Hilary Term
[2015] UKPC 9
Privy Council Appeal No 0081 of 2013

JUDGMENT

Pora (Appellant) *v* The Queen (Respondent) (New Zealand)

From the Court of Appeal of New Zealand

before

Lord Kerr
Dame Sian Elias
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT DELIVERED BY LORD KERR ON

3 March 2015

Heard on 4 and 5 November 2014

Appellant
Jonathan Krebs
Ingrid Squire
Malcolm Birdling
Kim McCoy
(Instructed by Alan Taylor and Co)

Respondent
Michael Heron QC
Mathew Downs
Zoe Hamill

(Instructed by Crown Law Office (New Zealand)

LORD KERR:

1. Susan Burdett was raped and murdered in her home in March 1992. In May 1994 the appellant was convicted of both crimes (and of aggravated burglary of Ms Burdett's home) following a jury trial. In 1999 the New Zealand Court of Appeal quashed the convictions and ordered a re-trial. On his re-trial before Williams J and a jury in March 2000 he was again found guilty. The appellant again appealed to the Court of Appeal. That court dismissed the conviction appeal in October 2000. This appeal lies from that decision.

2. Two principal grounds of appeal are advanced on behalf of the appellant. The first is that the confessions which he made concerning his complicity in the crimes (and which the appellant asserts constituted the main evidence against him) have been shown to be unreliable. The second ground is that evidence concerning another man who was convicted of the rape of Ms Burdett should have been admitted at the appellant's trial. This evidence, it is submitted, would have cast considerable doubt on the Crown case that the appellant had been present when Ms Burdett was raped and killed.

The confessions

3. Martha McLoughlin is Teina Pora's cousin. She has claimed that in the week after Ms Burdett's murder the appellant told her that he had discarded a softball bat in a drain near a sports venue called the Manukau Velodrome. According to Ms McLoughlin, Pora told her that the bat was blood-stained. Richard Marcus Bennett, the brother of Pora's girlfriend, gave evidence on the appellant's re-trial. He testified that some days after the murder, he and others, including Teina Pora, had been in the vicinity of the velodrome and that Pora had looked into a culvert and then had pointed out that a bat was visible. Bennett and the others looked into the culvert and saw part of a baseball bat. According to Bennett, Pora said that this could have been the bat which "wasted the lady in Pah Road". Ms Burdett had lived and was murdered in a house in Pah Road.

4. It is at least distinctly possible that the murder weapon was a baseball or softball bat but it has never been possible to identify conclusively a particular bat as the one which was used to inflict the fatal injuries. The only two bats which featured in the evidence as possible candidates for the murder weapon were the bat found in the pipe or drain near the velodrome and a baseball bat which the deceased had kept beside her bed. This baseball bat was found on the deceased's bed after the discovery of her body. Although neither bat could be directly linked to the

murder, the jury on the second trial heard evidence that an implement such as a baseball bat was, as the trial judge directed them, the "kind of thing … consistent with" the injuries that she had suffered.

5. The appellant was interviewed by police twice in 1992. On 7 April 1992 he made a statement to a detective constable that he had seen a baseball bat in a concrete pipe. Nothing further of significance emerged at that interview. Pora was interviewed again on 28 May 1992. He denied having made the remarks to his cousin or to Bennett which they had recounted to police.

6. On 18 March 1993 the appellant, then aged 17, was arrested in relation to a vehicle which had been stolen. After having been questioned about this, he told one of the interviewing detectives that "mobsters" had been looking for him and that he was scared of them. He then asked whether the police had apprehended anyone for the murder of Ms Burdett. When he was told that they had not, he said that he knew who had committed the crime. He was then told about a reward for information leading to the conviction of the offenders. He replied that this was "no good" to him as the mobsters would "find out". One of the interviewing officers then told him that, at the discretion of the Solicitor General, an indemnity against prosecution could be available for anyone who was not a principal offender. A form was produced which purported to clarify the circumstances in which such an indemnity might be available and this was explained to the appellant. After an initial failure to comprehend, Pora claimed to have understood it.

7. There then followed a series of interviews which continued over four days during which Pora gave various accounts of his knowledge of and later his involvement in the invasion of Ms Burdett's home, the attack on her, the rape that was perpetrated on her and, eventually, the circumstances in which she was murdered. It is unnecessary to rehearse the content of those interviews at length. Pora's accounts are strewn with inconsistencies, contradictions, implausibility and vagueness. At various times his replies to questions are halting, hesitant, incoherent and bizarre. A few examples will be sufficient to illustrate the nature of his responses.

8. Initially, Pora claimed that he had taken two men whom he identified only as "Dog" and "Hound" to Ms Burdett's home to carry out a burglary. At first he claimed that he did not know their true names. After the burglary, they had returned to his car carrying a baseball bat with blood on it. Soon after he gave this account, Pora accompanied police to a house where he said that Dog and Hound lived. On his return to the police station he said that he had lied about his involvement in the murder. He said that he had gone to Ms Burdett's home but only as a lookout. He did not enter the house. Within a short time of giving this

version, however, he said that he did indeed go into the house and there observed Dog and Hound raping Ms Burdett.

