Kristy P McDonald QC

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

March 2013

SUPPLEMENTARY ADVICE ON APPLICATION FOR THE ROYAL PREROGATIVE OF MERCY

SCOTT WATSON

Introduction

1. In March 2011 I provided advice to the Ministry of Justice concerning the application by Mr Scott Watson for the exercise of the Royal prerogative of mercy. My advice was complete at that time. The then Minister of Justice, the Honorable Simon Power directed that a copy of my advice be provided to Mr Watson's legal team, consisting of the late Mr Greg King, Mr Pip Hall, and Mr Kerry Cook.

2. I had no further substantial role in this matter until I received instructions on 14 December 2012 from the Ministry asking that I provide Supplementary advice commenting on submissions made by Mr Watson's legal team.

3. The Ministry received a submission from Mr King in August 2011 ('the August submission'). Following receipt of the August submission, the Ministry wrote to Mr King seeking further information in support of three new issues they raised in that submission. Specifically, on 1 September 2011 the Ministry wrote to Mr Watson's legal team and asked them to provide information or evidence to support the submissions that:

    i. A referral to the Court of Appeal is warranted on the ground that 'the verdicts were unreasonable and could not be supported having regard to the evidence'.

    ii. There were a number of identification procedures undergone by Mr Guy Wallace and Ms Roz McNeilly that were not recorded by the police or disclosed to defence counsel.

iii. It was inappropriate for me to have placed weight on defence counsel's tactical decision not to call [...] as a witness.

4. Between September 2011 and December 2012, the Ministry had a number of exchanges with Mr Watson's legal team, relating to the Ministry's requests that they provide the information the Ministry requested in its letter dated 1 September 2011.

5. Mr Watson's legal team responded substantively to the Ministry's requests for further information as follows:

- *22 September 2011 and 28 March 2012*

  Mr King wrote to the Ministry providing submissions in support of the assertion that a referral to the Court of Appeal is warranted on the ground that 'the verdicts were unreasonable and could not be supported having regard to the evidence'. He provided the following documents, which are relevant to those submissions:

  i. The affidavit of Scott Watson dated 20 September 2011; and
  ii. The affirmation of Ivan Antunovic and Bruce Davidson dated 24 February 2012.

- *17 May 2012 and 2 December 2012*

  Mr Hall wrote to the Ministry providing further information and submissions in respect of the assertion that Mr Wallace and Ms McNeilly underwent a number of identification procedures that were not recorded by the police or disclosed to defence counsel.

  Mr Hall also made further submissions in support of the contention that it was inappropriate for me to have placed weight on defence counsel's tactical decision not to call [...] as a witness.

My instructions

6. As indicated above I received instructions on 14 December 2012 from the Ministry asking that I provide Supplementary advice in response to defence counsel's submissions on the following matters:

(a) that a referral to the Court of Appeal is now warranted on the ground that the verdict was unreasonable and can not be supported having regard to the evidence.

(b) that I applied an unnecessarily strict "fresh evidence" test.

(c) the identification evidence and submissions regarding the identification procedures conducted with and the identification evidence of, Mr Wallace and Ms McNeilly.

(d) my assessment of other evidential issues, including:

i) [...]'s potential evidence;

ii) The cellmate confession evidence of secret witnesses A and B;

iii) Mr Wallace's "fresh evidence" relating to the location of the mystery ketch; and

iv) The timing of the trip from the Cook Strait to Erie Bay.

(e) the assertions, where relevant, that I made factual errors, including:

i) The time that Mr Watson returned to the *Blade* on New Year's Eve; and

ii) The time the *Blade* arrived at Erie Bay.

(f) the assertion that I incorrectly assessed the impact of the "late introduction of the two trip theory" and the significance of the alleged error by the Court of Appeal in finding that there had been extensive cross examination on the "two trip theory" during the trial.

7. I have also been asked to address the submission made by Mr Watson's legal team that the factual picture is now completely different from what it was at the trial and that "nearly all of the threads [of the case] have been undermined post trial" and "in critical respects the evidence presented to the jury has been shown to have been incorrect and to have been totally misleading".

8. The Ministry also asked me to –

(a) Summarise the main strands of the Crown case as it went to the jury, and comment on the overall strength of that case;

(b) Assess the extent to which new evidence has or has arguably changed the picture, and globally assess the cumulative impact of that evidence on the Crown case;

(c) Comment on the submission that I "overstated" the importance of the DNA evidence, and relied on it to "overrule all other evidential deficiencies on the question of identity"; and

(d) Comment on whether, as a result of the above, there is a reasonable prospect that the Court of Appeal would uphold an appeal if the case were referred back to the Court.

