998 and the submissions which Mr Watson Sr provided on the identification evidence given by Mr Wallace. I discuss this material below.

4.22 In response to receiving a copy of the transcript of my interview with Mr Wallace, Mr Watson Sr provided further commentary/submissions. I have had regard to the matters Mr Watson Sr raised but they do not alter the view I have reached as to the freshness and/or cogency of the allegedly new identification evidence. I discuss this further below.

History of Mr Wallace's Identification Evidence

4.23 In order to properly assess whether what Mr Wallace now says meets the test for fresh evidence, it is important to set out the history of the various accounts Mr Wallace has given on the issue of identification of Mr Watson.

4.24 Mr Wallace was the key identification witness at trial. He was the water taxi driver who it was alleged transported Mr Smart and Ms Hope and the lone male in his water taxi to *Blade*. His evidence was always that the lone male he transported in his water taxi was the same man he and other bar staff had served in the lounge bar at Furneaux Lodge earlier in the evening. It is clear the Crown case relied heavily on that evidence. I note this point because other witnesses, while not able to identify Mr Watson as the man in the water taxi, were able to identify Mr Watson as the man in the bar.

Prior to Depositions

4.25 Mr Wallace first offered a description of the man he had taken in his water taxi with Mr Smart and Ms Hope, on 3 January 1998. He stated to Police:

> "this guy on the ketch would have been about 32, about 5'9" tall, wiry build. He was unshaven but didn't have a moustache. He had short dark wavy hair and smelled like a bottle of bourbon."

4.26 Two days later (5 January 1998) he told Police:

> "He was about 5'8" tall, wiry build...His hair was a brownie colour, wavy and medium length. He had about two days' growth on his face. He was bourboned up, like his eyes weren't focusing."

4.27 Between January 1998 and 20 April 1998 Mr Wallace was shown photographs of Mr Watson. He was shown two photographs of Mr Watson when he was interviewed by Police on 9 January 1998 but Mr Wallace said he did not recognise the man in the photographs. Mr Wallace was told the name of the man in the photographs (Scott Watson) but he said he did not know the name.

4.28 On 11 January 1998 Mr Wallace was shown a montage of eight full-length photographs of men. One was of Mr Watson depicted in normal stance facing the camera. I understand this photograph had been taken on 8 January 1998. Mr Wallace did not recognise any of the men in the montage and he advised Police of that.

4.29 Mr Hunter says in his book (page 84) that Mr Wallace was later shown the same montage (montage A) but the photograph of Mr Watson had been changed to one which had been taken on 12 January 1998. According to Mr Hunter, Mr Wallace did not identify Mr Watson or any of the other men depicted in these photographs.

4.30 In his affidavit of 1 May 2010 Mr Wallace said "I have now been shown two montages of photographs. I understand they were both known as Montage (A). ...I [had] been given to understand that this was the first Police montage in Operation Tam, that it was known as Montage A and that the photo in it of Scott Watson, but not its name, was changed soon afterwards [referring to 'soon after his first viewing of it']." Mr Wallace went on to say that in early February 1998 television reporter Julie Roberts showed him a television sequence of a man walking down the street and asked him if this was "the mystery man" to which Mr Wallace stated "no".

4.31 On 20 April 1998 Mr Wallace was shown what became known as montage B. Montage B contained head and shoulders shots of a number of men. Mr Watson was depicted in photograph 3. His eyes were half closed in the photo which Mr Hunter has labeled the 'blink photo'. Mr Wallace identified photograph 3 but qualified his identification on the basis that while the eyes were the same as the man he had seen on the night, the hair of the man in photograph 3 was too short and his appearance was generally too 'tidy'. In his statement to Police Mr Wallace said:

> "I believe photograph number 3 is the person who was in the bar and on the boat with me. At that time however he had good growth on his chin and face. He had a more unkempt look. His hair had more length to it and was more bushy and wavy. This meant that his fringe was lower down his forehead towards his eyebrows. It's the eyes of the person in photograph number 3 that stand out for me more than anything. The photograph portrays the person more as I remember him, that is his eyes do not have an open trusting look."

4.32 In his affidavit Mr Wallace stated that he was initially drawn to two of the faces in montage B; no.5 and no.3. He said he had to choose between them and he chose no.3. He said "for me it was this hooded eye thing." And that was the only reason he "said yes" to photograph no.3. Mr Wallace said that by the time he had identified no.3 in montage B he had "seen two photographs of Watson in the Police station, the full length montage, the television shots of him by Julie Roberts all over the place on television, and then in this last lineup, montage B....Every time I said he was the wrong man".

4.33 At trial Defence Counsel applied for photograph no.3 in montage B to be ruled inadmissible on the basis of the half-closed eyes (it was submitted the photograph was not a natural likeness of Mr Watson). The application was declined. In his Interim Ruling No 1 (13 May 1999), the Judge said it was a legitimate photograph to put forward and if it was uncharacteristic of Mr Watson that was likely to be of assistance to him.

Guy Wallace – Depositions

4.34 Mr Wallace gave evidence at the depositions in late 1998. Mr Wallace maintained when I interviewed him that at depositions he had told the Court the man in the dock (Scott Watson) was not the man he had served in the bar or whom he had in his water-taxi in the early hours of 1 January 1998. In his affidavit he said that "when the defence lawyer pointed to Watson at the depositions hearing I said it was not him (Depositions Transcript p 182)."

4.35 My review of the transcript of the evidence Mr Wallace gave at depositions shows that Mr Wallace said, with reference to a photograph which became known as the *Mina Cornelia* photograph and which showed Mr Watson earlier in the evening of 31 December 1997 on *Mina Cornelia,* that if that photograph had been taken at around "10 or half past 10" then the accused could not have been the man that got off his naiad with Mr Smart and Ms Hope. I discuss the relevant parts of the depositions evidence further below.

Guy Wallace – Trial Evidence in Chief

4.36 In his evidence in chief at trial Mr Wallace described the man in the bar as "a bit scruffy", he had not done his hair and was "a few days" unshaven (T: 1974;1975). He estimated the man's age as 32 years. He described his hair as "dark, a wee bit wavy, just unkempt" (T: 1975) and "just above the shoulder". He agreed that it was "just covering the neck" and "just down to the tops of his ears." Mr Wallace was vague about what the man was wearing but he thought he was wearing jeans and a pair of sneakers. Mr Wallace said he had spoken to the man and the man had introduced himself by name "because I can still remember turning around to whoever was at the bar with me, I'm pretty sure it was Roz McNally [sic], and saying do you recognise this guy from Picton, I don't, and she said something to the effect of I'm from Nelson how would I." Mr Wallace was sure the man had said he was from Picton. Mr Wallace said he saw the man throughout the night

and he served him beer and, he thought, bourbon. Mr Wallace said the man paid with screwed up bank notes and appeared to be on his own (T: 1977).

4.37 Mr Wallace said he saw the same man, alone, "down at the garden bar" later in the night. He said he thought this was well after midnight because by then the bar had thinned out (T:1979). He said this was before the time a fight occurred in the bar during which Mr Wallace said the man was "right there". Mr Wallace said that the man's eyes "didn't appear to be very trustworthy", they were "dark brown" and "pretty slanty really not like a fully opened person, just more of a closed aspect but not closed". He estimated the man's height as being "5'8, 5'9" (shorter than himself) (T: 1981).

4.38 After 2.25am when the bar had closed Mr Wallace was involved in cleaning up the Furneaux Lodge grounds. When in the vicinity of the toilet block Mr Wallace said he was approached by "two young kids" who wanted a ride back to Solitude Jetty. Mr Wallace said he agreed to take them to the nearby "Doctors Jetty" near Solitude Jetty at which point the three of them "headed down towards the jetty" (T: 1984). At the "Hoby Cat 3 line" Mr Wallace saw "the same man from the bar that we have been discussing previously" who had introduced himself as coming from Picton and the same man he had seen later in the Garden Bar. The man followed Mr Wallace and the young couple down to the floating jetty. When at the jetty Mr Wallace said the man told him he wanted a ride. There was also another couple waiting at the floating jetty who indicated they wished to go out to *Tamarack* (Amelia Hope and Rick Goddard). The lone man, Mr Wallace and the four young people then boarded the naiad and headed for *Tamarack*.

4.39 Mr Wallace confirmed he had assisted Police with the preparation of a computer sketch of the man he had seen, based on his descriptions of the man which he gave on 9 January 1998. Mr Wallace discussed some of the difficulties with the sketch that was produced saying that it did not accurately depict the man as he

remembered him. The Defence position was that this sketch did not resemble Mr Watson.

4.40 Mr Wallace confirmed that in April 1998 he had been shown some photographs by Police and had recognised one of the men in the photographs as being someone who resembled or who was the person that had been aboard the water-taxi and who he had dropped with the pair onto the boat in question. Mr Wallace confirmed the photo was no.3 in the montage he had been shown. Photograph 3 was the head and shoulders photograph of Mr Watson referred to above and described by Mr Hunter as "the blink photo". When asked what he could say about the appearance of the man in photograph 3 in comparison to his recollection of the man on the night (what features of his appearance were of particular significance to him) (T: 2027) Mr Wallace said "the shorter hair, he doesn't appear to have quite so much stubble on his face". In respect of the eyes of the man in the photograph Mr Wallace said "they seem similar". When Mr Wallace was asked how sure he was about recognising photograph 3 as the person he took with him on the naiad and dropped off onto the boat with the pair Mr Wallace said "I am pretty definite". He was asked how the likeness of the man in photograph 3 compared with the person he served at the bar, the person he had seen in the Garden Bar, the person who had approached him from the Hoby Cat area, the person who got into the naiad with him prior to the trip out to *Tamarack*, and the person who got off the naiad and onto the boat with Ms Hope and Mr Smart. Mr Wallace said in response to that series of questions that it was "the same person" (T: 2027; 2028).

4.41 Mr Wallace was then asked to look at a photograph which showed Mr Watson when he had been photographed earlier in the evening (around 9pm) when on board *Mina Cornelia.* This was the same photograph Mr Wallace had been shown at depositions. Mr Watson's eyes were closed in the photograph. Mr Wallace said in his trial evidence that the man in that photograph did not appear to have as much stubble as the man he had been asked about and that it was "quite difficult

to say" from that photograph whether it was the same man he had been describing (T: 2028).

4.42 Mr Wallace was asked about having seen news footage showing a man "entering or exiting the Blenheim courthouse". The television footage was of Mr Watson following his arrest and first court appearance. Mr Wallace was asked for his response to the issue of "the likeness of the man on the videotape and your recollection of the man that you had taken out in the naiad and dropped with Ms Hope and Mr Smart" (T: 2032). Mr Wallace said that the quality of the videotape he had been shown (by a news reporter) was very poor but when asked if this was the man from the naiad Mr Wallace had said that from the footage he "would have to say no" although he said he considered the video footage to be "unclear for a definite yes or no answer" (T: 2033).

Guy Wallace –Trial Cross Examination

4.43 When cross examined by Defence counsel, Mr Antunovic, Mr Wallace confirmed he was in "no doubt at all" that the man he had seen and served in the bar earlier in the evening was the same man that he took out on his naiad with Mr Smart and Ms Hope (T: 2035). Mr Wallace was asked questions about the man's appearance to which he referred to the man's "unkempt look", in terms of his hair he looked like he had "just got up", dark coloured hair down to the back of his neck and to his ears (T: 2036). As against the identikit sketch which Mr Wallace had assisted Police to produce on 9 January 1998 Mr Wallace accepted he had most likely been trying to show that the man's hair came down over his ears at the side; and that the man's stubble was "prominent" (T: 2037). In respect of the man's clothing Mr Wallace said at the time he thought he had seen a Levis label on the man's shirt on the chest area, and that he had been wearing blue jeans. Mr Wallace agreed he formed the impression the man appeared to be a fisherman or tradesman (T: 2038). Mr Wallace said he was "sure in [his] own mind" that the man had said he was from Picton (T: 2039) but then later accepted there was some

element of doubt in his mind about that because he had told Police he was "reasonably sure" the man had said he was from Picton.

4.44 Mr Wallace was cross examined about evidence which he had given at depositions relating to the *Mina Cornelia* photograph referred to above. Mr Wallace said that his recollection of what he had said about the man in the middle of that photograph (Mr Watson) and having any connection with the man that was in his naiad, was that he "would have to have said no". He agreed he had virtually ruled him out as being the man in the naiad (T: 2040). He said the man in the photograph had different hair (wrong length) and no facial hair compared to the man on the naiad.

4.45 In respect of the photo montage which Mr Wallace had been shown by Police on 20 April 2008, some three and a half months after the night in question, Mr Wallace said he had been drawn to photograph 5 as well as 3 (photograph 3 was the "blink photo"). He agreed that all he could really say was that the face in photographs 3 and 5 stood out more than any of the others. He accepted he had made the point to Police at the time that in relation to photograph 3 the man in his water taxi had had good growth on his chin and face which the man in photograph 3 did not have; that the man in the water taxi had had more hair and had a more unkempt look than the man in the photograph; and the man's fringe was longer than the man in the photograph. When it was put to him that "really... it was the eyes of no.3 that struck you more than anything else wasn't it" Mr Wallace said "yes"; and he agreed that was because the eyes "are almost half closed".

Guy Wallace – Trial Re-examination

4.46 Mr Wallace was re-examined. He said that when he had first been shown montage B he had first paid attention to photograph 5 and then photograph 3; he said the more time he spent looking at the photographs he was able to discount photograph 5 and "found more similarities" with photograph 3. In response to being asked

what he concluded about photograph 3 in relation to his recollection of the man at the bar Mr Wallace said "well overall he was just more similar to the man that I had seen in the bar that night" (T: 2048). When asked how sure or positive he was in the way he expressed his recognition to Police of that man in relation to the man in the bar Mr Wallace said "well very sure like the eyes, had a very mistrusting look".

4.47 When questioned by the Judge (T: 2050A) Mr Wallace agreed the man in photograph 3 had what appeared to be a 5 o'clock shadow. He confirmed that one of the reasons he had expressed a caution about the identity was that the man in the bar appeared to him to be *more* unshaven than the man in the photograph.

Assessment of Mr Wallace's Potentially Fresh Identification Evidence

4.48 As stated, I interviewed Mr Wallace in relation to potentially new identification evidence. During my interview I questioned Mr Wallace about the evidence in his affidavit sworn on 1 May 2010, relevant to the issue of identification. Mr Wallace's affidavit in the main related to his account of being shown the various photographs and montages and his confirmation as to whether he had retracted his "identification" of Scott Watson. Mr Wallace said "I don't think I ever identified Scott Watson as the mystery man at all. The way I look at is it [sic] I identified this hooded eye look and they pulled out a frame and fitted him up with it. That's how I see it."

4.49 In his interview Mr Wallace did not seek to alter any of the evidence he gave at depositions or trial as to his various descriptions of the man in question. The only point he took issue with in relation to those matters was the accuracy of the Police identikit sketch he assisted with which he claimed was not accurate. He said that a sketch of the mystery man drawn by an artist (Ms Hollings) at his direction in 2002 (copy provided) was "very accurate, although she had trouble getting the right waviness in his hair.... and the stubble could be a bit more pronounced." I

deal with the issues relating to the Police sketch in more detail below but I note at this point that Mr Wallace gave evidence at trial about some of the difficulties he had with the Police sketch.

4.50 Mr Wallace said in his affidavit that had he known the man in photograph 3 of montage B had hair as short as it is shown in that photograph on the night in question he would "never have identified him at all"; likewise if he had been shown the photographs of Mr Watson taken on the morning of New Years Eve in the supermarket (as shown in Mr Hunter's book) or the photo taken of him on *Mina Cornelia* and told that these were all photographs of the same man and how his hair looked "at the party", he would not have identified him as the man. Mr Wallace claimed he was given to understand from Detective Fitzgerald that the man in photograph 3 "had cut his hair since the party and that was why it was short in the Montage B photo".

4.51 In the concluding remarks of his affidavit Mr Wallace said "I took three people to a ketch. Scott Watson was not one of them and I don't believe I've ever said he was. I ruled out the man in the photo taken that night on the boat next door, the *Mina Cornelia".*

4.52 On my analysis of the depositions and trial transcripts I accept Mr Wallace did make comments to that effect both at depositions and trial and it was on that basis that Defence counsel were justified in submitting to the Jury (and later to the Court of Appeal) that Mr Wallace never positively identified Mr Watson as being the 'mystery man'. Mr Wallace's identification evidence was always said by Defence counsel to be unsatisfactory.

4.53 As I stated above, when I interviewed Mr Wallace he told me he had been asked to do a dock identification at depositions and his evidence had been that the man in the dock (Scott Watson) was not the man he had seen in the bar and later taken

on his water taxi with Mr Hope and Ms Smart. The relevant part of the depositions transcript is set out below:

CROSS EXAMINATION (Mr Antunovic) – Transcript Page 181-182 at line 238

"Q. Now, the photograph that you've got in front of you is the same photograph that's shown in page 32 of the booklet of photographs, but I don't want you to turn to that, accept from me that it is that, right?

A. Yep.

Q. And the labels – you can't see any names on that photograph, can you?

A. On this photograph?

Q. Yeah?

A. No.

Q. Well, can I just tell you that that photograph was taken on New Year's Eve?

A. Really.

Q. Yes. At probably around 10 or half past 10 in the evening some five, six hours before you delivered these people to the ketch?