9. During an interview at 2.24pm on the 18 March he said that on the day of the murder he had gone to Superstrike (a ten pin bowling alley where Ms Burdett played regularly). Dog and Hound had come up to him and told him that they were going to follow Ms Burdett's car, with Pora driving the following vehicle. He agreed to do this and drove behind Ms Burdett's car to her home, he said. Despite this and despite the fact that he was an experienced car thief, he was quite unable to describe the car, to identify its make or model or to say whether it was small or large. When he was taken by police on a drive designed to show his route to Ms Burdett's house, he appeared disorientated, unable without assistance to indicate the way to her house and had great difficulty in identifying the house even when he was standing directly outside it.

10. It was on the issue of how entry to the house was obtained, however, that Pora was at his most vague and inconsistent, not only when he accompanied police to the property but also in the accounts given during interview. At first he claimed that he had climbed through a window; then he said that he had waited outside the back door and was admitted to the house by Dog. This complete volte-face occurred within the space of three transcribed lines and two successive questions on the interview record. Later during interview on 18 March he said that all three had climbed through a window. But within moments he said that Hound had gone in through the door. Then he reverted almost immediately to the account that all three had climbed through the window. At 6.18 pm on the same day, when he was at Ms Burdett's home with police officers he suggested that all three of them had climbed through a window by the back door.

11. Pora was also wildly inconsistent about the part that he had played in the events of the evening that Ms Burdett was killed, claiming at times that he did not witness the killing, having been out of the room when it had occurred and at others admitting to having struck Ms Burdett and held her down while she was attacked. These variations are not, in themselves, unduly surprising. Criminals who admit their crimes frequently seek in the first instance to play down their role. But this does not explain why radically different accounts of the parts played by Dog and Hound were given. One consistent feature was that Dog had raped Ms Burdett but, as to Hound's actions, Pora's account differed dramatically and often within a few consecutive sentences of a particular version having been given. He said at various times that Hound had raped Ms Burdett as well as Dog and then at others he insisted that Hound had not done so at all. No discernible reason for these remarkably different versions can be gleaned from the transcript of the interviews.

12. Of course, all these circumstances have to be viewed against the background that there was no evidence whatever (apart from Pora's word) that the two men, whom he referred to for most of the interviews as Dog and Hound, had anything whatever to do with Ms Burdett's rape and murder. Although at first he refused to, or claimed to be unable to, give the true names of the men, Pora later admitted that he knew them as Roy Wong Tung and Gert. In the event, DNA recovered from the body of Ms Burdett was linked to Malcolm Rewa who was subsequently convicted of having raped her; Roy Wong Tung and Gert gave blood samples in order to establish their DNA and, on the basis of the results obtained, were eliminated from the inquiry. Rewa has been found guilty of no fewer than 24 sexual offences against women, many of these bearing strikingly similar characteristics and in most, if not all, he acted alone.

13. At the invitation of the interviewing police officers, Pora drew an outline of the body of Ms Burdett as she lay on the bed during the attack on her. Significantly, this was in a different position from that in which Ms Burdett's body was discovered. Pora had drawn the figure representing Ms Burdett as lying fully on the bed whereas her body was discovered with the lower legs draped over the side of the bed. This is a position in which many of Rewa's victims were placed by him in order to carry out his attack on them.

14. Although the confessions made by Pora contained many internal inconsistencies and cannot in all respects be reconciled with the known facts and although they implicated individuals who, so far as the available evidence can show, had nothing to do with the crimes, the statements that he made constituted a graphic account of the rape and murder of Ms Burdett. It is an account, moreover, which can be shown in some of its material elements to be consistent with the circumstances surrounding the murder. These include the fact that a bat may have been used to inflict the fatal injuries; and that, in search of money, Pora had looked through a "suitcase type bag" which contained "paper". Police had discovered Ms Burdett's briefcase on the bed with its locks disengaged and papers spread across the floor.

15. It was therefore unsurprising that the appellant's confessions were of critical importance in the case presented against him on both his trials and that they played a pivotal part in the dismissal of the appeal against his convictions.

Treatment of the confessions in the earlier proceedings

16. Before his trial in 1994, counsel then acting for Pora challenged the admissibility of his confessions on the grounds that these were obtained in breach of the New Zealand Bill of Rights Act 1990 and that they were the product of unfairness

both because of a promise of immunity and because his relations had been used to extract the statements – his aunt and uncle had been present during later interviews. The challenge under the Bill of Rights Act was abandoned in advance of a hearing before Henry J as to whether the confessions should be admitted. Nothing was raised about any mental impairment that the appellant might have suffered. On 8 March 1994 Henry J ruled that the confessions were admissible. An appeal against this decision was dismissed by the Court of Appeal on 3 June 1994. Again no issue about the mental capacity of the appellant was raised, beyond a suggestion that he had not understood the distinction between the roles of a principal and a secondary party in the commission of an offence as part of a joint enterprise.

17. On his first trial the appellant gave evidence. He denied involvement in the crimes. He was unable to explain satisfactorily why he had confessed to involvement, however. He was duly convicted and sentenced to life imprisonment.