Advice in Response to Submissions on behalf of Mr Watson

(a) Referral warranted on the ground verdict unreasonable and could not be supported having regard to the evidence

9. The submission made on Mr Watson's behalf is that despite my previous advice, the case should be referred back to the Court of Appeal for determination (s 406(a)); so that in the interests of justice generally the case may be comprehensively reviewed for the first time by an appellate court. I cannot accept that submission.

10. As stated in my advice of March 2011 the Court of Appeal was not specifically invited by Mr Watson's counsel to consider whether the verdicts were unreasonable and could not be supported having regard to the evidence because Mr Watson's counsel did not pursue this as a separate ground of appeal. They concluded based on their assessment and knowledge of the case that it was a ground of appeal that had "no prospect of success" and in essence they "accepted" that, on the basis of the evidence at trial it was open to the jury to conclude on the evidence that Mr Watson's guilt had been established beyond reasonable doubt. Instead other grounds of appeal were pursued and they have been discussed in my March 2011 advice.

11. Mr Watson's legal team have suggested this ground of appeal was not pursued as had been intended because the Court of Appeal pressured defence counsel not to pursue it and also because counsel considered that the remaining specific grounds ought to have been sufficient for the appeal to have been allowed; they submitted that the decision not to pursue this ground was in error and that in itself would justify referring the case back to the Court of Appeal.

12. On 22 September 2011 Mr King provided an affidavit from Mr Watson (dated 20 September 2011) addressing this submission. In essence, Mr Watson said it was his understanding that the ground of appeal

(referred to in the initial "Notice of Appeal" filed with the Court of Appeal) stating that the "verdict was unreasonable and could not be supported having regard to the evidence" was the main ground of appeal, and that he did not instruct his counsel to abandon that ground of appeal.

13. On 28 March 2012 Mr King wrote to the Ministry providing further comment on this issue and an affirmation from Mr Watson's trial counsel: Mr Antunovic and Judge Davidson (dated 24 February 2012). That affirmation was provided in response to the Ministry's request for the relevant information, and the criticisms and allegations made by Mr Watson in his affidavit of 20 September 2011. The affirmation refers to the background to the decision not to pursue the ground of appeal relating to the unreasonableness of the verdict and the issue of evidential sufficiency. The affirmation sets out the communications that defence counsel had with Mr Watson and his parents at that time and refers to the instructions they received from Mr Watson at the time of the appeal.

14. It is fair to say that the affirmation is a complete rejection of what Mr Watson said in his affidavit. The affirmation makes it clear that the decision not to pursue this issue was made after advice to Mr Watson and after receiving instructions from him and his father, and against the background of Mr Watson having been provided with copies of counsel's submission at the time of the Appeal. Importantly both defence counsel considered that ground of appeal had no prospects of success. The affirmation of Messrs Antunovic and Davidson states from paragraphs 24 to 30 as follows:

"Abandonment of this ground

24. The ground was included in the original appeal notice dated 14 September 1999 as a "holding" ground.

25. A decision was reached on 1 February 2000 not to pursue this ground. Put simply in our view it had no prospect of success.

26. On 21 March 2000 the written submissions were discussed with Scott Watson in some depth, over a period of 4 hours.

27. On 27 March 2000 copies of the submissions were forwarded to Scott Watson and his parents.

28. On 8 May 2000 copies of the appeal decision were forwarded to Scott Watson and his parents.

29. At no stage was Scott Watson asked to sign any formal notice abandoning this ground, nor was he asked to sign some such instruction to us. However, from 21 March 2000 onwards he was aware that it was intended that such ground would not be pursued. His parents were aware soon after.

30. At no stage between March 2000 and September 2011 was it ever suggested that Scott Watson, or his parents, were unaware that the ground was to be abandoned."

15. The ground relating to unreasonableness of verdict and evidential sufficiency was referred to in the formal appeal notice and, as noted by Mr Antunovic and Judge Davidson is a ground that is routinely included in the initial Notice of Appeal form filed in most criminal appeals and it is often not pursued. They said it was included as a holding position to allow detailed consideration to be given to specific grounds that might better be advanced on the appeal. Defence counsel set out in detail in their affirmation the steps taken in consultation with Mr Watson to identify the specific grounds of appeal that would be relied on.

16. In any event, I note that counsel did make a general submission on appeal that the case was a finely balanced one, where the evidence could not be said to be overwhelming or unanswerable. I note also that the full factual background was set out clearly by defence counsel in support of the submission that the case was a finely balanced one. The specific grounds that were advanced were presented to the court against that background. The Court of Appeal was well placed to assess evidential sufficiency in that context.

17. As stated in paragraphs 3.41 and 3.42 of my March 2011 advice, 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, 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. There is no evidence that I am aware of to suggest the Court of Appeal pressured counsel to abandon this ground of appeal.

18. 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."