A. Well, I'd find that very hard to believe.

Q. Well Scott Watson couldn't have been the man, could he?

A. I find it very hard to believe that's the time element that that photo was taken.

Q. Just accept from me for the moment if you would that that photograph was taken some hours before you dropped those people off to the ketch?-

A. Okay.

Q. That is proved by other evidence in the case, and I believe it was some time around 10:00 or 10:30 on New Year's Eve?

A. Well, if that is the case then it wasn't Scott Watson that I dropped off.

Q. That's right. This man sitting here with the red tie on is Scott Watson, right?

A. Right.

Q. You identify the accused. But he was not the man that got off your Naiad with – Ben Smart and Olivia Hope, was he, couldn't have been -?

A. Not if that photo was in that timeframe, no."

4.54 It is clear that Mr Wallace's depositions evidence related to the photograph he was being asked to consider (the *Mina Cornelia* photograph). The depositions transcript shows that while Mr Wallace was not asked by Counsel in a formal way, to make a dock identification he did make a visual comparison of the man in the court with the man on the naiad. His evidence was related very much to the

man shown in the *Mina Cornelia* photograph and was entirely consistent with the evidence he went on to give at trial the following year on the same issue, which was, in effect that the man in the *Mina Cornelia* photograph had different hair (wrong length) and no facial hair compared to the man on the naiad and on that basis he could say the man in the photograph was **not** the man on his naiad. On that analysis there was little significant difference between what Mr Wallace said at depositions and at trial. I accept that at trial Mr Wallace was not asked to make a link about what he was saying about the *Mina Cornelia* photograph by reference to the man in the dock. However, the point was nonetheless made and was squarely before the Jury. Importantly, there was reference to the *Mina Cornelia* photograph taken early in the evening on 31 December 1997 and to Mr Wallace's concession under cross examination that Mr Watson's appearance in that photograph ruled him out as the person in the water taxi. There was also Mr Wallace's evidence in which he denied that the man he had seen in television footage entering or leaving the Blenheim District Court (Mr Watson) was the man who had been in his water taxi.

4.55 Defence counsel rigorously challenged Mr Wallace's identification at trial. Both at trial and before the Court of Appeal Defence counsel submitted that on any proper analysis of the evidence, Mr Wallace had not made a visual identification of Mr Watson; on the contrary he had given evidence which excluded Mr Watson as the man in question.

4.56 As recorded in the Court of Appeal decision, in his closing address for the Defence, Mr Davidson referred to Mr Wallace's 'purported' identification of Mr Watson and strongly countered the Crown's arguments for accepting there had been a reliable identification. He criticised the reliability of Mr Wallace's identification and contended the evidence positively excluded Mr Watson. In the Court of Appeal the argument (rejected) was that the effect of the Judge's section 344D warning was to undermine that exclusion to the wrongful disadvantage of Mr Watson.

4.57 Mr Watson's submission in his application that "had [Wallace] told the court I was not the man in the water taxi with him and Ben and Olivia, as he has now made plain, I could not have been convicted" in my view overstates the position and overlooks the significance the Jury were entitled to place on the other strands of circumstantial evidence, in particular the evidence of DNA analysis. In my view, that evidence if accepted by the Jury as reliable, was compelling. Further, Mr Wallace did in fact give evidence by reference to the *Mina Cornelia* photograph (taken on the night in question), and by reference to the television news footage that Mr Watson was not the man in the naiad. In his interview with me, Mr Wallace agreed he had given evidence to this effect at trial. He confirmed that the extent of what he is now saying is had he been asked to make a dock identification at trial he would have said the man in the dock was not the man in the naiad.

4.58 Mr Wallace's claim now that had he been asked to make a dock identification he would have denied the man in the dock (Mr Watson) was the man on his water-taxi on the night in question is not, in my view fresh evidence. The evidence was available at the time of trial, had Mr Wallace been requested to give it. Neither Crown counsel nor Defence counsel chose to ask Mr Wallace to make a formal dock identification. There was no obligation on counsel to require a dock identification. Further, as I discuss below the decision by Defence counsel not to ask Mr Wallace to make a dock identification was a tactical decision made by experienced counsel. It was a judgement taking into account a range of matters including other evidence given at trial.

4.59 Dock identifications can be notoriously unreliable and, as I have stated above, have been referred to as such by the Courts and commentators on many occasions. In his summing up in this trial the Judge referred to the fact there had been no dock identification "as such" (presumably a reference to the other modes of identification relied on), and noted the comment made by counsel in closing

submissions about the dangers associated with dock identification. In the context of this case I do not consider the fact that Mr Wallace was not invited to make a dock identification at trial was significant. Not only is reliance on dock identifications generally considered undesirable, in this case the evidence that was in fact given by Mr Wallace which on the Defence view did not amount to an identification renders any failure to invite a dock identification of limited importance.

4.60 In the end the significance of this matter needs to be assessed in the context of the actual evidence Mr Wallace gave at trial relating to the identification of Mr Watson as the "mystery man". In his evidence Mr Wallace made a number of qualifications to his identification of Mr Watson. That evidence, when considered alongside other comments made by Mr Wallace in relation to the *Mina Cornelia* photograph and the television footage, shows that Mr Wallace's identification of Mr Watson was qualified. I note that Defence counsel submitted that Mr Wallace did in fact rule Mr Watson out as being the "mystery man". Depending on the view taken of the evidence that was a submission open to them.

4.61 Assessed against that background, the fact that Mr Wallace was not in fact asked by either the Crown or the Defence to make a dock identification is of much less significance.

4.62 In order to better understand the decision made by Defence counsel not to ask Mr Wallace to make a dock identification at trial I interviewed Judge Bruce Davidson and Mr Michael Antunovic. Because Judge Davidson and Mr Antunovic are bound by legal professional privilege I sought a signed Waiver of Privilege from Mr Watson to enable me to speak to them. This was duly provided.

4.63 I interviewed Judge Davidson and Mr Antunovic on 15 February 2011. They confirmed their decision not to ask Mr Wallace to make a dock identification was a tactical decision. These were counsel judgements at the time about how to deal

with this issue after taking into account a range of considerations including the fact that they considered the main significance of Mr Wallace's evidence was his description of the boat which did not fit with the description of Mr Watson's boat. They also considered that Mr Wallace had not in fact provided a positive identification. He had been shown the *Mina Cornelia* photographs and he had also been shown photographs of Mr Watson outside the Courthouse and ruled Mr Watson out as being the "mystery man" based on those photographs. It was in light of that evidence having been given by Mr Wallace that Defence counsel made a decision not to go further and seek to ask Mr Wallace whether he could make a dock identification. Counsel told me they also had regard to the general concerns about the unreliability of dock identifications, along with the fact that throughout Mr Wallace had provided a series of conflicting statements. They described him, as "wavering", "confusing" and "difficult". They were also mindful of the potential for re-examination by the Crown. Counsel advised me they deliberately opted to limit their cross examination of Mr Wallace in order to limit the potential for the Crown to re-examine Mr Wallace on his identification evidence.

4.64 In that context it is perhaps understandable that Defence counsel chose not to ask Mr Wallace whether he could make a dock identification – the risk being that they would not be sure how Mr Wallace would respond. It should be noted however, that had Mr Wallace in fact made a positive dock identification Defence counsel would have been able to undermine that evidence to some extent by reference to what Mr Wallace had said at depositions. That said, the discussion about how best to deal with this issue was a matter that Defence counsel made having regard to a range of matters. I am not critical of their decision not to seek to have Mr Wallace make a dock identification. They did not know how he would respond. Asking him to make a dock identification carried significant risk. From their point of view the evidence they had elicited from Mr Wallace placed them in a satisfactory position. Further, for the reasons discussed above, in the context of the evidence

given by Mr Wallace at trial inviting a dock identification was of limited significance.

4.65 I have considered whether the Crown acted properly in not inviting Mr Wallace to make a dock identification. Again, and for similar reasons as stated above I would not be critical of Crown counsel for not inviting a dock identification. In recent years it has become the norm **not** to rely on dock identifications for the reasons referred to above. They are thought to be inherently unreliable. Had the Crown chosen to ask Mr Wallace to make a dock identification especially against the background of his unreliability they might well have been criticised for doing so.

4.66 I have also considered whether the Crown acted properly in placing so much reliance on Mr Wallace's evidence. It was clear that Mr Wallace was a witness whose evidence, from the outset was changeable. Against that however, his evidence was rigorously tested by Defence counsel, his various statements were all disclosed to Defence counsel and it was, in the end up to the Defence to challenge and test Mr Wallace's evidence as they saw fit. In addition, the trial Judge gave an identification warning to the Jury that they should be cautious in their assessment of the identification evidence. This was an adversarial process where Mr Watson was represented by experienced counsel and where the issues and concerns about Mr Wallace's unreliability were squarely placed before the Jury. Further, concerns were raised on appeal about the identification evidence and how it was dealt with by the Judge. The fact that Mr Wallace now says twelve years later that he would not have made a dock identification is not information I find to be cogent in the context of how this evidence was dealt with both at trial and on appeal.

4.67 Further, any concerns about the emphasis given to Mr Wallace's evidence by the Crown particularly in closing to the Jury need to be viewed in the context that any remarks about Mr Wallace were, in the end, only a submission by counsel. The trial Judge gave the Jury the usual direction that they must base their assessment

of the case on the evidence given from the witness box (rather than counsel's submissions). The Jury heard all the evidence and must have been well aware of the uncertainties surrounding Mr Wallace's identification evidence. When assessing this matter in the round, it is necessary to start from the premise that the Jury approached its consideration of this matter in a sensible fashion and having regard to the directions given by the trial Judge. The issue of Mr Wallace's identification evidence is but one matter in the context of a great deal of other evidence said to link Mr Watson to the two victims and in particular the DNA evidence suggesting that Ms Hope's hair was found on Mr Watson's boat. This is in the context of a statement made by Mr Watson denying that Ms Hope was ever on his boat. Notwithstanding the attempts to undermine the significance of the DNA evidence, the Jury was entitled to have regard to that evidence and may well have regarded it as significant in the context of other evidence.

4.68 Having fully considered all of these issues I am not satisfied Mr Wallace's new information about what he now thinks he would have said if asked to make a dock identification meets the test for fresh evidence. Nor do I consider it is significant, particularly in light of the evidence which Mr Wallace did in fact give at trial. As indicated, Mr Wallace's dock identification evidence needs to be assessed against the fact that at trial Mr Wallace made a number of qualifications to his identification and considered alongside his concessions in relation to the *Mina Cornelia* photograph and his comments about the television news footage. It was clear throughout that Mr Wallace's identification evidence was qualified. It was precisely because of that that the Defence was able to submit that Mr Wallace had not in fact positively identified Mr Watson as being the 'mystery man'. That was a matter that was before the Jury.

4.69 Mr Watson Sr has submitted that other matters relating to the identification evidence given by Mr Wallace amount to fresh evidence. Mr Watson Sr submits that Mr Wallace chose photograph 3 in montage B after having been "softened up" by Police remarks to the effect that the man may have changed his appearance

since the night in question; and points to Mr Wallace's description of an early undisclosed formal identification procedure, his repudiation of a statement he had signed when he lived in Australia in 2001, and the provision of a portrait drawn by an artist to Mr Wallace's description of the mystery man. These matters were referred to by Mr Wallace in his affidavit and I questioned him about them only to the extent I considered relevant. On balance, I am satisfied that none of these matters constitute fresh evidence (admissible or otherwise), or if they do they do not meet the tests for cogency and credibility. I deal with these matters below.

4.70 Even if Mr Wallace's repudiation of the statement he signed in 2001 (in which he stated he had not been shown montage A or another group of the same photographs mounted on cardboard) is accepted I do not consider anything turns on that. While it might fairly be said there were issues with the identification procedures followed by Police, a matter which the IPCA noted in its recent report, I am not satisfied those issues ultimately had any significant bearing on the identification evidence Mr Wallace gave at trial. Mr Wallace did not seek to alter the identification evidence he gave on those occasions either in his recent affidavit or in his interview with me. The only new issue, which Mr Wallace accepted when I interviewed him, is his claim about what he would have said had he been asked to make a dock identification at trial. As I have discussed above, his position on that is entirely consistent with the evidence he gave at depositions and trial (repeated in his affidavit) with specific reference to the *Mina Cornelia* photograph. Mr Wallace was cross examined extensively at trial and Defence counsel extracted statements from him which it could be said were very favourable to Mr Watson's case.

4.71 While the sketch of the mystery man produced in 2001 is new evidence in the sense that it was not available at the time of trial, I do not consider that a sketch produced two or three years after the events in question is sufficiently reliable or cogent to raise a real doubt about the safety of the convictions. In any event, Mr Wallace explained some of the difficulties he had with the Police sketch in his

evidence at trial (for example, T: 2026; in answer to a question about how well he thought in terms of coverage and density in the compusketch the Police artist captured the man's facial hair Mr Wallace stated "well not too bad but it was like the face was more pale so the stubble would stand out more and also with the neck, it made the stubble stand out more but he [the Police artist] couldn't seem to get it right"). In view of that evidence, it cannot fairly be said the Jury could have been mistaken or misled about Mr Wallace's views about the accuracy of that sketch. It was clear from what Mr Wallace said at trial that he did not believe the Police sketch was particularly accurate.

4.72 I do not consider that if any of this new evidence was before the Jury, when considered alongside all of the other evidence given at trial (including in particular the two hairs that were located from Mr Watson's vessel and that were the subject of later positive scientific testing which was strongly indicative of them having come from Ms Hope), a reasonable Jury might have had cause to entertain a reasonable doubt about guilt.

4.73 Notwithstanding that the case against Mr Watson depended substantially on the correctness of Mr Wallace's identifications, as the Court of Appeal observed it must also be noted that Mr Wallace's visual identifications of Mr Watson were but part of the overall evidence relied upon by the Crown as establishing beyond reasonable doubt that Mr Watson was the offender. Further, in this case Mr Wallace's identifications were supported by other identification evidence given at trial. In this regard I refer to the evidence of Mr Cronin who also identified Mr Watson in montage B as being the man drinking at the Garden Bar and who had some liquor stored there on his behalf. There was also evidence given by several people present in the bar during the evening who identified Mr Watson in montage B as being present in the bar; including Ms Amanda Egden who said she spoke to a man who said his name was Scott and who talked about having the only double-masted ketch in the Bay; and Ms Camilla Savill. Both Ms Savill and

Ms Egden identified the man they had described as being depicted in photograph 3 on montage B (Mr Watson).

4.74 In summary, having considered the further material obtained since my interim advice, in my view none of the evidence relating to Mr Wallace's identification satisfies the test of freshness and even if considered to be fresh, I do not consider the evidence to be of sufficient cogency such that if it is considered alongside the evidence given at the trial it might have caused a reasonable Jury to entertain a reasonable doubt about Mr Watson's guilt.

4.75 I wish to reiterate that having read the trial transcript and noted the comments in Mr Hunter's book about the overall reliability of Mr Wallace, it does appear the Crown relied on a well intentioned but generally unreliable witness in Mr Wallace in relation both to the issues of identification and the location of the boat (which I discuss below). However as I have stated, Mr Wallace was extensively examined and cross examined at trial by experienced counsel. It must have been plain to the Jury there were issues relating to the reliability of his evidence on these matters. Indeed, the Defence had some success in undermining the effect of Mr Wallace's evidence, to the point counsel were able to submit that Mr Wallace had not in fact made a positive identification.

Ms McNeilly's identification of Mr Watson

4.76 As stated, Mr Watson's application is supported by a statutory declaration by Ms Roslyn McNeilly dated 27 November 2000.

4.77 In her declaration Ms McNeilly states:

> "...I make this statement completely freely and on my own recognizance.
> I have made several comments to the police and was a witness at the depositions hearing and trail [sic] of Scott Watson.

I was shown montage B on 3 occasions and picked out number 3. The male in photo 3 of montage B had similar eyes but would have had a lot more hair and had one or two days facial growth. I stated this at the time.
I was never shown the photo taken of Scott Watson taken on New Years Eve just before he went ashore The first time I saw this photo was in the book "Silent Evidence".
Having seen this photo, I know, without any doubt in my mind, that the male I served at Furneaux Lodge Bar was not Scott Watson.

The male I served had a longer (almost shoulder length), unkept hair and had one or two days facial growth. I did not notice any fingers missing, and he was also wearing a black fishing type jersey not a shirt."

4.78 In his application Mr Watson has said this of Ms McNeilly's evidence;

"6) The second most important identification witness was the bar manager, Roz McNeilly. She also identified me from the same montage on account of the half-closed eyes and her testimony makes it clear it was for no other reason.

She too has since said she was told to ignore my hair in the photo because I had cut it since the party. Long after the trial and after seeing, for the first time, the photo taken of me on the night of the party, she provided an affidavit to the effect that I was not the man who she served at the Furneaux bar, who Wallace said was the man he took on his water taxi to the mystery yacht with Ben and Olivia. I enclose a copy of that affidavit.