18. After Rewa was convicted of the rape of Ms Burdett (on 17 December 1998, following a second trial), Pora appealed his conviction for the offences of which he had been found guilty. The Court of Appeal (Elias CJ, Keith J and Panckhurst J) allowed the appeal, quashed the convictions and ordered a re-trial. As Panckhurst J (delivering the judgment of the court) observed, the appeal was based on the single ground that, had the evidence of the DNA match to Rewa and his distinctive mode of offending been before the jury, they might not have convicted him on the basis of his confessions. The judge commented that Pora had been "bereft of an explanation" as to why he had confessed. He also referred to the competing arguments on the reliability of the confessions. In short summary, these were, on behalf of Pora, that the confessions were deficient in compelling detail and that such detail as they did contain was in the public domain, while on behalf of the Crown it was contended that certain details could only have been given by someone who had been involved in the crimes. The Court of Appeal considered that it was better not to express a view on these competing arguments in light of the fact that it had decided to quash the convictions because it could not be assumed that the appellant's confessions would be accepted by a jury "with knowledge of the Rewa dimension".

19. Significantly, the Court of Appeal considered that the Crown case had been based solely on the appellant's confessions. Noting the fact that the possibility of falsely confessing to serious criminal offending was now well recognised, it considered that the convictions should be quashed. In so holding the court referred to the appellant's immaturity at the time that he confessed to the crimes and his marked lack of literacy skills. There was no reference to any other form of mental impairment of the appellant.

20. Pora's second trial began on 20 March 2000. Again, the Crown case relied heavily on the confessions which he had made. Evidence was also given of an association between Rewa and Pora. In particular Martha McLoughlin said that she had seen them together on three occasions, including a few days before the murder. Another witness, Mark Shepherd, also claimed to have seen Pora and Rewa together on three occasions. The appellant did not give evidence on the second trial and no evidence was adduced, therefore, as to how or why he came to make the confession statements. He was again convicted.

21. The second appeal against conviction was based on two principal grounds. First that the trial judge was wrong to have prevented counsel from cross examining about erectile dysfunction that Rewa suffered from, which, it was suggested, would have thrown into doubt the Crown's theory that Pora and Rewa had acted in concert. Secondly, it was claimed that the trial judge had erred in permitting the Crown to recall a witness. The Court of Appeal rejected both arguments. The question of the reliability of the appellant's confessions does not appear to have featured to any significant extent on the appeal. Certainly, no question was raised about any mental impairment on the part of Pora that might have explained how he had come to make the confessions.

The new evidence

22. The appellant applied to introduce ten items of new evidence. These consisted of (i) a number of affidavits from medical and clinical witnesses, Professor Gisli Gudjonsson, a clinical and forensic psychologist, Valerie McGinn, a clinical neuropsychologist and Andrew Immelman, a consultant psychiatrist; (ii) affidavits from the appellant; (iii) affidavits from police officers who had been involved in the investigation of Ms Burdett's murder; (iv) an affidavit from a private investigator; (v) an affidavit from Pora's former counsel; and (vi) an affidavit from Professor Glynn Owens on the subject of whether Rewa was likely to have acted alone in the rape of Ms Burdett. The Board considered these materials in the course of the hearing of the appeal *de bene esse* without deciding whether they should be admitted.

Professor Gudjonsson

23. Professor Gudjonsson was asked by the appellant's solicitors to consider the reliability of confessions made by Pora to police and to some of his relatives; and to evaluate any other matters that he thought relevant, including the appellant's performance in the witness box and any possible disadvantage that he might have had at trial. This was a wide-ranging brief and Professor Gudjonsson undertook a commensurately all-embracing review of all aspects of

the case which included interviews and psychometric testing of the appellant, review of video recordings of the crime scene, crime scene reconstruction, police interrogation, witness statements, and the results of intellectual and neuropsychological tests, which he had asked to be undertaken. He also prepared an extensive appendix consisting of "extracts from time line, questions and answers in police interviews during Mr Pora's period in police custody, and observations (comments)".

24. Professor Gudjonsson can certainly not be faulted for any lack of thoroughness in his approach to the preparation of his evidence. But the Board would wish to make three general observations about that approach before commenting on some particular aspects of his reports and appendix. It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor Gudjonsson trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable.

25. The Board has reached this conclusion notwithstanding the provisions of section 25 of the Evidence Act 2006 and the submission that the common law of New Zealand before the passing of the Act broadly mirrored those provisions. Section 25 provides:

> "(1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
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> (2) An opinion by an expert is not inadmissible simply because it is about—

> (a) an ultimate issue to be determined in a proceeding; or
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> (b) a matter of common knowledge."

26. It was submitted that section 25(2)(a) had abolished the common law rule that forbade evidence being given as to the ultimate issue. The Board does not accept that proposition. The rule may have been modified by the 2006 Act but it still has a part to play in the decision as to whether particular species of expert evidence is admissible. As Andrews J observed in *R v Phillips HC* Rotorua CRI-2007-070-1765 at para 30:

> "[W]hile section 25(2) of the Evidence Act does not make evidence as to the 'ultimate issue' (that is, one that is to be determined by the jury) inadmissible on those grounds alone, it does not make such evidence admissible. Admissibility must still be determined."

27. The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter but this is not one of them. It appears to the Board that, in general, an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact. As observed above, Professor Gudjonsson could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination as to whether the admissions could be relied upon as a basis for a finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable. In this way it would be possible to keep faith with and preserve the essential independence of the jury's role, which is to evaluate all the relevant evidence, including both expert evidence and other evidence which the expert may have no special qualification to evaluate.