19. No doubt in an attempt to meet the response from then defence counsel, Mr Watson's legal team submitted that if a referral of this ground of appeal was allowed now, the Court of Appeal would be asked to assess this ground of appeal in light of the strands of the Crown case having "become very eroded" especially as regards the crucial identification evidence as well as in other respects, including the thoroughly discreditable "cellmate confessions".

20. I have already dealt with the manner in which the Court of Appeal approached their consideration of this matter when it came before that Court in April 2000 and concluded that the claimed Court of Appeal errors are not justified or of significance to the extent that an appeal should be reheard. No fresh matters of significance have been

advanced since that time. As with the initial submissions made in this application the issues now fall to be assessed by a consideration of the strength of the various arguments made in relation to the particular evidential matters now relied on in support of Mr Watson's application. I have addressed those in my earlier advice, and to the extent required, I cover them again below in this supplementary advice. The submissions that have been filed now by Mr Watson's legal team are really a refinement of the arguments previously advanced with some additional submissions rather than the identification of additional or fresh evidence.

(b) Application of unnecessarily strict "fresh evidence" test

21. Mr Watson's legal team submitted that my advice is too narrowly focused and gives insufficient weight to factors which could well be expected to have resulted in a completely different outcome had they been known to the jury. They suggest that I have confined my analysis to an assessment of "fresh evidence" in accordance with the Ministry's instructions and not on the wider perspective of miscarriage of justice; that I have failed to apply the qualification to the fresh evidence principle, namely "if it is strong and demonstrates a real risk of miscarriage of justice, the requirement it be fresh is of [less] importance".

22. I do not agree. I have dealt with the appropriate test to be applied when considering applications for the Royal prerogative of mercy in some detail at paragraphs 2.7 to 2.13 of my previous advice.

23. Mr Watson's legal team have suggested that I failed to refer to the decision of *R v McDonald* and the "qualification to the fresh evidence principle" where the Court stated "if it is strong and demonstrates a real risk of miscarriage of justice the requirement it be fresh is of little importance". That submission is incorrect. I referred to *R v McDonald* in paragraph 2.7 of my advice and I had regard to it when I considered

the cogency element of the traditional test for "fresh evidence".

24. 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 as now seems to be suggested by Mr Watson's advisers. That was not the task I was asked to undertake. 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.

25. As I understand it, the Ministry in its own advice to the Minister, will comment generally on the principles to be applied when considering an application for the Royal prerogative of mercy. The Ministry's advice will address the broader criticism that consideration of Mr Watson's application has been too narrowly focused. I emphasise at this point that my instructions from the Ministry were to assess the issue of fresh evidence. I was not asked to embark upon a more wide ranging inquiry as to overall miscarriage. It is important that that distinction is understood.

26. It is suggested at paragraph 31 of Mr King's August submission that "fresh evidence" should not be the sole focus of the Ministry's consideration of Mr Watson's application. That is an issue the Ministry will need to address.

(c) Identification evidence of Mr Wallace and Ms McNeilly

27. Mr Watson's legal team has submitted that the new identification evidence of Mr Wallace and Ms McNeilly cannot be discounted in the way I suggested in my advice of March 2011. It is submitted that had that evidence been before the jury Mr Watson would not have been convicted.

28. I have dealt extensively with these issues in my previous advice. There is little further comment I can make. Mr Watson's legal team's submissions are a reiteration of what was previously submitted on behalf of Mr Watson and I consider that I have already addressed this matter extensively and as best I can. I noted in my earlier advice and I repeat again, that as the Court of Appeal noted, while it is beyond question that the case against Mr Watson depended substantially on the visual identifications, that was 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.

29. Against that background the evidence of Mr Wallace and to a lesser extent Ms McNeilly was 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 said the man in the dock (Mr Watson) was not the man in the bar and in his water taxi. Ms McNeilly maintains that had she been shown the *Mina Cornelia* photograph which depicted Mr Watson earlier on the 31 December 1997 she would not have picked out photo three in photo montage B as the man she served in the bar.

30. I have interviewed both witnesses and assessed their evidence against other evidence given at trial, including against their own evidence given at that time. I have concluded, that when 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".

31. Both Mr Wallace and Ms McNeilly sincerely 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.

32. Further, for the reasons previously stated, I do not consider that Mr Wallace's dock identification evidence is fresh evidence. As I said in my previous advice (at paragraph 11) "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 at all, 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 that he would now give (some twelve years later) meets the test for fresh evidence. The evidence does not significantly alter the identification evidence which he gave at trial (which was fully tested so 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".

