THE HON IAN CALLINAN AC

REPORT

(IN CONFIDENCE)

DAVID CULLEN BAIN – CLAIM FOR COMPENSATION FOR WRONGFUL CONVICTION AND IMPRISONMENT

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Schedules

The Question

1. I make this report pursuant to a request of the Hon. Amy Adams, Minister of Justice, of the 19th of March 2015. I am asked to satisfy myself whether Mr David Bain has proved that he is innocent, on the balance of probabilities, of the murders the subject of this report. It is only if I am so satisfied to that standard of proof that I am asked further to decide whether Mr David Bain (the "Applicant") has proved that he is innocent of them beyond reasonable doubt.

1A. This is my Final Report. It contains amendments to a Draft Report provided to the parties on the 26th of September 2015. Only one of them, the Crown, responded directly to the invitation referred to in paragraph 21 of this Final Report to bring to my attention errors of fact or law claimed to appear in my Draft Report. The Applicant however corresponded directly with the Minister contending that errors of various kinds had been made by me. I have taken the Applicant's contentions about these and other matters brought to my attention by the Crown into account in finalising my Draft Report. Some other changes I have made on my own initiative. I have tried to ensure that such changes have been tracked. Having fully considered all of the matters brought to my attention, either directly or indirectly on behalf of the Applicant, and directly by the Crown since the 26th of September 2015, I am of the same opinion as I earlier expressed and as continues to appear in paragraph 407 of this Final Report.

Basic Facts

2. At some time between midnight and around 7.09am or 7.10am on the 20th of June 1994 (the "fatal day"), all of the Applicant's immediate family – his mother Mrs Margaret Bain, his father Mr Robin Bain, his two sisters Laniet and Arawa, and his younger brother Stephen – were killed by bullets owned by the Applicant and fired from the Applicant's .22 rifle fitted with the Applicant's silencer at the family residence at 65 Every Street, Dunedin.

3. At around 7.09am or 7.10am on the 20th of June 1994, the Applicant telephoned the emergency services number, 111. The call was transferred to the ambulance service operator. He told the operator, Mr Thomas Dempsey, that his family were "all dead". The Applicant gave Mr Dempsey his address, and police were contacted a short time after the call was initiated.

4. On arrival at the family residence, the police found that all of the victims of the shootings, except for the Applicant's father, Mr Robin Bain, had been shot and killed in their respective beds, or near to them. Mr Robin Bain's corpse lay on the floor of the living room of the house beside the Applicant's rifle. He had been killed by a single gunshot to the head between his left forehead and left temple. Next to, or as part of the living room, was a small alcove separated from the larger space by only a pair of curtains. Inside that alcove there was a computer accessible to, and used on occasions by the Applicant and his father, and perhaps other members of the family. During the course of their investigation, police found these words on the screen of the computer "sorry, you are the only one who deserved to stay".

5. There was clear evidence that Stephen had valiantly fought for his life and had been partially strangled with a t-shirt which he had apparently been wearing during the preceding night before he succumbed to gunshots.[1]

The Legal Proceedings

6. The Applicant was interviewed and within five days charged with the murder of all of the deceased persons.

7. Within about a fortnight of the fatal day, the executors of the Applicant's parents' wills took and carried into effect a decision, which was not apparently opposed by anyone or any official who might have had authority to do so, to burn the residence to the ground.[2]

8. The Applicant was tried, convicted and sentenced to life imprisonment on the 21st of June 1995 on the five counts of murder with which he had been charged. A minimum period of imprisonment of 16 years was imposed.[3]

9. The Applicant appealed to the Court of Appeal of New Zealand.[4] Following the dismissal of that appeal, he sought but failed to obtain leave to appeal to the Privy Council.

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1 Retrial Notes of Evidence pp 1549–1550; see also evidence of Kim Anthony Jones for evidence regarding Stephen's fingerprint on the silencer at p 2291 of the Retrial Notes of Evidence.
2 Retrial Notes of Evidence p 2417.
3 *R v Bain* HC Dunedin T1/95 [1995] NZHC 293.
4 *R v Bain* [1996] 1 NZLR 129.

10. A successful businessman and former international sportsman, Mr Joseph Karam, formed the view that the Applicant was not guilty of any of the murders. He was convinced that the Applicant's father had committed them before killing himself. Mr Karam has for some years tirelessly and resourcefully pursued a cause of the establishment of the Applicant's innocence.

11. That cause has included a close examination of the conduct of the first trial, and of the investigating police officers. The cause extended to a search for new evidence, the engagement of various experts, and the support of the Applicant in the making of an application to the Governor-General on the 15th of June 1998 for the exercise of the Royal Prerogative of Mercy in respect of the convictions.

12. That application prompted further curial proceedings: twice in the Court of Appeal,[5] and again in the Privy Council. On this, the second occasion in the Privy Council, the convictions were quashed and a retrial was ordered.[6]

13. Before the retrial, there was another hearing in the Court of Appeal (as well as a hearing in the Supreme Court), which lasted three days and was concerned with the evidence which should properly be received on the retrial. As a result of it (and pre-trial proceedings before the judge who conducted the retrial), some of Mrs Janis Clark's (the Applicant's aunt's) evidence was, together with other evidence, excluded.[7]

14. The lengthy retrial took place in Christchurch and culminated, on the 5th of June 2009, in the acquittal of the Applicant on all of the counts.

15. The Applicant spent about 13 years in prison before his release after the second Advice of the Privy Council.

My Task

16. On the 25th of March 2010, a claim was made on behalf of the Applicant to the Minister of Justice, the Hon. Simon Power, for compensation for wrongful conviction and imprisonment.

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5 *R v Bain* [2004] NZLR 638.
6 *Bain v R* (2007) 23 CRNZ 71 (PC).
7 *The Queen v David Cullen Bain* [2009] NZCA 1.

17. Whether compensation should be paid or not is a matter within the discretion of the Executive Government ("the Crown"), although in practice it chooses to act in accordance with guidelines which it sets for itself but which it might accordingly change if it so wishes.

18. My instructions are that, for various reasons upon which I need not elaborate, the Applicant's application falls outside the current guidelines. Even so, the Crown seeks my advice, as I understand it, in relation to any consideration which it may or may not decide to give to a grant of compensation.

19. The slayings and their prolonged aftermath are as puzzling and extraordinary as they were cruel and senseless. One particularly extraordinary aspect of them is the forensic and judicial attention that they have attracted. In addition to the curial proceedings to which I have referred, they were the subject of a review by the Police Complaints Authority, an advice by a retired judge of the Canadian Supreme Court, the Hon. Ian Binnie QC, and a peer review of that advice by a retired New Zealand judge, the Hon. Dr Robert Fisher QC.

20. Not surprisingly, this judicial and forensic attention has generated thousands of pages of material, in transcripts, judgments, rulings, reports, books and news stories. Both the Applicant and the Crown are content with a 'record', as set out in Schedule 1 to this Final Report, for my task. I should say that I have also, as requested by Mr Karam, read in full one of his three books, *David and Goliath*,[8] and have read much of the two others written about the killings and the subsequent legal proceedings. In this Final Report I use the term "case" in respect of all of the relevant written materials and the submissions by the parties to me.

21. My instructions are quite specific. I may take into account any information which logically bears upon the question of whether the Applicant can prove himself innocent of the charges of which he has now been acquitted. I am not to consult or receive any information or submissions about the reports made by the Hon. Mr Binnie and the Hon. Dr Fisher. I must provide my report to the Minister and to the parties in draft and in confidence. I must give the Applicant and the Crown an opportunity to provide me

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8 Joe Karam, *David and Goliath* (Reed Books, 1st ed, 1997).

with written submissions on any factual or legal inaccuracies which may appear in my Draft Report. Neither may contest my analysis or conclusions except to the extent that they may be affected by inaccuracies of these kinds, if any.

Process

22. I indicate how I have proceeded in making this Final Report. First, I discuss my approach to some fundamental principles and other matters affecting my conclusions. Secondly, I review the evidence (particularly with respect to the submissions of the Applicant) which I think most relevant and important, and state some views on it. Thirdly, I examine in detail the various versions of events that the Applicant provided to the police, to others, and in evidence at the trial. Inevitably there is repetition of some matters. One reason for this is that one matter or set of facts may have a different or further relevance to a number of other matters. Another is that some matters need to be viewed from more than one perspective. Difficulty has also arisen from the way in which the retrial was conducted, by the calling and recalling of witnesses and the interruption or postponement of cross-examination of them for some time. Fourthly, I make some comparisons between the respective cases and case theories of the Applicant and the Crown in the light of incontestable facts which I think most relevant. And fifthly, I state the answer to the question that I am asked, and my further reasons for it.

23. In undertaking my task, I have had the benefit of meeting with Mr Karam and Mr Michael Reed QC on behalf of the Applicant, and Mr Michael Heron QC, Mr John Pike QC and Ms Annabel Markham on behalf of the Crown. I have also had the benefit of written submissions by both sides and some fresh evidence obtained by Mr Karam, who very ably, although not qualified as a lawyer, effectively directly represents the Applicant from time to time. Notes of the meeting, and the dates of the written submissions that have been made to me, are referred to in Schedule 2 to this Final Report. I also travelled to Christchurch to look at some of the very large number of exhibits in evidence at the retrial. I identify these exhibits in Schedule 3. Both sides said they did not require me to refer to the notes of evidence at the first trial. Nonetheless, I have noticed several references to them in the material that I have considered. Reference has also been made in submissions to me to the evidence before the Privy Council on its second consideration of the case. Mr Karam, in what he

describes as the "narrative submissions" of some 464 pages, makes many references to these and other matters outside the evidence at the retrial. Such references, in the absence of a full knowledge of their context, again have complicated my task.

24. In my first meeting with the parties' representatives, I sought to make it clear that the onus lay upon the Applicant, and that it would be helpful to me if each side in their documents and submissions to me acted as if they were parties in a civil trial, in which of course the standard of proof would be on the balance of probabilities, and the moving party, here the Applicant, bore the onus of proof. The parties have done that, and it has been helpful that they have.

25. Withheld under ss 9(2)(a) and 9(2)(ba)

26. I have, of course, had regard to the summing up at the retrial and the various decisions of the courts of New Zealand, and the Privy Council in the case. As to that of the last delivered on the 10th of May 2007, I respectfully make these comments. The Board wished to emphasise and hoped that it was clear that its decision imported no view whatever on the proper outcome of a retrial.[9] I have not read all of the material that was before the Privy Council, but nor of course has the Privy Council considered, as I have had to do, the voluminous and often conflicting evidence at the retrial, as well as various miscellaneous other matters, and the detailed submissions of the parties in the light of all of that material. It is also necessary to distinguish between my task and that of the Privy Council, which was to decide whether there was evidence of "sufficient freshness and sufficient credibility" to justify its reception as fresh evidence, and:

> "whether its existence demonstrate[d] there has been a miscarriage of justice in the sense of there being a real risk that a miscarriage of justice ha[d] occurred on account of the new evidence not being before the jury which convicted the appellant … [that] when considered alongside the evidence given at the trial, might reasonably have led the jury to return a verdict of not guilty".[10]

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9 *Bain v R* [2007] 23 CRNZ 71 (PC) at 45–46 [119].
10 *Bain v R* [2007] 23 CRNZ 71 (PC) at 15–16 [34]–[35].

It is a quite different and higher threshold that the Applicant needs to cross to prove to me on the balance of probabilities that he was not the murderer of his immediate family.

27. I have been much assisted in all administrative and logistical matters, including in communicating with the parties, by Mr Jeff Orr of the Ministry of Justice.

28. The precise authorship (whether Mr Reed QC, Mr Karam or even the Applicant himself) of submissions and other written material before me is not always apparent. As a matter of convenience only, I refer sometimes to the Applicant, Mr Reed QC or Mr Karam interchangeably as the author of the submissions.

Consideration of Issues Arising

29. The case, and the task that I have been asked to perform in relation to it, immediately threw up the sharp difference between the stance and obligations of a moving party bearing the onus of proof on the one hand, and those of an accused in a criminal trial who may remain mute then and there whilst the prosecution seeks to discharge its obligation of proving guilt. Albeit that the standard of proof in a civil proceeding is lower than the standard of proof that must be reached by the prosecution in a criminal trial, the civil onus is a real and substantial one. A person bearing it must make his case. He must bring forward or point to evidence to sway the mind of the person who is to decide whether his cause should prevail. It is true that in civil proceedings a defendant (but not a plaintiff) may, if he is so advised, choose not to adduce evidence, instead arguing that the moving party has not produced evidence capable of swaying the deciding mind, but that is a rare and risky course to adopt. It is the Applicant here however who must *persuade* me that he did not murder his parents and siblings. This necessarily means that the Applicant, rather than the Crown must explain to my satisfaction why I should prefer his version of the events to any contrary one. In order to do that he must point to evidence that supports his version: he must convince me that some or most of the matters that he raised as sufficient possibilities to secure his acquittal in his criminal trial, supplemented by probative further evidence, were, and are in fact, probabilities. And he needs to refute plausible hypotheses suggesting that he was in fact the murderer. The Applicant cannot now make a case simply by advancing possibilities and challenging the Crown to negative them beyond reasonable

doubt. The Applicant has to produce or point to the relevant evidence and advance case theories to weigh the balance in his favour.

30. If a prosecution fail, it does not automatically follow that the accused person has not in fact committed the offence with which he has been charged. It may be that the prosecution's case has simply fallen short of proof beyond reasonable doubt. I have to say that I have had the impression from time to time during my work that the Applicant's representatives may not have fully appreciated that they do not establish the Applicant's innocence of the crimes merely by raising a number of doubts or even plausible possibilities. Nor does multiplication of doubts or plausible possibilities necessarily produce probability. Criticism, especially relevant and valid criticism, of imperfect or improper police procedures and investigation is a powerful forensic weapon in the hands of capable defence counsel in a criminal trial. Whether, or the extent to which, any such imperfections or improprieties are probative of a case in civil proceedings can be a quite different matter.

31. A verdict of a jury is inscrutable. No reasons for it are given by any member of the jury or its foreperson. The only matter upon which a jury in a criminal trial (subject to statutory exceptions in some jurisdictions with respect to majority verdicts which for present purposes are not relevant) decides is the ultimate question of guilty or not guilty. It is possible that members of a jury may come to the same conclusion by different routes. One piece of evidence might seem to some to be more persuasive than other pieces of evidence to others. That there may be such differences is understandable as the ultimate question is a question of fact. A judge, or a person doing the task that I am asked to do, unlike a juror, is expected to give reasons for his or her decision. But in common with jurors and a judge in a trial, in my less formal role here, I will form impressions on various matters, but it is the *case as a whole* that I have to and do decide.

32. The famous American jurist, Oliver Wendell Holmes Jnr, wrote in his introduction to his treatise on the Common Law that "[t]he life of the law has not been logic: it has been experience".[11] By this, that jurist did not mean that logic should be discarded. On the contrary, he was observing that logic alone was not enough for the resolution of

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11 Oliver Wendell Holmes Jr., *The Common Law* (The Legal Classics Library, 1st ed, 1881) p 1.

both legal and factual questions: practice and experience, both in large measure, are needed for the just and proper practice and determination, by both lawyers and judges, of the law and its controversies. And just as juries are instructed to use their own personal knowledge and experience in deciding the issues before them, I have tried to bring as fairly as I can, my own practice, knowledge, and experience to bear upon the Applicant's case here.

The Applicant's Acquittal

33. By the time of his acquittal on the retrial, the Applicant had served a long sentence of imprisonment. To be sentenced and imprisoned for a crime that a person has not committed is a terrible thing. In order to secure his acquittal on the retrial, the Applicant, by his Counsel and Mr Karam, must at least have raised a reasonable doubt of his guilt. I acknowledge and have kept in mind the importance of that acquittal in carrying out my task.

Proof of a Negative

34. I have also been conscious of the magnitude of the task of anyone who has to prove a negative. Any lawyer who has been placed in the position of having to do that knows that this is more difficult to do than to prove a positive set of facts. That burden is reduced here as the Applicant could establish his case by proving a positive: that his father was the murderer. In this case either his father or the Applicant was the culprit. No one else could have committed the murders.

Hearsay Evidence

35. There is a line of authority in the New Zealand courts, referred to and affirmed in the Court of Appeal on the hearing of the first reference to it by the Executive Government, that the court has a discretion to admit hearsay evidence. I understand that the position, as settled now by legislation, is that the test is whether the circumstances provide reasonable assurance that the [hearsay] evidence is reliable or not.[12]

36. I am not, however, strictly bound by the rules of evidence here because I am instructed that I may take into account any information which logically bears upon the relevant

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12 *Evidence Act 2006* (NZ) s 18.

question. Neither that nor the enabling provision for the reception of hearsay evidence means, of course, that the historical bases for scepticism of hearsay evidence are irrelevant. The bases for that scepticism reflect the wisdom and experience of jurists over the centuries. They continue to provide a prism through which to view hearsay evidence and assess its reliability. Wigmore discusses the theory of the hearsay rule:

> "The fundamental test, shown by experience to be invaluable, is the test of *cross-examination*. The rule, to be sure, calls for two elements, cross-examination proper, and confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable.
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> 1. The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. Of its workings and its value, more is to be seen in detail. It is sufficient here to note that the hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.*"[13] [References omitted]

37. There have always been exceptions to the common law rule, to one of which I will shortly refer. When an enabling provision for the tendering of hearsay evidence has been enacted, usually a judicial discretion to reject it has been conferred. The experience of advocates and judges, however, teaches that scepticism in a particular case may be well warranted for the reasons stated by Wigmore, and because of the natural and human tendency of many recipients of information to impart it to another, misunderstood, misheard, improved, embellished, understated (more rarely), or otherwise varied, whether as a result of bias, misapprehension, a tendency towards sensationalism or even a desire to be helpful, or relevant and involved.

38. I accordingly approach the hearsay evidence which was received into evidence in the Courts in this case, and any further hearsay evidence made available for my consideration, with a degree of caution. What I have done is to examine it closely for its reliability. Indeed there are two separate bodies of hearsay evidence to which I am inclined to give little or no weight in carrying out my task because I do not regard them as being reliable.

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13 J H Wigmore, *Evidence in Trials at Common Law* (Little, Brown and Company, revised ed, 1974) vol V p 3 [1362].

39. The first is the hearsay evidence given by various people of statements claimed to have been made to them by Laniet of a long standing incestuous relationship with her father. The original source of all of this evidence is Laniet. It is relied upon by the Applicant as proving a motive on the part of her father to slay Laniet, and all of the other members of the family, except the Applicant. Witnesses gave evidence that Laniet had told them that she was about to reveal to the family that her father had been carrying on the incestuous relationship with her for many years.[14] There was sought to be associated with that evidence other evidence given by a Ms Emma Blackwell of a statement alleged to have been made to her by Arawa when the latter was about 10 years old of a sexual practice introduced to her and encouraged by her father.[15] Dr Marjolein Copeland's evidence depended, in part at least, upon statements made by Laniet, her opinion as to the meaning of them, and inferences that she was disposed to draw from them.[16]

40. One historical exception to the hearsay rule was a dying declaration. The exception was only allowed if, among other things, the statement in question was made with the perception of imminent death. None of the relevant statements attributed to Laniet and Arawa fall into that exceptional category.

41. The hearsay evidence in this case is not one way. There is a body of hearsay evidence potentially inculpatory of the Applicant. Mr Kelly Gillan gave evidence that Laniet had told him that the Applicant had summoned the whole family to a family meeting at the weekend.[17] Another witness, Ms Joanne Dryden, gave evidence that Laniet had told her the day before the fatalities that she was scared of the Applicant.[18] Ms Dryden, as with witnesses called by the Applicant, did not give evidence at the first trial and only came forward years afterwards. Direct evidence (incidentally corroborating this hearsay evidence) requires separate consideration.

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14 Retrial Notes of Evidence pp 3129, 3685.

15 Pre-trial ruling of Panckhurst J (CRI 1994-012-217294, Ruling No. 16, 13 May 2009); Applicant's Submissions in Support of Claim of Innocence p 90 [362].

16 Retrial Notes of Evidence pp 3519–3520. Dr Copeland saw Laniet to treat her for a gynaecological problem.

17 Retrial Notes of Evidence p 2091.

18 Retrial Notes of Evidence pp 2099–2100. See also Retrial Notes of Evidence p 2109: Ms Marelle Nader-Turner gave evidence that Laniet had described the Applicant as "freaky or something like that".