- McNeilly can be seen clearing me in *Murder on the Blade?* in Part 3 at 01.37.39. Her evidence in court is discussed at page 96-97 of *Trial by Trickery.*"

4.79 Mr Wallace gave evidence that when he had been serving behind the bar on 31 December 1997 he had seen, served and spoken to the man whom he later transported in his water-taxi with Mr Smart and Ms Hope. Several witnesses gave evidence describing a similar man in or at the bar. One such witness was Ms McNeilly. The description she gave Police when she was interviewed on 8 January 1998 was consistent with Mr Wallace's description. She stated:

"A male, Caucasian Between 30 and 35 years, clean shaven, although his face gave the appearance of two days' growth or hadn't shaved that day, thin, scruffy, almost unkempt as if he hasn't seen a

hairdresser for a while. What I mean by that is the hair was uneven and different lengths. The hair roughly parted down the centre and fell over his ears.... I have to comment that I am left with the impression that he was unkempt and scruffy in appearance.

4.80 On 20 March 1998 Ms McNeilly was shown montage B from which she identified the "blink photo" of Mr Watson as being the man in question. She emphasised his slanting eyes and said the hair was not as she recalled.

4.81 At trial Ms McNeilly described a man who she had seen sitting in Reg's Corner (in the bar) sometime after midnight. She described the man as scruffy, unkempt with mid brown hair below his ears and covering his ears in part, and with a brown weather beaten face [T: 1341-7]. She thought the man was aged 30-35 years [T: 1341-8]; and he had facial hair. Ms McNeilly said the man was smoking roll your own cigarettes and he stayed in Reg's Corner for approximately an hour to an hour and a half [T: 1341]. She described serving him five to six times, double bourbon and coke and she said the man paid cash [T: 1342]. Ms McNeilly gave evidence of continuing to work at the bar and seeing the man there while she was serving many people; she described how he would obtain a drink, and said that at one stage he had a young woman with him [T: 1342-1344]. She said after the woman left the man returned for another 20 minutes or so and when she had looked up he had gone [T: 1344-45].

4.82 Ms McNeilly gave the following evidence about the reason for her identification of the man in the "blink photo" on montage B which she confirmed she had been shown by Police in March 1998 [T: 1344-45]:

"And what was it about the man in the photo that you saw that closely resembled or made you think that he was like the man you had been serving behind the bar there that morning?

His eyes

...Just so that it is clear are you able to say whether the person in photograph 3 is the man or are you saying the person in photograph 3 looks like the man?

The hair is shorter in this photograph than the man I remember but I would say that with longer hair yes it's the same man.

...You have mentioned of course the man you served as having slanted eyes in your description, how does the appearance of the man's eyes in photograph 3 compare with what you recall of the appearance of the man that you were serving on 1 Jan?

They are exactly the same."

4.83 Ms McNeilly said the man in photograph 3 had a nose and lips like the man she had served, was roughly the same age and had the same hair colour [T: 1349]. She described the man she had served as wearing a V neck dark jersey [T: 1348].

4.84 When she was cross examined by Defence counsel, Ms McNeilly said [T: 1347-1348];

"...Now, this person undoubtedly had long hair?
It wasn't short.
But would you describe it as long hair down over his ears?
Yes.
You would describe the hair as being unkempt and uncombed?
That's right.
..Now a feature for you appears to be these eyes, agree?
Yes.
And when you were shown the montage by the Police, it was the eyes of the person in the photograph that came to your mind?
That's right.

4.85 With reference to the computer sketch which Police produced with the assistance of Ms McNeilly and another bar worker, Mr Chey Phipps on 9 January 1998, Ms McNeilly said the hair in the compusketch was not that accurate; "it was stringier" and "wasn't as thick" as shown in the picture in the computer sketch and "he's got more [facial hair] growth than I remember him having" [T: 1350 and 1351]. She said the compusketch was limited by the options on the computer.

4.86 The description Ms McNeilly gave in her statutory declaration of the man she served at the bar does not differ in any material way from the description of the man she gave at trial. Ms McNeilly always gave a description of the man she maintained she had seen and served in the bar which was largely consistent with Mr Wallace's description (and the descriptions given by other witnesses (for example Egden and Savill) who had been present in the bar and who also picked photograph 3 in montage B). There is no fresh evidence in that respect.

4.87 Ms McNeilly says that she was never shown the *Mina Cornelia* photograph of Mr Watson taken on the night in question (albeit with his eyes shut). In respect of that photograph she says had she seen that photo she knows, "without any doubt...that the male [she] served at Furneaux Lodge bar was not Scott Watson". In effect Ms McNeilly says that had she been shown the *Mina Cornelia* photograph at trial and asked if the man in the photograph was the man she served in the bar she would have said "no".

4.88 This evidence is not technically fresh as it was available at the time of trial had Ms McNeilly been asked to give it. Neither the Crown nor the Defence chose to show the *Mina Cornelia* photo to Ms McNeilly and they could have done so. There was no obligation on the Crown to put the photograph to Ms McNeilly at trial and as with Mr Wallace, the decision by Defence counsel not to put the photograph to Ms McNeilly was a deliberate tactical decision. They did not know how she would respond if shown the photograph and I confirmed when I met with Judge Davidson and Mr Antunovic that they were satisfied with the position that had been reached as a result of the evidence that had been given by Ms McNeilly in the context of other evidence about this issue. They did not consider it necessary to put the *Mina Cornelia* photo to Ms McNeilly in light of the other evidence they had which, in their view established that the person Ms McNeilly was talking about was not Mr Watson. Defence counsel considered Ms McNeilly had not given identification evidence in any real way and that the overall effect of her evidence was that the person had to be someone else.

4.89 In my interim advice I concluded that I needed to interview Ms McNeilly in order to assess the cogency of the information she had provided. When the evidence is considered alongside the evidence of Mr Wallace, in essence Ms McNeilly is saying the same thing that Mr Wallace said at depositions and at trial; that having seen the *Mina Cornelia* photo the man she served in the bar was not the person in the photograph. Mr Wallace gave evidence to that effect and he was the key witness on this issue given that it was his evidence that the man he had talked to and served was also the man in the water-taxi. As stated, Mr Wallace's evidence (cross examination) was that the man in the *Mina Cornelia* photograph was not the man he had served in the bar and later taken in his water-taxi with Mr Smart and Ms Hope. Ms McNeilly's new evidence to the same effect, adds some strength to the Defence position in regard to this issue as there are now two people who deny the man in the *Mina Cornelia* photo was the man in question.

4.90 Ms McNeilly appeared on the television documentary to state that she felt "tricked" into making an identification based on photograph 3 in montage B and said she now refutes her identification altogether. There is no specific information in the documentary, as to why Ms McNeilly believes she was tricked. In my interim advice I surmised it may be that she considered the photograph she was shown in montage B was unreliable because it did not fairly characterise Mr Watson because he was blinking. This was a matter raised by the Defence at trial. In my interim advice I suggested that Ms McNeilly should be asked to clarify this issue.

4.91 I interviewed Ms McNeilly in Nelson on 5 May 2010. A Ministry official was present throughout the interview. Ms McNeilly was accompanied to the interview by Mr Rob Harrison, Barrister. The interview was tape recorded and a transcript was made and provided to Ms McNeilly and Mr Watson's representatives.

4.92 On the day of the interview Ms McNeilly swore an affidavit. Ms McNeilly said that she believed she "did not identify Scott Watson at all" as the "untidy longhaired man I served at the Furneaux Lodge lounge bar on New Year's Eve 1997 and the following morning New Year's Day 1998." She stated she identified "a photograph of a man with eyes similar to the man at the bar. I identified the eyes in the photograph and rejected the hair. My alleged identification was always dependent on the hair of the man in the photograph being longer on the night of the party and I repeatedly and consistently made this clear," "including in evidence in court". Ms McNeilly emphasised the key point made by the Defence throughout was that she never in fact identified Mr Watson as being the man in question. On that basis she stated it is incorrect to claim that she now wishes to retract her identification of Mr Watson "because there is no identification to retract."

4.93 I am satisfied this evidence is not fresh. It is entirely consistent with the evidence Ms McNeilly gave at trial and consistent with the Defence case which was that Mr Watson was never positively identified either by Mr Wallace or Ms McNeilly. I accept that depending on their assessment of the evidence, that was an interpretation open to the Jury.

4.94 In her affidavit Ms McNeilly said she believed she was "misled into identifying Scott Watson for four reasons", namely;

- The appearance of the man in photo 3, montage B as he was at the New Year's Eve Party was "misrepresented" to her [by Police];

- Despite her constant requests the Police and the prosecutor declined to show her a photograph of Mr Watson taken on the night of the party;

- The eyes in the photograph she identified are unnatural and captured Scott Watson blinking; and

- She was informed by Police that the name of the man at the bar was "Scott Watson" and so she referred to "Scott Watson" when she was asked about the man.

4.95 Ms McNeilly went on to say that had she been shown a photograph of Scott Watson on the night of the party she would not have picked photograph 3 in montage B as being similar to the man in question. Further, she said that had the Police not suggested that the man in photograph 3 could have had a haircut (since the party at Furneaux Lodge) she "would not have picked him" (or had she realised his hair had been short on the night). Ms McNeilly consistently explained the reason she chose photograph 3 was because of the similarities with the eyes of the man in the photograph and the man she served in the bar. She has never resiled from that and her position has always been that she never positively identified Mr Watson – just that the man in photograph 3 was most like the man she had served in the bar but that man had longer hair.

4.96 Both Mr Wallace's and Ms McNeilly's 'identification' evidence was supported by other evidence. There was evidence of a similar nature to that given by Ms McNeilly as to the description of the man she served, given by others who had been present at the bar on the night in question, including by Mr Wallace. Had Ms McNeilly not given any evidence in relation to photograph 3 in montage B, the Jury would still have heard evidence of the same nature from Mr Wallace. I am not persuaded that Ms McNeilly's evidence added greatly to the evidence the Jury heard from Mr Wallace about this issue. Importantly, Mr Wallace was the key witness on the issue of identification as he was the only person who was able to make the link between the man in the bar and the man in his water-taxi who disembarked from his naiad onto a vessel with Mr Smart and Ms Hope. That was not a link which Ms McNeilly was able to make. In my view that reduces the overall importance of Ms McNeilly's identification of the man in photograph 3 in montage B as the man she served behind the bar. I do not consider that Ms

McNeilly's new evidence (relating to the *Mina Cornelia* photograph) would likely have persuaded the Jury to have reached a different verdict either separately or taken with other evidence.

Ms McNeilly's evidence about man's hands and fingers

4.97 I have considered one other aspect of Ms McNeilly's evidence in her affidavit of 5 May 2010 as potentially fresh evidence. At paragraphs 17 and 18 of her affidavit Ms McNeilly deposed as follows:

> "Another thing that happened with the Police related to the fingers of the man. Before the trial they rang me and came and visited me at my house. They asked if I had noticed any fingers missing on the man that I served behind the bar and I said "definitely not". He had all of his 10 fingers. The police were not there very long. They sat down asked that question and then went away. I had to tell them about his hands and what they looked like. There were two policemen and I think Wayne McCoy could have been one of them. He seemed to always be there. I explained how the hands were thin, bony and long fingered and then they said "are you sure he did not have any missing fingers?" I said "no" and that I would have noticed if he had missing fingers because he had one hand wrapped around the glass and was smoking rollies with the other hand. I would have seen it if he had missing fingers.
>
> After I said he had all his fingers they went away. I got the impression they came to ask that specific question. It was at night time from memory. I do not have a record of it. Of all the police statements I have seen that one is not there. No one asked me about missing fingers in court. I have been told Scott Watson has missing fingers."

4.98 I am advised that it is recorded on the Police file that Mr Watson is missing his little finger and ring finger on his right hand.

4.99 When I interviewed Ms McNeilly about this issue she told me that she recalled having been asked about the issue of 'missing fingers' in Court and that she believed she told the Court the person she served at the bar had all of his fingers.

4.100 Subsequent to my interview I reviewed the transcript of Ms McNeilly's trial evidence. The only relevant exchange in the transcript was in her evidence in chief [T: 1341] where Ms McNeilly answered "yes" to the question "did you see his hands?" and in response to the question "what can you say about those?" Ms McNeilly stated "they were sort of bony". It would appear that Ms McNeilly was not cross examined on the point.

4.101 I have made further inquiries in relation to Ms McNeilly's evidence on this issue.

4.102 I have reviewed the evidence Ms McNeilly gave at depositions (including her written deposition). At depositions the extent of Ms McNeilly's evidence about the mystery man's hands was her statement [T: 133] that "I remember his hands were quite bony and skinny, his fingers." In her written deposition statement Ms McNeilly stated at page 5 that "I can remember that his hands or fingers were skinny like long and thin, his hands were brown like tradesman's hands. He was smoking rollies, roll your own cigarettes. He was sitting there with a skinny rollie in his mouth".

4.103 I have also obtained a copy of all the statements Ms McNeilly made to Police during Operation Tam and all Police job sheets recording information or contacts between Police and McNeilly. I received confirmation (through Detective Senior Sergeant Rae's advice to the Ministry) that all of these documents were disclosed to the Defence prior to trial.

4.104 There is no record of Police having made any query of Ms McNeilly about the man she served at the bar having missing fingers or any record of Ms McNeilly having advised Police that she had not noticed he had any missing fingers or put another way, that he had all his fingers. The statements Ms McNeilly made in her evidence at depositions about Mr Watson's hands reflect the statements she made to the Police during Operation Tam. For example, in her statement to the Police (Detective McLachlan) on 20 March 1998 Ms McNeilly stated "I can remember

that his hand or fingers were skinny like long and thin. I don't remember seeing his forearms..." In her statement to Police (Detective Fitzgerald) on 2 April 1998 Ms McNeilly stated "He had a leather complexion a sea person sort of look, like he had been in the sea or worked outdoors. He had brown hands like tradesman hands, definitely not an office worker. His hands were fairly skinny but not soft."

4.105 In his book Mr Hunter referred to Ms McNeilly's statements to the Police and the Court on the issue of Mr Watson's hands and fingers. He stated:

> "Her [Ms McNeilly's] observation is significant for what she did not recall about the man's hands or fingers. If the man had been Scott Watson she would have noticed something quite distinctive. Watson is missing two knuckles on both the fourth and fifth fingers of his right hand, a difficult, perhaps impossible, detail for anybody to miss if they took specific notice of the mystery man's hands.

4.106 It would appear that as Ms McNeilly is not recorded as having made any specific comments on the issue of 'missing fingers' to the Police, there was no disclosure because there was nothing to disclose to the Defence in this regard.

4.107 If what Ms McNeilly now says is correct (that she told the Police prior to trial that Mr Watson had all his fingers) then strictly speaking her evidence meets the test for fresh evidence, as it was not available to the Defence prior to trial and therefore they could not cross examine her on this issue.

4.108 Even if Ms McNeilly's evidence in this regard may meet the test for freshness I am not satisfied that the cogency test is met for the reasons I discuss below.

4.109 I accept that the description of the man Ms McNeilly referred to was, in the main consistent with the description given by Mr Wallace. I also accept that Ms McNeilly's (and Mr Wallace's) 'identification' of Mr Watson on montage B was always qualified (on the basis it was the eyes which drew her to photograph 3; as she said at depositions "it was his eyes that I recognised" [T: 134]). Those factors

enabled the Defence to maintain that Ms McNeilly's identification evidence was inconsistent with the man being Mr Watson; that it excluded him from being the man. However, significantly, Ms McNeilly was never able to make the important link between the man she described having served at the bar, and the man who subsequently boarded Mr Wallace's naiad with Mr Smart and Ms Hope.

4.110 It is necessary to consider the significance of Ms McNeilly's evidence about this matter in light of other relevant evidence; particularly what she now says about her likely response if shown the *Mina Cornelia* photograph and the new evidence from Mr Wallace that had he been invited to make a dock identification he would not have identified Mr Watson. In my view, given that Ms McNeilly was never able to make the link between the person she served in the bar at Furneaux Lodge with the man that boarded Mr Wallace's boat, the most that could be said is that the Defence submission that neither Mr Wallace nor Ms McNeilly had made a positive identification of Mr Watson would have been strengthened. It is acknowledged that the Crown sought to rely on Ms McNeilly as an identification witness but as stated above it has to be recognised that the evidence she gave was always qualified. Further, she did not (and could not) link Mr Watson to the man who boarded the naiad with the two victims. Defence counsel made the point when I interviewed them that Ms McNeilly's evidence was not considered of particular significance in the overall context as she had not (as they submitted to the Jury) in fact made any positive identification of Mr Watson. According to the Defence, based on the evidence given, the person Ms McNeilly served could not have been Mr Watson. Further, Mr Wallace's evidence linking Mr Watson to the victims through his identification of him as the man who boarded the yacht with Ms Hope and Mr Smart was the important identification evidence and it was corroborated by the evidence of DNA analysis which strongly supported the proposition that the two head hairs found on Mr Watson's boat were those of Ms Hope. In that context and having regard to all of the evidence I do not consider the new evidence given by Ms McNeilly either separately or taken with other

evidence would likely have persuaded the Jury to have reached a different verdict about Mr Watson's guilt.

Mr Wallace's description of the location of the boat

Background

4.111 The potentially fresh evidence on this issue was said to be that at the time of trial, Mr Wallace (for the first time) recalled a specific location of the boat which he dropped Mr Smart, Ms Hope and the mystery man to in the early hours of the morning of 1 January 1998; and that he told a Police officer this before he gave his evidence but was told it was too late for him to change his evidence on this issue.