28. The second preliminary observation relates to the professor's comments in the appendix which summarised the interviews of the appellant. At various points these partake of a forensic annotation with the apparent purpose of giving credence to the thesis which Professor Gudjonsson had advanced that the confessions were unreliable. For instance, observations are made about Pora's difficulties in describing the route that he is supposed to have taken when following Ms Burdett's car and his having to be shown a road map of the area

and about one detective officer's apparent scepticism of the appellant's account. Likewise, in his first report of 25 June 2012, Professor Gudjonsson conducts an extensive forensic review of the evidence assembled by police in the course of their investigations and refers to a number of matters which have no direct relevance to the question which it was legitimate for him to address, *viz* whether Pora was someone who might make a false confession because of some personality or psychological disorder. To take but two examples, he refers to Martha McLaughlin's mother contacting the police about Mr Pora's possible involvement in the murder and her later having admitted that she had falsely implicated him. He also refers to a detective having "dismissed Mr Pora as a suspect, citing false information and conspiracy by Mr Pora's aunties to implicate him." The Board considers that it is inappropriate for an expert witness to engage in this type of exercise.

29. The third and final preliminary observation relates to Professor Gudjonsson's reliance on the affidavits of Pora. As the Board will explain, these are not admissible as items of fresh evidence. In so far as his evidence and opinions rely on these affidavits they may not be admitted.

30. Professor Gudjonsson provided three reports in all. The second dealt with the Crown's submissions about the relevance and admissibility of his evidence. This is, at least, an unusual report, dealing as it does with legal issues and citing his experience in earlier appeals. Whatever may be the propriety of obtaining such a report, the Board is entirely satisfied that it could not begin to satisfy the test for admissibility of fresh evidence and it is therefore unnecessary to say anything further about it. The third report commented on Dr McGinn's and Dr Immelman's reports. It is not necessary to refer to it and the Board will concentrate, therefore, on the report of 25 June 2012.

31. Professor Gudjonsson's first report ranged over a great many fields and subjects. He reviewed the evidence in painstaking detail; he considered at length various psychiatric and psychological reports prepared for the purpose of the proceedings and for consideration of Pora's eligibility for parole; he analysed in great detail the reports of Professor Glyn Owens (who had administered tests to evaluate Pora's current intellectual functioning) and Dr Anthony Morrison (who had carried out a full neuropsychological assessment); and he discussed at length the interview that he had had with Pora and the results of the psychological tests which he had conducted. For reasons that will appear, it is not necessary to rehearse his findings on these many subjects at length.

32. The professor stated his overall conclusions in a series of paragraphs at the end of his report. The Board need only refer to two of these. They were:

> "1. I am in no doubt that Mr Pora's self-incriminating admissions to police in March 1993 … are, beyond reasonable doubt, unreliable due to Mr Pora's psychological vulnerabilities at the time he was interviewed and taken to the crime scene. His admissions whilst in prison in 1995 are similarly inherently unreliable. In fact, having evaluated Mr Pora and studied his interviews and self-incriminating admissions very carefully, I have no confidence in the self-incriminating admissions he made about his alleged witnessing and participation in the rape and murder of Ms Burdett. These confessions are fundamentally flawed and unsafe."
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> and
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> "7. In order to attempt to achieve his objective of receiving the reward money, combined with his apparently impaired personal and social decision making and insensitivity to future consequences of his behaviour, Mr Pora became entangled in a web of lies, which clearly was of major concern to the investigating officers who in the video recorded interviews kept emphasising the need to give a truthful account. He was repeatedly caught lying, which he could not get out of by telling the real truth if he was to maintain his story about having witnessed the murder and rape and hoping to receive the reward money. The longer he went on lying to police, the more difficult it would have been for him to own up to his having no useful knowledge about the crime whatsoever and having completely wasted the time of the officers who had been kind to him and whom he was trying to please and impress. …"

33. For the reasons given at paras 25-27 above, the Board considers that Professor Gudjonsson's expression of certitude as to the unreliability of Pora's confession was inappropriate. A report containing such a statement cannot be admitted as an item of fresh evidence. So too the professor's forensic analysis of the various materials referred to earlier. That evidence would not be admissible on trial. Inevitably, therefore, it could not be right to admit it in evidence on appeal.

34. It might be suggested that the professor's report could be "filleted" in order to isolate those parts of it which comprise objective accounts of the results of tests or which could be regarded as properly falling within the legitimate expression of opinion. The Board has concluded that such an exercise is not feasible in relation to the evidence of Professor Gudjonsson. His conclusions depend on his overall consideration of the various aspects of the case that he has examined and

the contribution which each of those has made to his decision cannot be safely identified. It is not possible to segregate those parts which are unobjectionable from passages which are not. The Board has concluded, therefore, that Professor Gudjonsson's evidence cannot be admitted.

Dr McGinn

35. Dr Valerie McGinn is a clinical neuropsychologist based in Auckland. She and Dr Immelman were asked by the appellant's lawyers to "conduct an investigation into whether Mr Pora has a neurodevelopmental disability and if so the nature of that disability". Dr McGinn's role was to carry out a neuropsychological examination while Dr Immelman was to undertake a psychiatric evaluation.

36. Having taken a history from Pora's father, Cedric Rangi, and his aunt, Matekino Matengi, about the appellant's mother's drinking habits during her pregnancy with Pora and having conducted an interview with him and administered tests to establish whether he suffered from foetal alcohol spectrum disorder (FASD) Dr McGinn concluded that he Mr Pora fulfils the diagnostic criteria of an alcohol related neurodevelopmental disorder (ARNO) also known as static encephalopathy (alcohol exposed).