33. I have concluded previously, that while it might be said the Crown should not have relied on an inherently unreliable witness in Mr Wallace, who was always uncertain about his identification of Mr Watson and the defence, for its part, could have been more rigorous in testing that evidence, that is a view reached with the benefit of hindsight and I do not consider those matters to be of material significance when considered in the context of all of the evidence that was presented in this case. Defence counsel were experienced and well

placed to make assessments about how particular witnesses may react when questioned and what impact certain aspects of the evidence may have had at that time and in the context of other evidence.

(d) Police identification procedures

34. There are further submissions made in relation to the improper Police practices with the identification procedures used in the initial stages of the investigation.

35. The submission in relation to this issue concerns the manner in which the Police made use of photographic images in their interviewing of Mr Wallace and Ms McNeilly and concerns held about the adequacy of the disclosure about these matters prior to trial.

36. In letters dated 17 May 2012 and 2 December 2012 Mr Watson's counsel identify the following identification procedures, which they claim were not conducted in accordance with proper practice, and in respect of which proper records were not kept:

    i. Mr Wallace being shown a single photo of Mr Watson on 9 January 1998;
    ii. Mr Wallace being shown a photo montage containing a photo of Mr Watson on 11 January 1998; and
    iii. Ms McNeilly being shown a photo montage containing a photo of Mr Watson on 11 January 1998.

37. I have discussed these issues in my previous advice. I interviewed Mr Wallace and Ms McNeilly about these matters. During my interview with Mr Wallace about his affidavit of 1 May 2000 which in the main related to his account of being shown various photographs and montages and his confirmation as to whether he had retracted his "identification" of Mr Watson, Mr Wallace told me that he did not consider he had ever identified Mr Watson as the mystery man at all. In

my interview with him Mr Wallace did not seek to alter any of the evidence he gave at depositions or trial as to the various descriptions of the man in question. The only matter he took issue with in relation to these matters was the accuracy of the Police Identikit Sketch he assisted with which he said was not accurate.

38. Mr Wallace said in his affidavit that "[he] took three people to a ketch. Scott Watson was not one of them and [he didn't] believe [he'd] ever said he was. [He] ruled out the man in the photo taken that night on the boat next door, the *Mina Cornelia*". On my analysis of the depositions and trial transcripts I accept Mr Wallace did make comments to that effect and it was on that basis that defence counsel were able to submit to the jury and subsequently to the Court of Appeal that Mr Wallace never positively identified Mr Watson as being the mystery man. Viewed in that context and having proper regard to what Mr Wallace said in his evidence, any concerns about possible procedural flaws in the identification process or subsequent disclosure, even if correct, do not have the significance that is now suggested.

39. The Report of the IPCA dated 19 May 2010 is attached to Mr King's August submission. It is said that the Report is relevant to the "identification" issues raised in Mr Watson's application.

40. I referred to this Report in my advice dated March 2011 at paragraphs 4.238 to 4.242. Nothing said now causes me to change the view I expressed in my earlier advice in relation to this matter. As previously indicated, I am not satisfied that the Report is the source of any fresh evidence that might justify a referral of Mr Watson's case to the Court of Appeal.

41. The IPCA found that the construction of the photographic montages and the methods used for presenting the montages to witnesses, and the showing of a single photograph to Mr Wallace "fell short of best practice".

42. The IPCA concluded that the evidence before it supported the contention that in a "major investigation conducted under intense pressure in a very difficult environment and involving a large number of Police officers, mistakes were made and that these were compounded by the actions of others" (media and members of the community who openly discussed the investigation with each other and with reporters); rather than the contention there was a deliberate and systematic attempt to skew the evidence towards a pre-determined outcome as was alleged on behalf of Mr Watson.

43. I have not been privy to all of the evidence and matters considered by the IPCA and I am not in a position to question or challenge the findings of the Authority. Concerns about the adequacy of the Police investigation were matters for the IPCA to consider and do not fall within the ambit of my consideration of this matter. That said, I have considered the Report and the submissions made on behalf of Mr Watson in relation to the "improper identification procedures" to the extent relevant to my consideration of fresh evidence and my overall assessment of the wider miscarriage of justice consideration. As I have said, none of the submissions made alter the view I expressed in my previous advice.

44. Mr Watson's legal team has submitted, or made references to:

a. "tunnel vision" by the Police; in this regard I note the IPCA concluded (paragraph 58) that although there were some deficiencies with the inquiry on the whole Operation Tam was conducted in a reasonable manner and that its leaders remained open-minded throughout;

b. improper identification procedures used by Police in the initial and vital stages of the investigation including the use of montage A, and other such matters; in particular Mr Wallace's

failure to identify Mr Watson when he was first interviewed on 11 January 1998 and when he was apparently shown a photograph of Mr Watson - there is apparently no Police record of this in the relevant job sheet for the interview or any other Police disclosure about this. Mr Watson's legal team submitted that this "negative identification" by Mr Wallace would have been cogent and relevant evidence for the defence case and could have been called had the Police not failed to disclose information about it.