42. Another witness, Mrs Greer Taylor, provided evidence that her husband had told her that the Applicant had told him that he could sexually offend against a female jogger and escape responsibility for it by claiming that he was undertaking his paper run at the time of the offence.[19] It should be noted, however, that this hearsay evidence was supported by direct evidence. Mr Mark Buckley, a school friend of the Applicant, was prepared to give evidence that the Applicant (whilst still at school) had told him of his sexual interest in a young female jogger, and how he could commit a sexual offence (presumably rape) against her and use his paper run to get away with it: the Applicant would free up time for this offending by arriving at the usual times at houses where he would normally see the residents (thus suggesting a normal delivery round), but deliver papers at other houses much earlier than usual. Mr Buckley would have given evidence that the Applicant had a notebook which seemed to contain details of the way in which he could use the paper round for this purpose, although he did not actually see what was in the notebook. The discussion started on their way home from school and continued in the Applicant's bedroom.[20] Of this evidence, the Court of Appeal said that its probative value was limited and would not be entirely easy to explain to a jury.[21] The Crown, in its overview of the case, argues that it is evidence to which I could have regard here.[22]

43. There are other reasons why the hearsay evidence of Laniet's statements to various people is not reliable. Some witnesses who claimed to have been told of the incestuous relationship were prostitutes who had suffered sexual abuse. I accept that sexual abuse is likely to have a great impact and could be a factor in causing them to be prostitutes. But so too, sometimes prostitutes may look for explanations for their way of life. I do not know the truth with respect to the two women here. I reject their evidence for other reasons. The two prostitutes here said that they had noticed that Laniet had stretch marks on her body indicative of the delivery of a baby by her.[23] Another witness, Mr Dean Cottle, had effectively been a procurer for her. Laniet had been a user of cannabis. Her life was, to say the least, in disarray. She was at odds with some of her family. She was, in my opinion, something of a fabulist. She had claimed to have

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19 *R v Bain* [2009] NZCA 1 at [192]–[193].
20 *R v Bain* [2009] NZCA 1 at [192].
21 *R v Bain* [2009] NZCA 1 at [208].
22 See Overview of the Crown Case and Summary of Legal Principles p 22 [58.3].
23 Retrial Notes of Evidence pp 2978–2979, 3127.

given birth to a child in Papua New Guinea, either early in, or even before, puberty.[24] She claimed (the story varied) that the child was her father's,[25] or the child of somebody else, either an indigenous Papua New Guinean,[26] or another man, a Caucasian, and that she had been raped.[27] On the whole of the evidence, it is highly improbable, verging on the impossible, that she had borne a child as she claimed. The claims by the prostitutes, of seeing stretch marks indicative of childbirth, are, in all of the circumstances, not credible.

44. Another reason to be wary of the hearsay evidence concerning Mr Robin Bain's alleged improper relationship with his daughter is the body of contrary evidence by people who observed them together regularly, and in different places, and sensed nothing but an entirely normal, and in no way improper, relationship between them.[28]

Admissions and Hearsay Evidence

45. It is right at this stage, I think, to draw attention to the nature of evidence of statements or admissions made by a *party* to litigation extra-judicially. These, although given by witnesses other than their maker, are received as exceptions to the hearsay rule. Various bases for their reception in evidence include that they may have particular probative value because they may have been made at a time when litigation (either civil or criminal) was not in prospect, and in any event, that a person would be unlikely to say something against his or her interest unless it were true. The Crown here relies upon various statements (and inconsistencies and gaps in them) made by the Applicant to his friends and relatives, investigating police officers, and directly in Court, as original evidence, as inculpatory of him.

Motive

46. Motive and absence of motive loom large in this case. Motive is practically never an element of a crime. Proof of a motive, however, gives an assurance or comfort to or in a conviction. What is 'motive'? It seems to me that it is an idea, a belief, a feeling, an impulse, a misconception, a delusion even, or a reason, an explanation as it were, for an

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24 Retrial Notes of Evidence pp 2400, 2965, 2979, 3019, 3127, 3132.
25 Retrial Notes of Evidence p 2990.
26 Retrial Notes of Evidence p 2400.
27 Retrial Notes of Evidence pp 3127, 3132.
28 Retrial Notes of Evidence pp 2174, 2231, 2257, 3009.

act: anyone would hesitate to use the word 'reason' in connexion with this case. There can be no truly rational basis for the horrible murders committed, whoever the murderer was.

47. In *De Gruchy v The Queen*[29], an Australian case which has a further relevance, albeit only peripheral to this case, Kirby J said this of motive:

> "50 According to Waller and Williams, '[a]lmost all expositions of criminal law theory accept, without discussion, the Cartesian theory of mind and body . . . That is to say, they treat mental operations as being related to physical activity as cause is related to effect'. Many philosophers and some legal scholars have rejected this dualism as 'implausibly mechanistic'. This is not the occasion to explore the assumptions that are commonly made (and that form the basis of judicial opinions and instructions to juries) concerning the way intentions may sometimes grow out of the emotions involved in motivation and lead on to criminal acts and omissions. Theorists may criticise the assumptions inherent in all such reasoning as 'robotic'. However, our legal system continues to observe an 'ongoing commitment to a fairly unreflective mind-body dualism'.
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> 51 Distinguishing between the usually essential ingredient of a criminal intention and a person's desire, purpose or motive will sometimes be important. But, as such, motive is rarely, if ever, an element of a criminal offence. Motive must not, therefore, be confused with intention. Motive may be 'the reason that nudges the will and prods the mind to indulge the criminal intent'. It may be the feeling that prompts the operation of the will, the ulterior object of the person willing. It generally has two evidential aspects. These will be the emotion that is supposed to have led to the act and the external fact that is the possible exciting cause of such emotion, but not identical with it.
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> 52 Such analysis of motives and intentions assumes the capacity to dissect the contributing forces of human will and human action in the precise ways described. Whether this is physiologically or psychologically sound, or philosophically satisfying, are not questions that judges or jurors generally have the time or inclination to ponder, still less answer.
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> 53 *Motive is neither necessary nor sufficient:* Because motive, as such, is not an ingredient of a legal offence (such as the murders with which the appellant was charged), it is not necessary, as a matter of law, for the prosecution to prove that an accused had a particular motive, still less one to commit the offence in question. This rule is based not only upon sound legal analysis of the actual ingredients of the offence. It is also grounded in highly practical considerations. The United States Supreme Court in *Pointer v United States* explained:
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> > 'The law does not require impossibilities. The law recognises that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it.'

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29 (2002) 211 CLR 85.

55 *Motive and proof:* It is because motive (or lack of it) will sometimes be considered highly relevant to the drawing of inferences and the pursuit of the chain of proof, that questions can arise in a criminal trial as to what the judge should tell the jury about the subject. The reason that assistance is sometimes necessary follows from the experience of humanity that ordinary people 'do not act wholly without motive'. It is for just such a consideration that evidence of motive is generally regarded as admissible in criminal cases, because it is thought to make it more likely that the crime was committed. It was also upon such bases of 'sound sense' and common reasoning that this Court, in *Plomp v The Queen*, a case involving the drowning of the accused's wife whilst swimming with him, upheld the proof of the facts that the husband had formed a liaison with another woman, to whom he had represented himself to be a widower and whom he had promised to marry.

56 In the cases before *Plomp* there had sometimes been suggestions that evidence of motive should not be received without some independent proof of the accused's involvement in the crime first being established. That approach had grown out of a concern that too much weight might otherwise be accorded by a jury to evidence of motive. Occasionally, the exploration of the motives of a witness or of the accused may open up impermissible considerations, having regard to the accusatorial nature of the criminal trial. However, the decisions of this Court have consistently recognised that, in some circumstances in criminal trials, evidence of motive may be 'of the greatest importance'. In *Plomp*, Dixon CJ emphasised:

> 'All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done.'"[30] [References omitted]

48. I do not discern any difference in approach by the New Zealand courts from the Australian courts and which is, with respect, so well explained in the passages I have quoted from his Honour's judgment in *De Gruchy*.

49. There are two bodies of evidence here suggestive of the non-essential ingredient of motive: one adverse to Mr Robin Bain, and the other to the Applicant. Mr Robin Bain's motive is said to have been to kill Laniet in order to prevent the revelation by her of his criminally incestuous relationship with her.[31] There are several problems about that, one of which is the unreliability of the evidence (largely said to come from Laniet) about the existence of such a relationship. Another difficulty is that such a

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30 *De Gruchy v The Queen* (2002) 211 CLR 85 at 40, 49–53, 55–56.

31 Opening Address of Defence in *The Queen v David Cullen Bain* [2009] CRI-1994-012-217294 p 4 (lines 19–23).

motive would not fully explain, if it would explain at all, the killing of the other members of the family. Nor does it explain, in particular, why the Applicant "deserved to stay". Further, it is inconsistent with the Applicant's own account of the weekend before the murders: of a normal family weekend (insofar as the family could be regarded as a normal one) without any particular revelations or admissions.[32]

50. The main body of the evidence relating to motive on the part of the Applicant needs also to be examined with care. It does not, however, suffer from some of the defects in the body of evidence said to establish a motive on Mr Robin Bain's part, of being hearsay, or from an unreliable source. It comes in part by way of admission by the Applicant himself, of an expressed hatred for his father,[33] his objection to his father's attempt to dominate the household,[34] his wish to see his father excluded from the household and the family, and his arguments with his father, including a very recent (and recurrent) one over the use of a chainsaw. The Applicant wished to use it around the residence at Every Street. His father wished to use it elsewhere.[35] There is also evidence that the Applicant was conscious, astutely so, of the financial implications to his mother and to the grand design of a house if his parents were actually to divorce. He said this to Ms s 18(c)(ii) :

> "... it was up to Robin to recognise that he wasn't wanted ... if they separated formally and all that, if they got a divorce they'd have to sell the house and if they sold the house it would mean that the building programme – the project that they had, the building of the sanctuary, wouldn't happen ..."[36]

I would be inclined to accord more weight to the evidence about motive in respect of the Applicant for these reasons, than the evidence of it with respect to Mr Robin Bain. I take no account, however, of the likelihood that the Applicant, if he were not charged and convicted, would have been the sole heir to his parents' estates even though he was virtually penniless, had failed his only completed year at university, had been largely unemployed for two years, and had only just recommenced, at about twenty one, his university course.

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32 Retrial Notes of Evidence p 2670.
33 Retrial Notes of Evidence p 2476.
34 Retrial Notes of Evidence p 2450; Privy Council Record of Proceedings p 0384.
35 Retrial Notes of Evidence p 2666; Privy Council Record of Proceedings p 0384.
36 Retrial Notes of Evidence p 2352.

The Bain Household

51. There is a deal of evidence about the Bain household. I need not repeat the summary of Laniet's disordered life. The mind of the Applicant's mother seems to me to have been disturbed. Mrs Bain's life had become partly a nocturnal one. She stayed up late at night watching television and did not rise until 9 or 10 am, or on occasions later.[37] To describe the interior of the house, and the scattering of the clothing and objects owned by its inhabitants throughout it, as untidy would be a gross understatement. [38] The photographs in evidence would suggest that it was rarely if ever cleaned or dusted. One exhibit, a photograph of the kitchen in the residence, shows it to be in an unspeakably dirty state.[39] So offensive was the smell of the interior of the house itself that police officers from time to time wore masks to carry out their work in it.[40] The house itself was extremely dilapidated, a state not explicable by Mrs Bain's wish to demolish it. She had a rather grandiose plan (of which the Applicant was a keen proponent) for its replacement by a much larger residence,[41] although the evidence does not disclose how she could afford this. At one point, Mr Reed QC prefaced a question to Mrs Clark with a statement that the trustees had said that there was enough money to do so,[42] but I am not satisfied that this was so having regard to the grandeur of the new residence that Mrs Bain had planned, the other property owned by Mr and Mrs Bain and the modesty of Mr Robin Bain's, the only breadwinner's, salary. The Applicant's father lived principally at the school house fifty or so kilometres away from the family residence during the week, and in a caravan on the site of the residence at weekends, and often on Monday nights. Mrs Bain had for some time previously herself lived in the caravan,[43] which too was in a state of much untidiness at the time of the slayings.[44] The Applicant, having failed his first year at university,[45] spent most of his days during the

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37 Retrial Notes of Evidence p 2698.

38 See also photograph of the floor in Stephen's room and also of the laundry at pp 192–193 of Joe Karam's *Trial by Ambush* (HarperCollins Publishers, 1st ed, 2012).

39 See also Retrial Notes of Evidence p 2698 (cross-examination of the Application from the first trial):

> "Question, "Were you concerned about the state of hygiene in the kitchen?"
> Answer, "Yes I was.""

40 Retrial Notes of Evidence p 535.

41 Retrial Notes of Evidence pp 2191, 2573, 2689.

42 Retrial Notes of Evidence p 2587.

43 Retrial Notes of Evidence p 2664.

44 See photograph of Mr Robin Bain's bed in the caravan between pp 192–193 of Joe Karam's *Trial by Ambush* (HarperCollins Publishers, 1st ed, 2012).

45 Retrial Notes of Evidence p 2572.

next two years gardening around the residence with his mother.[46] Mrs Bain seems to have rejected her former strong religious beliefs and to have substituted for them an unnatural reliance upon symbols or omens, and the movement of pendulums, or, as the Privy Council put it, "the occult".[47] There was evidence that Mrs Bain wished to end the marriage, but that she had not sought, and was not intending, a formal divorce.[48] The Applicant saw the family as divided between his mother and his father. He said that he and Arawa supported his mother, to whom he had become very close. Laniet, on the other hand, supported her father.[49] Young Stephen's position, if he had one, is not clear, although at one point the Applicant said he favoured his mother. Margaret's sister, Mrs Clark, said that it was her impression that the relationship between the parents was improving.[50]

52. The matters referred to in the preceding paragraph could provide reason for Mr Robin Bain to despair. That despair may have been compounded by a possible but not proved physical illness from time to time,[51] and by his inability to obtain promotion or transfers as a teacher in the State school system.[52] That evidence needs, however, to be weighed in light of quite a body of evidence to the effect that he was constructive and effective as a teacher, and that the children and his colleagues at work held him in high regard, and saw him as cheerful and helpful.[53] There was also evidence that he continued to take pleasure in musical activities and the achievements of his children and pupils, apart from a suggestion that once he may have over-chastised two pupils.[54]

53. There is reason to take a quite different view, however, of the picture painted of the Applicant's parents and their relationship by the Applicant and some others: of a "sneaky" domineering husband and a passive put-upon wife and mother. That picture emerges from evidence called on behalf of the Prosecution at the retrial.[55]

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46 Retrial Notes of Evidence pp 233, 2691.
47 *Bain v R* [2007] 23 CRNZ 71 (PC) at 2 [2].
48 Retrial Notes of Evidence p 2352–2353.
49 Retrial Notes of Evidence p 2478.
50 Retrial Notes of Evidence p 2577.
51 Retrial Notes of Evidence pp 2229, 2242, 3026, 3029–3030, 3252.
52 Retrial Notes of Evidence pp 2791, 2805, 2828, 2865.
53 Retrial Notes of Evidence pp 2219, 2241, 2248–2249, 2258, 3253.
54 Retrial Notes of Evidence p 2866.
55 Retrial Notes of Evidence pp 2476, 2449–2550.

54. Mr Richard Matches, who is now deceased and was in practice as a registered psychologist, knew Mr and Mrs Bain well. Mrs Bain had been a lecturer at the Kindergarten Teachers College in Dunedin at the same time as he had in the early 1970s. He described her as an extrovert, often loud and sometimes inappropriate in her speech and her behaviour. He thought that she gained pleasure from embarrassing other people: she targeted people who would be offended by her comments. For example, she discussed sexual matters in front of the head of the department who was a middle-aged spinster. She was unclean, her personal hygiene was not good, and her body odour was quite overpowering at times, so much so that she had to be urged to make some not entirely successful efforts to change her hygiene habits.[56] Mr Matches said: "I thought back then that, look out when she has children, they're in for a hard time."[57]

55. He described Mr Robin Bain as introverted and Mrs Bain as being a dominant person in the relationship. She would belittle him in front of others. Mr Matches had met Mrs Bain about a year before he made his statement. She said, in answer to his question how things were, that they were "terrible … If I could shoot him I would", then she laughed and ended the conversation.[58]

56. Mr Matches had seen Mr Robin Bain some months before the fatalities. They had a long conversation, and at the end of it Mr Robin Bain said something like "it is a real battle bringing up children in this world", then stood up, smiled, and left.[59] He looked haggard, grey and depressed, much older than his age.[60]

57. On any view, the household was a very unusual and complicated one. I have formed the view that Mr Robin Bain was struggling, not only to reunite his family, but also to reorder their lives. I say this, although it is clear that the irregularity of the household was having an effect upon him, because there was evidence that his personal tidiness and professional attention to detail at work had deteriorated. Mrs Bain's condition is simply inexplicable. I read from some of her diaries written both while she was living in Papua New Guinea and New Zealand. The writings were of a literate woman who

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56 Retrial Notes of Evidence p 2997.
57 Retrial Notes of Evidence p 2997.
58 Retrial Notes of Evidence p 2998.
59 Retrial Notes of Evidence pp 2998–2999.
60 Retrial Notes of Evidence p 2999.

had had a tertiary education, were expressed in clear language, and obviously put down with some care and thought. A common theme was a complaint against her husband: that she had given him everything and that she had, in effect, received nothing in return, a complaint echoed by the Applicant, although never articulated with any supporting detail, apart from a claim by him that his mother had not been able to complete (whether correct or not) a music degree. It is also more than a little difficult to understand how the Applicant, a young, adult male studying at university, could, with apparent disregard for the squalor of the household, happily continue to live there. I question how anyone could continue to live within it if there were any practical alternative of any kind. The only inference I can draw which might have any possible bearing upon the question that I am asked is that all members of the household must have developed an insensitivity or indifference to their unpleasant domestic circumstances.

58. There is further evidence of abnormality of behaviour, that is, behaviour of the Applicant. He spoke several times of "black hands" coming to take away the family.[61] He said he had experienced déjà vu and had premonitions.[62] He had fallen into a kind of trance more than once, and he had stood up suddenly and abruptly during a musical performance, disturbing other people in the audience.[63] Later I refer to other manifestations of abnormality including some which occurred after the slayings.

59. Before leaving the topic of the state of the household, I say something further of the disarray of it. In Stephen's bedroom, clothes and other objects were stacked in various places and in no obvious order. The Applicant's room was very untidy. The family had brought many objects from Papua New Guinea, and these were scattered about the house. That various items of clothing were indiscriminately left lying about is relevant to a green jersey or sweater which, on the evidence, was likely to have been Mr Robin Bain's sweater, but was worn by Arawa from time to time.

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61 For example, Retrial Notes of Evidence pp 416, 473, 2427, 2558, 2581.
62 Retrial Notes of Evidence p 2354.
63 Retrial Notes of Evidence pp 2124–2125.