37. On the basis of this diagnosis, Dr McGinn reached a number of highly important conclusions. In the Board's estimation the most significant of these were:

> (i) "The higher thought processes of judgment, reasoning, planning and organising, as well as adjusting to changing situational demands are important in regulating behaviour and behaving appropriately. These executive functions are required to plan and think through to the consequences of one's actions and realise the effects of these on others. These are the last cognitions to fully develop in the teenage brain and are known to be significantly affected by serious neurological insult including prenatal alcohol exposure. Deficits can be reflected in poorly regulated and egocentric behaviour. As a teenager Mr Pora certainly seemed to display these characteristics from the information available. On testing he showed significant deficits in most aspects of executive brain function."
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> (ii) "Despite not presenting as impulsive during the assessment, Mr Pora made a high number of impulsive errors on a task sensitive to this tendency, the D-KEFS Colour Word Interference task. He was required to firstly name coloured squares (red blue

and green) and then read the words of these colours and he did this efficiently and without error. On the Inhibition condition Mr Pora was required to name the colour ink a word was written in, suppressing the more dominant urge to read the word. He did this quickly but with a high rate of errors (seven errors, more errors than 99% of his same age group). When the demands of the task were increased on the more difficult switching condition that required Mr Pora to respond according to two different rules depending on whether the word was presented in a box or not, he slowed down and worked more carefully making fewer impulsive errors. However, he attained a lowest possible score for his efficiency to complete the task, indicating that this was a challenging demand for him to switch attention and inhibit responses. In everyday life these results indicate that Mr Pora has deficits of regulatory control and this is a common feature in those with FASD who struggle to regulate their moods and actions. When placed in a complex situation Mr Pora is likely to show a tendency to act impulsively with reduced capacity to think through to consequences.

In terms of his FASD diagnosis, Mr Pora has significant impairments of executive function including impaired reasoning, literal and limited thinking, cognitive rigidity and deficits of regulatory control."

(iii) "Mr Pora's developmental history was, in my opinion, entirely consistent with a child with an undiagnosed FASD. He was clearly alcohol exposed with a low birth weight. He was described consistently as being slow and having difficulty with communicating from a very young age. There was mention made of his immaturity, being easily led and engaging in impulsive behaviours without considering the consequences, all primary neuro-behavioural features of FASD. Children with FASD are known to be vulnerable to being victimised and it seems that Mr Pora was scapegoated and more severely mistreated in his upbringing than other children in the family. With an unrecognised disability, he would inevitably have been set up for school failure and could not have functioned successfully within a mainstream educational programme. Sadly the life course experienced by Mr Pora in his teenage years is all too common in New Zealand where young people with FASD tend to be gullible and readily targeted by gangs and attracted to antisocial activities unless they are closely protected, supervised and provided with pro-social influences. Without his disability diagnosed and recognised, even had there been responsible family members to raise him, they

would not have known how to cater optimally to his special needs."

(iv) "FASD is often described as 'Swiss cheese brain damage', with some processes remaining intact while others are in deficit. It is the variability of function that is typical but can be deceptive with those affected often seeming more capable on the surface than they actually are. Intellect is lowered but not always in the retarded range, even with full FASD. Many adults with FASD function in the Borderline to Low Average range intellectually as Mr Pora does. However, adaptive function is known to be more affected and they are functionally disabled in their everyday life and tend to lack common sense. Mr Pora shows impairment of his daily living skills in the areas of functional academics, community use, self-care, leisure and social function. Conceptual and social domains were impaired while practical skills were strong when living in a well-structured and supported environment."

(v) "Most notable on testing was Mr Pora's impairments of executive functioning. He showed no capacity for abstract thought, interpreted sayings entirely literally and could not appreciate deeper or implied meaning. He was cognitively rigid, sticking to one way of responding and was unable to appreciate a range of differing options. This indicates that he will get something in his mind and stick to it even when the evidence is contrary to it. He will not be well able to match his thinking to the circumstances and adapt with changes of situational demands. Mr Pora also showed deficits of regulatory control suggesting that he will tend to respond without due consideration especially in complex situations. As well as behavioural dysregulation those with FASD tend to be emotionally dysregulated and cannot tolerate or manage stress well. They require others to provide a high level of direct assistance to be productive and remain emotionally settled. These types of higher thought process deficits seriously affect a person with FASD's capacity to self-monitor, realise the thoughts and feelings of others, and appreciate how their actions may be perceived. Due to brain limitation Mr Pora will tend to say and do what seems to his advantage at the time, without a realisation that he is doing this. This tendency can be perceived as manipulative and self-serving until the underlying brain damage is considered and it is appreciated that this is not wilful or intentional. A lack of insight into one's own limitations is a universal feature of FASD and in my opinion Mr Pora was not well able to understand that he has a disability when this was simply explained to him. This is because individuals with FASD can only view situations from their

own perspective and lack the capacity to step out of their own shoes to appreciate the perspectives of others and compare themselves to others. …"