45. All of these matters are alleged to have "led to a miscarriage of justice". Reference is made to a recent decision of the UK Supreme Court regarding failure to disclose relevant material (*Fraser*). I have considered that decision in light of Mr King's comments. I note that case was fact specific but to the extent statements of principle are made in that decision and the case of *McInnes* (also referred to), I am satisfied the approach I have taken to my assessment of matters is in line with those authorities. In essence, the court in *McInnes* said that when assessing the consequences of non-disclosure in the context of a submission of miscarriage of justice, the question is whether there is a real possibility the jury would have arrived at a different verdict if the withheld material had been disclosed. That is precisely the approach I have adopted here assuming there was a failure to disclose information (which is not clearly established). As I said above, when considered in the context of the evidence that was in fact given at trial and in particular having proper regard to what Mr Wallace said in his evidence, and the position taken by defence counsel, any concerns about possible procedural flaws in the identification process or subsequent disclosure, even if correct, do not have the significance that is now suggested. I do not consider there is a real possibility a jury would have arrived at a different verdict if the material said to have been withheld (if that is correct) had been disclosed.

46. Mr Watson's legal team has submitted that Mr Wallace's purported

identification evidence was the central strand of the Crown case and without it, the case was at an end.

47. Again, I have dealt with these issues previously and I have reflected further on them in light of the way in which Mr Watson's legal team have made their submissions. Nothing submitted now leads me to alter my view. 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.

(e) Assessment of other evidential issues

Timing of Mr Watson's Return to Blade

48. This submission relates to the evidence about the timing of Mr Watson's return to *Blade*. Mr Watson's legal team has suggested that I have misunderstood the evidence about that issue. On the contrary, with respect, it is Mr Watson's legal team which appears to have overlooked part of my earlier advice.

49. Mr Watson's legal team claim that I have not taken into account evidence that "demonstrated that Mr Watson did not return to his boat until sometime after 3:15am", and refer to the following passage from my advice (paragraph 3.6): "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".

50. In paragraph 3.6 I simply refer to the position taken by Mr Watson's counsel at the time of trial. Subsequently in my advice (at paragraph 3.16 and following) I refer to the evidence which suggested Mr Watson went to a vessel (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.

Arrival of Blade *in Erie Bay*

51. Mr Watson's legal team has submitted that I have "understated" the position regarding the time of arrival of *Blade* at Erie Bay; they state that two witnesses (not just one) provided a time of arrival shortly after 5 pm (the caretaker and his daughter), along with another witness "who was familiar with *Blade* and who had previously seen both Mr Watson and his boat that day."

52. The assertions made by Mr Watson's advisers overlook the fact that I have dealt extensively with this issue at paragraphs 4.194 to 4.204 of my previous advice. They have selectively referred only to a portion of my advice which summarises aspects of the evidence without reference to the later discussion of the detailed evidence about this topic.

53. A I said in my previous advice, I am not satisfied the matters raised in respect of timing are "fresh". The issue relating to the timing of the alleged trip by *Blade* from Cook Strait to Erie Bay on 1 January 1998 was raised by the Defence both in evidence and submissions at trial, and in the Court of Appeal. It was also dealt with in Mr Watson's application to the Privy Council.

54. The new evidence relating to reconstruction of timing is said to be conclusive on the issue of whether it would have been possible for Mr

Watson to have made the journey as it was alleged in the time available.

55. I have discussed that issue previously and as indicated in my earlier advice, my opinion on this issue is that the reconstruction evidence which has been submitted in support of this application is unlikely to be admissible in the Court of Appeal. If I am wrong about that and it was admitted, I do not accept it would have the relevance and probative value suggested by Mr Watson's advisers unless the Court could be satisfied that all of the conditions (wind, tides etc) which applied on 1 January 1998 had been replicated at the time of the reconstructed trip on *Blade*. The applicant has not sought to provide that level of assurance as to conditions and nor do I believe that could now be done.

Conclusion in respect of Blade *timing issues*

56. Mr Watson's legal team asserts that I made factual errors in relation to the time that Mr Watson returned to *Blade* on New Year's Eve; and the time the *Blade* arrived at Erie Bay. I do not accept that I have made factual errors as suggested. The evidence at trial on these matters was conflicting. Even if Mr Watson's legal team's assessment of the evidence is correct which I do not accept, I do not consider anything turns on these claimed errors. I am satisfied the jury was well placed to consider and give appropriate weight to the conflicting evidence before it at trial.

Potential evidence of [...]

57. On 2 September 2005 [...], swore two affidavits relating to the issue of the hatch scratches and in relation to a missing squab cover and piece of foam from one of the squabs in the saloon. It is submitted that the affidavits contain "fresh evidence" on this issue.