A Circumstantial Case

60. The Crown case was largely a circumstantial one. The Applicant steadfastly denied guilt. There were no eyewitnesses to the killings. That did not mean that each and every strand of the case needed to be proved beyond reasonable doubt.[64] All that the Crown had to do, if it could, was to prove that the Applicant was guilty on the whole of the evidence. Evidence insufficient to establish the truth of an allegation to a required standard of proof may nevertheless remain evidence in the case and may be taken into consideration in making the final decision. I approach the case upon the same basis as a judge would a civil case. I respectfully agree with the statement in the 9th edition of *Cross on Evidence*:

> "In civil cases it is liability which has to be proved on balance of probabilities. If more than one element of the cause of action is genuinely in dispute then it logically follows that each must be proved to a higher level so that they are jointly proved on a balance of probabilities."[65]

61. It is that burden which the Applicant has to discharge to satisfy me of his innocence.

Expert Evidence

62. Both at the retrial and for the purposes of my task, the parties tendered or referred me to much expert evidence. There is no doubt about the admissibility of expert evidence, so long as it satisfy the criteria for its admission, that is to say, essentially that the expert giving it is sufficiently qualified, and his or her bases for the evidence are properly stated. It is important to keep expert evidence in proper perspective. Because experts are well educated and tend to be authoritative in demeanour and opinion, their evidence can assume an undue importance or plausibility. Experts prefer not to be contradicted, even by other experts. They have been known to become more assertive, to the point almost of dogmatism on occasions, the more their opinions are questioned. It has to be kept in mind that most of their evidence does consist of opinions, and, as the availability of experts willing to give contradictory opinions demonstrates, there is often room for fair-minded difference between expert opinions. Such differences are for a jury to resolve in curial proceedings.[66] All tribunals of fact need to be on their

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64 *Thomas v R* [1972] NZLR 34.
65 Don Mathieson QC (ed), *Cross on Evidence* (LexisNexis, 9th ed, 2013) p 560.
66 *Hocking v Bell* (1945) 71 CLR 430 at 440 per Dixon J (in dissent on other matters).

guard against unconscious bias on the part of even the most conscientious of experts. Unconscious and unintended biases arise because forensic experts usually know exactly which result or opinion will support the case of the side that engages them. Their tendency, no matter their efforts and any protestations to the contrary, is to achieve or prove up that result or reach that opinion. In this case many experts were called. As will appear, it is not necessary for me to resolve, even if I could, all of the conflicts between them: the nature of the problem is well illustrated by this exchange between the Crown Prosecutor and the dental witness, Dr Donald Adams, for the Applicant at the retrial:

> "Q. I suggest to you that you haven't been very guarded in expressing a view about these marks given the very limited nature of the information that you have to work from.
>
> A. Well I don't agree.
>
> Q. Can I just record that you would agree with this comment and I think you have but I'm talking about a very recent paper by the National Research Council in the United States which is a combination of National Academies and the Institute of Justice and one of the focuses of that report was on bite marks. In that report one of the very concerns that you've just talked about and agreed with, I'll read you this comment, "Some of the key areas of dispute include the accuracy of human skin as a reliable registration material for bite marks", and you've just agreed 20 that that is a difficulty?
>
> A. Mhm.
>
> Q. And one of the other concerns identified in this report is the role of examiner bias, and do you know what I mean by that?
>
> A. Yes I do."[67]

Demonstrations, Reconstructions, Simulations, Views, Experiments and Re-Enactments

63. It is well settled that evidence of, or consisting of, reconstructions, demonstrations, simulations and experiments, and sometimes of re-enactments, is admissible and may have probative value. Judges and juries will often visit or view a locus or objects in order the better to understand the evidence. Attention must be paid, however, by any decision maker to the difficulty of recreating with exactitude the situation the subject of

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[67] Retrial Notes of Evidence p 3590.

a demonstration, experiment or re-enactment.[68] At the retrial, a demonstration was attempted with a view to proving whether Mr Robin Bain, with his relatively short arm length, could have committed suicide by shooting himself in the temple with the Applicant's rifle.[69] For this purpose, a mask and a metal rod were made and became exhibits at the retrial. I inspected them at the Court House in Christchurch. I would question whether they would have assisted very much in achieving a satisfactory replication of a suicide, if such it was in the living room at the front of the Bain residence. Similarly, a demonstration with the rifle in question in court by another person would be unlikely to be any more than indicative of possibilities, rather than a complete and reliable simulation of a real event. That having been said, I would accept that if Mr Robin Bain were determined to do so, he could have managed to shoot himself in the temple with the rifle. People determined on suicide will find a means of doing so by using whatever objects are at hand, even seemingly benign objects falling far short of a lethal firearm. In saying that, I do not mean to convey that it would have been easy or otherwise for Mr Robin Bain to kill himself with the rifle. His arm length from the top of the shoulder to the knuckle of his thumb was about 51cm to 52cm.[70] There is a photograph between pages 192 and 193 of Mr Karam's book, *Trial by Ambush*,[71] which appears to be a photograph of a simulation of a demonstration to the jury at the retrial of a person in the suggested position of Mr Robin Bain in suiciding. The length of the rifle in total is 1135mm.[72] The distance between the extremity of the rifle at its barrel and the trigger does not appear from the evidence, but the photograph certainly suggests that that measurement would be more than one half of the total length of the rifle, and accordingly such as to require it to be held at an angle of the kind at which it is being held in the photograph, and for the person holding it to position his head downwards and to the side. I inspected and handled the rifle at the Court House and could see as a result of doing so that, fitted as it was with an optical sight and a silencer, it was not entirely easy to hold and direct by orthodox handling with two hands pointing the rifle in even a generally horizontal orthodox direction.

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68 See the discussions in John Henry Wigmore, *Evidence in Trials at Common Law* (Little, Brown and Company, revised ed, 1974) vol IV at pp 326–328; [1152]–[1153]; Hodge Malek QC (ed), *Phipson on Evidence* (Sweet & Maxwell, 18th ed., 2013) pp 1146 [33-19].

69 Retrial Notes of Evidence pp 1613–1621.

70 Brief of Evidence of Ivan John Coward p 4.

71 Joe Karam, *Trial by Ambush* (HarperCollins Publishers, 1st ed, 2012).

72 Retrial Notes of Evidence p 1895.

Any other handling and aiming of it in a steady fashion, either in a vertical or near vertical direction, would be more difficult.

64. I make it clear now that none of the evidence of or relating to the position of Mr Robin Bain's body on the floor, the proximity of a chair, the position of the rifle, the blood spatter, bullet wipe, position of staining on the curtains between the alcove and the rest of the room, any blood on his shoe, or the direction of movement of blood on his trousers or shoes, and related or consequential hypotheses establishes on the balance of probabilities that he was in any particular position before he was shot, or died, whether kneeling, leaning over, sitting, crouching or standing. I am not prepared to infer either suicide or murder from it, whether in evidence given or theorised by any expert or otherwise.

65. On the topic of reconstructions I would refer to one hazarded as a not too unlikely a scenario by Mr Karam in *David and Goliath* his controversial bestseller.

> "On the matter of denying having seen his brother and two sisters or having been in their rooms, this too, when viewed with common sense, is simply and easily understood. Imagine please, yourself, at 22 years of age, after having been absent from your home for an hour, in the still dark of the early morning, finding the bloody body of your mother shot dead in her bed. I hazard to argue that you would display absolutely no rational thought pattern or behaviour. Instantaneous, subconscious, instinctive bodily and mental functions would take over. In no particular order or degree of importance, they would include extreme shock, extreme disbelief, self preservation, disorientation, terror, fear. Who could possibly say what they would do, or remember in fact what they actually did? A not too unlikely scenario, I would suggest, is that you would stumble panic-stricken and incoherent from room to room to check on other members of the family. You would probably grab them, shake them, cuddle them, talk to them. You would be very likely to faint at some point, upon coming across each one, more gruesome and bloody than the last."[73]

There is no evidence from the Applicant of this scenario, particularly the last two sentences of it.

Psychology of the Applicant and Mr Robin Bain

66. My reading of the Retrial Notes of Evidence suggests to me that there may at times have been more slight or conjectural psychology about the personalities and tendencies of the Applicant and Mr Robin Bain than there was compelling expert opinion.

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[73] Joe Karam, *David and Goliath* (Reed Books, 1997) p 149.

67. At the retrial, a Ms Ingrid Dunckley, a psychologist for the Ministry of Education, Special Education, Otago gave evidence. She had not visited the school where Mr Robin Bain worked. She did, however, speak to him on the Friday immediately before the fatalities. Her contact with him was by telephone only, and her recall of it was of a pleasant, normal conversation with him.[74] The Applicant's Counsel cross-examined Ms Dunckley, putting to her that another psychologist, Mr Cyril Wilden, would say that Mr Robin Bain's mental health was, in effect, deteriorating.[75] Mr Wilden had known Mr Robin Bain for many years. On the basis, in part at least, that some stories written by children whom Mr Robin Bain had been teaching were grim and unnatural and were or may have been edited or published by Mr Robin Bain, Mr Wilden suggested that Mr Robin Bain may have needed medical treatment, and, by implication, was mentally ill. Ms Dunckley's response was that a diagnosis of that kind would [should] not be made without a proper assessment and, in turn, such an assessment would not be the role of an educational psychologist.[76] Mr Reed QC of Counsel sought to assert a link between the publication and the tragedy. Ms Dunckley rejected it:

> "...children write all sorts of stories and it depends on the context of the classroom, what the topic was at the time, what, how the children were, I mean, I don't see the link between that and this."[77]

A little later, Ms Dunckley effectively corrected what Mr Reed QC was putting by saying that Mr Wilden had said [on an earlier occasion] no more than "[t]hey think he might have been depressed".[78]

68. In my opinion, the publication of the stories provides a very insecure foundation for a connexion between them and any likelihood that Mr Robin Bain killed all of his family except the Applicant. There were four (or on another version, three) out of twenty such stories by the children as it turned out. It is not even clear what, if any, role Mr Robin Bain had in editing or publishing them. It would be consistent with his attitude to education that any creative instincts by the children should be encouraged. Well before 1994, children would have been exposed to violence on television and in the cinema. Children relish and often recount horror stories. Many fairy tales are themselves

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74 Retrial Notes of Evidence p 2304.
75 Retrial Notes of Evidence p 2308.
76 Retrial Notes of Evidence p 2308.
77 Retrial Notes of Evidence p 2310.
78 Retrial Notes of Evidence p 2312.

frightening. Bad relatives and evil fairies are common. The morbid stories of Roald Dahl, the well-known English author, are very popular with children. The *Goosebumps* series by R. L. Stein, with their lurid covers, contain accounts of many grotesque and horrible occurrences. There is much violence in the Old Testament: the Crucifixion in the New Testament is a story of terrible cruelty. Children hear and read these at Sunday School.

69. I reject as generally contrary to ordinary human experience the link that was sought, and continues to be sought to be made, between the writing and publication of the stories, and the commission of homicide by Mr Robin Bain.

70. A sinister connexion was also sought to be drawn between two popular detective novels that Mr Robin Bain had been reading in his caravan before the killings.[79] One of them related to an accusation which turned out to be false that a father had killed one or more of his family.[80] The books were written by Agatha Christie and Ngaio Marsh. The former is, of course, a household name throughout the world, and the latter also well known worldwide and particularly respected in New Zealand, the country of her birth and to which she returned after a period overseas. I think that any sinister connexion with them is as fanciful as the connexion alleged between children's stories and any depression, violent disposition, or conduct on the part of Mr Robin Bain.

71. Mr Wilden's evidence, when it was given, was that he had retired in 2004 as a psychologist in the same section of the Education Department as Ms Dunckley.[81] He had known both Mr and Mrs Bain for many years, meeting them at about the same time in training at the Dunedin Teacher's College.[82] He recalled visiting the Taieri Beach School where Mr Robin Bain taught, in late 1993 or the beginning of 1994. He found:

> "... Robin to be looking gaunt and not a well person ... my impression was that he had some sort of communication problem ... I was concerned about the state of the school ... it was rather chaotic and disorganised ... I felt that he had some deep-seated emotional problems that really did concern me ... I'd done a lot of assessment for Family Court work for years and years so I could pick up pretty well ... whether a person had deep emotional problems."[83]

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79 Applicant's Submissions in Support of Claim of Innocence p 50.
80 Applicant's Narrative Submissions in Support of Claim of Innocence p 78.
81 Retrial Notes of Evidence p 2860.
82 Retrial Notes of Evidence pp 2861–2862.
83 Retrial Notes of Evidence pp 2863–2864.

Later, he said that he was quite sure that Mr Robin Bain had many symptoms of stress. His abiding impression was that he was suffering from some sort of reactive depression or situational depression.[84] He then gave a deal of hearsay evidence about what two children had told him.[85] Counsel suggested violence or striking, but I do not read Mr Wilden's evidence as convincingly confirming that to have occurred. There is no basis for any finding that Mr Robin Bain in fact encouraged the children to write gruesome or violent stories. I could find no evidence elsewhere, whether in the amateur or professional psychological profiles attempted by witnesses, and Mr Karam, that Mr Robin Bain was not a kindly, gentle teacher much liked by his pupils.

72. Mr Wilden himself came under some criticism. A colleague of Mr Robin Bain, Ms Darlene Thomson, said:

> "Without being too unkind, I didn't find he [Wilden, at the school after the fatalities] was very helpful ... [h]e got the children really upset and worked up and made them talk about things ... I just thought, gosh, just leave them alone, you know... they [the children] got very upset."[86]

Her evidence was put to Mr Wilden in cross-examination. He was dismissive of it, saying that she was quite inexperienced as a teacher, even though she had known the children for a year, and much better than he could have.[87]

73. I cannot regard Mr Wilden's evidence as establishing anything more than at most that Mr Robin Bain may have been in a state of some distress or unhappiness. I do not accept that he was at a stage of being clinically depressed. The cross-examination of Mr Wilden exposed contradictions in his evidence when he conceded that he had said of Mr Robin Bain (perhaps as a friend, but not I would think hypocritically so) that he was honest, caring, had a good wit, always wanted the best for his children, strove to get the best facilities at the school, and would always be remembered for his positive attitude and values, and the range of skills that he had helped develop in each child in his classes.[88]

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84 Retrial Notes of Evidence p 2864.
85 Retrial Notes of Evidence p 2867.
86 Retrial Notes of Evidence p 2227.
87 Retrial Notes of Evidence p 2886.
88 Retrial Notes of Evidence pp 2890–2891.

74. Later, I will deal in a different context with more of the evidence relating to Mr Robin Bain's personality, character and state of health. For present purposes, I simply say that the evidence does not satisfy me on the balance of probabilities that Mr Robin Bain was in such a condition as would impel him to murder all of his family except his eldest child.

75. At the retrial, the Defence called a psychiatrist, Dr Phillip Brinded. He was instructed by the Applicant's Counsel soon after the murders to visit the Applicant whilst he was on remand in Dunedin Prison in July and August 1994. He was asked to examine the Applicant and to do a mental status examination to decide whether or not he was suffering from a mental disorder, and to consider his fitness to plead or otherwise. He found the Applicant extremely distressed and at times difficult to interview.[89] He thought that he "showed no previous signs of mental disorder ... [or current] personality disorder".[90] (It is not clear whether he talked to people who knew the Applicant before the fatal day to explore what they saw or heard of the Applicant and his general behaviour then.) He diagnosed an acute stress reaction. The Applicant became incoherent at times when his family was discussed.[91] Dr Brinded gave evidence that he discussed his diagnosis with a colleague, Professor Paul Mullen.[92] After a time, Dr Brinded became, somewhat unusually, a treating psychiatrist following upon his role as an independent expert. Further evidence given by Dr Brinded goes to one other particular issue which I will discuss later, the unusual behaviour of the Applicant when and after the police arrived at the residence. Dr Brinded's conclusion was that he did not think that the Applicant suffered from any antisocial personality disorder or depression before the fatalities.[93] In cross-examination, Dr Brinded accepted what I think is a matter of ordinary common sense and observation, that acute stress reaction, or its near analogue, post-traumatic stress disorder, can equally occur in the person who has actually committed crimes as a person seeing or shocked by the commission of them.[94]

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89 Retrial Notes of Evidence p 3097.
90 Retrial Notes of Evidence p 3097.
91 Retrial Notes of Evidence p 3097.
92 Retrial Notes of Evidence p 3099.
93 Retrial Notes of Evidence p 3106.
94 Retrial Notes of Evidence pp 3110–3111.

76. There are aspects of the Applicant's behaviour which were, in my opinion, unusual, bizarre even. The evidence in this regard is unequivocal. Some of the evidence comes from the Applicant himself, other of it from persons to whom he described the unconventional feelings that he had. At a concert not long before the slayings, he fell into a kind of a trance, not hearing or responding in any way to the music for some time. One witness said that he had suddenly risen from his place in an audience and bumped, not intentionally, but inexplicably, a person or persons beside him as he struggled to leave his seat.[95] The Applicant spoke to s 18(c)(ii) of a premonition that he had of something bad that was to happen to his family,[96] and to others of "black hands coming to take them away".[97] I am not persuaded that this is normal behaviour. His resentment of his father, and his adversarial stance towards him, and description of the division of the family into two camps, either for Mrs Bain or against her, struck me as unusual. In the light of Mr Matches's evidence, to which I have referred, his championing of his mother, and description of her as oppressed by Mr Robin Bain, raise unanswered questions. On the other hand, other witnesses spoke of the Applicant as having a gentle disposition.[98] He was certainly very, almost obsessively, attached to his mother, and to building and occupying the grand home in prospect with her.

Fresh Insights and Fading Memories

77. As I understand it, this case deeply shocked the whole country. It has, in one way or another, been in the public eye since the fatalities, in newspapers, on television, in Mr Karam's three books, in advertisements by him, and in the Courts, among other places. The reversal of the Applicant's fortunes on the second occasion upon which his case came to the Privy Council was in itself a sensational event. Experience tells that there will always be people who think that they have some novel insights into a tragedy of which this case is a marked example, or that they have discovered some overlooked or unremarked fact or matter casting an entirely new light on the affair: that they have in fact "cracked the case" as no one else has so far. Other people come forward for the first time honestly believing that they can recall, often in detail, an occurrence or a

95 Retrial Notes of Evidence pp 2124–2125.
96 Retrial Notes of Evidence p 2356.
97 Retrial Notes of Evidence pp 416, 473, 2427, 2558, 2581.
98 Retrial Notes of Evidence pp 2370, 2385, 2957.

conversation, the significance of which they did not appreciate until recently.[99] Their evidence has to be weighed with the knowledge that memories inevitably fade, and that the recall and description of the newfound important occurrence or conversation may be affected by the passage of time, as well as a desire for relevance, recognition or importance. That does not necessarily mean that these people are dishonest or not sincere in *thinking* they know and in recounting details of their beliefs.

Character

78. The *Evidence Act 2006* is not explicit with respect to evidence of character in relation to guilt or innocence. A court of five judges (Street CJ and Hope, Glass, Samuels and Priestly JJA) of the New South Wales Court of Appeal discussed this topic in *R v Murphy*.[100] In that jurisdiction, section 412 of the *Crimes Act* expressly provided that evidence of good character was admissible in criminal trials as evidence on the question of guilt. The New South Wales Court of Appeal was of the view that the section was largely reflective of the common law. The Court referred to *R v Stalder*,[101] in which Street CJ had discussed that:

> "It is clear from these authorities that evidence of good character is admissible as material establishing that it is unlikely that the accused committed the offence ... It is unlikelihood of guilt that most accurately describes the proposition in aid of which evidence of good character can be used.
>
> There is a corollary which has likewise long been recognized as within the legitimate use which may be made of evidence of good character. Evidence of good character can be used as establishing the credibility of the accused in his denial of the charge and hence the unlikelihood of his guilt."[102]

79. In New Zealand, I understand the principle to depend upon the proper construction of the *Evidence Act* (sections 38 to 41, in particular) and to be less expansive than the common law as stated in *Gharbal v R*.[103] My instructions, to act on matters bearing on the question of innocence, enable me to have regard to good character, and I do so to the extent that it is reliable and persuasive.

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99 See, for example, Maryanne Pease, Stephen Cousins, Daryl Young, Darren Palmer.
100 (1985) 4 NSWLR 42 at 53.
101 [1981] 2 NSWLR 9.
102 [1981] 2 NSWLR 9 at 17.
103 [2010] NZCA 45 at [104].

Relevant Evidence

80. I draw attention to another contrast between what I may take into account and what in a criminal trial a jury may be precluded from hearing or considering. In a criminal trial, a judge may exclude relevant, even probative, evidence if the judge thinks its prejudicial effect outweighs its probative value ("the prejudice rule").[104] As I read the authorities, it may not be clearly settled in New Zealand whether the prejudice rule has application to civil proceedings. At common law in civil cases, judges did not usually have a discretion to disallow prejudicial evidence. The issue arose, and still tends to arise, in cases in which evidence has been unfairly obtained. That is not the position in this case. In adversarial proceedings it will be a very large and important forensic goal to prejudice or impugn, for example, the credit of the opposing party and his or her witnesses, and the opposing case. Most civil cases are not heard by juries these days, and the risk of unfairness is much less likely to arise when a judge is the tribunal of fact as well as law. Before the retrial, Panckhurst J, in a preliminary hearing, made rulings applying the prejudice rule by disallowing and allowing various pieces of contentious evidence which the Crown wished to adduce. Some of his Honour's rulings were then the subject of a prolonged hearing in the Court of Appeal. My position here is that I do not act on any evidence that is *unfairly* prejudicial to the Applicant and not logically probative of some aspect or fact relevant to the outcome.

Statistics

81. Each side in this case, more particularly the Applicant, either directly or indirectly, seeks to rely on statistics. At the retrial, Dr Alexander Dempster, for example, spoke of the statistical rarity in the texts of suicide by gunshot in the left temple by right handed people as the Applicant contends it was committed in that way by his father: one in eight to one in twenty reported cases.[105] Mr Karam similarly cites research papers containing statistics showing that a very large number, the great majority, of familicides

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104 *Evidence Act* s 8.
105 Retrial Notes of Evidence p 1646.

are committed by the father of the family.[106] I will deal with familicide as a separate topic later.