(vi) "Having diagnosed and treated more than 200 children and young people with FASD, many of whom were youth offenders I am able to provide my opinion about the FASD limitations that Mr Pora would have shown at the age of 17 years when interviewed by the police and charged. I have viewed the evidence including transcripts and DVD footage. In my opinion at the age of 17 years Mr Pora was thinking and acting like a much younger child of about eight to ten years of age. He was not able to comprehend the meaning of complex words or sentences, grasping parts but missing much of the meaning. He lacked insight into his limitations and tended to respond as if he understood. When asked directly if he understood he would often say no, but he did not volunteer this information. What was most evident when reviewing police interviews was the paucity and simplicity of speech displayed by Mr Pora, and the long delays in his responding where he seemed confused and did not know how what to say. …"

(vii) "Mr Pora showed significant verbal memory deficits although with repetition he has some learning capacity. When listening to two simple stories at an eight and ten year old level of complexity, very little was apprehended and retained. The general gist of each story was not grasped and Mr Pora confused one with the other. Even when asked questions about the stories and required to pick the correct answer out of three options, one being correct, Mr Pora's responding was no better than by chance guessing. This result indicates that when in a situation that requires listening to, comprehending, retaining and recalling verbal information, Mr Pora will be severely limited. His span of apprehension is four simple pieces of information, when compared to about seven being usual for an adult. Adding to this limitation is the before mentioned extremely limited understanding of the meaning of words and the inability to compare one thing to another. Results of this assessment show that Mr Pora is markedly impaired in his capacity to engage in conversation or comprehend and respond to even quite simple questioning. This is a brain based problem and part of his FASD disability."

(viii) "People with FASD, most especially when they have memory and executive deficits are prone to confabulate; that is make up stories to fill in the gaps that are not in keeping with the

> truth. This is different to lying as it is not intentional and is a feature of executive brain impairment. Mr Pora did confabulate on Professor Gudjonsson's testing and also showed this tendency on my memory testing, although it failed to reach significance. At the age of 17 years Mr Pora's brain, although damaged, was still in a phase of rapid development. I would expect that his executive functioning was even more impaired at the time of police interview and when charges were laid. When working with families of young people with FASD who confabulate, we advise that things they may say should be taken 'with a grain of salt' and suggest that they double check with a reliable source. The persons with FASD cannot be considered a reliable informant and this is in my opinion the case for Mr Pora."

38. On behalf of the respondent, the Solicitor General either accepted or raised no issue with the statements recorded at (i), (iii), (iv) and (v) above. He said that he had "some reservations" about the contents of the other passages.

39. In the Board's view, Dr McGinn's evidence should be admitted. The process by which admission of new evidence should be determined was stated in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273, at para 120:

> "… the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."

40. Dr McGinn's evidence cannot be described as "fresh" in the sense in which that term has been used in this context. With reasonable diligence on the part of Pora's defence team at his two trials, her evidence, or that of a suitably qualified expert, could have been obtained. But no submission has been made that her evidence is other than entirely credible. And, although it was faintly suggested that the jury was already alive to certain shortcomings in the appellant's intellectual functioning, it really cannot be plausibly argued that the crucial

evidence that he suffered from a form of FASD does not have a potentially significant impact on the safety of the conviction. The simple truth is that at the first trial the appellant was quite bereft of an explanation for having admitted guilt of crimes which he sought to have the jury believe he did not commit. At the second trial he did not even give evidence, much less try to explain why he had confessed to these offences. Dr McGinn's evidence would, at the least, provide a possible explanation for his having admitted to something that he did not do. The possibility of such evidence securing a different outcome to the trial cannot be gainsaid.

41. This conclusion is in accord with New Zealand judicial authority on the question of the admissibility of expert evidence. In *R v Cooper* [2007] NZCA 481 at para 21 the Court of Appeal accepted that the statement in *Cross on Evidence* that "the overriding question [was] whether the witness could give evidence which is helpful to the court, *ie* which is relevant and reliable", correctly stated the law in New Zealand both before and after the passing of the Evidence Act. And in *Mahomed v R* [2010] NZCA the Court of Appeal accepted that the concept of "substantial help" required consideration of the relevance, reliability and probative value of the proffered evidence.

42. Before the enactment of the Evidence Act, Tipping J had occasion to consider the question of the admissibility of expert evidence in the case of *R v Calder* (HC Christchurch T 154/94, 12 April 1995). He said that this was to be determined on the following basis:

> "Before expert evidence … can be put before the jury by a suitably qualified person it must be shown to be both relevant and helpful. To be relevant the evidence must logically tend to show that a fact in issue is more or less likely. To be helpful the evidence must pass a threshold test which can conveniently be called the minimum threshold of reliability. This means the proponent of the evidence must show that it has a sufficient claim to reliability to be admitted."

43. Dr McGinn's evidence satisfies these requirements. She is undoubtedly suitably qualified; her evidence is relevant and it is, at least potentially, extremely helpful in determining whether Pora's confessions can properly be relied on.

Dr Immelman

44. Dr Andrew Craig Immelman is a consultant psychiatrist, also based in Auckland. He received identical instructions to those given to Dr McGinn. He also

interviewed Matekino Matengi, the appellant's maternal aunt. He examined Pora on 14 March 2014.

45. Although Pora was found to have an IQ of 83 (which is within normal limits), Dr Immelman pointed out that this was not inconsistent with there being significant abnormalities in some areas. Pora performed badly on verbal memory testing and this indicated great difficulty in understanding questions that were put to him and in remembering the content of the question when composing his reply. He had very significant impairments in frontal executive function, with no demonstrable capacity for abstract thought and a strong tendency to maintain a position even when it was shown to be entirely untenable.