58. I have dealt with this issue and the position regarding Ms Watson's affidavit evidence in my previous advice. In summary I concluded that Ms Watson's evidence about these issues was not fresh, it was known at the time of the trial and defence counsel made a considered decision not to rely on Ms Watson as a witness. Further, there was some evidence at trial about some of these issues in any event as a former girlfriend of Mr Watson gave evidence that Mr Watson had told her that [...] had made the scratches while the hatch cover had been open.

59. It is said by Mr Watson's advisers that I inappropriately dismissed Ms Watson's evidence as not credible and ignored the fact this was a circumstantial case (and therefore that it is appropriate that the defence present an entirely innocent explanation for the hatch scratches which is properly available).

60. Again, there is little more I can say about this issue. I have dealt with it at paragraphs 4.221 to 4.226 of my previous advice. As indicated then, it does not satisfy the test for fresh evidence. The evidence was available at the time of trial and a conscious decision was made by defence counsel (after discussion with Mr Watson and his father) not to call that evidence because they did not consider that was necessary given the other evidence about this issue and because they felt there were risks in calling that evidence. Significantly, the defence position taken at trial was that the scratch markings could not have been made with the hatch cover closed (a position supported by the scientific evidence), accordingly, any evidence that Ms Watson might give about the issue was not considered by counsel to be of significance. Against that background and when this issue is considered in light of the other evidence, I am not satisfied it is of sufficient credibility or cogency to raise a real doubt about the safety of Mr Watson's convictions.

61. Further, I note that the comments of the Supreme Court in *R v*

Sungsuwan [2006] 1 NZLR 730 (SC) where the Court said that a claim of miscarriage of justice will not normally succeed on the basis that complaint is made of trial counsel's tactics if the actions taken are seen as reasonable in the circumstances. I note the Court's observation that there will be rare cases where counsel's conduct, even though reasonable may nevertheless give rise to an irregularity that might prejudice a client's chance of acquittal.

62. I do not consider that this situation fits into one of that rare class of case described by the Court in *Sungsuwan*. I set out below the relevant extract from that decision.

> [66]There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some cases the accused will have agreed or acquiesced — only to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.
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> [67] But there will be cases, rare cases, as was recognised in Pointon, where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown to have given rise to an irregularity in the trial that prejudiced the accused's chance of acquittal (or conviction of a lesser offence) such that the appeal court is satisfied there was a miscarriage of justice. The court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice however caused.
>
> [68] Often these cases will be able to be analysed without examining the quality of counsel's conduct. For example, where the effect was that vital evidence was not placed before the jury it might be appropriate to enquire directly whether that gave rise to a miscarriage of justice, although that will need to be considered in light of principles governing the admission of further evidence on appeal, including any explanation for its absence from the trial.

Cellmate confessions

63. Mr Watson's legal team has submitted that I gave "insufficient weight" to the deficiencies in the cellmate confession evidence, in particular:

(i) that I should have drawn a stronger adverse inference against Secret Witness A because he failed to meet with me and;

(ii) that the jury could not have known the unreliability of Witness A at the time of trial.

64. I do not accept that submission. Secret Witness A's reliability and credibility was extensively challenged by defence counsel at trial. I referred to this in my previous advice. For example, Secret Witness A was challenged about whether he had been in a cell with Mr Watson for the length of time he claimed; and the fact that he had a psychiatric history and that he had changed his story about certain matters.

65. The critical point, in my view, as to the significance or otherwise of Witness A's failure to meet and discuss his trial evidence with me is that as things stand, there is **no** retraction of the evidence which Secret Witness A gave at trial—contrary to Mr Watson's contention in his application that there has been a retraction.

66. Mr Watson's legal team has submitted that Mr Watson has provided evidence that contradicts the evidence of Secret Witness B. As I understand it, Mr Watson's legal team is referring to the affidavit of [...] which I referred to and discussed in some detail in my previous advice.

67. I discussed the serious credibility issues with Secret Witness B (as there were with Secret Witness A) and concluded that having considered all relevant material, while it is not possible to determine precisely what weight the jury attached to the evidence of these prisoners I am satisfied that had Secret Witnesses A and B not given evidence it cannot be fairly said the jury would have likely reached a different verdict in view of all of the other strands of evidence including the DNA evidence.

68. Mr Watson's legal team has referred to Privy Council case law (*Benedetto & Labrador*) and the Canadian approach to cellmate confession evidence and has submitted that nowhere is the risk of a

wrongful conviction higher than where the State relies on evidence of a cellmate confession.

69. I note that many of the factors Mr Watson's legal team discusses in its submissions are matters which were the subject of cross examination by the defence at trial (for example, whether the witness was motivated by the prospect of a reward; inmates having time on their hands to plan their story; suppression orders indicating "officialdom" believes the evidence). These were matters that were appropriately canvassed in front of the jury.