82. There have been several recent articles in Australia in relation to the use of statistics in the resolution of cases. Three of these are by the philosopher jurist Justice David Hodgson of the Supreme Court of New South Wales. In the first, *Probability: The Logic of the Law - a Response*, his Honour said this:

> "I wish to contend that, while compliance with logical rules (including quantitative rules of probability, where they are applicable) is necessary for satisfactory inference drawing or legal fact finding, it is very far from sufficient, and that the most important and interesting aspects of satisfactory fact finding lie elsewhere."[107]

In that paper, and in his two subsequent papers,[108] he explains Bayes' Theorem, which is the foundation for the school of thought that favours a mathematical or statistical approach to fact finding. In substance, the Theorem is sought to be utilised to derive a "likelihood ratio". His Honour's papers, and the application of the Theorem, were considered in a subsequent commentary and dissertation on the possibility of a particular application of the Theorem to DNA evidence by Andrew Ligertwood in *Avoiding Bayes in DNA Cases.*[109] This author quotes statements by the [English] Court of Appeal in *R v Denis Adams*:

> "[Bayesian analysis] trespasses on an area peculiarly and exclusively within the province of a jury, namely the way in which they evaluate the relationship between one piece of evidence and another.
>
> ...
>
> [It is] simply inappropriate to the jury's task. Jurors evaluate evidence to reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before them."[110]

83. Mr Reed QC for the Applicant, and Dr Dempster, were both substantially correct when the former put this question to, and Dr Dempster responded in this way at the re-trial:

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106 See Applicant's Submissions in Support of Claim of Innocence at 80 [336.1]; Rowena Cave, '*Understanding Familicide: What the Research Says*' (Research Report, Factuality Research and Analysis, January 2011) (Appendix B to Applicant's Submissions in Support of Claim of Innocence). See also evidence of Geoffrey Leigh Swift (Retrial Notes of Evidence p 2948) which suggests that David had assumed the position of the head of the household while Robin was working at Taieri Mouth.

107 (1995) 15 'Oxford Journal of Legal Studies' 51 at 51.

108 *The Scales of Justice: Probability and Proof in Legal Fact Finding* (1995) 69 'Australian Law Journal' 731; *A Lawyer looks at Bayes' Theorem* (2002) 76 'Australian Law Journal' 109.

109 (2003) 77 'Australian Law Journal' 317.

110 [1996] 2 Cr App R 467 at 481.

"Q. But this trial is not about statistics is it?

A. Well statistics comes into it."[111]

Lost or Destroyed Evidence

84. I told the representatives of the parties at our meeting in Auckland that I would, in considering the case, have regard to the circumstances and capacities of each party to adduce evidence in assessing the evidence proffered or not proffered by the party.[112] I have done that.

85. That does not mean that a doubt is able to be elevated to a probability on the basis of a loss, or destruction, or alteration of something that could possibly have evidentiary value. The position might be different if it could be established that a piece of evidence was deliberately destroyed, or lost, or altered with colourable intent. Imputations of that have been made against some of the investigating police officers, particularly Detective Sergeant Milton Weir, by the Applicant. On the other side, imputations and accusations have been made against the Applicant: indeed, it is part of the Crown case that he deliberately tampered with evidence by, among other things, washing necessarily heavily blood spattered clothing,[113] typing a false suicide note into the computer, and delicately balancing a magazine on its edge on the floor of the living room near Mr Robin Bain's body.[114] A large part of the Applicant's case revolves around alleged blood stains or smears on one of Mr Robin Bain's hands: either that samples were not taken, or if taken, were lost or destroyed or not analysed.[115] These are only examples. The relevance and importance of the destruction, or loss, or alteration of a piece of evidence can only be assessed in the light of all of the surrounding circumstances. If not in terms, certainly by implication the Applicant's Submissions in Reply ask me to assume that if lost or destroyed evidence were available, it would certainly exonerate him.

Case Theories

86. In criminal cases, just as prosecutors and defendants seek to establish or refute motives,

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111 Retrial Notes of Evidence p 1646.

112 See *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970.

113 Overview of the Crown Case and Summary of Legal Principles pp 7–11.

114 Overview of the Crown Case and Summary of Legal Principles p 4.

115 Applicant's Submissions in Support of Claim of Innocence p 93 [387]–[389].

each will try to construct a case theory to support his or her case. Obviously, the credibility of a prosecution or a defence will be enhanced if a reasonable theory for the way in which the crime might be or could not plausibly be committed can be advanced. During the course of a trial, a case theory may evolve, or indeed change, or be discarded or replaced either temporarily or permanently because of the way in which the evidence emerges, or is tested, or even be abandoned out of perceived forensic advantage, or perhaps out of forensic misjudgement. A particular problem here (but not an unfamiliar one) is that only the perpetrator knows how, at what time, and in what sequence, five members of the household died by gunshot. It is possible in a criminal trial that each juror may have a different theory regarding the commission of a crime. Proof of a particular case theory is not essential for the securing of a verdict of guilty. The prosecutor can very properly say to a jury that he or she does not know precisely how the crime was committed. A verdict of guilty will still be open in a circumstantial case if the Prosecutor is able to demonstrate that on all of the evidence that is available, the accused is guilty. For example, the Crown submitted at the trials that Mr Robin Bain was probably or possibly kneeling in prayer when he was shot. The Applicant sought to show that, by reference to the position of Mr Robin Bain's corpse on the floor, blood spatter and stains, bullet wipe, trajectory of the bullet, proximity of the rifle to the entry point of the bullet and other matters, this was wrong. Even if I were to be satisfied that Mr Robin Bain was not kneeling when he was shot, it does not necessarily follow that I would be persuaded that he suicided. If the Applicant were the killer only he would know what happened. The Crown was not at the trials bound to one theory of Mr Robin Bain's death, and is certainly not so bound now. Who knows what may have occurred in that living room on the fatal day? It is not inconceivable that in or after a confrontation, Mr Robin Bain, resigned to his fate, chose to offer no resistance. It is perfectly natural, and in no way inappropriate, for the Crown, now as the Defence, to try to demolish a case theory by demonstrating inconsistencies with it or erecting its own case theory. In cases of this kind, it would be surprising if there were not 'loose ends'. I will give further consideration to possible case theories of the parties in due course.

The Applicant's Case

87. Mr Karam, on behalf of the Applicant, advances 13 primary reasons for the Applicant's Claim of Innocence. They are as follows:

(a) Alibi 1: The Applicant's whereabouts when computer turned on;

(b) Alibi 2: The times of deaths;

(c) The footprints;

(d) Blood on Mr Robin Bain's hands;

(e) Physical evidence that Mr Robin Bain committed suicide;

(f) Auxiliary evidence of suicide;

(g) Injuries to Mr Robin Bain;

(h) Other matters implicating Mr Robin Bain;

(i) Contentious issues;

(j) Familicide;

(k) Police errors resulting in conclusive evidence being unavailable;

(l) New Evidence – Sooty lines on Mr Robin Bain's thumb; and

(m) Integrity of police and prosecution case.[116]

88. I will deal with such of these as I consider arguable bearing in mind that they, and the evidence in relation to each of them, need to be evaluated in the light of all of the evidence, especially in this essentially circumstantial case.

89. There is evidence, as Mr Karam contends, that the computer was turned on between 6.39am and 6.42am on the morning of the 20th of June 1994. Mr Karam is also correct in pointing out that, at the first trial, the Crown's case was that the computer had been turned on at 6.44am.

90. Furtherer, it is correct that the Applicant was seen at the gate of the family residence by a person at a time *said* to have been about 6.45am.

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116 Applicant's Claim of Innocence pp 3–4.

91. The evidence to which I have referred comes from a number of witnesses and needs to be examined.

92. Mr Martin Cox was a software engineer who had been working with computers for about 15 years before the retrial. He was engaged on the 21st of June 1994 by the investigating police to advise them on matters relating to the computer in the alcove of the living room at the Bain residence. The computer was an IBM compatible, made by Philips. It was old, about 10 years or so. Unusually for the time and the model, it contained a hard disk.[117] The investigating police wished to save, because it was obviously an important piece of evidence, the message displayed on the screen. In his evidence, Mr Cox described what he considered before he did that, and how he went about it.

93. At the retrial, Mr Cox was reminded of his evidence at the first trial, which was that the message was saved at 2.16pm on the afternoon of the 21st of June 1994, and that, by counting back 31 hours and 32 minutes, he could ascertain that the computer had been turned on at 6.44am on the 20th of June 1994.[118]

94. Detective Kevin Anderson was present when Mr Cox examined and worked on the computer. The times the subject of his evidence were calculated by reference to Detective Anderson's watch, which was, it seems, inaccurate to the extent of about two minutes. In consequence, Mr Cox's opinion that the computer had first been turned on at about 6.44am the previous day could be adjusted to about 6.42am.[119]

95. Mr Reed QC, for the Applicant at the retrial, foreshadowed in his cross-examination of Mr Cox the evidence of Mr Maarten Kleintjies, an electronic engineer, who had formed the opinion that a further adjustment was required to account for the fact that an internal clock within the computer did not record seconds, but that times, by reference to them, could be obtained from a hard drive which he had cloned. It was put, therefore, that the time that the computer was turned on the preceeding day should be set back by about

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117 Retrial Notes of Evidence p 658.
118 Retrial Notes of Evidence p 672.
119 Retrial Notes of Evidence p 670.

54 seconds. Mr Cox regarded the 54 seconds as the maximum, rather than necessarily the actual likely number of seconds that should be further accounted for.[120]

96. As foreshadowed, Mr Kleintjies was in due course called to give evidence, after having made a forensic examination of the computer. He had made a clone of it in order to preserve the data that it contained. His examination-in-chief began with a detailed explanation of the process which he followed with a view to assessing the time upon which the computer was turned on, having made it clear that he was unable to say with certainty what that time actually was.[121]

97. Mr Kleintjies was subjected to a testing cross-examination. If anything, the cross-examination demonstrated that, despite the best efforts of both Mr Cox and Mr Kleintjies, precise scientific accuracy as to both the time at which the computer message was saved and the computer turned off, and the time at which the message appearing on the computer was typed, were not ascertainable.[122]

98. Mr Karam, in reliance on other evidence, argues that the Applicant was at the gate to his house at a time after the computer was turned on, which, he says, was very soon after 6.41am and most likely between 6.41am and some seconds.[123]

99. Dr Brian Thomas, a computer consultant, gave evidence on the topic for the defence at the retrial. His first involvement with the case was in 2009. The original computer had by then been lost. In consequence, Dr Thomas, for the purposes of giving evidence, used another computer for the running of the same software as was used on the lost computer. He "guess[ed] about fifteen seconds, something like that" would be the time taken for any person, with some expertise, to "tap in" the message and to enter it.[124] In substance, what Dr Thomas did is to estimate the times that might have been taken by Mr Cox to place himself in the position of being able to estimate in turn the earliest time the message on the computer was entered into it. In the end, as a matter of

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120 Retrial Notes of Evidence p 675-676.
121 Retrial Notes of Evidence pp 744–745.
122 Retrial Notes of Evidence pp 766, 771.
123 Applicant's Submissions in Support of Claim of Innocence p 20 [44]–[46].
124 Retrial Notes of Evidence p 3052.

practical reality, all of Dr Thomas's estimates were subject to the qualification with which he agreed, that "[o]bviously it's very hard to say because I wasn't there".[125]

100. The argument for an 'alibi' necessarily depends upon the strict accuracy of what are in fact possible variables, and the compatability and consistency of the claimed alibi with other evidence. These are some of the possible variables:

(a) the means, times and reliability of the calibration of Detective Anderson's watch;

(b) the clone as a complete and perfect replica

(c) the internal clock on the computer;

(d) the allowance(s) made for negative and positive adjustments of times for the various functions of the computer;

(e) the compatabilty of the computer Dr Thomas used and the actual computer;

(f) the timing of the identification made by witnesses of the Applicant at the gate and elsewhere on his paper run;

(g) a witness' attention to the clock in her car;

(h) the degree of inaccuracy of her car clock;

(i) the Applicant's claim that he was just past Heath Street at exactly 6.40am and that it took 2 to 3 minutes to walk up from there;

(j) the accuracy of the Applicant's watch if he relied upon that for his statement at the time;

(k) the time that the Applicant took to go from the gate at the residence to the house; and

(l) estimates of the times actually taken to activate and use the computer.

101. It is to the identification evidence that I now turn. Mrs Tania Donaldson in 1994 worked at a rest home and hospital at the top of Every Street. It was her habit to depart

125 Retrial Notes of Evidence p 3058.

from her house for her work at about 6.25am, a journey that took 15 to 20 minutes usually.[126] On her journey on the day of the fatalities, she saw a man crossing to Every Street as she turned a corner. He was in his early fifties. She did not recognise him.[127] Shortly afterwards, she saw a boy with his dog, whom she had seen on other occasions, and whom she thought to be "the paper boy". He was wearing dark trousers, a sweatshirt with a hood on it and was "hard to see". Mrs Donaldson was on time for her work. She said that when she saw the paper boy: "... it must've been before 6:45, could've been 6:40, 6:41 'cos I had time to make a coffee before I sat down for handover".[128]

102. Some inaccuracies were able to be demonstrated in this witness' evidence in cross-examination. In an earlier statement she had given different times of arrival at work and had said that the paper boy had been carrying a bag on his right shoulder.[129] She was told, in premises to questions addresed to her, what other witnesses might or might not say as to the clothing and appearace of the paper boy, but she generally adhered to her opinion that the paper boy was not wearing long trousers.[130]

103. Ms Denise Laney was another employee at the rest home. She too worked a shift there beginning at 6.45am. Her evidence was that on the 20th of June 1994, she probably, in accordance with her practice, left home at about 6.40am.[131] Before reaching her workplace she saw a person whom she believed to be the paperboy squeezing through a gate. She was surprised because normally she saw him a further distance away at this time.[132] The gate to which she was referring was the gateway to the Bain residence. She looked at her clock which she knew to be fast and which showed a time of 6.50am. It was fast, she said, by about 5 minutes. She particularly noticed that the paperboy had a bag on his back. She did not see a dog with him.[133] It was out of character, out of routine, she thought, that the paperboy was as far advanced on his paper run when she saw him. In cross-examination, unchallenged hearsay evidence was adduced that her

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126 Retrial Notes of Evidence p 2132.
127 Retrial Notes of Evidence p 2133.
128 Retrial Notes of Evidence pp 2133–2135.
129 Retrial Notes of Evidence pp 2137.
130 Retrial Notes of Evidence p 2139.
131 Retrial Notes of Evidence p 2142.
132 Retrial Notes of Evidence pp 2142–2143.
133 Retrial Notes of Evidence p 2144.

clock had been checked, and found to be fast by five minutes.[134] She could not see whether the paperboy was wearing long pants or trousers.[135]

104. A third witness, Ms Kathleen Mitchell, gave some identification evidence. In June 1994, she was living in Somerville Street, Dunedin at an address on the Applicant's paper run. Before June, this woman's dog used to bark at the Applicant when the Applicant brought his dog with him up onto her balcony to leave the newspaper there. She had spoken to him and asked him not to bring his dog on to her property because it caused her own dog to bark.[136] On the morning of the 20th of June 1994, between 6.10am and 6.15am, her dog started barking. She switched on the external lights and called out "hello, as [she] knew the [Applicant] was up on the stairs."[137] She was quite clear that she had actually seen the Applicant "[not] too far onto the balcony".[138]

105. Ms Mitchell's statement was read at the retrial, and therefore remains unchallenged.

106. The identification evidence suffers to some extent at least from the deficiencies, of which most lawyers are aware, of susceptibility to suggestion and the superficiality of physical observations and estimates of time made in the ordinary course of life. I do not suggest that the witnesses here did not see and identify the Applicant. Rather, it is the time at which each did so that is open to question.

107. I turn to the response of the Crown on these issues. Other variables were in play: the delay between the switching on of the computer and the operation of the internal clock, the delay between start up of that clock and the creation of the temporary file, and the deviation of the internal clock over a period of 31 hours. The Crown argues that the problem that confronted Mr Cox when he set out to examine the computer, with which he was not familiar, was an unusual one. He needed to give thought to what he must do to ensure that the message displayed on the screen was not lost. In effect, after he did that, he crashed the computer, expecting to find the time that the message file had been created in the internal clock of the computer. It was not functioning. It reverted to a

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134 Retrial Notes of Evidence pp 2145–2146.
135 Retrial Notes of Evidence p 2147.
136 Brief of Evidence of Kathleen Yvonne Mitchell p 3.
137 Brief of Evidence of Kathleen Yvonne Mitchell p 2.
138 Brief of Evidence of Kathleen Yvonne Mitchell p 4.

default setting.[139] The time taken for the way in which these functions were performed can only be the subject of estimates, albeit estimates by experts, not of time, but of computers.

108. Nothing, the Crown contends, that was done or said by Mr Kleintjes produced any greater certainty.

109. The Crown submits, in effect, that much of the cross-examination at the second trial of Mr Cox was misconceived. The processes adopted by Mr Cox were careful and themselves would have taken some time. The adoption by Defence Counsel in his closing speech to the jury at the retrial of a precise time of switch time of 6.41.50 was arbitrary. It ignored the variables that were obviously in play.[140]

110. The Crown does not accept that the Applicant could not have been at home at the time that the computer was switched on. These points are made: that the preponderence of evidence at both trials was that the Applicant commenced and completed his paper run earlier than usual;[141] that the Applicant himself was quite exact about times in his statement to the police;[142] and that he had himself in effect been quite, indeed too, emphatic to be credible about these. The Applicant also told the investigating police that he ran most of the paper run.[143]

111. The Crown submission, after pointing to the imprecision which must attach to what were essentially estimates of various times by observers, argues in summary that the evidence *taken as a whole*, including that of the Applicant, does demonstrate that he had completed his run and returned home in time to switch on the computer and type in the message displayed on it.

Times of Deaths

112. Mr Karam submitted that "there was either a gap of about three hours between the deaths of the others of the family, and Mr Robin Bain's on the Crown's case, or all five deaths occurred while the Applicant was out of the house (with the possibility that Mr

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139 Crown's Response to Applicant's Case p 6.
140 Crown's Response to Applicant's Case p 11 [23].
141 Crown's Response to Applicant's Case p 13 nn 37.
142 Privy Council Record of Proceedings p 0386.
143 Privy Council Record of Proceedings p 0387.

Robin Bain died very soon after the Applicant arrived home) on the Applicant's account".[144] With respect to Mr Karam, I think that it would be more accurate to describe what he has called the Crown case as a case *theory* of the Crown. It is necessary to bear in mind what I have said earlier. No one except the murderer knows what happened and the order in which events occurred. But in any event it is now for the Applicant to prove this case.

113. Mr Karam's theory depends principally upon two pieces of evidence: that of a chief ambulance officer who thought that the bodies of Mrs Bain and the children were all warm to touch, and of the same warmth as one another;[145] and pathology evidence that Stephen, almost naked on the floor, would have become very cold to touch very quickly.[146] It follows, Mr Karam says, that Stephen could not have been dead for nearly three hours, and that therefore the Applicant was away on his paper run when the killings occurred.

114. The response of the Crown to this argument may be summarised in this way. The ambulance officer's assessment, by palpation of the relative warmth of the five bodies, provides some support for the Crown case. Mr Robin Bain's corpse was distinctly warmer than the others. The Crown quoted the evidence of the pathologist, Mr Ken Thomson, given during the Review in 1997:

> "The assessment of body temperature by palpation is notoriously difficult and I would agree with Mr Karam that given the climate and Stephen's lack of clothing, he would be expected to lose more heat than the other members of the family. Against that of course would be the period of undoubted exertion prior to his death during which the body temperature would have been elevated. It is clear from Mr Wombell's evidence that he noted a significant difference in body temperature between Robin Bain and all the other deceased. I believe this is significant but I doubt that the minor variations in temperature between Stephen and other family members who were presumably killed at about the same time would be detectable by palpation."[147]

Footprints

115. Mr Karam makes much of the bloodied footprints illuminated after the application of luminol in various parts of the house. He refers to several footprints made by a sock-clad right foot, in Mrs Margaret Bain's room, in the hallway and the entrace to Laniet's

144 Applicant's Claim of Innocence p 4 [18].
145 Retrial Notes of Evidence pp 363–364.
146 Retrial Notes of Evidence p 1554.
147 Crown's Response to Applicant's Case pp 19–20.

room, and the absence of any prints of a left foot.[148] A single sock was found in the washing machine by the investigating police.[149] Two of the prints were described as being complete, that is from the top of the toes to the heel. These were measured at 280mm.[150] Another of the footprints was measured at 240mm. It is right to say that the Crown was pressed to concede, during argument in the Privy Council, that the Prosecution case could not accommodate the presence of any footprint made by Mr Robin Bain. As the Crown's present stance makes clear, and is the situation now, that was not a binding concession made for all times and all purposes. Concessions made in argument under pressure of close questioning by judges, on further consideration can sometimes be seen to have been made too hastily. In any event, the question is not whether the case could or could not accommodate the presence of Mr Robin Bain's footprints, but the reliability and probative value of the evidence of the footprints themselves in light of all of the evidence.