46. Dr Immelman confirmed Dr McGinn's diagnosis of Pora's FASD. He stated that a feature of this condition is that responses given during interview, even in the non-coercive setting of the taking of a medical history, can be unreliable. By way of illustration, he referred to an explanatory model described by Novick-Brown in 2011. This discusses the three components associated with the condition: uncertainty about what the "correct" answers might be; interpersonal trust that the interviewer's intentions are constructive and benign; and reluctance to admit uncertainty or lack of knowledge when the interviewees believe they should know, or are expected to know, the answers to the questions.

47. Translating this to Pora's case, Dr Immelman considered that, firstly he might be uncertain about what the correct answer to the question should be, because he does not remember and may therefore provide an incorrect answer in order to satisfy the interviewer. Secondly, he might also place trust in the person questioning him, and be eager to please. Thirdly, he might be reluctant to admit uncertainty about his lack of knowledge and continue to maintain a position which is different from the true facts.

48. The Board has concluded that Dr Immelman's evidence must be admitted, essentially for the same reasons that Dr McGinn's evidence should be received. While it is not "fresh" since it could clearly have been obtained with due diligence before the trial, it is plainly credible and could be critical in the assessment of whether Pora's confessions could be relied upon.

The other evidence

49. The affidavits from the appellant do not satisfy the test for admissibility of fresh evidence. They are plainly not fresh and their credibility must be questionable at least, given that they are proffered in order to advance his appeal. Moreover, the

Board does not consider that there is a risk of miscarriage of justice if these affidavits are excluded. They cannot be accepted as fresh evidence, therefore.

50. The affidavit of Timothy Smith, a police officer who had been involved in the investigation of the murder of Ms Burdett, consisted of his impression of the consistency of Pora's statements and 'body language' and facial expressions when taken by police to show them the victim's home. This evidence would not be admissible at trial and it is clearly not admissible on the appeal. The affidavit from the private investigator, Timothy McKinnel, comprises, for the most part, commentary on the evidence of other witnesses and the result of his investigations. It is plainly not admissible as an item of fresh evidence.

51. The affidavits from Pora's former counsel, the police officer, David Bruce Henwood and Professor Owens touch on the second principal issue on the appeal *viz* the significance of the evidence about Rewa's alleged erectile dysfunction. For reasons that will be given in the next section of this judgment, the Board considers that this is not something which is relevant to the safety of Pora's conviction and that the evidence of these witnesses, in so far as it relates to that issue, is not admissible. Counsel's affidavit also deals with a number of what she considers to be errors on her part in the conduct of Pora's defence. She deposed that she ought to have engaged experts to advise on the reliability of Pora's confessions; that she should have called evidence to refute the suggestion which featured in the Crown case that Pora had given his sister earrings that resembled those which had been owned by Ms Burdett; and that she should have consulted and called witnesses who would have challenged evidence of an association between Pora and Rewa. The Board considers that the last two of these matters are peripheral to the issue of the safety of Pora's conviction and the question of whether she should have engaged experts to advise on the reliability of Pora's confession is subsumed into the consideration of Dr McGinn's and Dr Immelman's evidence. Counsel's affidavit is therefore not admitted. It should be said, in passing, that the Board considers that the error which counsel so commendably accepted is not as grievous as she suggests. Many decisions taken in the course of a trial may appear unfortunate in hindsight. It is by no means clear that the failure to investigate these matters and call the witnesses concerned was an egregious error.

Rewa

52. The man who raped Ms Burdett was undoubtedly Malcolm Rewa. That she was killed at the time that she was raped is not open to doubt. Unless Pora was present at the time of the rape he could not be implicated in Ms Burdett's murder. It is now known that Rewa suffered from erectile dysfunction. It is also known that he belonged to or was an associate of a gang which was a rival to that of which

Pora was either a member or an associate. The theory is therefore promoted that it is unlikely in the extreme that Rewa would have carried out the attack in the presence of another since he would not wish to have his condition disclosed. In particular, it is said that he would certainly not have had a young member or associate of a rival gang with him. The appellant suggests therefore that there is a real risk that a miscarriage of justice has occurred because the jury at his re-trial did not receive evidence that during eight of the nine rape offences committed by Rewa before his rape of Ms Burdett he suffered from erectile dysfunction, nor did they hear evidence of the steps that he took to overcome those difficulties. These were such, it is suggested, that the inevitable embarrassment that he would suffer if others were present meant that it was far more likely that he operated as a lone predator.