(f) Assessment of impact of "late introduction of the two trip theory"

70. Mr Watson's legal team submits that my "unqualified" statement that nothing turns on the Crown's late introduction of the two trip theory (which they have submitted was "rubber stamped by the Court of Appeal") is "wholly wrong". They say the quality of the result of the trial was severely questionable as a result of the defence having been denied the opportunity to test the evidence on this theory which was introduced late.

71. As I said in my previous advice, I am not persuaded this issue has the significance Mr Watson's legal team attributes to it. I do not consider I need to elaborate further given that I have already dealt with this issue fully in my earlier advice (for example at pages 37 to 39).

72. I have considered Mr Watson's submissions on this issue. They are matters of opinion and submission on issues which have, in the main, already been addressed on appeal. They are not new matters.

(g) Importance of the DNA evidence

73. In relation to the DNA evidence, Mr Watson's legal team suggest that I overstated the importance of this evidence. I do not accept that

criticism.

74. Mr Watson's legal team has submitted that the DNA evidence should not be elevated to a "cure-all" to the deficiencies in the Wallace identification evidence and further this is a matter for a properly constituted appellate Court to assess in the context of a full appeal.

75. As it stands the DNA evidence seems to be clear and unimpeachable. As I stated in my advice of March 2011, on one view the DNA evidence strengthens the identification evidence given at trial by Mr Wallace and also Ms McNeilly, regardless of what they now say about their identification or otherwise of Mr Watson. Further, when I interviewed Mr Wallace and Ms McNeilly they did not retract, and to the best of my knowledge they have never retracted, their trial evidence as to the descriptions of the "mystery man".

76. No fresh evidence has been provided in relation to this issue. The submissions made regarding the possibility of contamination were made to the Court of Appeal and the Privy Council. Those Courts considered the submissions about the reliability of that evidence and rejected them. The Court of Appeal said it was satisfied there was no new evidence that would throw doubt on the reliability or accuracy of the DNA testing results. Nothing has been presented to me since that time which changes that position.

77. The IPCA noted in its Report that there was no evidence Police deliberately contaminated the evidence and no evidence of secondary transfer of evidence having occurred; and that such matters could have been advanced at trial if there was any evidential foundation to them. In relation to the laboratory scientists at ESR the IPCA recorded there is no evidence that laboratory scientists deliberately or accidentally contaminated the exhibits or any suggestion as to how contamination could have occurred (para 183-184 IPCA Report).

78. Regardless of the current "state" of the other circumstantial evidence, in my view the reality is that on the current evidence there is still a clear forensic link (DNA/hairs) between Scott Watson and Ms Hope and by implication Mr Smart.

Summary of main strands of Crown case and assessment of strength of that case.

79. I have been asked to summarise the main strands of the Crown case and comment on the overall strength of that case. I have dealt extensively with this issue in my earlier advice, accordingly I will set out only a summary of the key issues that have been raised in the additional submissions filed on behalf of Mr Watson and that I have considered as part of this supplementary advice.

Identification evidence

80. Undeniably an important aspect of this case concerned 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. Mr Wallace's identification evidence has been a primary focus of the submissions made on behalf of Mr Watson in support of his application. It follows that that evidence and those submissions have also been a central part of my assessment of this matter. That said, and as noted on more than one occasion, while it is beyond question that the case against Mr Watson depended substantially on the correctness of the identification evidence, the visual identifications were but part of the overall evidence relied upon by the Crown as establishing the guilt of Mr Watson. As the Court of Appeal noted, that visual identification may be supported (or weakened) by other evidence.

81. As far as the identification evidence given by Mr Wallace and Ms McNeilly is concerned, 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.

Impact of "new" identification evidence

82. As stated previously, 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 Mr Wallace and Ms McNeilly and assessed their evidence against other evidence given at trial, including against their own evidence given at that time. I have concluded, that assessed in the context of all of the other evidence, the new information Mr Wallace and Ms McNeilly have provided now some twelve years after the event 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". Notwithstanding that the Crown submitted that Mr Wallace had identified Mr Watson, the defence argued that was not the case. Mr Wallace was always uncertain about his identification of Mr Watson and it was that lack of certainty that allowed the defence to submit to the jury that he had not in fact made a positive identification.

83. As I have said previously both Mr Wallace and Ms McNeilly impressed me as genuine in their belief that what they now say is of importance. They both believe their evidence at trial was crucial in leading to the conviction of Mr Watson. While 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.

84. Trial defence counsel said when interviewed that they had made a tactical decision not to invite Mr Wallace to make a dock identification. That was a deliberate and calculated decision made because they were unsure how he would respond. Asking Mr Wallace to make a dock identification carried significant risk for the defence. 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.