116. The argument of the Applicant continues that his foot was 300mm in length, and that it would be impossible for him to make a footprint of smaller length than that. Mr Robin Bain's feet were 270mm and a foot of that length makes prints of about 280mm.[151]

117. It is necessary to examine the actual evidence relating to the footprints. That evidence raises as many questions as it answers. Why were there no footprints of a left foot? How could it possibly be that the same foot could make two footprints of such different sizes, that is to say a difference of 40mm whether complete or not?[152] The Applicant was wearing white socks when the police arrived at the house which, on examination, were found to have their soles covered in minute particles of blood, with two spots of blood on an upper part of one sock (the latter relied on to support another argument of the Applicant).[153] If the footprints were the Applicant's and applied by the white socks he was wearing, why did one of the feet leave no footprint? Why were there so few

148 Applicant's Claim of Innocence p 5 [22]; Applicant's Submissions in Support of Claim of Innocence pp 23–27 [57]–[75].
149 Retrial Notes of Evidence p 600.
150 Applicant's Submissions in Support of Claim of Innocence pp 23–24 [58].
151 Applicant's Claim of Innocence p 5 [27]–[29]; Applicant's Submissions in Support of Claim of Innocence pp 25–27 [64]–[73].
152 Applicant's Submissions in Support of Claim of Innocence pp 23–24 [58].
153 Applicant's Claim of Innocence p 6 [30]; Applicant's Submissions in Support of Claim of Innocence p 27 [78].

footprints? What distance separated the footprints? Was there anything about them to suggest running, walking, walking quietly, on tiptoes, pausing or standing?

118. Evidence in relation to the footprints came principally from Dr Peter Hentschel, a scientist with a degree in chemistry and considerable experience of forensic science.[154] He described the way in which luminol was used, and what it disclosed by way of footprints on its application and illumination.[155] The first print that he saw was from the ball of the foot to heel in Mrs Bain's room. The second print was from the ball of the foot to the heel also.[156] The next area of luminescence was in the hallway just outside that bedroom. The maker of the footprint, he said, was wearing a sock and would have been moving towards a door, which I take to be the door to Laniet's bedroom. It was close to that door that the third, a "complete print", was found. It was that print, from toe area to the heel, that was about 280mm in length. He was able to see the toe area as well as the rest of the sole. The fourth print was found by the bedroom door and it too was a complete print.[157] A final "partial print" was found in the hall by the stairs leading downwards.[158] No other prints were found in the house. This was so even though luminol was used in areas of the kitchen and the laundry, and each of Arawa's and Stephen's bedrooms.[159]

119. In cross-examination, Mr Reed QC for the Applicant questioned the evidence of Dr Hentschel that 280mm was a minimum measurement. The witness did, however, accept that there could be a margin of error, that is to say the actual foot could have been longer, not smaller, than the print. It was common ground that a sock of Mr Robin Bain had been found to be 240mm in length.[160] On the other hand, it was also common ground that one of the Applicant's socks measured 270mm, the same length as Mr Robin Bain's actual foot was measured to be in the mortuary.[161] Mr Reed QC for the Applicant was able again to expose uncertainties in what at first sight might have the appearance of absolute scientific veracity.

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154 Retrial Notes of Evidence p 1268.
155 Retrial Notes of Evidence pp 1273–1275.
156 Retrial Notes of Evidence p 1276.
157 Retrial Notes of Evidence p 1277.
158 Retrial Notes of Evidence pp 1277–1278.
159 Retrial Notes of Evidence p 1279.
160 Retrial Notes of Evidence pp 1358–1359.
161 Retrial Notes of Evidence p 1360.

120. The response of the Crown summarises the nature and direction of the footprints.

> **"The prints**
>
> 55. As part of the scene examination, an ESR scientist (Mr Hentschel), assisted by Detective Weir, sprayed the carpets at 65 Every Street with luminol. This revealed the presence of six bloody footprints, from a stockinged right foot. Two of the prints were in Margaret Bain's bedroon, in the area at the foot of her bed. They indicated a direction of travel away from Stephen Bain's adjoining bedroom. One print was found in the hallway outside Margaret Bain's bedroom orientated towards the front door. The next two were detected outside Laniet Bain's bedroom, one indicating a direction of travel into the room, the other in the opposite direction. The last print was found at the top of the stairs.
>
> 56. Some of the prints were measured. This was effected by Mr Hentschel placing his thumbs at the extremities of the glowing area. The lights were then turned on, and Detective Weir measured the distance between the thumbs.
>
> 57. Some of the prints were described by Mr Hentschel as "partial" prints in that they only showed the ball of the foot to the heel. The first of these, in Margaret Bain's bedroom, was measured at 240mm.
>
> 58. Two of the prints in the hallway were measured at 280mm, and one of these was described by Mr Hentschel (in the language later sparking the debate) as a "complete print.""[162] [References ommitted]

121. When he died, Mr Robin Bain was wearing socks and shoes which were examined under intense light and also after the application of luminol. No blood was detected.[163]

122. The last is contentious. The Applicant argues that there were spots or other traces of blood on Mr Robin Bain's shoes that were not, but should have been, tested and that their presence is inculpatory of Mr Robin Bain.[164] I am unable to accept this. It is no more than a possibility that the stains or traces were of blood. If Mr Robin Bain killed the other members of the family while wearing the shoes, it seems to me that it would have been likely that there would have been more blood on them, whether directly deposited from, for example, Stephen's body, or indirectly from it via Mr Robin Bain's own clothing. In any event, the absence of any blood tests of matter, whatever it was, on Mr Robin Bain's shoes does not make it probable that the matter was blood from one of the bodies of his family.

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162 Crown's Response to Applicant's Case pp 20–21.

163 Retrial Notes of Evidence p 1301.

164 Applicant's Submissions in Reply p 9 [22]; Applicant's Narrative Submissions in Support of Claim of Innocence p 342 [19.35].

123. Another point that the Crown makes is that luminol is used principally for the detection of blood stains. It is not conventionally used for the purposes of measurement or comparison of footprints: there will be variables anyway, the size of the staining on the sole, variations in intensity of the staining, whether the maker of the prints is walking standing, his or her gait, the receptiveness or otherwise of the surface, and perhaps the extent to which blood may be progressively deposited on, or absorbed by, the surface as the maker of the prints proceeds.[165]

124. The whole of the Applicant's argument on this topic, according to the Crown, depends upon a literal interpretation of Dr Hentschel's expression "complete print". The Crown submits that Dr Hentschel used the term to distinguish prints which included the toe area (complete prints) from the prints that showed only the ball and heel (partial prints).[166] The print that was measured at 280mm was a minimum measurement. Years of experience, Dr Hentschel said, led him to believe that the length of the print that he saw assisted by luminol was less than the actual length of the foot that made the print.[167]

125. The Crown made reference to Mr Kevan Walsh's evidence. Using a tray of mammalian blood for the reception of footprints, Mr Walsh caused bloodstained prints to be applied and measured. Under the application of luminol, these prints, on carpet, ranged from 273mm to 285mm (standing) and 286mm to 308mm (walking).[168]

126. Mr Walsh also took measurements of staining on the Applicant's socks. They were not completely soaked in blood, and nor was it known which sock the Applicant had worn on which foot. The staining on one sock was not the same as on the other. Using the more bloodstained of the two, and wearing that sock in different positions on his foot, Mr Walsh measured the areas of heavy staining at between 259mm and 287mm. Another set of experiments was made, employing a person with a foot of the same length as Mr Robin Bain's foot, said to be 270mm. Prints visible to the naked eye

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165 Crown's Response to Applicant's Case pp 21–22 [61]–[63].
166 Crown's Response to Applicant's Case p 22 [64]–[65].
167 Retrial Notes of Evidence p 1362.
168 Crown's Response to Applicant's Case p 24 [72]; Privy Council Record of Proceedings p 1986.

made by this person varied between 268mm and 276mm. On the application of luminol, the prints varied between 269mm and 287mm.[169]

127. The Crown referred to the evidence of a forensic scientist, Dr Anna Sandiford, engaged by the Applicant who attepted to replicate Mr Walsh's methods, also using mammalian blood.[170] The prints that the Applicant himself made were measured by her after the application of luminol and were found to be between 300mm and 315mm.[171]

128. On the footprints, the Crown concludes its argument by submitting that the experiments effectively show the unreliability and the wide range of variation that may occur in the measurement of footprints, whether with or without the application of luminol, and the attribution of the making of them to a particular person.[172] An ancilliary submission is made by the Crown. It is that the absence of any blood on the new pair of running shoes that the Applicant said that he had worn on the morning of the killings was telling. Other evidence suggested that the Applicant had not been wearing these shoes.[173] An older odd pair of running shoes was located in the Applicant's wardrobe, just inside his bedroom door. These shoes were found to be bloodstained on testing shortly before the trial in 1995. There was insufficient of it for grouping purposes. Those shoes have been destroyed.[174] The casenotes of Dr Cropp, who examined these shoes, record spots of blood on the left shoe and slight discolouration from the toe region to the centre of the foot on the right, which was Sangur positive. The heel area of that shoe was also Sangur positive, although not discoloured. There was further staining on various parts of this shoe consistent with bleeding, only some of which was Sangur positive.[175] The Crown also relies upon some statements, not all entirely consistent with one another, that the Applicant made regarding his actions when he first returned to his room after the paper run, what he did there, and the shoes in that room: that those statements were indicative of an eagerness on his part to identify the "new

169 Crown's Response to Applicant's Case pp 24–25 [73]–[74].
170 Crown's Response to Applicant's Case p 25 [75].
171 Crown's Response to Applicant's Case p 25 [75]; Retrial Notes of Evidence p 3263.
172 Crown's Response to Applicant's Case pp 25–26 [76]–[80].
173 Crown's Response to Applicant's Case p 27 [83].
174 Crown's Response to Applicant's Case p 27 [84].
175 Crown's Response to Applicant's Case pp 27–28 [85].

pair of Laser running shoes as having been worn on the run". He identified them twice as the first items of clothing that he had been wearing.[176]

129. The Applicant in his Submissions in Reply points out that the old "stained" shoes were odd ones, not likely to be worn by the Applicant on his paper run. He asks: why, if he was alert to incrimination, did he not trouble to change his socks?[177] It is a good question. But equally there are other questions which remain unanswered. The odd shoes were in bad repair. That is indeed evident from the photographs. I agree that on the balance of probabilities the Applicant was not wearing the odd shoes on the morning of the 20th June 1994 when he conducted his paper run or when he was in the house.

Blood on Mr Robin Bain's Hands

130. The Applicant's case is that the murderer, Mr Robin Bain, removed the two white gloves which he had been wearing but that blood had soaked through them on to his hands and fingernails.[178] Mr Robin Bain must have been the murderer because there was "blood on most regions of his left hand and one finger of his right hand" as well as "in his fingernail scrapings".[179] The stains appear to be slightly diluted.[180] Only one of these "multiple areas of blood" was collected, but not tested.[181] The bloodstains, Mr Karam on behalf of the Applicant says, with the exception of the "splash" on the left fingernail, cannot be a legacy of Mr Robin Bain's own death.[182] The Defence was disabled from proving these contentions by the failure of the Crown to cause testing to be done, and the destruction of samples by the police.

131. In paragraphs 49 to 68 of the Applicant's Claim of Innocence, Mr Karam seeks to construct an elaborate theory as to the way in which blood would have spattered or fallen from the gunshot to Mr Robin Bain's head. I do not accept this as a probability: it is too conjectural.

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176 Crown's Response to Applicant's Case p 29 nn 110.
177 Applicant's Submissions in Reply p 28 [129].
178 Applicant's Claim of Innocence p 6 [36].
179 Applicant's Claim of Innocence p 6 [37].
180 Applicant's Claim of Innocence p 7 [38].
181 Applicant's Claim of Innocence p 7 [40]–[41].
182 Applicant's Claim of Innocence p 7 [47].

132. The Crown's response relies upon the fact that exhaustive testing of Mr Robin Bain's clothing revealed no blood that was not his own.[183] There is no evidential basis for a claim that the blood on his hands was diluted, and was residual staining through the gloves.[184] Mr Robin Bain had no fresh injuries, and no blood on his fingertips or palms, even though if he suicided he would have needed to have grasped the rifle that was covered in smeared, fresh blood.[185] The additional point is made that his hands were visibly dirty and were unlikely, therefore, to have been washed so as to dilute or partially remove blood on them.[186]

133. The reason, the Crown says, that the blood on Mr Robin Bain's hand was not subjected to testing was that there was insufficient of it for grouping. Furthermore, what were found, at most in very small quantities, behind his fingernails were "possible" traces of blood only, and not "splashes" or multiple areas of blood.[187]

134. The Crown points to difficulties of reliance upon so-called further bloodstains identified in photographs by the Defence witness, Dr John Manlove, a forensic scientist. The qualified nature, the Crown says, of his observations appears from some quotations from his evidence set out in paragraph 92 of the Crown's Response. Ordinary experience, and the optical illusion arising from photographic evidence in this case itself (of a spectacle lens in Stephen's room), provide reason to be guarded in drawing conclusions from the photograph.

Blood Testing

135. At this point, it is convenient to identify precicely which items of evidence were tested for blood and where they were found. So far as I have been able, I have compiled a table showing these.

Exhibit	Item	Where Item Was Found	Persons to Whom Samples Match	Expert	Reference
2	White socks (red and grey bands) Sock 1	Applicant wearing	2 of 5 samples Stephen 1 sample the Applicant	Dr Sallyanne Harbison	Exhibit 1026

183 Crown's Response to Applicant's Case p 31 [95].
184 Crown's Response to Applicant's Case pp 32–33 [97]–[98].
185 Crown's Response to Applicant's Case p 33 [99].
186 Crown's Response to Applicant's Case p 33 [100].
187 Retrial Notes of Evidence p 1504.

			2 samples inconclusive		
	Sock 2	Applicant wearing	Inconclusive		
3	Sweatshirt (white)	Applicant wearing	4 of 6 samples Stephen 2 samples inconclusive	Dr Sallyanne Harbison	Exhibit 1026
4	Black shorts	Applicant wearing	Mrs Margaret Bain, Arawa, Laniet or Stephen	Dr Peter Cropp	1458 & 1459
			Stephen	Dr Sallyanne Harbison	Exhibit 1026
5	Pink and green cycling shorts	Applicant wearing	Inconclusive	Dr Sallyanne Harbison	Exhibit 1026
6	Red underpants	Applicant wearing	No blood	Peter Rudolph Hentschel	1304
				Dr Douglas Elliot	2498
14	Rifle		4 of 10 samples Stephen 5 of 10 samples inconclusive	Dr Sallyanne Harbison	Exhibit 1026
			3 of 14 samples Stephen 1 sample Stephen/mix 1 sample mixed unknown persons 9 samples inconclusive	Susan Vintiner	Exhibit 1027
27A	Green alcove curtain (right)		Mr Robin Bain	Dr Peter Cropp	1469 & 1470
			Mr Robin Bain	Susan Vintiner	Exhibit 1027
			Mr Robin Bain	Dr Douglas Elliot	2550
			2 of 7 samples Mr Robin Bain 1 of Stephen 4 inconclusive	Dr Sallyanne Harbison	Exhibit 1026 and 2536
40	White t-shirt	Stephen's body	Stephen or Laniet	Dr Peter Cropp	1459 -1461
45	Black underpants	Stephen's body	No conclusive result	Dr Peter Cropp	1461
56	Blue track pants	Mr Robin Bain's body	Mr Robin Bain	Dr Peter Cropp	1462 - 1463
			23 of 28 samples Mr Robin Bain 2 samples (partial profile) Mr Robin Bain or the Applicant 1 sample (partial profile) Mr Robin Bain, Laniet, or the Applicant 1 sample (partial profile) any	Dr Sallyanne Harbison	Exhibit 1026 and 2527 - 2529

			member of the family 1 sample male human DNA		
57	T-shirt	Mr Robin Bain's body	Mr Robin Bain	Dr Sallyanne Harbison	Exhibit 1026 and 2530
58	Green hat	Mr Robin Bain's body	3 of 5 samples Mr Robin Bain or the Applicant 1 sample Mr Robin Bain. 1 Sample inconclusive	Dr Sallyanne Harbison	Exhibit 1026
59	Sweatshirt	Mr Robin Bain's body	5 of 8 samples Mr Robin Bain 1 sample tested 5 of 6 times as Mr Robin Bain. 1 test returned unidentifiable human DNA. 1 sample Mr Robin Bain or the Applicant 1 sample inconclusive	Dr Sallyanne Harbison	Exhibit 1026
60	Brown socks	Mr Robin Bain's body	No blood	Dr Douglas Elliot	2494
61	Brown Jersey	Mr Robin Bain's body	Inconclusive	Dr Sallyanne Harbison	Exhibit 1026
63	Striped short-sleeve shirt	Mr Robin Bain's body	Robin Bain	Dr Sallyanne Harbison	Exhibit 1026
98	Green jersey	Washing line			
99	Red sweatshirt	Washing line			
105	Striped towel	Washing line			
106	Black patterned towel	Washing line			
107	Swimming shorts	Washing line			
108	Tracksuit pants	Washing line			
109	Facecloth	Washing line			
110	Pair of socks with black and green stripes	Washing line			
111	Other swimming shorts	Washing line			
112	Blue skivvy	Washing line			
113	Black corduroys	Washing line			
114	Pierre Cardin pale blue shirt	Washing line			
115	Pair of blue grey work socks	Washing line			
116	Black skivvy	Washing line			
117	Bike shorts	Washing line			
118	Hanes blue t-shirt with LFB written upon it	Washing line			
119	Black and yellow swimming shorts	Washing line			
120	Green shirt with grey stripes	Washing line			

121	Single white sock	Washing line			
122	Door jamb (Sample 1)	Into Stephen's room from Mrs Margaret Bain's	Stephen or Laniet	Dr Peter Cropp	1473 & 1474
123	Door jamb (Sample 2)	Into Stephen's room from Mrs Margaret Cullen-Bain's	Inconclusive	Dr Peter Cropp	1473 & 1474
128	Scope cover		Inconclusive	Dr Peter Cropp	1477
138	Right glove (white)	Stephen's room	Stephen or Laniet	Dr Peter Cropp	1464
			Stephen	Dr Sallyanne Harbison	Exhibit 1026
139	Left glove (white)	Stephen's room	Stephen or Laniet	Dr Peter Cropp	1464
			Stephen	Dr Sallyanne Harbison	Exhibit 1026
155	Blue wrangler jeans	Caravan	Mr Robin Bain	Dr Peter Cropp	1465
156	Siro trousers	Caravan	No blood	Dr Peter Cropp	1465
158	Doorframe	Arawa's room	Stephen or Laniet	Dr Peter Cropp	1474
159	Sample from Basin	Basin in laundry/bathroom area	Laniet, Stephen or the Applicant	Dr Peter Cropp	1476
181	Washing machine hob	Laundry			
198	Duvet	The Applicant's room	1 of 3 samples Mr Robin Bain or the Applicant 1 sample the Applicant 1 no human DNA	Dr Sallyanne Harbison	Exhibit 1026 and 2537
232	White lidded washing powder tub with blood smear	Shelves in laundry	No human DNA detected	Dr Sallyanne Harbison	2537
				Peter Rudolph Hentschel	1329
246	Mr Robin Bain's boat shoes	Mr Robin Bain's body	Inconclusive	Dr Douglas Elliot	2495
			Mr Robin Bain	Dr John Manlove	3398 & 3399
258	Green alcove curtain (left)		Inconclusive	Dr Sallyanne Harbison	Exhibit 1026
				Susan Vintiner	Exhibit 1027
				Dr Peter Cropp	1473
			Didn't test	Dr Douglas Elliot	2510 – 2512
300	Light switch	Laniet's room	Inconclusive	Dr Peter Cropp	1477
465	Doorjamb	From Stephen to Margaret's Room	Stephen or Laniet	Dr Peter Cropp	1474
498	Doorjamb	Arawa's room	Inconclusive	Dr Peter Cropp	1475
499	White mesh curtain		Inconclusive	Dr Peter Cropp	1478 & 1479
507	Doorframe	Pantry	Laniet, Stephen or Mr Robin Bain	Dr Peter Cropp	1475 & 1476
515	Swimming cap with blood on it	Left shelf of laundry cupboard	Not suitable for testing	Peter Rudolph Hentschel	1329
516	Shower curtain with blood on it	Middle shelf of laundry cupboard	Inconclusive	Dr Peter Cropp	1476
517	Face mask with blood on it	Middle right hand shelf of laundry cupboard	Inconclusive	Peter Rudolph Hentschel	1328
518	Pink cloth with blood on it	Left shelf of laundry cupboard	-	-	-
520	Green stained towel	Towel rail in laundry	No human material detectable	Dr Peter Cropp	1477
			1 of 3 samples Mr Robin Bain. 2 samples inconclusive	Susan Vintiner	Exhibit 1027
523	Bloodstain from red towel/bathmat		Inconclusive	Susan Vintiner	Exhibit 1027
				Peter Rudolph Hentschel	1329

				Dr Douglas Elliot	2551
524	Bloodstain from white towel or bathmat		Inconclusive	Susan Vintiner	Exhibit 1027
				Dr Douglas Elliot	2551
525	Back of neck of coke t-shirt		No human DNA	Susan Vintiner	Exhibit 1027
				Dr Douglas Elliot	2551
526	Empty paper Kleensak with blood inside it	Behind laundry door leading to kitchen	No human DNA	Susan Vintiner	Exhibit 1027
				Peter Rudolph Hentschel	1329 & 1330
				Dr Douglas Elliot	2551
527	White t-shirt with blood on arm. Marked "Opera Otago"	In cane basket on laundry floor	No human DNA detected	Dr Sallyanne Harbison	Exhibit 1026
			No Test	Dr Peter Cropp	1465 – 1467
531	Towel with blood on it	Laundry cupboard			

136. It is apparent from the table that it is likely that blood found on the Applicant's socks, sweatshirt and his black shorts were bloodstained with Stephen's and/or Mrs Bain's, Arawa's and Laniet's blood. No sample of blood taken from any clothing positively identified as clothing that Mr Robin Bain was wearing when he died could be associated with anyone apart from Mr Robin Bain, except for some traces of blood that could *possibly* have been Laniet's or the Applicant's blood. Overwhelmingly, the blood found on Mr Robin Bain's clothing was his own.