4.112 As I discuss below, when I interviewed Mr Wallace, he effectively accepted that on a proper assessment of what he claimed in relation to this matter (and as deposed in his affidavit) he does not in fact have any fresh evidence about the issue of the location of the boat at the relevant time.

4.113 It is important however to set out the history of how this issue arose in the context of the application.

4.114 Mr Wallace gave Police a detailed description of the boat which he said Mr Smart and Ms Hope had boarded on the morning of 1 January 1998. He described the boat as a large, white, two masted, unique-looking, high-sided wooden vessel of an unusual old-fashioned design, with ropes festooned all over its stern, a distinctive sway-backed shape which raked upwards from the centre to the bow and stern and equally distinctive wide blue strip on the hull above the waterline. Inside the blue stripe were set a number of large, circular, brass-surrounded

portholes while the hull above and below the stripe was white. Because of the two-masts Mr Wallace called the boat a "ketch".

4.115 Despite having a detailed recollection of the boat Mr Wallace was confused from the outset about the exact location of the boat at the time Mr Smart and Ms Hope had disembarked his water-taxi and boarded the boat with the lone man. In his discussions with Police Mr Wallace gave four different locations for the "ketch". On 3 and 4 January 1998 when he was first spoken to by Police he gave two different locations. On 3 January 1998 he said "I think it was moored just starboard of the jetty. Looking at the map it would have been next to the *Spirit of Marlborough*". The following day Mr Wallace said he thought the boat had been tied up to a Markline boat and the Markline boat may be called *Nugget*. This latter location was restated several times by Mr Wallace over the following days.

4.116 By 11 January 1998 Police had reports of a large ketch matching Mr Wallace's description, and the descriptions which had been given by [redacted] and [redacted](who had been in the water-taxi with Mr Smart and Ms Hope), and by water-taxi drivers [redacted] Donald Anderson, and by [redacted] , [redacted] and a [redacted] . Those witnesses who were able to give a location for the ketch all located it in a similar position in Endeavour Inlet. The location was different to any of the locations which Mr Wallace had identified in his discussions with Police (some 150 metres from the locations identified by Mr Wallace). The witnesses described the same boat but placed it some 250-300 metres out to the left of the jetty but Mr Wallace positioned it 70-120 metres out to the left of the jetty. Mr Watson's yacht *Blade* was moored 150 metres out to the left of the jetty.

4.117 On 6 February 1998 Mr Wallace gave another description of the location of the boat as follows:

"The boat the ketch was rafted to I can say is the boat named Awesome.

It was rafted on Awesome's port side.
In the foreground is Panache.
That is ANDERSON'S Markline.
I know it wasn't that one.
The position of Awesome fits the position of where the ketch was."

4.118 On 5 March 1998 Mr Donald Anderson (water taxi driver) signed a statement to Police which contained the following:

> "On three different occasions that I have spoken to Guy about the ketch he has described three different positions to me as to where he saw the ketch in the bay. ...These positions changed as us guys talked about boats that were in these positions and we worked out that no such boat of that description could have been there. His story would change a bit a couple of days or so after this...

4.119 The next day (6 March 1998), Mr Wallace gave yet another possible location of the boat as being "near *RIPPA*" and close to *Mina Cornelia*. *Rippa* was located 50 metres away from the mooring *Blade* shared with *Mina Cornelia*.

4.120 At trial Mr Wallace did not give any evidence relating to the specific location of the boat presumably because he was unable to give such evidence. He described the general direction he took the naiad after leaving *Tamarack* and drew this for the Court. Mr Wallace said he was given some instructions by the lone man in the naiad including the name of his boat and the direction to go [T: 2000 Lines 7-17]. He then described in detail the voyage from *Tamarack* to the yacht in question starting to retrace his outward journey from the jetty in general terms and veering out from the jetty again back to the Solitude jetty making a right turn away from Furneaux Lodge [T: 2001 and 2002]. He discussed how many rows out from the jetty in the line of boats he went, saying the second or third line of boats from the end of the jetty [T: 2002].

4.121 Mr Wallace then described where he went by reference to standing on the end of the Furneaux Lodge jetty [T: 2002]. On Exhibit 151 (Wallace drawing) Mr

Wallace drew a shoreline reference point and drew a general direction of where the drop off boat was in relation to the shoreline and the jetty [T2002-2003]. He then described making his way out in the general direction he had drawn on Exhibit 151, describing the boats facing the shore relative to the position of the jetty, and said he was getting directions from the lone man on the naiad, as to where the boat was [T: 2003-2004]. Mr Wallace said he recalled the young man who got on from *Tamarack* (Mr Smart) expressing hope as they got closer to the drop off boat, that the boat they were going to was a large Markline launch [T: 2004]. He also gave details as to where the Markline launch was in relation to the travel of the naiad, that it was with the other boats and there did not appear to be any lights or signs of life on it; that the launch appeared to be in the middle of a group of boats [T: 2004]. Mr Wallace said that the lone man said words to the effect that his boat was moored up next to it [T: 2004].

4.122 The wife of the manager of Furneaux Lodge, [redacted] took a video of the Lodge and the boats moored in the Bay in front of the Lodge at 7.30pm that evening. This video, Exhibit 42, was played to the Court. Mr Wallace confirmed he was shown Exhibit 42 in early January 1998 by Police to see whether he could identify the boat or boats where he had dropped the three people. By viewing the video he was able to point out the vicinity of the boat where he dropped the three people [T: 2030-2032]. The video was played in Court for Mr Wallace to view. He was asked to indicate when the tape showed the image that best enabled him to pinpoint the area he recognised as where, or near where, he had dropped the three people from the water taxi [T: 2031]. The video was paused and Mr Wallace was able to indicate a location [T: 2031-2032]. The paused image became a still shot produced as Exhibit 185 and was available to the Jury.

4.123 On the paused video (Exhibit 42) Mr Wallace referred to what looked like three vessels on the right of the picture (eventually Exhibit 185), he described how it appeared to be in the area near *Spirit of Marlborough* although he said the boats were actually facing in a different direction at the time [T: 2031-2032].

4.124 In cross examination Mr Wallace explained what he meant by everything "on anchor" pointing towards the shore and agreed that a boat will swing about no matter how slowly and point towards the breeze, but if the breeze is not there the boats will adjust themselves to suit the direction of the tide [T: 2033-2034]. There was also discussion about what happens to a boat on anchor in relation to weather and tidal conditions. Mr Wallace accepted that in the five water taxi trips he did in the early morning of 1 January 1998 the only yachts he had come into contact with were *Tamarack* and the ketch [T: 2044-2045]. There was no cross examination of Mr Wallace on the details of the location of the ketch.

4.125 The Judge clarified with Mr Wallace whether the boat where he had dropped the three people was rafted to other boats. Mr Wallace agreed, thinking there were more than three boats and that the boat he approached was on the outside [T: 2049]. The Judge then made reference to the evidence relating to Mr Smart expressing preference for a particular Markline launch. Mr Wallace was referred to a photograph (Exhibit 2). The Judge referred Mr Wallace to the inset photograph at the top of that Exhibit and pointed out three launches; one to the left, one in the middle and one to the right. The Judge asked Mr Wallace whether the launch that had been discussed by Mr Smart was like any of those. Mr Wallace did not accept that the launch referred to was like any shown in the photograph, but he described it as quite large like the boats in the photo but he thought it had three levels [T: 2049]. The Judge then asked Mr Wallace to look at the expanded photograph and referred him to the launch on the right side of the photo. This launch appeared to have two levels. Mr Wallace accepted it may have been the boat [T: 2049]. There was also some discussion as to the distance the naiad would have been from the boat when he heard the conversation and when he recognised what Mr Smart was talking about. Mr Wallace discussed the lighting and the type of objects one would be able to see in those circumstances and whether his vision had been limited. [T: 2050].

4.126 Detective McLachlan confirmed that Mr Wallace's evidence regarding the location of the boat had been supported by a reconstruction which Mr Wallace had been involved in. This reconstruction had been carried out by [redacted] and confirmed the location of the yacht where he had dropped the three people [T: 2947-2949]. In re-examination questions were asked regarding whether Detective McLachlan had ever considered Mr Wallace as being mistaken about the exact area he had taken the missing people to. The Detective took the view that the location had been corroborated by other research including the reconstruction video (Exhibit 187). He discussed the content of the video and its purpose. Defence counsel objected to the video's production as an exhibit but the objection was overruled.

4.127 [redacted] who, with [redacted], was one of the passengers on Mr Wallace's naiad with Mr Smart and Mr Hope described the travel of the naiad as it departed from *Tamarack*. She said it went (in general) the way it had come but not straight back to the wharf. She said this trip took two to three minutes [T: 1924; T 1926]. [redacted] said when the naiad left the jetty to go to *Tamarack* it went from the end of the jetty and the trip took a couple of minutes. [T: 1938]. Once the couple got off *Tamarack* he said the naiad basically headed back in the same direction towards the jetty and weaved through a couple of boats. This trip also took only a couple of minutes [T: 1940]. Under cross examination [redacted] said the naiad left *Tamarack* and motored over to the other boat the ketch, passing a couple of boats and came to this boat on its own [T: 1952].

4.128 The Crown submitted in closing that on any view of it Mr Wallace dropped the man (and Mr Smart and Ms Hope) off in the general vicinity of *Blade* (summing up, page 28).

4.129 In his book Mr Hunter refers to Mr Wallace's statement in an interview recorded in December 2002 (for the television documentary) that he had remembered the

true location of the boat. Mr Wallace claims he had spoken to a Police officer prior to either depositions or the trial about this:

> "..Well when I went back to Australia. You spend a lot of time, oh like I do. You spend a lot of time at sea and when you're on prawn trawlers...you get a lot of time to think and there's no disturbance out there...It's just peaceful and a lot of stuff comes flying back to you, how the memory works. You remember a lot of things. And that's when it came back to me, it was like ping, wow...The ketch is not where I have told Police it was. I've remembered exactly where it was, um. I get flown back and I'm talking to (a named detective) and I said to him, I says, look, I've made a mistake. The location of the ketch I've given you is incorrect, it's way further out in the bay, just like I've pinpointed right here, okay. The location I first gave was in here, wrong. I did do trips over that side of the bay but it wasn't to the ketch. The fishermen that were doing all the fighting I can remember seeing this ketch on the way back, all by itself right on its own and I told this to (the detective) and he said, don't worry about it and walked away, too late....

4.130 The evidence Mr Wallace gave at trial placed the mystery yacht in the general vicinity of Mr Watson's yacht *Blade*. The evidence disclosed in the extract above places the "mystery yacht" outside the vicinity of *Blade*.

4.131 If it was the case that Mr Wallace raised this evidence with a Police officer prior to depositions or trial, then it follows that Mr Wallace is now saying the evidence he gave at trial about the location of the boat was wrong. In the television documentary Mr Wallace refers to Police pressuring him to give evidence tying in with his original statement about the position of the boat and "not to worry about the change in location".

4.132 On the information I had at the time I prepared my interim advice it was not possible to assess whether or not this evidence met the test of fresh evidence. I had insufficient information on which to determine whether this was in fact a matter which Mr Wallace had raised prior to trial. I noted that it would be usual for the Police to have recorded the discussion in a job sheet which should have been disclosed to Defence counsel, if what Mr Wallace now says is correct. I

concluded that the evidence may satisfy the test of freshness on the basis that, while available at the time of trial, the Defence could not have reasonably been expected to raise the issue as they would have been unaware of it.

4.133 This was a matter I considered needed to be the subject of further inquiry before the credibility and cogency of the information could be properly assessed. I noted however that Mr Wallace had always been unclear as to the precise position of the boat. Mr Wallace had given many different possible locations for the boat and therefore this raised issues about his reliability on this issue. Further, it must be borne in mind that Mr Wallace's description initially about the location of the boat was corroborated to some extent by the evidence given by two other passengers in his water-taxi; [redacted] and [redacted]. Detective McLachlan observed this in his evidence [T: 2947]. I concluded that if this new evidence from Mr Wallace met the test for freshness then in order to properly assess cogency, [redacted] and [redacted] should be spoken to again about the evidence they gave relating to the location of the boat.

New Evidence

4.134 In his affidavit of 1 May 2010 Mr Wallace referred to having discussed the location of the ketch in a videotaped interview by Mr Hunter in January 2003. A transcript of excerpts from the interview was attached to his affidavit. He said that his statements were true. Despite having previously been unsure whether he told Police about this matter prior to depositions or prior to trial, he said he is now certain about when and to whom (Detective Thomas Fitzgerald) he spoke about the ketch location. He said this occurred "in a lift going to the High Court in Wellington, during the High Court trial." He went on:

> "The thing that really clarifies it for me is taking the fishermen that were fighting right out into the other side of the sounds where all their fishing boats were moored up and the ketch is the first boat I see on the way back. It would have been moored out level with the Pines. I can still remember hitting something in the water with the prop which wasn't

> anything hard, probably a fish or something, a decent size fish, and hearing a playful sort of a scream coming from the ketch and thinking nothing of it. I recall that vividly, telling Tom Fitzgerald that I had a memory of coming to the ketch first so it had to be in a different position. I did tell him that on the way into the High Court in Wellington when they brought me over from Australia and he said, sorry, too late. I didn't pursue it because I assumed from his response that it was too late to change my evidence and that I should not change it in court. I assumed that it was not a matter of importance."

4.135 In his affidavit in response, Detective Fitzgerald commented that in his various statements to Police, in his evidence at depositions and at trial, "although adding more detail as time progressed" Mr Wallace "was consistent with his placement of the area the ketch, as he described it, was in." He noted that as far as he could ascertain "the first documented evidence of the change in his recollection as to where the ketch was appears to have come about some time just prior to, or on the 14 November 2001 while talking to Mike Kalaugher." Detective Fitzgerald said he has no recollection of being in a lift with Mr Wallace in the High Court in Wellington; that he was not responsible for briefing witnesses at this time and did not believe he would have been the person dealing with Mr Wallace. Detective Fitzgerald said if the scenario Mr Wallace now claims occurred and he had been informed of a change in evidence about the location of the boat, he would have immediately advised the "2IC" or the officer in charge and the Crown prosecutors. He stated that not advising them would have been significant because Mr Wallace "could have, and indeed should have, given evidence differing from his previous statements and depositions." Detective Fitzgerald said that "if Mr Wallace is to be believed, a passing comment made to him by a detective stating "sorry too late" was enough for him to, at best give inaccurate evidence, or at worst to perjure himself at trial in relation to the location of the yacht."

4.136 As Detective Fitzgerald observed, and this was a matter I questioned Mr Wallace about, Mr Wallace went on to give very detailed evidence at trial on the issue of location and had "ample opportunity to change his evidence if indeed this change in mindset had occurred prior to trial." He isolated the location of the boat with

reference to the videotape taken by [sic] using a pointer and he circumscribed the area with a circle on a still photo printed from the video and he made reference to the "sort of area around here" in the vicinity of the vessel "the *Spirit of Marlborough*". Mr Wallace's evidence in these respects did not reflect any change in his memory as to the location of the vessel.

4.137 When I interviewed Mr Wallace, he accepted that prior to trial he had given a range of descriptions as to the location of the boat (all in the same general area but with more details provided over time). When I asked him when it was that he first realised that he had a clearer memory of where the vessel was he confirmed that it was when he was "coming to High Court" during the trial (1998). In the lead-up he had been living in Australia which is where Mr Wallace maintained he was when he first remembered the exact location of the boat. He told me that he now wishes he had pursued this further when he told "the Policeman" in the lift in the High Court and was advised that it was "too late".

4.138 Mr Wallace accepted that despite claiming to have told a Police Officer he had remembered the exact location of the boat before he gave his evidence (and that the boat was " [way] further out than we first thought"), he went on to give quite detailed evidence about this issue at trial. In his evidence at trial he placed the yacht in the vicinity of Mr Watson's yacht (which was consistent with his previous statements to Police and his evidence at depositions).

4.139 Mr Wallace accepted that the effect of what he is saying now is that he gave evidence at trial that was wrong. In response to my question why he gave false evidence in Court at a time when he claims to have reached a point of clarity about this issue, Mr Wallace rather surprisingly stated "well, I wouldn't have a clue."

4.140 In the course of my interview with Mr Wallace it dawned on Mr Wallace that the information he can now give about the exact location of the boat is in relation to

the position of the boat at the time he was returning to shore after having dropped the fishermen off, which was some time later; not at the relevant time which was when he dropped off Mr Smart and Ms Hope. Mr Wallace accepted that in the period from the time he dropped them to the vessel, and the time he claims he saw the vessel again after having dropped off the fisherman, the vessel could have "drifted back" or "drifted out" or "motored back" from the position it was in at the time he dropped off Mr Smart and Ms Hope. Mr Wallace then confirmed that when he claimed he told Detective Fitzgerald about the exact location of the boat, this was not a reference to the position of the boat at the time Mr Smart and Ms Hope disembarked his naiad. After discussing this issue with Mr Wallace it became clear he had not been focusing on the issue of when he recalled seeing the boat in the location now recalled. After the discussion about the time of his recollection Mr Wallace appeared to accept this issue was considerably less important because of the possibility the boat could have moved or drifted.