53. Some consideration of Rewa's condition took place at the appellant's re-trial. It appears that counsel for Pora attempted to introduce evidence of Rewa's erectile dysfunction in his offending both before and after his rape of Ms Burdett, through her cross-examination of Detective Inspector Rutherford. Apparently, the trial judge ruled that evidence of Rewa's other offending could only be elicited from the detective inspector if a direct link between it and the crimes committed on Ms Burdett was established. Unfortunately there is no transcript of the exchange between the trial judge and defence counsel but it is suggested by the appellant that they may have been at cross purposes because she curtailed her cross examination and did not pursue the theory that she had intended to advance, namely, that Rewa's method of attack made it highly likely that he would have acted alone. The respondent has suggested that the detective inspector was in fact cross-examined extensively at the retrial in relation to Rewa's modus operandi in his extensive sexual offending. Cross-examination included reference to the position of the victims *vis-a-vis* Rewa during intercourse, how he gained entry into their homes, the level of violence inflicted during the offending and patterns discernible from the commission of those offences. This evidence was relied on by the appellant in an attempt to demonstrate that the attack on Ms Burdett was perpetrated by Rewa alone. It is accepted, however, that it was not put directly to Detective Inspector Rutherford that Rewa suffered erectile dysfunction or that the description of his offending by a number of the complainants implied this. One of the positive reasons that Rewa would not have offended with others was therefore not put to the jury; rather the mere fact of his habitual lone offending was raised. On one view, this is enough to displace the suggestion that Pora was a joint offender with Rewa. He was undoubtedly a very confident sexual predator in the company of lone women. But this does not necessarily mean that he would have been willing to have others with him as primary offenders in his sexual offending. The theory that his confidence would have been contingent on the absence of other men is not implausible.

54. Having given this matter careful thought, however, and whatever may be the true situation about the ruling of the trial judge and counsel's reaction to it, the Board is not satisfied that the failure to adduce evidence of Rewa's erectile dysfunction gives rise to a risk of miscarriage of justice. The thesis that Rewa acted alone was before the jury on Rewa's re-trial. (In fact there is some dispute as to whether this is accurate on all occasions but that does not signify in the present discussion). The jury was aware that Rewa had been convicted of the rape of Ms Burdett. In the Board's estimation, the suggestion that it would have been more disposed to find that Pora was not present because of Rewa's erectile dysfunction is speculative. As Dr Downs, on behalf of the respondent, put it, this requires a leap of faith or, at least, a measure of conjecture. Moreover, the offences committed on Ms Burdett had features which distinguished them from Rewa's other attacks, not least in relation to the level of violence used. This was a savage attack obviously carried out with murderous intent. It was markedly different from the other instances of Rewa's offending. Of course it is suggested by the appellant that Ms Burdett was likely to present more robust defence than many of Rewa's other victims and that it would be necessary to perpetrate greater violence on her in order to overcome her resistance but this discussion emphasises the essentially conjectural nature of the reflection on the various possibilities. It is simply not possible to say that evidence of Rewa's erectile dysfunction, if given to the jury, would have made the difference which the appellant claims.

Disposal

55. The evidence of Dr McGinn and Dr Immelman unquestionably establishes the risk of a miscarriage of justice. It provides an explanation as to why Pora's confessions may have been false. This is of central and critical importance to one's approach to the question whether his convictions can be regarded as safe.

56. The impact that evidence of a confession will have, especially a confession to heinous crime, is difficult to overstate. The natural reaction to such an admission is that it is bound to be true. Why would someone confess to a dreadful crime if they were not guilty of it? But experience has shown that false confessions, even to the most serious of offences, are often made. The intuitive response to the fact of confession to crime is, inevitably, that it must be right but that intuitive reaction may be very dangerous. In *R v Oickle* [2000] SCR 3 the Supreme Court of Canada confronted the phenomenon of false confessions. Iacobucci J at paras 34 and 35 said:

> "… it may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone

> would confess falsely. See *S M Kassin and L S Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts"* (1981), 11 J Applied Soc Psychol 489. However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence. See, eg, *R A Leo and R J Ofshe, 'The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation'* (1998), 88 J Crim L & Criminology Justice …"

57. As Elias CJ observed in *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277, [2007] NZSC 7, para 14 "apparently reliable confessional evidence has led to significant miscarriages of justice". Any court must therefore be astute to examine the reliability of seemingly straightforward confession of guilt where that comes under later challenge. In the present case it is clear that none of the police officers exerted pressure on Pora. Indeed, they were, if anything, fastidiously correct in their treatment of him. The natural inclination therefore is to assume that his confession (which was certainly not the product of any form of coercion) must be true. But it is precisely because of the experience that people confess to crimes that they did not commit that one should be vigilant to examine possible reasons that confessions may be false. As the senior Canadian prosecutor, Bruce MacFarlane, has said, "judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime". In light of that entirely natural and to-be-expected reaction, careful attention should be paid after the confession has been made to reasons given that it was in fact untrue. Indeed, such is the potential potency of confession evidence that particular care is required in examining whether it reflects the true state of affairs.

58. The combination of Pora's frequently contradictory and often implausible confessions and the recent diagnosis of his FASD leads to only one possible conclusion and that is that reliance on his confessions gives rise to a risk of a miscarriage of justice. On that account, his convictions must be quashed.

59. It has been contended that no jury, faced with the evidence of Dr McGinn and Dr Immelman, could possibly be convinced that Pora's confessions were reliable. For this reason, it is claimed, it would not be appropriate to order a new trial. The respondent has argued, however, that the question of the reliability of the appellant's confessions should be subject to the type of close scrutiny that only a further trial can provide. The Solicitor General made it clear that it would be the Crown's intention, in the event of a re-trial, to obtain evidence that might well counter that given by Dr McGinn and Dr Immelman. As against this,

however, must be weighed the respondent's acceptance of much of Dr McGinn's evidence. On one view this would admit of only one conclusion, namely, that that affirmation of the appellant's convictions could not be contemplated.

60. The question of whether a re-trial should be ordered was not the subject of extended argument. The Board has therefore decided that the parties should have the opportunity to make written submissions within four weeks as to whether the appellant should be ordered to stand trial again.