Physical Evidence that Mr Robin Bain Committed Suicide

137. The Applicant's advisors, in paragraphs 49 to 68 of his Claim of Innocence, present a case theory for Mr Bain's suicide. It depends upon an interpretation of blood spatter and spray, and the theoretical positioning of Mr Bain immediately before the fatal shot was fired and after it. Mr Robin Bain was standing, it is said, in front on the red chair beside the curtains to the alcove, with his right foot on the floor, stooped forward, with the butt of the rifle on the chair so that his left temple was in contact with the tip of the silencer, held in place with his right hand when he pushed the trigger with either the thumb or finger of his left hand. This explains everything, Mr Karam says. Otherwise, an assailant would need to have been lying on the ground with the gun pointing vertically upwards.

138. The response by the Crown includes a reference to Dr Manlove's acknowledgement that it is and was very difficult to draw definitive conclusions based on blood spatter.[188] The Crown still takes the position that Mr Robin Bain was probably kneeling in prayer near to the curtains when he was shot.[189] This theory would account for the blood on Mr Robin Bain's clothing and his killing by a murderer in or emerging from the alcove. As I have said, I think it very difficult to form any confident opinion about this matter based on blood spatter, bullet wipe, bullet abrasion or location, or blood movement, or indeed anything of this kind in this case. No one except those present knew the positions in each was in relation to the other, or the objects about them, at the time of each death. Postures may have become contorted: a person or two people may have moved quickly, or knelt or stood, or leaned forward or backwards, and there may even have been movements after gunshot, either voluntary or involuntary. I do not think that this case can be decided on the basis of theories about, or reconstructions of these.

Auxiliary Evidence of Suicide

139. The Applicant's case is that there had been a misfeed of a round before the fatal shot. The presence of the bullet found beside the trigger of the rifle which had jammed when entering the breech establishes this.[190] Time would have been required to clear the round, and presumably to enable Mr Robin Bain to elude, or at least grapple with his son.

140. Against this, the Crown argues that its expert Mr Walsh did not consider the bullet in question to be the product of a misfeed, and nor, properly understood, did Mr Philip Boyce.[191] Whether it was or not is, in my opinion, not necessarily evidentiary of either murder or suicide.

141. In paragraph 117 of its response, the Crown also argues that if there was a true misfeed, it would have necessarily occurred immediately after a completed shot.[192] There would be time and opportunity to clear it. A further point is made, that the bullet that was said

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188 Crown's Response to Applicant's Case p 35 [110].
189 Crown's Response to Applicant's Case pp 35–36 [111]–[112].
190 Applicant's Claim of Innocence p 9 [69]
191 Crown's Response to Applicant's Case pp 36–37 [115].
192 Crown's Response to Applicant's Case p 37 [116].

to have been misfed had different markings on it from the bullet which indubitably was the product of a misfeed that was found in Arawa's bedroom.[193]

Marks on Mr Robin Bain's Hands

142. There were some very minor injuries to Mr Robin Bain's hands. As to these, the Crown says that the state of his hands supports its case. The injuries were not fresh injuries: there was no blood on his fingertips or palms. Dr Dempster said of this:

> "Actually it is not a great photograph but you can see the bruise here, a fresh bruise surrounding this area which looked as though it was a little dry. There was no evidence of recent bleeding on it, and there was no bloodstaining of surrounding tissues. I formed the opinion that it was a relatively recent bruise. I couldn't be dogmatic about its duration but I thought it was not, or hadn't been inflicted immeditately prior to his death."[194]

143. Mr Robin Bain had spent some time at the weekend fixing spouting at the residence.[195] He also loaded a chainsaw into his van.[196] The minor injuries that were apparent were consistent with scratching or bruising in carrying out these tasks. They are not the sorts of injuries that were likely to have been sustained in attempting to strangle Stephen to death, and in overpowering him as he fought for his life. It is not correct to say that Dr Dempster's evidence was unequivocally, if at all, to the effect that the injuries to the hand could have occurred within an hour prior to his death.

144. I refer next to evidence given by Dr Adams, an oral and maxillofacial surgeon of long experience in practice and in forensic affairs. He was asked to read Dr Dempster's report and to examine the photographs of Mr Robin Bain's hands. He detected four marks in the latter. He said:

> "I believe that if the hand of 10 the deceased had been rotated outwards, in the same supination so that the palm was up and the thumb out and if he was to strike another individual as with an uppercut, it would be possible for those four marks to be caused by contact with teeth. The appearance will not be absolutely symmetrical in accordance with the outline of the dental arch 15 because of certain factors always present and these are the fact that the skin is mobile over the underlying tissues and in my own case moves for over five millimetres freely as an adult man. The skin also stretches on impact and those two factors considerably modify the appearance of any impact which teeth may have, whether it be biting or from a blow on 20 the tissues concerned. Furthermore as the force is delivered, the teeth may skid and cause a variation and for that reason I believe those

193 Crown's Response to Applicant's Case pp 36–37 [115].
194 Crown's Response to Applicant's Case p 34 [103].
195 Retrial Notes of Evidence pp 221–222.
196 Retrial Notes of Evidence p 939.

marks could have been caused on the knuckles of the deceased."[197]

145. The necessarily qualified nature of his opinion appears from these passages in the evidence.

At page 3585 of the Retrial Notes of Evidence:

"A. So I – I used this to show that those marks could have been made by contact with teeth of such a description. It doesn't prove the contact with a particular individual or a particular case, but it shows that it would be possible.

Q. Yes. Now have you had experience of looking at teeth marks on victims and assailants in just this manner before?

A. I have never seen a case exactly like this previously."

At page 3589 of the Retrial Notes of Evidence:

"Q. And you will be well aware having been involved in the area of forensic teeth marks, even perhaps on the limited scale that you have, that that is one of the fundamental problems and debates about tooth marks on skin isn't it?

A. It is.

Q. And there are real issues about the reliability of skin as a medium to record the marks in the first place?

A. Yes, that is so."

At page 3591 of the Retrial Notes of Evidence:

"A. It is possible, as possible as it is that they have been caused by dental contact, I – I can't go one way or the other. I have no idea what else might have caused this.

...

Q. Yes, and here, you are suggesting is only marks which have come from one, the upper jaw, and to do that I suggest to you, make some comment about the likelihood of that from one jaw is also highly unusual in relation to this area of expertise?

A. This is an unusual situation."

At page 3594 of the Retrial Notes of Evidence:

"Q. Would it surprise you that Dr Dempster did not notice any injuries to Stephen Bain's mouth given what you are suggesting?

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197 Retrial Notes of Evidence p 3583.

A. I have no knowledge of his, of him being examined in that direction at all, but my knowledge of injuries to the mouth and teeth as such that it be quite possible for somebody to be struck in the teeth without any physical evidence of an injury. Striking the teeth with a fist won't 15 produce any, necessarily any lasting visual evidence of damage.

Q. Have you ever been involved in a case where a random cast has been used –

A. No. No, that's my manner, that's my method of producing something which helps reconstruct the situation. That's what I've done, I've reconstructed the situation as well as I can.

Q. Because even at the best of times if there is an accurate cast or measurements made of the, if we call it assailant in the broad sense, the person receiving the blow, the interpretation of that can be immensely difficult even in those circumstances can't it?

A. Yes.

Q. And there are, I think, if one looks at the textbooks, almost a hundred different variables which can come into play in terms of the dynamics of teeth marks, and the various things that one might have to consider.

A. Yes."

Reply Submissions of the Applicant

146. I turn at this point to some related matters argued by Mr Karam in his Submissions in Reply to Crown's Overview. I make comments on and raise questions in respect of some of these in passing:

1. The Applicant contends that the rifle was not smeared in blood as already explained. There were nine partial fingerprints on the rifle of which there is no record apart from the arrows on the rifle showing (in the photographs) where they were, any or all of which might have been Robin's. It is unknown how Robin gripped the rifle, and he could easily have done so on the barrel between the silencer and stock, which is too narrow for the leaving of prints; as shown in the picture of Mr Boyce's demonstration at the 2009 retrial.[198]

   Whether the rifle was "smeared" in blood or not, blood, and quite a deal, was certainly found on it. I doubt whether Mr Robin Bain, in committing suicide, could "easily" have done so without, at some stage at least, putting fingerprints

198 Applicant's Submissions in Reply to Crown's Overview p 38 [136].

on it. Once the assailant removed the gloves, as he must have done in Stephen's room, he had to carry the weapon into the living room.

2. In 2011, there was a murder-suicide in Fielding where a man shot two people then himself with a .22 calibre rifle. There were similarly no fingerprints found on the rifle, and the coroner in that case stated: "I'm satisfied that … finding a firearm without prints is not necessarily indicative of anything sinister …"[199]

   What may have been found by a coroner in another case is entirely irrelevant to this case. A coroner does not conduct a trial in any event. Each case depends upon its own facts. My references elsewhere to *De Gruchy* were for its exposition of principle and in the context of the use of statistics.

3. The Applicant's submissions continue, Robin's hands were not dirty as can be seen from the photos. His fingernails and cuticles were slightly dirty.[200] (This is contradicted by the evidence of Mr Hentschel the ESR scientist[201(a)] who saw and examined his hands and took a swab/smear from them.)[201(b)] My attention has also been drawn to the comment of Detective Sergeant McGregor in the joint Police and PCA Report that Mr Robin Bain's hands appeared dirty around the fingernails and in the creases.[201(c)]

   The consequences of the fingerprinting are matters of evidence which I discuss elsewhere.

4. "Bewilderingly", Robin's weight and slightness are put up as indicating that he would struggle to overcome Stephen, yet Stephen was just 14 years old, weighed only 52kg (20kg less than Robin), and was seriously injured, no doubt totally disorientated, and probably blinded by the blood from the wounds to his hand and head.[201]

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199 Applicant's Submissions in Reply to Crown's Overview pp 38–39 [137].
200 Applicant's Submissions in Reply to Crown's Overview p 39 [138].
201(a) Retrial Notes of Evidence p 1302.
201(b) Retrial Notes of Evidence p 1503.
201(c) Joint Police and PCA Report at p 73.
201 Applicant's Submissions in Reply p 40 [144].

This last is conjecture. No one describes the late, middle aged Mr Robin Bain as physically powerful. One witness, Mr Michael Mayson, described him as wasted,[202] others as much diminished physically in various forms of expression of that. [203] At what precise point of the struggle Stephen was "seriously" injured is not clear. But what is beyond doubt is the real disparity in size, age, and strength between the Applicant and Stephen.

5. It would be very surprising if Mr Robin Bain were intending to go either to school or to a meeting in the old track pants and top he was wearing.[204]

   This does raise a question although there is evidence that Mr Robin Bain had become somewhat indifferent to the way in which he dressed.[205]

6. As stated by the urologist, the amount of urine in his bladder is of no use in determining when he last urinated. The fact that it was concentrated is also meaningless.[206]

   This evidence is not meaningless. There is no evidence of any bladder or urinary abnormality: a slightly enlarged prostate would not explain the collection.

Other Matters Said to Implicate Mr Robin Bain

Green v-necked jersey

147. The Crown's case was that the murderer was likely to be wearing a green v-necked jersey which the Applicant said belonged to Mr Robin Bain. Green fibres consistent with the fibres of which the jersey was made were found under Stephen's fingernails.[207]

148. The jersey, the Applicant says, was too small for him: accordingly, the correct inference is that Stephen was killed by Mr Robin Bain whilst he was wearing the jersey.[208]

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202 Retrial Notes of Evidence p 3026.
203 Retrial Notes of Evidence pp 2794, 2863, 3249.
204 Applicant's Submissions in Reply p 40 [145].
205 Retrial Notes of Evidence pp 2794, 3003–3004.
206 Applicant's Submissions in Reply p 41 [149].
207 Overview of the Crown Case and Summary of Legal Principles pp 7–8 [21].
208 Retrial Notes of Evidence p 2669.

149. It cannot, however, be contested that the green jersey was actually handled by the Applicant when it was sorted from white clothing and placed by him in the washing machine. The Applicant did this with the light turned on in the laundry.[209]

150. The evidence that the jersey was too small for the Applicant at the time of the killing is by no means unequivocal. The notes of evidence of the first trial, the only occasion on which the Applicant gave evidence, show that the Applicant was questioned about the jersey. He said that he could recall taking a couple of jerseys out of the washing basket and putting them in the washing machine. He could not recall if one was the green jersey "identified as my father's".[210] This evidence stands in contrast to the Record of the Privy Council:

> "Q Whose is [the rough knit jersey?].
> A Arawa's..."[211(a)]
>
> "Q A dark jersey belonging to Arawa.
> A Yes."[211(b)]

151. Elsewhere, the Applicant said:

> "I see the green jersey, that is not my jersey, it is my father's jersey. Arawa wore it on occasion, just to slop around the house. That jersey does not fit me, it is too small. (witness stands) During that weekend I did not wear that jersey, that weekend my father was wearing it on the Saturday afternoon I think."[211]

152. In cross-examination, this exchange occurred:

> "Question, "Where did he [Mr Robin Bain] keep exhibit 98 [green v-necked jersey]?"
>
> Answer, "The green jersey. He would probably have kept that either out in the caravan but Arawa borrowed that quite frequently as well. She liked borrowing his clothes because they were large and baggy. They would either pass them between them, if one wasn't wearing it the other was. But Dad would quite often wear it around the house when he was working in the yard and that."
>
> Question, "You say that jersey, exhibit 98, would not fit you?"
>
> Answer, "No, it would not.""[212]

153. There was further cross-examination about the jersey:

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209 Privy Council Record of Proceedings p 0409.
210 Retrial Notes of Evidence p 2672.
211(a) Privy Council Record of Proceedings p 0409.
211(b) Privy Council Record of Proceedings p 0425.
211 Retrial Notes of Evidence p 2669.
212 Retrial Notes of Evidence p 2706.

"Question, "Have you put on weight since the 20th of June?"

Answer, "Some weight but not markedly."

Question, "More than a stone?"

Answer, "I can't tell you, I don't know.""[213]

154. What seems to be relatively clear from the evidence is that the green jersey was either kept in the house or was is the house from time to time, and was worn by Arawa on occasions. It is possible that in that disordered and umkempt household, it could have been left lying around, and could have been picked up or worn by the Applicant.

155. When I looked at exhibits in Christchurch, I took some time to examine the green jersey and the Applicant's red anorak. I also looked at the green shreds which did indeed appear to my inexpert eye to be similar in kind and colour to those of which the jersey was made. The green jersey seemed to me to be fairly loose and made of wool. I could find no tag inside it indicating its size.

156. In these circumstances I asked that an accurate comparison be made between the two garments. The comparison yielded these results:

Measurement Area	**Red Anorak**	**Green Jersey**
Overall length, neck to base	69cm	63cm
Shoulder to shoulder	50cm	47cm
Across the hips	62cm	51cm
Sleeve length (left)	65cm	58cm
Sleeve length (right)	65cm	58cm

157. I make these observations about the green jersey. First, an anorak is generally worn as an outer garment and therefore needs to be of sufficient size to fit over other garments. Secondly, the green jersey appears to be wool and therefore liable to shrink if washed (as it was by the Applicant). Thirdly, the Applicant seems to have accepted, when he tried the green jersey on during the first trial, that he had put on some weight. Fourthly, the house was indiscriminately littered with many objects and the green jersey must

213 Retrial Notes of Evidence pp 2712–2713.

have been in the house from time to time because Arawa liked to wear it. Fifthly, the green jersey was loose to the touch and able to be stretched.

158. The Applicant accordingly does not prove on the balance of probabilities that he could not have worn the green jersey on the 20th of June 1994.

Mr Robin Bain was a Computer Enthusiast

159. The Applicant seeks to advance his case on the basis of Mr Robin Bain's undoubted enthusiasm for and competence in the use of computers.[214]

160. The Applicant too used the family computer, although I note that he denies any use of it for some time before the fatalities.[215] The programme installed on the computer was an early version of Microsoft Word. It was simple to use, and the message displayed on it was a short, if a somewhat cryptic one.

Mr Robin Bain's Use of the Rifle

161. Mr Robin Bain was familiar with firearms. He had actually helped the Applicant to sight the rifle.[216]

162. The Applicant had used the rifle more often, and more recently than Mr Robin Bain, and would accordingly had a recent familiarity with it.

Caravan Evidence

163. There were spent shells from the rifle and one live round, as well as a copy of the firearm's code in the caravan.[217]

164. As the Crown points out, there were also shell(s) in Stephen's room.[218] Why and when the shells came to be in the caravan will never be known.

165. Mr Karam asserts that Mr Robin Bain's alarm clock was set to ring at a time when he

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214 Applicant's Claim of Innocence p 10 [80]; Applicant's Submissions in Support of Claim of Innocence p 48 [187]–[189].
215 Retrial Notes of Evidence p 2676.
216 Applicant's Submissions in Support of Claim of Innocence pp 48-49 [190].
217 Applicant's Submissions in Support of Claim of Innocence p 49 [190]–[192].
218 Retrial Notes of Evidence p 182.

would be in the house.[219]

166. The alarm was in fact set for 6.30am.[220] One would think that an unlikely time if Mr Robin Bain intended it to be the time at which he was to rise, dress, go up to the house, enter it, find the rifle and the bullets, look through the Applicant's drawers, find and put on the gloves, methodically move through the other rooms, murdering his family in them, go to the laundry, discard some or all of his outer clothing, clear up, return up stairs, enter the living room, put on his shoes and clean socks, type in the computer message and kill himself. He was familiar with the paper run and the Applicant's athleticism. It is unlikely that he would have allowed himself only ten minutes or so from the time at which his alarm was set to do all that needed to be done before the Applicant returned home.