4.141 Having interviewed Mr Wallace, I am satisfied that Mr Wallace is not saying he has any new information about the position of the boat as it was at the time Mr Smart, Ms Hope and the lone man disembarked his naiad.

4.142 It only become clear after interviewing Mr Wallace, that he is not seeking to alter in any way the evidence he previously gave about the location of the 'ketch' at the time the mystery man and Mr Smart and Ms Hope disembarked his naiad onto the ketch. In my view there is no fresh evidence about this issue.

Confession to murders to Secret Witness A and the Affidavit of [redacted] in relation to the Trial evidence of Secret Witness B

4.143 At trial two prison inmates (secret witnesses A and B) gave evidence of Mr Watson having supposedly confessed to the murders of Mr Smart and Ms Hope.

4.144 Mr Watson was in custody at Addington prison following his arrest. He allegedly made statements to two inmates on separate occasions, each of which constituted admissions of responsibility for the killing of Mr Smart and Ms Hope. In one instance he gave a graphic description and demonstration of the incident.

4.145 Secret witness B (name suppressed) was the first of the prisoners to come forward to Police to say that Mr Watson had confessed to him. This confession supposedly occurred several weeks after Mr Watson had been arrested and within days of him having arrived in the prison remand wing. The evidence was that Mr Watson had been in the corridor outside witness B's cell at the time he confessed and had whispered the confession to the witness through the peephole in the cell door. An affidavit has been provided from [redacted] which is said to provide information undermining the reliability of the evidence given by witness B. I deal with that matter in detail below. There was no other fresh evidence in relation to secret witness B.

4.146 Approximately 6 months later a second prisoner came forward (secret witness A - name suppressed). At trial witness A claimed Mr Watson had confessed to him within days of their first meeting. Witness A first spoke to Police about Mr Watson during an interview about another matter in October 1998. As I understand it, at that time witness A said to the Police "I believe Scott murdered those two kids. He never said it but I think he wanted to."

4.147 At trial witness A described being in a cell with Mr Watson for two weeks on remand at Addington Prison. The witness said several incidents brought he and Mr Watson together including an argument between Mr Watson and a Black Power member and an incident involving the weights room where the witness took Mr Watson's side in a dispute. Witness A said he and Mr Watson talked about personal things including why Mr Watson was in prison [T: 2961-2966]. He gave evidence of an occasion at night when Mr Watson woke up screaming. The witness said he kicked Mr Watson awake and Mr Watson denied that he was

'haunted'. The next time Mr Watson woke up screaming Mr Watson agreed he was 'haunted' [T: 2967]. The witness said to Mr Watson "how the fuck can you fuck somebody when they are screaming" at which point Mr Watson said "they have got nothing on me" [T: 2967-2968]. On a later occasion the witness asked Mr Watson more "about that girl" saying "how the fuck can you do that" to which Mr Watson said "the pigs got nothing on me." When asked whether Mr Watson told him anything about the evidence in the case the witness said Mr Watson told him he had wiped the tapes clean, and mentioned "something about a piece of hair that when they found that you know like, sort of freaked out on that..." [T: 2969]. The witness said Mr Watson told him he was going to say the hair was planted. Witness A said one night during exercises he asked Mr Watson how he did it and Mr Watson gave him a demonstration [T: 2968-2970]. Under cross examination the witness was challenged about a number of matters, whether he had been in a cell with Mr Watson for the length of time he claimed; the fact that he had a psychiatric history and that he had changed his story about certain matters [T: 2972-2979].

4.148 In his book, Mr Hunter refers to a *New Zealand Herald* article published on 4 November 2000 in which secret witness A is said to have recanted the evidence he gave at Mr Watson's trial "because the pressure of keeping his secret was causing him too much stress." Secret witness A is said to have told the newspaper he had no faith in the justice system, and that in the period October 1998 leading up to the trial, Police had visited him 'at least ten times'. One was on 7 April 1998 when he was visited by Detective Tom Fitzgerald. Detective Fitzgerald recorded in his job sheet that Mr Watson had admitted killing Ms Hope and that witness A said [to Mr Watson] "...did you kill them or didn't you. WATSON said 'Yeah it was me mate, I wasted them." The Detective went on to record that the witness told him Mr Watson had trouble "with Olivia because she struggled so much. He talked about holding her down with a piece of her own ripped clothing...believed he meant strangling her with it." This was the evidence which secret witness A gave at trial, and subsequently is said to have recanted.

4.149 In my interim advice I concluded that if substantiated, secret witness A's purported retraction is prima facie fresh evidence and I treated it as such. However, on the information before me at that time I could not make an assessment of the cogency of secret witness A's purported retraction. I recommended that secret witness A be interviewed and his retraction be the subject of formal evidence.

4.150 Following a number of unsuccessful attempts to contact secret witness A between December 2009 and July 2010, he was eventually located and served with a letter on 2 July 2010 requesting that he meet with me. He was subsequently contacted by Ministry officials on 14 July 2010 and arrangements were made for me to meet him at the Manukau District Court (a venue suggested as suitable to him). However, despite considerable attempts to contact and locate him at that time and my efforts to meet with him in Auckland on two occasions (I travelled to Auckland to attend scheduled meetings on 10 August and 6 September 2010), witness A failed to attend the meetings and was not able to be located by either Ministry officials, his counselor or (as a last resort) the Police.

4.151 In light of the failed attempts to locate witness A and his obvious reluctance/refusal to respond to requests that he meet with me, I concluded he was not prepared to attend an interview. As a consequence of not having been able to interview secret witness A, I have been unable to properly assess the credibility of his purported retraction.

4.152 I note that the evidence of secret witness A was the subject of an inquiry by the Police Complaints Authority in 2000. On 14 November 2000 the Police Complaints Authority initiated an investigation into the conduct of Detective Sergeant Fitzgerald who was responsible for taking the testimony of secret witness A. These matters were revisited when Mr Hunter made a fresh complaint to the Police Complaints Authority several years later at a time when, in addition

to raising concerns about secret witness A, he also raised concerns about secret witness B. The result of these investigations were notified to Mr Watson through a report by the IPCA on or around 17 May 2010.

4.153 Mr Watson has provided me with a copy of the IPCA report to him dated 17 May 2010 which records the Authority's findings in relation to these matters. Given that I was not able to interview secret witness A about his alleged retraction I consider it may be of assistance to record the following paragraphs from the report:

> "21. After publication of the article in the *Herald* Police visited Witness A and offered the opportunity to recant his trial evidence by way of sworn affidavit or sworn evidence. He chose not to do so.
>
> 22. Witness A was subsequently interviewed as part of the Police Complaints Authority's investigation in November 2000, in the presence of his barrister and a kaumatua. Witness A told the Authority's investigators that at the time he spoke to the media and had appeared to recant his evidence, he had done so out of "depression and anger". He said he did this because he believed Police had not done enough for him in terms of his personal safety and security and he had felt let down by Police. However, he told the Authority that what he had originally said to Police and repeated in his evidence at trial had been the truth. He further said he had received no benefit from giving evidence: on the contrary, his life had been more difficult as a result.
>
> 23. On the basis of the foregoing there is no evidence on which to conclude that Police officers involved in Operation Tam pressured Witness A to give false evidence; or that they included an inaccurate account of his version of events in the statement he made in May 1999. Nor is there any evidence that Police acted in an unlawful or improper way in terms of their interaction with Witness A before, during, or after he gave evidence at Scott's trial."

4.154 When I interviewed Judge Davidson with Mr Antunovic, Judge Davidson told me he had been contacted on two occasions by Mr Greg King, Barrister (on behalf of Mr Watson) and asked whether he had had discussions with secret witness A.

Judge Davidson explained that an arrangement was made before Mr Watson's appeal (and after secret witness A's statement to the *New Zealand Herald)* to meet with secret witness A at Mt Eden Prison. Upon Judge Davidson's arrival (he was accompanied by [redacted] of Corporate Risks Limited) secret witness A refused to meet. After explaining to a prison guard who he and [redacted] were and why they were there, secret witness A came out and bluntly told them to leave. Judge Davidson advised that no further discussion took place. Judge Davidson told me that after the appeal, Counsel were made aware that secret witness A was in Court on another matter and had indicated he would talk to them. Subsequently, when a staff member of Corporate Risks Limited went to meet with secret witness A they were again told to leave.

4.155 It is clear that secret witness A has been very unreliable and despite a number of attempts by counsel and by me, he has demonstrated an unwillingness to meet and discuss the evidence he gave at trial. As things stand, there is no retraction by secret witness A.

Affidavit of [redacted]

4.156 Since I provided my interim advice Mr Watson Sr has provided an affidavit by [redacted] sworn on 20 January 2010. [redacted] was the cellmate of secret witness B at the time of Mr Watson's alleged confessions to secret witness B.

4.157 At trial secret witness B described [redacted] being present at the time of the alleged confessions. In his affidavit [redacted] states that he never heard any discussion between Mr Watson and secret witness B in which Mr Watson indicated he was responsible for the murders of Mr Smart and Ms Hope. Further, [redacted] said in the visits he and secret witness B had from Mr Watson he never admitted involvement in the murders; and that secret witness B (whom he

described as having a reputation for being unreliable) never told him that Mr Watson had confessed to the murders.

4.158 In addition to providing [...]'s affidavit Mr Watson Sr provided copies of newspaper clippings of various court appearances by secret witness B, a copy of the relevant part of the trial transcript containing the evidence given by secret witness B and a CD containing a recording of an interview of secret witness B by Detective Fitzgerald in January/February 1999. I have considered that material.

4.159 In my opinion [...]'s evidence does not meet the criteria for fresh evidence as his evidence would have been available at the time of Mr Watson's trial had appropriate inquiries have been made. Given that [...]'s name was mentioned in the evidence of secret witness B multiple times, it was always open either to the prosecution or the Defence to make inquiries of [...] and call him to give evidence had they wanted to do so.

4.160 It was submitted on behalf of Mr Watson that [...]'s evidence undermines the evidence given by secret witness B and in view of the "public" retraction by secret witness A of his evidence, the "cellmate confessions" are "now worth little". Mr Watson Sr has suggested (letter to the Ministry dated 7 November 2010) that given secret witness A's "utterances" since trial (a reference to his retraction, presumably) he believes there is "now a valid inference to be drawn that witness A is unreliable."

4.161 The evidence given by both the secret witnesses in this trial was fraught with problems from the outset. As with all prison witnesses, the trial judge gave the appropriate warning to the Jury in his summing up in respect of the witnesses (s12C Evidence Act warning about the evidence of Secret Witness B) and essentially instructed the Jury to take care in their consideration of this evidence. Had [...] been called to give evidence the same warning would likely have been given and/or been applied to his evidence.

4.162 There were always serious credibility issues with secret witness B (as there were with secret witness A) and the Defence submitted at trial that his evidence should be "completely written off" (summing up, p45) because of its unreliability. Secret witness B was extensively cross-examined about the circumstances surrounding his evidence including the possibility of a 'deal' having been struck with Police before he gave evidence. He adamantly denied those allegations. In his summing up, the Judge referred to the fact that the witness "got an excellent deal from the Police" and that he had had a very significant charge reduced. The Judge also noted that the witness had been given bail and went on to note to the Jury that "you may think that Mr Davidson has got a point when he says you should treat that evidence with a great deal of care and caution and probably overall disdain." Therefore, the Jury was cautioned in strong terms about reliance on secret witness B's evidence and directed to have regard to the considerable benefits he allegedly received from Police. In my view the Judge's comments are likely to have made an impact on the Jury. While [redacted]'s evidence may have further undermined the reliability of the evidence of secret witness B I am not satisfied it can be said it would have had a material bearing on the overall result.

4.163 Having considered all relevant material I have concluded that while it is not possible to determine precisely what weight the Jury attached to the evidence given by these prisoners I am satisfied that had secret witness A or secret witness B not given evidence (or if [redacted] had also been called to refute evidence given by secret witness B) it cannot fairly be said the Jury would have likely reached a different verdict particularly in view of all of the other strands of circumstantial evidence before it, including the forensic evidence about the hairs located on Mr Watson's vessel.

Additional ketch sightings

4.164 There was a significant amount of evidence relating to sightings of a ketch or ketches in Queen Charlotte Sound and elsewhere in the Marlborough Sounds over the relevant period. Mr Hunter referred to some of this evidence in his book; namely the evidence given by water-taxi driver [redacted] (who also gave evidence of having seen a blonde female sitting next to a young male in the port of the cockpit of the ketch), and by his wife [redacted], and his sister [redacted]; [redacted] and [redacted] (all passengers on [redacted]'s launch *Sweet Release* on 2 January 1998 as was [redacted] who also gave evidence of seeing a two-masted ketch while out fishing on *Sweet Release* on 2 January 1998).

4.165 Other witnesses who gave evidence at the trial about ketch sightings on New Year's Day and the following days included [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; Mr K (name suppressed) saw ketch on 7 January 1998 [T: 3237]; [redacted]; [redacted] (saw ketch at Port Jackson or between Port Jackson and Motuara Island on 1 January 1998 as reported by [redacted]) [T: 3243 and 3247]; [redacted] [T: 3219]; [redacted]; [redacted]; and [redacted]. Some of these witnesses were called by the Defence. In addition, at least three water-taxi drivers (one of whom was Mr Wallace) gave evidence of having sighted a ketch; [redacted] (he maintained he had seen a ketch which was similar to the *Alliance* and which he accepted could have been the *Alliance*); and Mr Donald Anderson (he stated he believed Mr Wallace had described either the *Alliance* or *Waves* as being the boat to which he had taken Mr Smart and Ms Hope [T: 1766; 1767]).

4.166 In his book Mr Hunter claims that "judging from the calls and messages [he] received after the broadcast of *Murder on the Blade?* there were at least dozens and perhaps even hundreds of sightings [of a ketch or ketches in Queen Charlotte Sound and elsewhere in the Marlborough Sounds over the days that followed the disappearance of Mr Smart and Ms Hope, some matching previous descriptions,

others including only a few features of the yacht described by Mr Wallace] that were ignored by the Police".

Rowe and [redacted] sightings

4.167 Mr Hunter referred to 'evidence' he received from certain people to this effect following the broadcast of his documentary. One sighting, he claims, reported to him while filming and followed up in the film, was in remote East Bay "where Betty Rowe had told the Police about seeing a similar ketch, but was ignored". Mr Hunter said there is no record of Mrs Rowe's sightings of what she said looked like a "Chinese junk", among the documents disclosed by the Crown to the Defence. Similarly with the sighting of a yacht matching the description of the yacht given by Mr Wallace, reported by [redacted]. Mr Hunter claims [redacted] sighted the yacht just south of Endeavour Inlet off Snake Point, heading slowly towards Picton at around 9.30am on New Year's Day; which he described as having a small raised 'coach roof' or cabin, a lot of rope work, a blue stripe and portholes. [redacted] reported seeing a man on board whom he described as "unshaven". There are further generalised suggestions made by Mr Hunter that Police ignored reports of many other "ketch-sighters" (page 138).

4.168 In my interim advice I concluded that if the sightings which Mrs Rowe and [redacted] claim they made to Police were in fact made then the evidence is not strictly fresh evidence because it was available at the time of the trial. However, if the reports were not formally recorded by Police or not disclosed to Defence I considered the evidence could potentially meet the test for fresh evidence. No affidavits from Mrs Rowe and [redacted] had been provided in support of the application. I concluded this was a matter which required further investigation and I suggested Mr Watson be asked to provide affidavits from Mrs Rowe and [redacted].

4.169 In terms of cogency, I noted having reviewed the notes of evidence, taking into account the amount of evidence which was before the Jury relating to this issue (and the fact that there was a substantial body of evidence to support the existence of an unidentified ketch at Furneaux Lodge on the evening in question and in the days after in the relevant geographical area), my preliminary view was that this evidence may not be highly significant on its own. Even if Mrs Rowe and [redacted] s evidence was before the Jury, there was a substantial amount of other evidence related to ketch sightings.

4.170 Since providing my interim advice I have been sent further information relating to these sightings, as well as submissions on behalf of Mr Watson.

4.171 An affidavit from [redacted] (sworn 13 April 2010) was provided by Mr Watson Sr on 6 May 2010. He referred to his sighting of a "ketch just south of Endeavour Inlet, off Snake Point" at approximately 9.30am on 1 January 1998. He gave a description of the yacht as having "a small raised coach roof cabin, a lot of rope work, a blue stripe and portholes. It was a very distinctive yacht, like a 1960's vintage design". [redacted] deposed that he saw an "unshaven man standing amidships by the mast" whom he waved to but his wave was not reciprocated. [redacted] stated "He just stood there and stared back at me. I recall this in particular because it is unusual behaviour." [redacted] deposed that when he contacted Police to advise them of his sighting (about two weeks later) "My call was answered by a woman who told me the Police were not all that interested in that sighting" and that he "heard no more about it".

4.172 Police (Detective Senior Sergeant Rae) provided documentation confirming that both Mrs Rowe and [redacted] reported sightings of a ketch to Police. A copy of the relevant telephone information sheets dated 8 January 1998 (recording [redacted] 's sighting of a ketch on 1 January 1998 "in the vicinity of Bay of Many Coves Sth & west of Blumine Island" with "1 man with short beard on back") and 12 January 1998 (recording Betty Rowe's sighting of a ketch in East Bay,

Arapawa Island and noting that she "didn't see anyone on board") were provided along with confirmation that these documents were disclosed to the Defence by the Crown Law Office in a folder containing documents relating to "ketch sightings" prior to trial (19 April 1999). Comments on how the reports were followed up were also provided.