Forensic Examination

85. *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 ([...]) 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.

86. 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.

87. No credible attack has been made on the reliability of the DNA evidence and, to the extent that there have been submissions or issues raised about it, those matters have all been dealt with fully previously as I discuss in my early advice. There is no new evidence raised in relation to the forensic analysis.

Ketch sightings

88. 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. In relation to the evidence given by Mr Wallace that the yacht the three people (Ms Hope, Mr Smart and the mystery man) boarded was a ketch (two masted) with characteristics that did not match *Blade*, 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 for its part 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. All of this material was before the jury.

89. I have considered the material submitted in relation to apparent additional ketch sightings. None of that material amounts to fresh evidence in my view. It is discussed in detail in my previous advice. In the end, that information was available at the time of the first trial. Defence counsel made a decision about what and how much evidence of that type to place before the jury. I note that there was a substantial amount of evidence before the jury relating to ketch sightings, much of it led by the defence.

Cellmate confessions

90. When Mr Watson was in custody at Addington prison following his arrest he allegedly made statements to two inmates (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 was said to have given a graphic description and demonstration of how Ms Hope 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 a desire to kill a woman, and again in November 1997 he had spoken of a desire to kill people. As indicated in my previous advice I did not consider this evidence to be of great significance. While it is not possible to determine what weight the jury might have attached to the evidence given by the prison witnesses I am satisfied that had these witnesses not given evidence 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.

Assessment of extent to which new evidence has altered the picture and global assessment of cumulative impact of that evidence on Crown case

91. Counsel for Mr Watson have submitted that despite my advice to the Ministry on the freshness of the new evidence nearly all the threads of the Crown's circumstantial case have been undermined post trial; that the evidence of key identification witnesses has been undermined and that if the trial was held again it would look wholly different to the 1999 trial. It is submitted that the essential strands of the Crown case have been removed and what remains no longer supports the submission of Mr Watson's guilt. In effect, the submission is that regardless of whether the matters referred to in support of Mr Watson's application satisfy the test for fresh evidence, there should none the less be a referral back to the Court of Appeal under section 406(a) of the Crimes Act 1961.

92. I emphasize again that my instructions are not to express a view on whether there should be a referral under that provision but rather to assist the Ministry, who will advise on that issue, by commenting on whether the matters the subject of consideration are, in my view "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.

93. As part of my consideration of the cogency element of the traditional test for "fresh evidence" I have had regard to the decision in *R v McDonald* and the "qualification to the fresh evidence principle" where the Court stated "if it is strong and demonstrates a real risk of

miscarriage of justice the requirement it be fresh is of little importance". I have also had regard to *R v Bain* [2004] 1 NZLR 638, where the court said:

> "An appellant who wishes the Court to consider evidence not called at the trial must demonstrate that the new evidence is (a) sufficiently fresh, and (b) sufficiently credible. Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice (...) The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled."

94. The case against Mr Watson relied on a number of strands of circumstantial evidence. It is impossible to know what aspects of the evidence the jury viewed as significant. The identification evidence was certainly an important aspect of the case as was the DNA evidence. The submissions made now in relation to the identification evidence given by Mr Wallace and Ms McNeilly do not meet the test for fresh evidence. It was available at the time of the trial. Further, and as I have said previously, when considered in light of what was actually said by these witnesses at the time of the trial and when carefully analysed against the position taken by trial defence counsel, I do not believe what is said now has the significance suggested by Mr Watson's legal team. I have dealt with these matters extensively in this advice and in my March 2011 advice.

95. A key strand of the Crown case remains the DNA evidence relating to the two head hairs found on Mr Watson's yacht. That evidence strongly supports the proposition that the hairs were those of Ms Smart. There have been criticisms of that evidence. The criticisms are not new. There is no fresh evidence about this matter. Accordingly, it remains the position that if the jury accepted that evidence as reliable it can be seen as corroborative evidence linking Mr Watson to Ms Smart.

96. I have considered all the material that has been submitted in support of Mr Watson's application and I am not satisfied that any of that material contains any evidence which could meet the test for fresh evidence. Their submissions are largely a reiteration of matters previously submitted accompanied by a contention that the weighting I have attributed to matters is wrong or that I have failed to appreciate the significance of certain matters (which really amounts to the same submission). I do not accept that view.

97. 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. In my view there is no basis upon which the Court of Appeal should be asked to reconsider its decision on these matters.

Is there a reasonable prospect the Court of Appeal would uphold an appeal if the case was referred back to the Court?

98. I do not consider that any of the new evidence that has been submitted is, taken either singularly or cumulatively, sufficiently fresh, credible and 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.

Kristy P. McDonald QC

March 2013