Reading Matter

167. It is, for the reasons which I give elsewhere, with respect, fanciful to seek to connect Mr Robin Bain's selection of two of the most famous mystery writers of the twentieth century for light reading, with the horrible killings which occurred on the morning of the 20th of June 1994.

The Applicant's Lack of Motive

168. I have already discussed the topic of motive at some length. There is no readily comprehensible motive for these killings. The motive attributed to Mr Robin Bain, that he, either or both of, snapped and impulsively committed the murders, and then suicided, and/or did so in order to prevent disclosure of his shameful and criminal relationship with Laniet, or out of guilt acted as he did, requires analysis.

169. The Applicant's own evidence is of a fairly typical family weekend, during which no deep and shameful secrets were revealed, or anything out of the ordinary happened. Mr Robin Bain's circumstances had not changed for some time. He was a deeply religious man and generally maintained a cheerful demeanour. He was a man of impeccable character and altruistic intent. He was plainly fond of his children, having attended the Polar Plunge with his sons as recently as the weekend before the killings. It could

219 Applicant's Claim of Innocence p 11 [83].
220 Retrial Notes of Evidence p 909.

fairly be said of him that he loved both his family and his music. He had some superannuation for his retirement and was regularly contributing to that, a matter as to which incidently the Applicant made a rather resentful reference:

> "Question, "Were you ever angry with your father that in your view he had not provided well financially for the future of the family?"
>
> Answer, "No."
>
> Question, "Were you if not angry, disappointed then that he had not provided financially in your opinion for the future of the family?"
>
> Answer, "I think in relation to what my mother, what her future years were going to be. But as for myself, I was quite capable of looking after myself for it wasn't for me as such, it was for my mother. She had no superannuation plan or retirement plan as such and as far as I was aware, there wasn't very much in the bank accounts to take care of her future years."
>
> Question, "To your knowledge did your mother or father have a joint bank account?"
>
> Answer, "Yes they did."
>
> Question, "Was your father's salary paid into that joint bank account?"
>
> Answer, "Yeah. I think quite a bit of it was but some was taken automatically for his superannuation plan."'[221]

170. There was evidence that he too was interested in the proposed new house. He was described by the Applicant as stoic. There is reason to believe that he had perservered over many years with patience and fortitude to maintain and improve his relationship with a deeply troubled wife of whom he remained fond, and to encourage his children to improve their lives.

171. So far as the Applicant too is concerned, it is also difficult to point to a sufficient motive to kill his family, although there is evidence capable of establishing motive on his part. I draw attention to an aspect of it in cross-examination of him at the first trial:

> "Question, "Did you make comment to the effect that it was up to Robin to realise he was not wanted, and to move out of Every Street?"
>
> Answer, "Yes I did. I think I said that to Rebecca and I was passing on what Mum, trying to describe the relationship that Mum had with him."
>
> Question, "Did you tell Val Boyd that you hated your father?

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221 Retrial Notes of Evidence p 2690.

Answer, "I think I did, but I cannot remember exactly, clearly.""[222]

172. Mrs Val Boyd did, in fact, give evidence to that effect.[223] The Applicant was not, at the time that he said that he hated his father, merely an immature male adolescent. He was a young man of some 22 years who had spent one and a half years at university and two years doing little except gardening about the residence in Every Street. His own evidence attests to the fact that he regarded himself as being in a contest with his father for domination of the household.

173. The cross-examination continued:

> "Question, "Did you say that he was sneaky and listening to conversations that did not concern him?"
>
> Answer, "Yes."
>
> Question, "Did you say to the police that Arawa was able to deal with him without the feelings of guilt he brings out in me?"
>
> Answer, "Yes I did."
>
> Question, "What did you mean by the feelings of guilt he brings out in me?"
>
> Answer, "That was his way. He never used to do it before hand, like in the years previous, but as he was being pushed out by Mum it was his way of controlling, to get things within the family and would, like this argument over the chainsaw, he brought that sort of stuff up as well. Basically guilt trips, like you could have used it over the weekend and I need it a great deal. Sorry, this is talking about the chainsaw, whereas Arawa wasn't affected by that but I was. I think I'm more sensitive to that sort of thing."
>
> Question, "The argument between you and your father on this Sunday evening, was that over the chainsaw?"
>
> Answer, "Yes it was."
>
> Question, "Did your father wish to take it to Taieri Mouth?"
>
> Answer, "Yes he did."
>
> Question, "Did you wish to retain it in Dunedin?"
>
> Answer, "Yes I needed to use it during that week for work around the house."
>
> Question, "Do you agree you said to the police that he, meaning your father, had constant battles pulling and pushing over the chainsaw?"

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222 Retrial Notes of Evidence p 2685.
223 Retrial Notes of Evidence p 2476.

Answer, "Yes. He was off down to the school every week and there was a bundle of firewood down there that he used to chop, so having only the one chainsaw we were constantly at it to see who could get the chainsaw for that time."

Question, "Did you say to the police, 'He tried to beat me down with comments such as me using the chainsaw then so that he could have it'."

Answer, "Yes."

Question, "First of all, did you say that to the police?"

Answer, "Yes I did."

Question, "What did you mean by the term, 'Beating me down'?"

Answer, "Well, using words, you know, so I'd have to change my mind, you know using the guilt trip thing. I don't know. I mean there wasn't anything physical at all, just using words to get what he wanted."

Question, "Did you see this as your father asserting his authority?"

Answer, "Yes I did."

Question, "Did you resent this?"

Answer, "No. I think it was natural, because he had been going through a very tough time with Mum pushing him out and his feeling of loss of his family, so you know I know that he would try anything to, you know, get back into the family and if he had control over his son then, you know, that is one way of 20 getting back into the family. He had that over Stephen, so yeah."

Question, "Did you tell s 18(c)(ii) that you hadn't felt your father was your father?"

Answer, "That was after an argument I had with him and I think I was just a bit angry with him at that stage. I was just..."

Question, "Did you, however, say this?"

Answer, "Yes. Sorry."

Question, "Do you say that was solely as a result of an argument just before hand?"

Answer, "Yeah. Had been within the day or so previous I think. It wasn't, yeah, it was just something that I was using to try and get back at him. Really petty I suppose."

Question, "Did you tell s 18(c)(ii) that there was someone in PNG who you saw as a father figure?"

Answer, "Yes I did."

Question, "You hadn't lived in PNG since the end of 1988?"

Answer, "That is correct."

Question, "Did you tell Val Boyd in reference to Laniet that she was a sweet, gentle girl and that your father had got her?"

Answer, "Yes."

Question, "What did you mean by the term 'got her'?"

Answer, "That he had – he had got that control, you know, being able to assert his authority, being the father sort of thing. Arawa had stood up for herself and was her own person. That would be the other end of the spectrum I suppose. As for myself, I was somewhere in the middle. I was more concerned with Mum and Dad splitting up."

Question, "Did you tell Mrs Boyd that you were now a family of four?"

Answer, "Yes."

Question, "And did she ask what you meant by that?"

Answer, "Yes I think so."

Question, "And did you reply that, 'Laniet is living with Dad'?"

Answer, "Yes that is correct."

Question, "Did you regard the family of four as being your mother, Arawa, Stephen and yourself?"

Answer, "Yes.""[224]

174. Both the Applicant and Mr Robin Bain were people of good repute and character. The Applicant was devoted to his mother and, he claimed, contrary to the evidence that I have just quoted, loved his father.

175. Mr Robin Bain was holding true to his Christian faith. I refer to his habit of prayer. His service as a missionary and school teacher in Papua New Guinea for many years is evidence of humanity and altruism.

Other Issues Raised by the Applicant

176. The Applicant, in paragraphs 89 to 93 of his Submissions in Support of Claim of Innocence, argues that there are four other important contentious issues: the Applicant's cooperation with police; inconsistency between the making of supposedly self-incriminating statements which the "scheming, cunning murderer" the Crown's case requires; absence of evidence of a "clean up" by the Applicant; only minor bruising and

224 Retrial Notes of Evidence p 2685–2687.

grazing sustained by him; and that the scratches seen on his torso occurred after the morning of the 20th of June 1994.[225]

177. These issues are better dealt with elsewhere when I compare the uncontradicted facts and respective case theories of the parties. But I do point out that there is evidence capable of proving that the Applicant cleaned up the laundry and attempted to clean up himself in the laundry: that bruising was noticeable and there was an abrasion or laceration on the Applicant's knee.

Glasses and Lens

178. The Applicant's case is that he did not need to wear and had not worn his mother's glasses during the weekend.[226] A missing lens which was in Stephen's room was in a position on the floor partially or wholly covered by a skate shoe or other items.[227] A photograph was used by the Crown to suggest it was in a much more exposed position.[228] The lens or lenses was or were dusty,[229] and therefore not likely to have been used recently and by the Applicant.

179. None of the Applicant's contentions with respect to the glasses address the absence of any satisfactory explanation by the Applicant of the presence of the distorted frame with one lens in it which was found in his room.[230] He did not suggest in his various interviews with the police that the frame was not in the position that it was found in his room. The missing lens was the one found in Stephen's room. The evidence supports the Crown contention that in that grossly untidy room, further disordered by a life and death struggle, a lens could have fallen out of a frame and found its way underneath or in the vicinity of a skating shoe, or that the shoe was bumped in the struggle. None of the evidence supports a contention that the lens or the frame was planted in the place where it was actually found. The Applicant's claim that he did not need or use glasss over the weekend is contradicted by other evidence.

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225 Applicant's Claim of Innocence pp 11–12 [88]–[93]; Applicant's Submissions in Support of Claim of Innocence pp 53–55 [206]–[219].

226 Retrial Notes of Evidence p 2669.

227 Retrial Notes of Evidence p 1095.

228 See 'Photo 62' between pp 192–193 of Joe Karam's *Trial by Ambush* (HarperCollins Publishers, 1st ed, 2012).

229 Retrial Notes of Evidence p 594.

230 Retrial Notes of Evidence p 594.

180. It is in paragraph 94.2 of his submissions that the Applicant states that he did not use the (his mother's) glasses that weekend.[231]

181. In fact, the Applicant actually asked Mr Edward van Turnhout, a police constable, for his glasses when he attempted to get up from the position in which he was lying at about 9.30am in the morning of the fatalities.[232] Another difficulty for him is that he had on occassions said that he had used his mother's glasses instead of his own. It is understandable and rational that the police and others might see a connexion between the damaged glasses and the displaced lens, the Applicant's facial bruising and the struggle that must have occured in Stephen's room. As for dust on the lenses, it is a common observation that glasses are often worn and used in such a condition. On any view, any doubt about the use, condition and location of the glasses or a lens from them does nothing to inculpate Mr Robin Bain.

Conduct of Detective Sergeant Weir

182. Detective Sergeant Weir was insensitive and foolish, and perhaps even vindictive, in celebrating the decision of the Court of Appeal in December 2003 dismissing the reference of the Governor-General and in painting a wall in the way in which he did. So too Detective Sergeant Weir erred in not causing to be corrected opthalmological evidence which had been given at the first trial. I have been asked to record and I do so here the fact that the Court of Appeal before whom this officer gave evidence rejected the proposition that he corruptly "planted" the detached lens in Stephen Bain's room.

183. It is unfortunate and wrong for police officers to become overzealous to the point that their judgement may be affected. The extinction of a family by one member of it is a horrible thing to contemplate. The Crown says that Detective Sergeant Weir suffered psychological stress contributing to his voluntary retirement from the force: any mistrust of him by other police officers, it is submitted, was a consequence of Mr Karam's public advocacy of the cause of the Applicant's innocence (in, for example,

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231 Applicant's Claim of Innocence p 12.
232 Retrial Notes of Evidence p 440.

Mr Karam's book, "David and Goliath") and vocal criticism of the police investigationand allegations of corruption on the part of Detective Sergeant Weir.[233]

Gurgling

184. At paragraph 97 of his Claim of Innocence, the Applicant states:

> "At the first trial, it was said that if David heard Laniet gurgling, he must have been her killer. This was shown to be untrue at the second trial: it is known that dead bodies can make gurgling noises for some time after death."

185. To imply, as I infer this submission to do, that the issue of "gurgling" was an issue that was created by the Crown would not be correct. As I understand it, whether Laniet was making a gurgling noise or not arose as a question because the Applicant only belatedly claimed that he had heard her gurgling, and that was an explanation for his entering her room, when previously he had said that he had not done so. When he described the noise that he claimed to have heard he at least once referred to it as "groaning type sounds muffled by what sounded like water".[234] The evidence that dead bodies can emit sounds is not that it is a frequent occurrence. The evidence is to the contrary, and it is doubtful in any event whether such noises as are emitted would answer the description of "gurgling" or groaning muffled by water.

Familicide

186. Mr Karam argues that the crime of familicide is rarely committed by a child when both parents die. He says that almost invariably the perpertrator is the father.[235] He then presses the further argument that where an adult son has killed both parents and has not himself committed suicide, there has *always* been evidence of severe abuse, psychosis, or other serious mental impairment and/or substantial alcohol or drug abuse factors absent here in the case of the Applicant.[236]

187. I have read the learned papers referred to by Mr Karam containing statistical evidence of this kind.[237]

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233 Crown's Response to Applicant's Case p 55 [178].
234 Retrial Notes of Evidence p 1825.
235 Applicant's Claim of Innocence p 14 [108].
236 Applicant's Claim of Innocence p 14 [110].
237 See the Applicant's Appendix to Submissions: Supplementary Evidence – B.

188. I also undertook a search of other materials by learned authors on the topic.[238] All of the authors whom I read offer cautions against the categorisation of perpetrators, although some patterns do emerge. Professor Carl Malmquist says this:

> "As a *caveat*, and based on this study, we should not assume that the perpetrators in familicide all bear one diagnosis even in a descriptive nosological sense."[239]

189. The ages of the perpetrators vary widely. In the cases looked at by Professor Malmquist, two common elements were present in the fathers: a chronic pattern of disturbance in their marital lives, and further alienation from their wives that they could not handle by severing their bonds to each other.

190. It is true that there was discord and alienation in Mr Robin Bain's household and that he did not wish to accept that alienation.

191. Liem and Reichelmann in their paper say that when a spouse and children are killed the perpetrators are mostly men, typically in their thirties or forties, who commit the offence with a firearm. Such familicides are typically preceded by a woman's threat of withdrawal or estrangement. These authors recognise also what they describe as a less frequent type of familicide, the killing of one or more parents and one or more siblings. This type of familicide has been less studied. The perpetrator is thought to be aiming his aggression at one or both parents, the siblings being considered as allies of a dominant, hostile father. The perpetrators, the authors say, are typically motivated by a desire to free themselves from the parents' tyranny, and to regain an identity the parents inhibit. Prior incidences of domestic violence are typically uncommon among offenders. Studies of paracide in the United States have found that in the majority of cases, fathers and mothers are killed by adult sons. I also note that these authors report that in 57 of the cases examined the perpetrator committed suicide. The authors conclude that the results indciate that familicide is a heterogeneous phenomenon. They identified what they describe as extended paracides which were committed by relatively

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238 Averi R Fegadel and Kathleen M Heide, 'Offspring-Perpetrated Familicide: Examining Family Homicides Involving Parents as Victims' [2015] *International Journal of Offender Therapy and Comparative Criminology* 1; Marieke Liem and Ashley Reichelmann, 'Patterns of Multiple Family Homicide' (2014) 18 *Homocide Studies* 44; Margo Wilson, Martin Daly and Antonietta Daniele, 'Familicide: The Killing of Spouse and Children' (1995) 21 *Aggressive Behavior* p 275.

239 Carl P Malmquist MD, 'Psychiatric Aspects of Familicide' (1980) Vol. 8(3) *Bulletin of the AAPL* 298 p 298.

young, troubled men, whose primary anger is directed towards one or both parents: suicide rarely occurred in this cluster of familicides.

192. In their paper, Fegadel and Heide say this also:

> "It is unwise to draw conclusions, given the small number of familicide cases found in this study. Several observations however, can be made with respect to offender and victim involvement and tested further in large scale investigations of familicide. First the typical offender involved in offspring-perpetrated familicide in our study was a white male approximately 26 years of age."[240]

Their study also found that offspring-perpetraded familicide was almost exclusively commited by sons, but they were very careful to point out that the rarity of offspring-perpetrated familicide, coupled with the limited number of familicide cases identified in the data which they used, made a statistical analysis not possible. Further research was needed.

193. Relatively fresh in my mind is the case *De Gruchy v R*,[241] to which I referred earlier in discussing motive. The murderer there, a son of the household, was aged 18. He was convicted of killing those of his family who were home at the time of the killing, his mother, and his two siblings in an almost unimaginably brutal manner. His father was away from home on the night of the murders. There was no conceivable motive for the murders. They were calculated. There was no evidence of any severe or other abuse, psychosis, impairment of mind, alcohol or drug abuse. I do not suggest that any criminal case can be treated as some kind of a de facto precedent for subsequent cases. I only mention this case as a relatively recent example of a brutal inexplicable slaughter of all but one of his family by a young male. One of the investigating police there was so seriously affected by the brutality of the murders, so much so that he never worked again after the investigation.

194. Mr Karam's submissions, based on the materials to which he referred and those which I looked at independently, do, in my opinion, have some relevance and I do take them into account in my consideration of the case.

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240 Averi R Fegadel and Kathleen M Heide, 'Offspring-Perpetrated Familicide: Examining Family Homicides Involving Parents as Victims' [2015] *International Journal of Offender Therapy and Comparative Criminology* 1 p 13.

241 (2002) 211 CLR 85.

195. They do not, however, rule out the Applicant as a culprit. Every case is different, and in any event, as Mr Reed QC pointed out, although statistics may come into the calculus here, the case is not about statistics. I am by no means satisfied that the contention appearing in paragraph 110 of the Applicant's Submissions in Support of Claim of Innocence is supported as it is so categorically put there, by the statistics, or, of more importance, by the objective facts of this case.

Police Errors and Integrity Issues

196. In his submissions, Mr Karam lists dozens of alleged departures from the standards required of the police and by the Detective Manual.[242] Some of them have more validity or strength than others. None of the departures, however, can convert an absence of evidence, or even equivocal evidence, into an affirmative piece of evidence. Carpet samples should have been taken, the hands and feet of the various corpses should have been bagged, and a better exhibits register should have been kept.

197. Ideally, but not practically, could every different pool or splash or spot of blood be lifted or taken and tested. It is difficult to see what purpose would, however, have been served by collecting any samples from Arawa's hand and feet. Perhaps it would have been better to excise the skin around Mr Robin Bain's temple wound, but I doubt whether it would have quelled the dispute between the experts in relation to the infliction of the wound. If reports are not available in relation to testing, then there is no evidence as to what any test may or should have shown. The fact that, for example, there is no report in relation to blood lifted from the washing machine does not provide an answer to the point, if it is otherwise well made, that the Applicant could and should have seen the blood there if he was not the person who deposited it. So too should blood from the wash basin and the washing machine, ideally, have been tested if it could have been. The fact that there were no movement records in relation to blood on the door jamb or on a window sill, does not prove that blood was not there. Mr Karam argues that records should have been kept of the crime scene examination with appropriate drawings and explanation. There were, however, a very large number of photograhs taken which provided relevant evidence. The criticism is made that

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242 Applicant's Claim of Innocence p 15 [114]–[117]; Applicant's Submissions in Support of Claim of Innocence p 92–101 [378]–[416].

movement records were not kept in respect of the numerous items taken from Stephen's room. That would not have been a simple task having regard to the scene of turmoil there.

198. Some of the deficiencies in the investigation are understandable. It must have stretched the resources of the police force of Dunedin. Nothing of the kind had occurred there before. The number of bodies that had to be examined and removed was unprecedented. The condition and smell of the house must have aggravated the difficulties. A number of the criticisms go to the Applicant's point that his arrest was premature, that is to say was made before various enquiries and tests that were made subsequently. A great deal of material was in fact destroyed or disposed of, precisely when, in respect of some of it, is not clear, but that it may have been disposed of before the end of the Appeal process is not probative of the Applicant's case which he is now obliged to make out. One problem with some of Mr Karam's criticisms that are valid is that they are in respect of matters and tests which, if available, might be just as likely to be inculpatory of the Applicant as exculpatory.