4.173 Detective Senior Sergeant Rae advised that the [redacted] sighting was followed up and it was decided the sighting was likely to have been of the yacht *Nanoose* which was fishing at Snake Point at the relevant time. He said that "It's presence was confirmed by the occupants of 'Velocity' who spoke to the people on it as they thought a friend of theirs was on that yacht. 'Nanoose' is described as a '28 ft sloop keel boat, single mast, white hull, thin blue stripe, white cabin, fiberglass (GRP)'. 'Nanoose' was there for about an hour from about 10am. 'Velocity' is described as a '29 foot Young 88 yacht'. There is no other record from these people of another yacht being there over that period. We were satisfied that the [redacted] sighting was likely to have been to 'Nanoose'".

4.174 I received information that Mrs Rowe is now deceased. Detective Senior Sergeant Rae advised however, that he remembered the information from Mrs Rowe and said that "as far as I could tell it related to the ketch that was at Punga Cove overnight New Year 1997-8, Chieftain. This was probably the ketch the [redacted] family saw out by Ship's Cove on 1 or 2 January as it went back up to East Bay on Arapawa. [redacted] reported the sighting initially as being to the right of the Furneaux wharf when in fact it was to the right of the Punga Resort wharf. He had been driving a water taxi between the two that New Year's Eve." Detective Senior Sergeant Rae went on to advise that he believed the original information on this ketch came from Mrs Rowe who lived on Arapawa Island. He said that neither he nor Detective Richard Rolton could find any reference to "[redacted]" [sic] or "Rowe" in the electronic file but there was a reference to Betty Rowe in the hard-copy material in the ketch folders. I was advised that Detective McLachlan who was in charge of the yacht phase of the Police investigation did an analysis of the

"Ketch folders" some years ago and that his analysis document recorded "12/1/98 Betty Rowe Sees ketch East Bay 2-3/1/98." I was advised there would be a hard-copy sheet in the "ketch sightings sounds folder 15011". No name of the ketch sighted by Mrs Rowe was recorded.

4.175 Subsequently, I received advice that Detective Rolton had checked the hard-copy documentation and had located a copy of a telephone message from Mrs Rowe regarding her sighting of a ketch on 2 or 3 January 1998 in the "ketch sighting sounds folder 15011". A copy was provided to me. He said he located a further copy of this message in the disclosure material that was made available to Defence counsel on or around 19 April 1999. Detective Senior Sergeant Rae advised in his letter of 15 November 2010 that the statements taken from three people on *Chieftain* were also supplied to the Defence (together with the statements which accounted for the yacht probably seen by [redacted] *Nanoose*). I was told that "[redacted] of Corporate Risks hired by the Defence would have looked at these files when he did all his scanning of the contents prior to [19 April 1999]."

4.176 Detective Sergeant Rae advised that the Rowe and [redacted] ketch sightings were followed up (the occupants of the yachts Police believed Mrs Rowe and [redacted] had seen were spoken to/interviewed) "along with the plethora of them [ketch sightings] at the time" and that "in all there were some 400 ketch sightings checked in New Zealand, Australia and the Pacific basin."

4.177 Having received and considered all of this information carefully I am satisfied that the sightings by [redacted] and Mrs Rowe do not meet the test for fresh evidence. It is clear the information was available at the time of trial, and it had been disclosed to Defence counsel prior to trial. [redacted] and Mrs Rowe could have been called to give evidence by the Defence but they were not. That was a matter for Defence counsel. I was told by Defence counsel that they spent many

hours analysing the ketch sightings and took great care in the decision concerning what evidence to call about this issue.

[redacted] *ketch sighting*

4.178 On 9 November 2009 the *New Zealand Herald* published an article about Mr Watson's trial. As a result of that article and other related media attention, Mr [redacted] contacted me with potentially new information about an alleged ketch sighting on 2 January 1998. He said he saw a "two-masted ketch, white with a blue stripe around the hull" and claimed he saw "two or three mature people sitting in the rear cockpit". I referred this information to the Ministry and suggested it be followed up with Police. I discuss this further below.

4.179 [redacted] told me he had seen a ketch matching the description given by Police on 2 January 1998 when he was boating north of Kaiteriteri with his family. [redacted] said he reported this sighting to Motueka Police at that time The description [redacted] gave me was as follows:

> "My family and I were holidaying at Kaiteriteri Motor Camp during 1997/1998 Christmas Holidays. We were obviously aware of the disappearance of the two teenagers from Furneaux Lodge and the Police request for any sightings of a Yacht. Approx late morning on the 02/01/1998, my family and I were boating north from Kaiteriteri aprox 500 mtrs offshore when I noticed a ketch heading our way. I slowed down, almost stopping, because the yacht matched the exact description given by the Police. A two masted ketch, white with a blue stripe around the hull. We circled the yacht to see if we could identify any distressed passengers. The only people we saw, were from memory, two or three mature people sitting in the rear cockpit. Satisfied we had done our "part" we moved on slowly and then stopped and made a cellphone call (from 025 ------) to the Motueka Police and let them know that the yacht they were looking for, was probably the one we had just circled. To my surprise, that was the last I heard from the Police and to my knowledge, nothing was ever done about the reported sighting."

4.180 In response to a request for advice in relation to this alleged sighting Police advised there is no record of this sighting in the electronic Police file, however "several similar ketches were reported to Motueka Police and one of those was *Carrie'L* which was in the Adele Island/Port Motueka area at the time. Adele Island is up the coast from Kaiteriteri past Marahau Bay. [redacted] 's ketch *Wanderer IV* was also in the area. All of the people who could assist were spoken to and their details and profiles of the yachts completed."

4.181 Detective Senior Sergeant Rae, in a letter to the Ministry dated 15 November 2010, stated further "as to the sighting of a ketch in the Kaiteriteri area reported by [redacted] on 2/1/98 other reports show at the very least the ketches *Scorpio*, *Exabbo* and *Entice* were in that area".

4.182 While [redacted] 's evidence may be fresh in the sense that it was not available at the time of trial (because it would appear there was no record of it in the files disclosed to the Defence), in terms of strength and cogency I am not satisfied that had the evidence been before the Jury it would have affected the overall result. As I have stated above, having reviewed the notes of evidence, taking into account the amount of evidence which was before the Jury on this issue (and the fact that there was a substantial body of evidence to support the existence of an unidentified ketch at Furneaux Lodge on the evening in question and in the days after in the relevant geographical area), in my view this evidence is not of such significance when considered alongside the other evidence that it could be said it might affect the result. Even if [redacted] 's evidence was before the Jury, there was a substantial amount of other evidence related to ketch sightings. Further, Defence counsel told me of their very extensive consideration of the large volume of information relating to ketch sightings and emphasised that the evidence they (in consultation with Mr Watson) decided to call was intended to show or suggest to the Jury that the existence of another boat was a plausible suggestion. As I have already stated, the Defence were anxious that the evidence that was placed before the Jury on this issue was consistent and did not cause confusion. In view

of this I do not believe any further inquiries need to be made in relation to this evidence.

Further new evidence – [redacted] ketch sighting (Auckland, March 1998)

4.183 In addition to the affidavit of [redacted], and the information I received from [redacted], the only other affidavit received from other people who Mr Hunter claims made reports of ketch sightings to Police, was an affidavit of [redacted] sworn on 28 October 2010.

4.184 In his affidavit [redacted] said he saw a "very unkempt ketch" adjacent to his launch when he was refueling at Westhaven Marina in Auckland on 27 March 1998. He considered aspects of the ketch to be unusual and he noticed one person aboard, a woman who looked to be of Chinese descent in her late 20's sitting in the open cockpit (but who never looked his way or acknowledged him). Mr [redacted] described a "highly unusual event" which occurred when the man who had been refueling the ketch returned; he said he noticed the ketch had "portholes in its topside (the upper part of the hull)", approximately four each side; the hull was painted white and "it had a blue line around it." [redacted] said "A realisation came over me then that this appeared to be the ketch described by [redacted] (the captain of the charter boat I had heard on the radio) and this was possibly the man who the Police had indicated they were looking for in connection with the Hope/Smart murder enquiry." He said that made him look at the vessel more closely and he noticed painted on the stern was a name which he cannot now recall and immediately below the name the port of registry which was Nelson.

[redacted] said he contacted the waterfront Police and spoke to Sergeant McIntosh about his sighting. He said he gave detailed information to Sergeant McIntosh but not having heard from anyone at the Police after an hour or so, he went home. Mr [redacted] said he "heard nothing more about the incident" until a few weeks before Mr Watson's trial when he called a television-advertised phone number to offer

his information only to be told by a policeman that "they no longer wanted any more information".

4.185 [redacted] said "after the trial had been going for about three weeks I decided to ring the Court in Nelson to speak with the Defence lawyer [Bruce Davidson] about what I had seen. He was not there but returned my call and I asked him hoe [sic] he was going with my evidence I had given to the Police and I explained to him what I had seen on the 27th March 1998. I asked him if he wanted me to come down to give evidence. He was totally surprised and very concerned as he knew nothing about my evidence and immediately arranged for one of his investigators to come to my home which happened about 11am. The investigator…double-checked everything I told him…He then said on his way to town he would go into the Waterfront Police to check their records. He phoned me half an hour later to say nothing had been done by the Police following my sighting of the ketch…The Police apparently rang Nelson and advised them of my sighting of the ketch in Auckland and were told to do nothing as "they had their man"".

4.186 In view of the fact that [redacted] contacted Defence counsel and an investigator working with the Defence, in my opinion [redacted] 's evidence is not fresh evidence as it was plainly available at the time of trial. [redacted] could have been called to give evidence by Defence counsel but he was not. Again, that was entirely a matter for Defence Counsel and Mr Watson.

Failure by police to follow up other ketch sightings

4.187 In the documents initially provided in support of Mr Watson's application there are generalised criticisms of Police for failing to follow up numerous other sightings of a ketch at relevant times. At the time of my interim advice no evidence had been provided to support those criticisms and it was not possible therefore to assess freshness and cogency. It was in this context that I recommended Mr Watson be asked to provide affidavit evidence from persons

who reported sightings to Police which Mr Hunter claims were ignored. I did not consider that the freshness and cogency of this 'evidence' could be considered until that information had been provided. The only affidavits I have received in relation to other ketch sightings which were reported to Police but allegedly not investigated were the affidavits from [redacted] and [redacted] which I have dealt with above.

4.188 Mr Watson has provided an affidavit from [redacted] of Christchurch. [redacted] is a former Police officer who was seconded to the Police enquiry, Operation Tam as a [redacted]. His role was to establish and maintain the computerised network system for Operation Tam. [redacted] has said that on about the 14th of January 1998 "We were told [by Detective Inspector Pope] that the ketch sightings were going to be ignored and no investigations were going to be made into the sightings.". [redacted] said that was after Police had shifted the focus of their investigation to Mr Watson who was by that time the prime suspect. As Mr Wallace's description of the yacht in question did not fit with Mr Watson's sloop *Blade*, there were issues at that time about how the public would best be informed that ketches were no longer the focus. [redacted] has said "At this time I was working in the main reception area, where we answered the 0800 phone lines, emails and the public counter. We were told by Detective Inspector Pope to tell the public that we were no longer looking for a ketch and that the boat we were actually interested in was a one masted sloop. We were still to record the caller's details and submit them to the investigation team."

4.189 As I understand it, this evidence has been provided in support of the criticisms which have been made by Mr Hunter to the effect that numerous reports of ketch sightings were not investigated (or adequately investigated) by Police.

4.190 Criticisms of the Police investigation in this case are not matters which I have been asked to consider as part of this advice. As I have stated above, my advice is focused on any potentially fresh evidence disclosed in Mr Watson's application. I

have not been asked to inquire into or comment on any aspect of the Police investigation and therefore I make no comment about the adequacy or otherwise of the Police enquiries into reports of ketch sightings. Those are matters for the IPCA. As I understand it, [redacted] 's affidavit was not before the IPCA at the time of the IPCA report on Mr Hunter's and Mr Watson's complaints.

4.191 Mr Watson Sr submitted that "the reports of disinterest from Police are entirely in keeping with the evidence of [redacted], and our contention that evidence was missed because of the Police turning away ketch sightings driven by the inappropriate Scott Watson based focus of the investigation at an early stage". Mr Watson Sr submitted that "this evidence is fresh".

4.192 I do not accept Mr Watson's submissions on this issue. [redacted] 's information about these issues is not fresh evidence. Even if [redacted] 's affidavit does contain some fresh information or may be considered to be the source of fresh information, which I do not accept, I am not satisfied that any of his evidence is of sufficient strength or cogency to raise a real doubt about the safety of Mr Watson's convictions, or put another way if considered alongside all of the other evidence given at trial there is a reasonable prospect the Court of Appeal would uphold an appeal.

Conclusion on ketch sightings

4.193 When I interviewed Defence counsel they confirmed they considered all of the material provided by the Crown on the issue of ketch sightings. They said the material was very extensive. They told me they made a deliberate decision not to call every person who had identified a ketch as it was their intention only to suggest the potential existence of another boat which left the Sounds. They considered that in order to achieve this, only witnesses who were credible and who had given consistent accounts should be called to give evidence. Defence

counsel did not want to call witnesses who were not reliable or who had provided inconsistent stories as that risked undermining the Defence position.

Timing of trip from Cook Strait to Erie Bay on 1 January 1998

4.194 [redacted] gave evidence at trial of having seen a boat which they 'identified' as *Blade* in Cook Strait (four to five miles off Tory Channel entrance) at around 4.30pm on 1 January 1998. The Crown case was that Mr Watson travelled to that point during the day after leaving Furneaux Lodge to dispose of bodies and other incriminating evidence. After he had done so it was alleged Mr Watson had travelled to Erie Bay. Evidence was given about his arrival time at Erie Bay at around 5.00pm or shortly thereafter.

4.195 Issues relating to the timing of the alleged trip by *Blade* from Cook Strait to Erie Bay on 1 January 1998 were raised by Defence counsel in the Court of Appeal. The Defence relied on timing evidence given at trial by the [redacted], [redacted] and the Picton Harbourmaster, [redacted], who was in Erie Bay that afternoon.

4.196 In his book Mr Hunter claims the alleged voyage from Cook Strait to Erie Bay on the afternoon of 1 January 1998 was "obviously physically impossible in the time involved". Mr Hunter said "The voyage required an object which is restricted by the laws of physics to a maximum speed to exceed that maximum speed by almost a factor of four. The sloop *Blade*, physically capable of approximately six knots under ideal conditions and with a motor capable of pushing her to her maximum, was required by this fable to travel at 22 knots".

4.197 The documentary depicts a voyage made by Mr Hunter on *Blade* in February 2003 over the "same course, with an impartial skipper". Mr Hunter maintains he made the voyage to see how long it took the boat to travel eleven nautical miles under the same tide and wind conditions as obtained when the Crown alleged Mr

Watson had done the trip on New Years Day 1998. Mr Hunter said the scenario put to the Jury was that *Blade* made the journey on New Year's Day 1998 "in little over half an hour". Mr Hunter claims that on his trip, with a weed free bottom, *Blade* averaged 4.43 knots and took two hours and twenty nine minutes at a normal cruising rate in terms of engine revolutions. Mr Hunter has more recently sworn an affidavit in relation to this issue in which he discusses this voyage and records the timing of it (sworn on 19 April 2010).

4.198 In his book Mr Hunter criticises the Police for not having tested *Blade* on the "Cook-Strait-Erie Bay proposition" (page 201). Mr Watson Sr made a similar criticism of Police for having only conducted speed trials with a focus on the Furneaux Lodge to Erie Bay trip. Again, I have not been asked to consider the adequacy or otherwise of the Police investigation.

4.199 Mr Watson Sr advised that the same trip Mr Hunter had commissioned [redacted] to take in February 2003 was repeated in April 2010 by Mr Fisher of the *New Zealand Herald* ; "again the boat had a clean bottom and tidal conditions were the same as on 1 January 1998. There was a light northwest wind, which was again similar to, but less than, the conditions pertaining on the afternoon of 1 January 1998. This trip, although beginning somewhat closer to Tory Channel entrance, took two hours and thirty five minutes."

4.200 I am not satisfied the issues raised by Mr Hunter (and by Mr Watson Sr in his submissions) in respect of timing are "fresh". While Mr Hunter's affidavit is new, the issue of the timing of this voyage was raised by the Defence both in evidence and submissions at trial, and in the Court of Appeal.

4.201 At trial (as recorded in the Judge's summing up), Defence counsel submitted it could not have been *Blade* in Cook Strait which [redacted] said they saw; that Mr Watson could not have gone out into Cook Strait from Tory Channel and be seen at 4.30pm, having regard to the time he returned to Erie Bay. It was

submitted that on the evidence, the earliest Mr Watson could have arrived in Erie Bay was 7.15 pm (relying on the evidence given by the Harbourmaster), that is with the tide changing from east to west at 5.15pm; but in any event Mr Watson could not have arrived in Erie Bay shortly after 5.15pm as suggested by the evidence given by [redacted]

4.202 In the Court of Appeal the Defence criticised the Judge's summing up in relation to the evidence of [redacted] . Again, the Defence case on this issue was that it was physically impossible for the boat seen by [redacted] (at around 4.30pm) to be *Blade* in part given the evidence of other witnesses as to the timing of sightings of *Blade* in Erie Bay in the 5.00pm-6.00pm period.

4.203 This timing 'evidence' referred to by Mr Hunter and Mr Watson Sr is supportive of the Defence case at trial that it was not *Blade* seen by [redacted] at 4.30pm on 1 January 1998. However, it is not a new matter. It was the Defence case throughout, including in the application to the Privy Council, that it was physically impossible for the boat seen by [redacted] to be *Blade* because of a "simple reconstruction of the total evidence". Of course, additionally, it was contended there were features of [redacted] 'identification' that made it of doubtful weight that it was in fact *Blade* they had seen in Cook Strait at the relevant time.

4.204 In summary I do not consider this evidence meets the test for fresh evidence. Further, I do not consider it to be sufficiently cogent or credible to the extent it could be said that it might have caused a reasonable Jury to entertain a reasonable doubt about Mr Watson's guilt.

Evidence of water-taxi driver [redacted]

4.205 When Mr Watson first made statements to the Police in January 1998 he described being taken back to *Blade* that night on a water-taxi "driven by an old guy with a hat on." Mr Watson said he was the only passenger. As I understand it

[redacted] was the oldest of the water-taxi drivers working at Furneaux Lodge on the evening of 31 December 1997/morning of 1 January 1998; and he commonly wore a cowboy-style hat.

4.206 gave evidence at trial. However, he gave no evidence about a trip of the nature described by Mr Watson. He was not questioned about any such trip either by the Crown or the Defence. was not asked to give any evidence about whether he had taken a man resembling Mr Watson either to shore or to his boat on the night in question.

4.207 In his book Mr Hunter states that he asked [redacted] directly whether he had made such a trip. In the documentary [redacted] states:

> "[redacted]: He was in the wrong boat at the wrong time...taking up space. A little bit agro...asked him to get off in time he did get off...and I said I would take him back to his boat...which I did myself after a couple of trips when he sat on the wharf...
>
> Narrator: Did he take the man back alone or in company?
>
> [redacted] When I took him back I took him back by himself.
>
> Narrator: And what sort of boat did he take this man to?
>
> [redacted] I couldn't tell you. Just another vessel to my memory out to the left of the wharf...
>
> Narrator: Watson's *Blade* was moored out to the left of the wharf?..
>
> [redacted] Just a youngish guy with jeans, white shirt ort shirt type thing
>
> Narrator: Watson was wearing jeans and a white tee shirt beneath a blue denim shirt. So now there's evidence that two people took Watson back alone to his boat that night – [Donald Anderson] and a man who matched Watson's claim that he had been taken back...

Prosecutor ...by an old guy with a hat

Narrator Because [redacted] commonly wears

[redacted] ...an old cowboy hat..."

4.208 In my view this information does not meet the test for fresh evidence because it was evidence which was available at the time of trial. As Mr Hunter identified, [redacted] was interviewed by a private investigator hired by the Defence, in February 1998. In that interview [redacted] said he could not remember taking a man alone to a yacht although he accepted "it could have occurred". [redacted] could have been asked about this under cross examination. He was not. Further, the Defence accepted at trial that the water-taxi trip described by Mr Anderson was the trip during which Mr Watson was returned alone to his boat. The Defence case was always that Mr Watson returned to his boat only once during the night in question (and with Mr Anderson).

4.209 In my interim advice I recorded that I had concerns about the cogency of this information even if it is fresh. First, [redacted] . does not identify the lone man he now maintains he took to his boat, as being Mr Watson (despite Mr Hunter making the assumption in his documentary that he did by reference to the white t-shirt and jeans). Secondly, less than two months after the night in question [redacted] informed private investigators he did not recall such a trip. There are obvious issues of reliability about this information.

4.210 In addition, the issue needs to be assessed in the context that it was Mr Watson who first mentioned having been returned to his boat alone by 'an old guy with a hat on'. Mr Hunter claims that what [redacted] now says substantiates what Mr Watson first told Police. The reliability of Mr Watson's account of events was significantly undermined at trial. Further, with the addition of [redacted] 's new information on this issue it is not clear where that leaves the Defence concession at trial that it was Mr Anderson who returned Mr Watson to his boat.

4.211 As indicated above, this issue has been raised by Mr Hunter. In my interim advice I recorded that it is not clear what Mr Watson's position is in relation to this matter. I recommended that if this matter was to be pursued there needed to be clarification from Mr Watson about how he saw the significance of this information in light of the way his case was run at trial.

4.212 Subsequent to me providing my interim advice I am aware the Ministry asked Mr Watson to clarify his position on the 'new evidence' from [redacted] Further, Mr Watson was invited to supply an affidavit from [redacted] Despite Mr Watson Sr advising the Ministry in June 2010 that [redacted]'s affidavit is "still in progress", and on 12 October 2010 that he had arranged for a private investigator to interview some further witnesses including [redacted], an affidavit has not been provided.

4.213 The Ministry has not been given a clear indication of Mr Watson's position in relation to [redacted]'s evidence. However, in a letter dated 7 December 2010 Mr Watson Snr wrote:

> "The Minister's paragraph 15 suggests that Scott should somehow make a choice between the evidence of Donald Anderson and the new evidence of [redacted]
>
> As early as 8 January 1998 Scott told police regarding the return to his vessel: "It was a Naiad, yellow. It was driven by an old guy with a hat on. I was the only passenger". And again on 12 January: "I think he had a hat on, a cap on. I think he was old. I had seen him earlier on that afternoon whizzing around dropping people off, picking them up. I'm not sure whether I got a lift in with him or not. I had no trouble getting off the Naiad onto my boat".
>
> These were the sum total of his words on the subject and he was labelled a liar by police, prosecution and trial judge for his trouble. Donald Anderson's evidence was a part of the circumstantial evidence so prized by these people and it would have been a valuable addition to this evidence had [redacted] who was indisputably "the old guy with the hat" had been asked by the investigators at any time after 8 January 1998 or, for that matter by the prosecution, if he might have taken a single person to a small yacht somewhere off to the left of the wharf. He was not and because he was not asked there was no record of an answer to that question and so he was not asked by the defense either. The point of the new [redacted] evidence is not whether Scott should choose between the two but why, in the shoddy fit up that was operation Tam, was he [redacted] never asked".

4.214 In view of the lack of direct admissible evidence from [redacted] I am not in a position to assess those aspects of Mr Watson's application that relate to [redacted] and the weight that can be attributed to any statements he may have made to Mr Hunter. Against that background and in light of the way this case was run at trial, any such new evidence, even if fresh (which I do not accept), lacks cogency.

Other New Evidence

4.215 As recorded above, subsequent to my interim advice I was provided with a substantial amount of material which had been presented by or on behalf of Mr Watson for consideration as part of his application. Some of that material disclosed matters additional to those which I had identified, and which were raised by or on behalf of Mr Watson on the basis that they constitute "fresh evidence". The last of this additional material was provided by Mr Watson Sr in early March 2011, when I was in the final stages of completing my inquiries and preparing this advice. In particular those matters were;

- Two affidavits from [redacted] this evidence is said to provide the "innocent explanation" for the presence of the scratches on the hatch of *Blade* and for the excision of a piece of foam from the squab in the saloon on the vessel;

- The affidavit from former Police officer, [redacted] on the issue of the investigation or lack thereof by Police of ketch sightings in the early days of Operation Tam;

- An affidavit from Keith Hunter regarding the timing of the Cook Strait – Erie Bay trip;

- Information pertaining to an underwater sonar search by New Zealand Navy in August 2000 (at the direction of the Police) in the Tory Channel/Cook Strait area which failed to locate Mr Smart or Ms Hope;

- Submissions on DNA evidence relating to the two hairs located on Mr Watson's vessel;

- An affidavit from [redacted] who was the cellmate of secret witness B at the time of the alleged confessions by Mr Watson; [redacted] has said that Mr Watson made no confessions to secret witness B when he ([redacted]) was present, contrary to the evidence given by secret witness B at trial;

- An affidavit from [redacted] regarding a ketch sighting in Auckland on 27 March 1998 which he maintains was not investigated by Police; and;

- Aspects of the reports of the IPCA (May 2010) on complaints by Mr Watson Sr and Keith Hunter respectively; and

- Material including photographs, Police job sheets and a Police statement from [redacted], a spreadsheet showing arrivals and departures of boats from Furneaux Lodge, and submissions concerning an 'extra' unidentified vessel seen at Furneaux Lodge anchorage on the morning of 1 January 1998.

4.216 I have discussed the evidence of [redacted] my analysis of the evidence given by the prison witnesses above. I have also addressed the affidavit of [redacted], and to an extent the affidavit of [redacted]. Further, I have addressed

the affidavit of Mr Hunter relating to the timing of his February 2003 voyage on *Blade*. I need not repeat my analyses of these issues in this section of my advice.

4.217 I now address each of the other new matters Mr Watson has raised below, in terms of their freshness and cogency.

Hatch Scratches and Squab Evidence of [redacted]

4.218 When Police examined Mr Watson's boat *Blade* they located scratches on the hatch cover above the forward sleeping compartment. In his book Mr Hunter refers to "the inference attached to the scratches… a frantic, panic-stricken Olivia put them there while the hatch cover was closed, said the Crown".

4.219 Evidence was given at trial by a former girlfriend of Mr Watson's that Mr Watson maintained to her that [redacted] had made the scratches while the hatch cover was open.

4.220 On 2 September 2005 [redacted], swore two affidavits. These affidavits have now been presented in support of Mr Watson's application. It is contended the affidavits contain "fresh evidence" on the issue of the hatch scratches and also, in relation to a missing squab cover and piece of foam from one of the squabs in the saloon squab.

Hatch Scratches

4.221 In her first affidavit [redacted] deposed that "in December 1997" she and her two daughters went sailing with Mr Watson in the Marlborough Sounds "on Scott's boat" and "the following day [date not clear] Scott visited my house and told me that my daughters had scratched the foam rubber lining of the front hatch of his boat". She then stated "The day after Scott's visit to my house I visited his

boat and saw the damage that had been done, by my daughters, to the front hatch lining."

4.222 Mr Watson Sr submitted there was never any connection between the scratches on his front hatch lining and the missing Mr Smart and Ms Hope. In his submission [redacted] "provides the innocent explanation for these" scratches, which evidence he claims is corroborated by Ms Karena on Mr Hunter's DVD. I note that no affidavit has been provided from Ms Karena.

4.223 Mr Hunter discusses reasons why [redacted] are the more plausible answer" for the presence of the scratch marks [than Ms Hope], in his book (pages 162 and 163).

4.224 At trial, the Defence position was that the presence of scratch marks on the interior lining of the forward hatch was "misleading". Before the Privy Council Defence counsel submitted that little testing had been conducted by ESR to determine if the scratching could necessarily only have been made by fingernails as opposed to other objects; scratching of the outer perimeters was not possible when the hatch was closed; the hatch could not be secured in any event; and reference was made to the fact that Mr Watson's former girlfriend had given evidence during the trial that Mr Watson had maintained to her the scratching had been made by [redacted] .

4.225 I do not consider the evidence of [redacted] this issue meets the test for fresh evidence as it was available to the Defence at the time of Mr Watson's trial, had [redacted] tendered the information. Mr Watson Sr submitted the Crown neglected to inform the Jury that [redacted] had never been asked about the hatch and that her statement to Police "does not show that she was questioned on it." It would appear that [redacted] never told Police about this matter. That is surprising if the evidence was available and it was considered to be of the importance it is now contended to be.

4.226 When I interviewed Judge Davidson and Mr Antunovic they told me they were aware of the evidence [redacted] could give about this matter at the time of trial and they, together with Mr Watson and his father made a decision not to call evidence from her because they did not consider that was necessary given other evidence about this issue. Further, they considered there were risks in calling that evidence from [redacted] . I have been told that decision was made after full discussion and with the agreement of Mr Watson and his father. Importantly, Defence counsel told me the Defence position was that the scratch markings could not have been made with the hatch cover closed and that was supported by the scientific evidence. Accordingly, any evidence that [redacted] could give about the issue was not considered by them of sufficient significance. I am not satisfied this evidence is of sufficient credibility or cogency to raise a real doubt about the safety of Mr Watson's convictions.

Squab Cover and Foam

4.227 In her second affidavit [redacted] provided evidence about having gone sailing with Mr Watson in the Marlborough Sounds on 4 January 1998. She has deposed that:

> "Scott had recently repainted his boat.
>
> Left over paint was being stored in a white plastic bucket at the aft end of the boat.
>
> While we were sailing, the bucket tipped over on to its side.
>
> The lid was not secure and the paint spilled.
>
> It spilled over everything that was stored in the aft area of the boat including a squab.
>
> We removed the paint off everything we could as soon as possible by taking everything that was stored in that area out and cleaning it and the area around it.

> The bucket was put on the table and because paint was dripping down the side of the bucket the paint spilled further, dripping on to another squab.
>
> We laid newspaper down over the aft area of the boat before we put all of the stored items back.
>
> We could not remove the paint off the squab so we took the cover off the squab and put it in the rubbish.
>
> Where the paint had soaked through to the foam rubber of the other squab, we cut it out with a knife after the paint had hardened."

4.228 Mr Watson Sr submitted that [redacted] "provides the innocent explanation for the excision of the foam in the saloon squab." In addition photographic evidence was provided of the spilled paint which an ESR examiner, Mr Wilson, apparently found to have penetrated to the same depth (15mm) as the excised piece of foam.

4.229 Before the Privy Council Defence counsel referred to the fact there was evidence given at trial by Mr Watson's former girlfriend that there had been a burn hole on one squab cover; and it was contended paint had been spilled on another squab cover and the other had simply been 'mislaid'.

4.230 I do not consider [redacted] 's evidence on this issue meets the test for fresh evidence. Clearly it would have been available to the Defence at the time of the trial. I do not consider it reasonable to suggest that because [redacted] was never asked (by Police) about what she knew of the circumstances surrounding the missing squab cover and foam squab, the evidence in her affidavit is fresh. The evidence could have been ascertained at the time of trial. If the evidence was of the significance now claimed, it is difficult to understand why [redacted] for Mr Watson did not tender the information to Police during the investigation, or to Defence Counsel during the trial when Mr Watson's former girlfriend gave evidence on this very issue. Even if [redacted] 's evidence on this issue is new, I

am not satisfied it is of sufficient credibility or cogency to raise a real doubt about the safety of Mr Watson's convictions. Further, as indicated above Defence counsel made a decision in consultation with Mr Watson and his father that, for tactical reasons they did not wish to call [...] as a witness.

Underwater Sonar Search

4.231 Mr Watson Sr, in his submissions, referred to a comment made by Mr Davison QC in his closing address to the Jury on behalf of the Crown, where he said "...because what is Mr Watson doing at that time of the afternoon off in the deep water of Tory Channel in Cook Strait. Good place to go if you had something to dump." Mr Watson considers the Crown contended by virtue of this comment that Mr Watson deposited the bodies of Ms Hope and Mr Smart in the general area of the alleged sighting of *Blade* by [...].

4.232 Mr Watson referred to a side-scan sonar search that was conducted by the Royal New Zealand Navy in August 2000 (at the request of the Police), of that general area "to confirm whether or not the remains of murdered couple Ben Smart and Olivia Hope may be present...." Mr Watson attached some significance to the fact that no remains were located (as the Navy reported to the Police).

4.233 The search by the Royal New Zealand Navy was conducted after Mr Watson's trial (in 2000). The Navy report is therefore strictly fresh evidence because it was not available at the time of the trial. However, I do not consider the fact that Mr Smart and Ms Hope were not located during that particular search, is of such significance to the overall case or that it raises a serious doubt about the safety of the convictions.

4.234 It is clear from the trial transcript that the Crown called no evidence to the effect that incriminating evidence in relation to Mr Smart and Ms Hope would be found in the general area where the Navy search was conducted, or indeed in any other

particular area. The Jury was merely invited to draw an inference that Mr Watson disposed of the bodies at a time and in a place where he knew it was unlikely they would ever be found.

4.235 I do not consider this issue requires any further investigation or consideration.

Submissions on the DNA Evidence

4.236 Mr Watson Sr submitted there "was a strong possibility of inadvertent transfer of the hairs at the ESR laboratory at Auckland on 7 March 1998 when both STO5 (reference hairs from Olivia Hope) and YA69 hairs (tiger blanket hairs found on Mr Watson's vessel *Blade*) were examined by the same scientist, on the same day, at the same examining laboratory table". He maintains "there was an unexplained cut in bag STO5 and hairs of Olivia Hope could inadvertently have escaped from that bag. By 7 March 1998 the YA69 hairs had already been screened on two previous occasions (19/1/1998 and 21/1/1998) without any examiner noticing the crucial two blonde hairs. The DNA evidence to show these two hairs were Olivia Hope's was far from conclusive and was unconvincing." It has also been submitted on behalf of Mr Watson that "there was a strong possibility, which could not be excluded by the Crown hair expert of secondary hair transfer given that both Olivia Hope and Scott Watson had been at the same function over New Year's Eve at Furneaux Lodge."

4.237 I have considered these submissions alongside all of the evidence which was given at trial and the submissions of Counsel before both the Court of Appeal (including a copy of the report on DNA anomalies dated 30 November 1999 which I have referred to earlier in this advice) and the Privy Council. I have also considered all of the additional material which has been provided on behalf of Mr Watson in support of his application. I am satisfied there is no fresh evidence on this matter. These same issues were well traversed both at trial and before the appeal Courts. They are not new matters. I am satisfied there is no new evidence

which would tend to throw doubt on the accuracy or reliability of the DNA testing results as they were placed before the Jury at trial.

Matters in the Reports of the IPCA

4.238 Mr Watson Sr has made extensive submissions in relation to the matters traversed in the reports of the IPCA which I have referred to earlier in this advice.

4.239 As I have stated above, my instructions were specific and focused on identifying potentially fresh evidence and considering whether the evidence or matters satisfy the criteria for fresh evidence (which I have set out above).

4.240 Mr Watson's submissions in relation to the matters the subject of the IPCA Reports related to the following matters;

- An allegation that Detective Inspector Pope lied to the media about Mr Watson's status in his inquiry, which led to a pre-arrest trial by media;
- An improper Police interview of Mr Watson on 12 January 1998;
- Police dismissing prematurely, the statements they had received from members of the public that a ketch was involved;
- The improper distribution by Police of a suspect profile of Mr Watson to "large search parties assembled by the families of the missing pair", which was reported nationally and shown on Television One's *Assignment* Programme;
- Detective Inspector Pope's poor management of "press reportage" which suggested there were no anchors on *Blade* when it was seized, knowing that to be untrue;

- Allegations that Detective Inspector Pope made false statements in affidavits he made when he applied for warrants to search or intercept private communications;

- Detective Inspector Pope allegedly misleading the press about the description of the mystery man, and about an incident at the dive shed at Furneaux Lodge.

4.241 The submissions relate to the adequacy or otherwise of the Police investigation into the disappearance of Ms Hope and Mr Smart. They are matters of opinion and submission only and they appear to repeat arguments raised in the original complaints to the then Police Complaints Authority and in Mr Hunter's publications. None of the submissions made in my view could meet the test for fresh evidence, or put another way, I am not satisfied they are the source of any fresh evidence that might justify a referral of Mr Watson's case to the Court of Appeal.

4.242 If Mr Watson wishes to pursue these matters (including the evidence in [redacted]'s affidavit which I understand has not previously been presented to the IPCA) that is a matter for him to take up further with the IPCA.

The 'extra' unidentified vessel

4.243 In February 2011 Mr Watson Sr provided information (including photographs and Police job sheets and a Police statement of [redacted]) and submissions in relation to what he alleged was an 'extra' unidentified vessel seen at Furneaux Lodge anchorage on the morning of 1 January 1998. Mr Watson Sr submitted this is "an essential aspect of the unfair trial of Scott Watson and the miscarriage of justice it became." In March 2011 Mr Watson Sr provided a spreadsheet which he

had prepared relating to the arrival and departure of boats at Furneaux Lodge on 31 December 1997-1 January 1998.

4.244 The Crown case was presented on the basis that every vessel which had been at or near Furneaux Lodge at the relevant time had been identified and eliminated from the Police inquiry. Over 150 witnesses were called to give evidence to establish this point.

4.245 Watson Sr submitted that "by reference to the trial evidence and the bloated Police file there is evidence that there was an extra, unidentified vessel at Furneaux Lodge". He submitted "this evidence or the suppression of it involves misconduct on the part of the prosecution, probable perjury on the part of a Police witness, and a missed opportunity on behalf of defense [sic] counsel. The existence of one unidentified yacht makes redundant the more than one hundred and fifty "boat witnesses" that bloated the trial and bogged down the Jury with trivia."

4.246 I have considered a Police job sheet dated 30 January 1998 recording a telephone conversation with [redacted] who referred to having seen a yacht leave the Furneaux Lodge anchorage between 6.00am and 7.00am in 1 January 1998. I have also considered [redacted]'s statement to Christchurch Police of 4 February 1998 in which she gave more detailed information about this sighting including her recollection of a yacht "starting its motor and seeing a yacht come past us at about 6.30am-6.45am...from somewhere in the main body of yachts... and passed on the north side of a boat, which from the body of the bay, was TROOPER". No other identifying details of this yacht were provided by [redacted].

4.247 Mr Watson Sr submitted "this information [from [redacted]] existed in isolation until just prior to trial when an attempt was made to verify [her] statement." With reference to this point Mr Watson Sr provided a copy of a Police

job sheet of Detective McLachlan recording a telephone conversation he had with Mrs E on 8 June 1999 in which Mrs E is recorded to have said she "thought she saw another yacht leave over that period [6.30 am to 7.30 am] but couldn't describe it any further".

4.248 It is not clear whether this sighting by Mrs E was of the same yacht described by [redacted] . I am not satisfied on the information before me that the information from Mrs E is of the significance Mr Watson Sr considers it to be.

4.249 In any event, as Mr Watson Sr has identified, this telephone conversation with Mrs E occurred around one week before the trial commenced. More significantly Mr Watson Sr has identified that this information was notified to Defence counsel on 17 June 1998 on the basis "these investigations were to follow up every such boat and their occupants."

4.250 Mr Watson Sr has raised questions about how the 'extra' vessel was followed up by Police and why [redacted] was not called as a witness. He has suggested that the issue of the 'extra vessel' referred to by [redacted] and, he claims, Mrs E could suggest there was misconduct by Detective McLachlan; misconduct by the prosecution in that "one of the core circumstantial planks of the Crown case" was known, or suspected, by at least one "crown solicitor" to be a fallacy prior to the trial commencing; and "poor or incompetent defense [sic] in that defense [sic] lawyers failed to realise that one of fifty, hard copy documents supplied to them while the trial was in progress, was pivotal to the defense [sic] of Scott Watson."

4.251 Having considered all of the material which has been provided on this issue I am satisfied there is no fresh evidence and that none of the material which has been provided is the source of any fresh evidence. I am satisfied the Crown complied with its disclosure obligations to the Defence in relation to all of this information and that Defence Counsel were in possession of the relevant information at the time of Mr Watson's trial. [redacted] could have been called to give evidence

but she was not. For the reasons I have stated I am satisfied there is no fresh evidence on this issue.

Other matters raised in Mr Watson's Submissions

4.252 For completeness, I record that Mr Watson Sr's very detailed and comprehensive submissions in support of his son's application contained a number of other submissions in which he alleges;

- "sub-judice reportage" against Mr Watson – Mr Watson Sr refers to an article published in the June 1998 edition of *North & South* magazine which is alleged to be damaging or prejudicial to Mr Watson and his right to a fair trial;

- unfair and improper conduct by the Crown which led to an unfair trial (specifically an allegation that Ms Crutchley in her opening address "prevented a fair trial by falsely giving the Jury to believe certain facts; an allegation that Mr Davison QC misled the Court and misinformed the Court about certain matters; an allegation that "the Crown case against the ketch was falsely based and misled the Court" and "the Crown case was built on false 'circumstantial evidence' which prevented a fair trial");

- an allegation that the Crown and/or the Police concealed evidence from the Defence and the Court from Ms McNeilly that she did not notice the mystery man had any fingers missing (when Mr Watson does have missing fingers on his right hand);

- the Crown 'concealment' of the murder scenario and the 'two trip theory';

- Mr Watson Sr submits that these matters "are irrefutable proof" of Mr Watson's innocence.

4.253 I have considered Mr Watson's submissions on these issues alongside all of the other material that has been provided during the course of my enquiries. I am satisfied that none of these issues are the source of any fresh evidence. They are matters of opinion and submission on issues which have, in the main, already been addressed on appeal. They are not new matters. They are not matters which give rise to any fresh evidence and therefore they are not matters which fall within my instructions.

5 WATSON: COURT OF APPEAL – ALLEGED ERRORS

5.1 I have been asked to express my views as to whether any of the alleged errors in the Court of Appeal judgment could justify a referral of the case to the Court of Appeal.

5.2 In his application Mr Watson has referred to Mr Hunter's book and in particular the Chapter in the book addressing alleged errors with the Court of Appeal's judgment. The book discusses several of the grounds Mr Watson took to the Court of Appeal. Mr Watson has stated that "All [errors] are vital to my case but one by itself provides cause for my release and retrial." In that regard Mr Watson's main criticism of the Court of Appeal judgment relates to the manner in which the Court dealt with the issue of the "two trip theory". Mr Watson contends the judgment "contains a major error of fact which has concealed the miscarriage of justice from its view".

5.3 Mr Watson referred specifically in his application to paragraph 44 of the Court of Appeal's judgment where the Court stated:

> "It was suggested that more extensive cross examination of the witnesses who were on board the *Mina Cornelia* and the *Bianco* as to the timing of the appellant's return with Mr Anderson would have been undertaken. Similarly as regards the witnesses to the Perkins incident ashore, and the absence of evidence as to how the appellant may have returned to the shore. But an examination of the transcript shows that there was extensive cross examination on those issues."

5.4 Mr Watson submitted that the Court was wrong when it asserted there was extensive cross examination on these issues. Specifically he states that "an examination of the transcript shows, not only that there is no extensive cross examination as to "how I may have returned ashore", but that there is no such examination at all. Nor is there any reference at all to a trip ashore in direct examination." Further:

> "Since the matters did not arise in direct examination, it was unknown to me and my counsel that the Crown case rested on my taking two trips to my yacht and a trip ashore between them. The case I defended was one where I was accused of a single trip to my yacht in the company of Guy Wallace and Ben and Olivia. Not knowing of the two trip theory I did not defend myself against it. Since it did not arise in direct examination there was no cause for it to arise in cross-examination, and so it did not.
>
> It is apparent then that I did not and could not defend myself against the charge against me because I did not know what that charge was.....".
>
> .....
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> .....
>
> Had they known about the two trip theory my counsel would have examined the two women on the boats next to mine as to whether I had returned to my boat while they were awake. If they answered according to the statements they had made to the Police, the Jury would have discovered that I did not return to my yacht until after 3.15am. This would have been a complete answer to the two trip theory and I could not have been convicted on it."

5.5 I do not accept Mr Watson's main criticism of the Court of Appeal's discussion of the "two trip" theory is valid or is of any material significance. There was questioning of the relevant *Mina Cornelia* witnesses relating to the timing of Mr

Watson's return to *Blade* and/or his visit to their boat; and of witnesses who gave evidence relating to the Perkins incident ashore. These witnesses were examined by the Crown on issues of timing to the extent possible. It is clear the witnesses were unable to be sure of the times they stated the relevant events occurred and that may well explain why there was minimal cross examination on those issues.

5.6 I accept there was no questioning at all about Mr Watson's alleged return to shore and that there was no direct evidence about this. However it was always the Defence case that Mr Watson made one trip only back to *Blade* and that was with Mr Anderson, at which point he boarded the *Mina Cornelia* looking for a party.

5.7 While it is correct to say that the Court of Appeal's reference to "extensive cross examination" on issues of timing and a return trip ashore was wrong I am not satisfied that anything turns on that. I accept the Court of Appeal's reasoning as to the validity of the Crown's two trip theory and the Court's view that the Crown's late formal introduction of the theory did not unduly prejudice the Defence. There was supporting evidence for the Crown's theory consistent with the whole nature of its case. It was a matter which could be established by the Jury drawing an inference that Mr Watson must have returned to shore after he had been returned to *Blade* by Mr Anderson at around 2.30am; particularly given the evidence that he was ashore at the time of the Perkins incident at around 3-3.30am (which it was accepted he was involved in) and about the jersey which Mr Watson was seen wearing later in the evening (which he had not been seen wearing earlier). I am not satisfied that the error by the Court of Appeal had any material significance to the validity of the Court's reasoning relating to the "two trip theory" and for that reason I do not accept Mr Watson criticisms.

5.8 In Chapter 8 of his book Mr Hunter outlined other errors he alleges in the Court of Appeal's decision. These include allegedly incorrect factual references (including to the killer being a lone male yachtsman; and to the "so-called late acknowledgement by the Crown" of the two trip theory). Further he suggests that

the Defence did in fact pursue as a separate ground the contention that the verdicts were unreasonable and could not be supported by the evidence, and the Jury vetting issue.

5.9 In relation to the alleged factual errors made by the Court of Appeal I have considered all of these in the context of the overall appeal. I am satisfied that none of the matters Mr Hunter has raised are of such significance as to have a bearing on the Court of Appeal's decision. I do not accept that any of the matters raised can fairly be characterised as "inexplicable and profoundly prejudicial" as Mr Hunter has claimed.

5.10 Defence counsel elected not to pursue as a separate ground a contention that the verdicts were unreasonable and could not be supported by the evidence as the Court of Appeal recorded in its decision. The Crown submissions to the Privy Council in response to Mr Watson's Application for Special Leave records this was the Defence position. I accept also that the Jury vetting issue was not pursued. While Defence counsel intended to pursue this as a separate ground and included submissions on this issue in their written submissions filed in advance of the Court of Appeal hearing, it would appear the Defence indicated at the hearing that this matter would not be pursued.

5.11 In summary I have considered all of the alleged errors in the Court of Appeal's judgment. I am not satisfied that any of the criticisms are justified or are significant to the extent the appeal should be reheard or the issues readdressed.

6. CONCLUSION

6.1 The Crown case against Mr Watson relied on the circumstantial effect of a number of strands of evidence. As the Judge explained to the Jury in his summing up, in a case based on circumstantial evidence, although one strand alone is not

enough, all strands together may be sufficient to prove guilt. To prove the case beyond reasonable doubt the circumstantial evidence must be so cogent and compelling that it is inconsistent with any rational hypothesis other than guilt.

6.2 The Crown case was that the person who took Mr Smart and Ms Hope onto his boat must have killed them. That person was alleged to be Mr Watson. Central to the Crown contention was identification evidence given by various witnesses, the most important of whom was Mr Guy Wallace. Mr Wallace's identification evidence was, however, but part of the overall evidence relied on by the Crown as establishing that Mr Watson was the man whose yacht Mr Smart and Ms Hope boarded. Another key strand of evidence was the evidence of DNA analysis in relation to two head hairs found on a blanket located on Mr Watson's boat, which strongly supported the proposition the hairs were those of Ms Hope. This scientific evidence provided some corroboration, if the Jury chose to accept it, for one aspect of the evidence given by Mr Wallace in relation to his identification of Mr Watson as the man taken on his naiad with Ms Hope and Mr Smart to the boat.

6.3 In relation to the identification evidence given in particular by Mr Wallace, the Defence maintained throughout, that evidence excluded Mr Watson both by the description of the person and the description of the boat to which Mr Smart and Ms Hope were delivered as a two-masted ketch as opposed to a sloop. The other strands of circumstantial evidence relied on by the Crown were said by the Defence to be weak, unconvincing or capable of explanation.

6.4 In accordance with my instructions to consider whether there is any fresh evidence in this case, I have considered all of the material which has been submitted in support of Mr Watson's application. I considered a number of categories of new information against the relevant test for fresh evidence in the context of applications of this nature. The categories of new or potentially fresh

evidence I considered along with a summary of the conclusions I have reached in relation to each category is set out in the Executive Summary.

6.5 It will be evident that an important focus of my consideration of the material Mr Watson has submitted has been the identification evidence. That is because of its importance at trial and the fact that both Mr Wallace and Ms McNeilly now maintain they would have answered certain questions, if asked, in a particular way. As I have stated, applying the relevant test of freshness and cogency to their new evidence, I have concluded the evidence does not meet the test for fresh evidence. It was available at the time of trial. Further, for the reasons explained in detail above, I am not satisfied the new dock identification evidence would have added significantly to the evidence Mr Wallace gave at trial. He gave evidence about the man in the *Mina Cornelia* photograph (Mr Watson) and the video footage (which was presumably the same as Mr Watson looked in the courtroom at trial) and said that the man depicted in those images was not the man in the bar and the man in his naiad. Further, it was open to the jury if they weren't left in any reasonable doubt as to the accuracy or truth of the explanation provided for the presence of the hairs on the boat, to regard that evidence, in the circumstances, as compelling support for the evidence identifying Mr Watson as the man on Mr Wallace's naiad with Ms Hope and Mr Smart.

6.6 Similarly, I do not consider that Ms McNeilly's new evidence would have likely led the Jury to reach a different verdict, both as it relates to what she believes she would have said if asked to view the *Mina Cornelia* photograph or in relation to what she says about the hands of the man she served in the bar. It needs to be remembered that Ms McNeilly was never able to make the link between the man she served at the bar with the man Mr Wallace said boarded his naiad with Mr Smart and Ms Hope.

6.7 In summary, I have considered all of the material which has been submitted in support of Mr Watson's application. I am not satisfied that any of the material

contains any evidence which could be said to meet the well-established test for fresh evidence, either separately or cumulatively.

6.8 Further, I have considered all of the alleged errors in the Court of Appeal's judgment. I am not satisfied any of the criticisms are justified or are significant to the extent the appeal should be reheard or the issues readdressed.

6.9 I do not consider that any of the matters I have considered meet the test for fresh evidence which could justify a referral of Mr Watson's case back to the Court of Appeal.

Kristy P. McDonald QC
March 2011