199. It is unnecessary to deal with all of the departures or failures. I have carefully tried to evaluate all of them. I should mention one other matter of criticism, however, and that is the criticism which is made of the procedures in relation to the treatment of the footprints after the application of luminol and the photographing of them. Mr Karam says that the measurements of the feet of the Applicant and Mr Robin Bain should have been made and compared with the footprints rather than the socks, and more particularly that there was a failure to record positions and outlines of luminol footprints.[243] These criticisms, it seems to me, reflect the uncertainties arising out of any attempts to measure footprints after the application of luminol and the reliability of any such measurements, matters to which I have already referred.

New Evidence: Sooty Lines on Mr Robin Bain's Thumb

200. I have read the reports provided by Mr Karam on the allegedly sooty lines on Mr Robin Bain's thumb, and have watched the video of the several television

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243 Applicant's Submissions in Support of Claim of Innocence pp 24–27.

programmes about them. It is right to be wary, as the Crown says, of any expert analysis based upon secondary materials, photographs and reconstructions.

201. It is also correct that the photographs, to the extent that they can be used for the purpose of identifying and characterising marks at all, show marks that are "similar" only to residue marks that *can* be caused by loading a magazine. There is uncontradicted evidence, the Crown says, based upon police fingerprint analysis of superficial skin damage in the same location as the marks: they are, therefore, the Crown argues, nothing more than minor nicks or cracks in the skin, possibly caused in fixing the spouting at the residence on the Saturday before the deaths.[244] It has to be kept in mind that Mr Joe Slemko reported that he had "forcefully dragged" his fingers across a magazine before taking inked impressions.[245] None of the impressions revealed damage to the ridges.

202. The Crown's response on this issue is at least as persuasive as the Applicant's arguments. I am not satisfied on the balance of probabilities that the marks, whatever their character and location, are probative of the Applicant's innocence. I agree with the Crown that more probably than not if they were sooty marks they would not have been visible in the fingerprint forms of the 22nd of June, two days after the deaths and after Detective Lodge had rolled the fingers in ink and taken an earlier set of prints. They would likely have been cleaned after this process. It would be an extraordinary coincidence if the marks were both superficial damage to the skin and sooty residue, and that both were caused by loading the magazine. It is doubtful and, I think, unlikely that the marks would have been made immediately before Mr Robin Bain killed himself if he were the murderer. He must have washed his hands to clean them of the blood on them as a result of the other slayings, particularly of Stephen. Prior to that the killer would have been wearing the white gloves discarded and bloodstained in Stephen's room. On the Applicant's own case, Mr Robin Bain must have washed his bloodstained hands, albeit the Applicant contends, incompletely, after killing the others.

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244 Crown's Response to Applicant's Case p 38.
245 Crown's Response to Applicant's Case p 45.

203. The submissions and the depictions of the reenactments of loading, unloading and firing of the rifle did raise an arguable case. In the result they were not enough, taken with all of the evidence, to satisfy me on the balance of probabilities of the Applicant's innocence. This is so for the reasons I have given and because I accept as at least as plausible the Crown's analysis of the evidence and submissions which on this issue I set out in full below:

"THE "FRESH" EVIDENCE AS TO MAGAZINE LOADING

This represents another fertile area of expert analysis of secondary materials (photographs, reconstructions). At its highest for the applicant, the photographs show marks "similar" to residue marks that can be caused by loading a magazine. But the correspondence is far from exact, with discrepancies as to shape, dimensions, location and colour. Police fingerprint analysis conclusively shows superficial skin damage in the same locations as the marks, suggesting the marks represent nothing more than minor nicks or cracks in the skin. Robin Bain was known to have spent Saturday 18 June fixing the spouting at 65 Every Street. Mr Karam's response, that the marks must be *both* minor skin damage and residue, is implausible, and unsupported by any of the witness testimony or reconstructions. The analysis raises a speculative possibility which, having regard to the other evidence, cannot be regarded as probable, let alone as bearing the conclusive weight that Mr Karam asserts.

119. The applicant now makes the case that three marks on Robin Bain's right thumb and forefinger (visible in photographs A008 and A009) were made by the actions of loading .22 rounds into one or both of the magazines at the scene.

First time?

120. It is asserted this is the first time the marks have been noticed by anyone involved in the proceedings. Yet the Crown does not know what Mr Guest and/or experts instructed by him may have considered. It is also understood that the Joint Police/PCA investigation considered the issue.

Rounds in magazines

121. The 10 shot magazine adjacent to Robin Bain's right hand contained three live rounds.

122. The 5 shot magazine loaded in the rifle contained two live rounds. There was another live round in the chamber, ready to be fired.

The applicant's evidence

123. None of the applicant's witnesses opines that the marks were in fact caused by loading the magazine. Their conclusions are variously expressed:

123.1 Mr Tiffen, a gunsmith, says it is *"extremely likely"* the marks were made as a result of contact with the magazine;

123.2 Mr Durrant, a former industrial photographer, says the marks *"could have been made by powder residue"* as a result of handling the magazines. Mr Durrant's statement is supplemented by a brief report, which analyses only the width of the marks at a single point on Robin Bain's thumb. Putting aside problems of scale, Mr Durrant says this width is "exactly" the same as the width of the magazine, again at a single point;

123.3 Mr Suddes, a former firearms' trainer, says the marks are *"consistent with"* a person loading or unloading a magazine.

124. The above opinions are based on an examination of photographs (the precise provenance of which is not always specified), and an experimental reconstruction involving "test fires" of the exhibit rifle in March 2013, the object of which was to replicate the marks. During the tests, *"similar"* marks were observed on the hands of those involved in loading the magazines.

125. Despite the existence of a Court order requiring them to be disclosed, the witnesses' notes of the March 2013 test-fires have been misplaced and/or destroyed. For example, it is not known:

125.1 How many firings of the rifle produced the first set of "marks";

125.2 How often the reloading of the magazine caused marks (Mr Munt merely refers to a "*tendency*" for it to do so).

126. The recently disclosed report of Mr Slemko (dated the 28th of April 2015) does not appear to add anything of significance to the applicant's case.

Cleanliness of rifle

127. The applicant's witnesses attest to the poor state of the exhibit rifle in 2013, with significant fouling and residue. Two witnesses, Mr Munt and Mr Tiffen, purport to give evidence about the state of the rifle when it was used in the killings in 1994. They assert, respectively, that it was in *"below average"* and *"quite dirty"* condition.

128. These observations, made in 2013, are in contrast to the evidence available at the time:

128.1 In cross examination, it was put to the Police armourer, Mr Ngamoki that the rifle was in "*well used but fouled*" condition. He did not agree. He described it as being in "*good condition*";

128.2 The applicant told Police he had the gun professionally cleaned two days before he bought it. He told the jury he didn't fire the rifle until after he purchased the silencer about a month later. This was when he sighted it in at the beginning of summer 1993, around October. He agreed he had not used it a great deal. It was last used on a possum shoot in Jan/Feb 1994. There was gun cleaning equipment in his wardrobe.

129. The applicant's witnesses do not make it clear whether the "residue marks" are caused only when the firearm is dirty or, if not, whether dirtiness increases the likelihood of residue being deposited. Given the focus of their evidence on the fouled state of the rifle, the inference is that this factor must be relevant.

130. Either way, it is clear that the test-fires in 2013 (using a soiled rifle in poor condition) do not replicate the known "good" condition of the rifle in 1994.

Police response

131. Although none of the applicant's witnesses' statements was disclosed, Mr Karam went to the media with their findings, which were the subject of a television programme. In response to the publicity, on 13 August 2013 Police commissioned their own sets of tests.

ESR Report: Mr Walsh

132. Mr Walsh considered the results of Mr Karam's witnesses' test-fires (and "test loading") and also conducted his own. Again, the tests were made in a manner most likely to lead to residue marks. He then compared the results to photographs A008 and A009.

133. Mr Walsh noted obvious difficulties with comparisons using photographs A008 and A009. There is no scale in the photographs and, while the magazine can be used for this purpose, there are issues with perspective giving rise to significant distortions. Also, the photographs were taken with a flash and have no colour calibration cards, making it difficult to carry out an objective colour determination.

134. With those qualifications, Mr Walsh found:

    134.1 Residue marks are dark grey or black (both "in person" and in the photographs taken of the marks after the test-fires). The marks in photographs A008 and A009 appear reddish;

    134.2 The two lines produced by magazine loading are approximately parallel, although not "*necessarily*" so. The marks in photographs A008 and A009 are not parallel. One in particular shows significant curvature.

    134.3 The test-fire marks were generally able to be overlaid on photographs of the lips of the magazine. This was not the case with Robin Bain's marks: the two could not be well aligned.

    134.4 The length of the residue marks produced in the tests was between 12 and 25 mm long. The lengths of the marks on Robin Bain's thumb are approximately 6mm and 8mm.

    134.5 Residue marks from loading are generally left on the pad of the thumb. The marks on Robin Bain's thumb are located more towards the edge. It is difficult and awkward to create marks in this location. (Contrary to Mr Karam's submission, the loading marks in Mr Walsh's figure 5A1 are not "towards the side of the thumb" or in a similar position to the marks on Robin Bain).

134.6 Multiple loadings generally produce at least two sets of separate marks. No additional marks are visible in photographs A008 or A009, although the earlier marks may have been wiped away.

135. Mr Walsh concluded that although the marks could have been made by loading a magazine:

> "There is lacking an accurate correspondence of the features of the marks. In my opinion there is oconsiderable doubt that the shape, dimensions and colour of the marks on Mr Robin Bain's thumb are consistent with marks made as a result of loading a cartridge into a magazine."

136. It is apparent Mr Walsh has brought a much greater rigour to the comparative analysis than the applicant's witnesses, who merely assert, on the basis of visual interpretation of photographs, that the marks "could have" been made by loading the magazine.

Mr Durrant's response to Mr Walsh

137. Mr Durrant has more recently supplied a response to Mr Walsh's report. Mr Durrant does not offer any fundamental disagreement. Rather, the tenor of his report is to downplay the difficulties Mr Walsh identifies, in terms of making accurate comparisions from photographs not fit for that purpose. Mr Durrant prefers to express his conclusion in unqualified terms:

> "my overall impression gained from viewing the police video and photographs of their tests is that they do confirm strongly that the marks seen on Mr Bain's thumb are indeed sooty lines from the magazines."

138. It may be fairly observed that Mr Durrant has a history of expert "overreach" in his interpretation of photographs.

Fingerprint officer's examination

139. On 13 August 2013, Principal Fingerprint Officer Eugene Wall, and Fingerprint Officer Ian Harrison compared photographs A008 and A009 with post-mortem fingerprints taken from Robin Bain on 22 June 1994, by fingerprint officer Kim Jones. (An earlier set of prints had been taken, on 21 June, by Detective Lodge, but Mr Jones' prints were of superior quality).

140. Photographs A008 and A009 were received as 39 MB .tif files. They were then printed to A3 size, as both full and cropped images. The original fingerprints were examined. Using the 10 shot magazine as a scale, the officers estimated the length of the marks, although these could not be regarded as exact measurements.

141. Some ridge characteristics were visible in photographs A008 and A009, on both the thumb and forefinger. This enabled the officers to locate, on the fingerprints themselves, the relevant areas of interest. All three marks were able to be located on the fingerprints. The officers concluded:

> In these identified locations on the post-mortem prints, features are observed which correspond accurately with the marks observed in the photographs.

> These corresponding features are strongly indicative that marks present on the right thumb and forefinger of Robin Bain as seen in Operation Huia scene photographs are the result of minor superficial damage to the skin surface."

142. This evidence, unchallenged, is sufficient to dispose of the original "sooty residue (alone)" hypothesis:

142.1 First, the marks were still visible on the fingerprints forms on 22 June, two days after the deaths. This was after Robin Bain's post-mortem, and after Detective Lodge had rolled the fingers in ink and taken an earlier set of prints. The fingers would likely have been cleaned after this process.

142.2 Secondly, the fingerprint officers' descriptions are not consistent with a substance deposited on the surface of the finger/thumb, but with minor, superficial damage to the skin. For example, the officers note *"damage at a low angle to the direction of the ridgeflow"* and *"a primary ridge which has sustained damage along its peak"* on the thumb.

Applicant's submissions

143. Faced with the results of the fingerprint officers' examination, Mr Karam now argues that the marks must be *both* superficial damage to the skin *and* "sooty residue", and that both were caused by loading the magazine. None of the witnesses or test-fire comparisons provides support for this specific contention, which is advanced purely as a matter of submission.

144. (It is noted the report from Mr Slemko tendered by Mr Karam tends to undermine the applicant's case in this respect. Mr Slemko describes experiments whereby he "forcefully dragged" his fingers across a magazine, and then took inked fingerprint impressions. None of the impressions displayed any damage to the ridges.)

145. Support for the applicant's propostition is said to be found in the fact that the pathologist, Dr Dempster, did not make any specific note of the damage to Robin Bain's thumb and forefinger. It follows, on Mr Karam's case, that the damage must have been "invisible to the naked eye." And if the damage was invisible to the naked eye, it follows that what can be seen in the photographs must be "soot" overlaying the damage; soot that must have been wiped off or otherwise removed from the skin cracks while Robin Bain's body was transported to the morgue.

146. This is guesswork upon guesswork. It also assumes as a starting point the very point that Mr Karam seeks to prove.

147. Dr Dempster's notes were economical. His description was of "*recent minor injuries involving both hands.*" These "*included*" the four itemised injuries to the back of the right hand (viz. a bruise and three abrasions). In this context, the minor, superficial damage to the skin on the thumb and forefinger were either unnoticed or seen as unremarkable.

148. It is noted the applicant relies on the absence of a specific note as "proof" there was nothing to be seen. Elsewhere, however, the applicant relies on blood staining and injuries to Robin Bain's hands which were also not noted by Dr Dempster.

Dr Dempster's affidavit

149. Dr Dempster's contemporaneous notes and his trial evidence are now supplemented by an affidavit, which Mr Karam obtained recently without reverting to the Crown. The affidavit confirms an earlier media interview, and "confirms" that "the marks" visible in the photographs "were not present" on Robin Bain's thumb at the post mortem. The mark on the forefinger is not addressed.

150. The language of the affidavit is difficult to reconcile with the unequivocal fingerprint evidence (which Dr Dempster does not address) that the marks were indeed "present". The question is not whether they were present, but whether they were observed.

151. The fact that the three minor marks in question were not specifically observed or noted at the post mortem does not mean they were "invisible". The marks can be seen (albeit "in reverse") on the fingerprint form, taken on 22 June. The mark on the forefinger is particularly clear, and is described by the fingerprint officers as an "*obvious line*." In addition, the officers describe:

    151.1 A "deep coloured" spot near the centre of the lower thumbprint, which corresponds to a similar dark spot in photographs A008 and A009. It is likely to be biological in origin.

    151.2 The damage on the lower thumbprint is wider on the left and narrower on the right, which corresponds to deeper colouring on the right side of the mark in the photographs.

152. There may well have been some contaminant inside the cracks/splits in Robin Bain's skin. Other evidence suggests his hands were not particularly clean.

153. Finally, it is noted that both Dr Dempster and Detective Lodge examined Robin's hands (and made notes in relation thereto) *at the scene*. Detective Lodge said that, in addition, once the body had been outlined with chalk, they were able to examine it more closely. It was at this point that Detective Lodge noted the smear of blood on the left hand. Neither witness noted the marks, yet they were obviously present in the photographs taken contemporaneously.

Other difficulties

154. Leaving aside the speculation it requires, the combined "soot and superficial damage" theory still fails to account for the discrepancies (colour, length, curvature, location etc.) noted in Mr Walsh's report (above paragraph 134).

155. On the applicant's murder/suicide case, there is also no evidence Robin Bain needed to reload either magazine prior to killing himself. The rifle was found with three live rounds (above paragraph 122). If he did reload the magazine, it must be asked why he loaded it with three "spares" when he was about to shoot himself in the head.

156. It might also be thought odd that Robin Bain would "cut" himself (damage his skin) only on this final manoeuvre, but not when loading or reloading earlier, and further that the action should result in not one cut, but three.

157. Contrary to the applicant's submissions, the alleged "misfeed" (dealt with elsewhere in these submissions, above at paragraph 114) has no relevance to this issue. Even if there *was* a misfeed in Scene A (which the Crown disputes), it would not have required reloading of the magazine, merely a clearing of the misfed round. Parallel residue lines, of the kind asserted, are only going to result from the (loading of or) removal of cartridges that are in place within the lips of the magazine – i.e. cartridges that are *not* misfeeds. The actions required for loading a magazine, and clearing a misfeed, are quite different.

158. The respondent reiterates that no fingerprints from Robin Bain were found on either magazine, or on the rifle.

Further "circle shapes" on palm

159. The applicant's submissions, and Mr Durrant's new opinion in this respect, are speculative in the extreme.

Staging of suicide scene

160. The applicant submits that the Crown case cannot accommodate Robin Bain even "handling" a magazine on 20 June. This is not so. On the Crown case, this was a staged suicide scene. The applicant carefully placed the 10 shot magazine (on its narrow, slightly convex edge) next to Robin Bain's right hand. It is certainly not improbable that, prior to doing so, he attempted to place it in his father's hand. Blood was found on this magazine."[246] [References omitted]

Fingerprints on the Rifle

204. Mr Karam develops his argument in relation to the fingerprints in paragraphs 295 to 332 of his Submissions in Support of the Claim of Innocence.

205. I am unable to accept his submission that the evidence is clear that the fingerprints were not in blood and are not suspicious.[247] That is not to say that I think that the issue as to whether the fingerprints were imprinted with or in blood is absolutely clear. Their presence, however, is obviously potentially incriminatory of the Applicant.

206. The actual visual examinations of the rifle made by Mr Jones and others, which they said appeared to them to indicate the application of blood by a finger or fingerprints, cannot, however, be dismissed. That having been said, the matters raised by Mr Karam in the paragraphs to which I have referred do give rise to doubt about the precise manner of application of the fingerprints. But just as Mr Karam's point cannot be lightly dismissed, the results of the Ouchterlony test are not, as Mr Karam asserts,

246 Crown's Response to Applicant's Case pp 38–48.
247 Applicant's Submissions in Support of Claim of Innocence p 67 [296].

irrelevant. They can be indicative of human blood. I do not think that the Crown's evidence about where the sample was taken is "hopelessly confused".[248] Nor is it likely, as Mr Karam suggests, that the four fingerprints actually taken were unrelated to one another.

207. The fingerprints are, however, capable of constituting credible evidence pointing to guilt of the Applicant.

208. First, it is indisputable that the fingerprints were those of the Applicant.

209. Secondly, there is no evidence in the case that I would accept to support the suggestion by Mr Karam in paragraph 325 of his submissions that if the fingerprints were imprinted with blood-tipped fingers, or into blood on the rifle, that such blood would have been rabbit or possum blood. Some months had elapsed since the Applicant had used the rifle. He never gave evidence, and nor did anyone else, that he had handled the rifle with bloodstained fingers, or if and when the rifle itself may have been stained with rabbit or possum blood.

210. Thirdly, despite Mr Karam's speculation to that effect, the Applicant did not prove that he picked up the rifle when he went into the room where it was lying beside his father's body.

211. Fourthly, although it may be accepted that fingerprints can endure for quite a period, the fingerprints here, if not made contemporaneously with the murders, would have had to have survived smudging or obliteration by the white gloves which the killer indubitably wore, before and after their saturation in blood, the use of the rifle in suicide by Mr Robin Bain, and the necessary manipulation of the rifle by him in order to do that.

The Applicant's Demeanor and Statements Made by Him From Time to Time and in Evidence

212. It is a relevant part of the narrative of the case that the Applicant, as he was fully entitled to do, chose not to go into the witness box at the retrial. He would say that it was unnecessary for him to do so, both as a matter of law and appropriate expediency:

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248 Applicant's Submissions in Support of Claim of Innocence p 78 [326].

that his version of events was already before the jury, in the evidence of his statements made to police officers and others, and his evidence in examination – in chief and cross-examination in the first trial which was read to the jury in the second. So far as I am aware, the Applicant has not given evidence on any other occasion. There are before me no further explanations, corrections or additions to, or withdrawals of that evidence given some twenty years ago.

213. That evidence, of statements made to the police officers and others, and of what the Applicant said in the witness box at the first trial, and observations of him by doctors and others, requires examination for its consistency and credibility.

214. I go first to the evidence of the police officers who came to the residence after the emergency service had contacted them. It is not in dispute that when they arrived there the Applicant did not respond to requests that he open the front door. Sergeant Murray Stapp smashed a glass panel in the front door to gain entry. He then entered the Applicant's room and saw him huddled against the wall in a foetal position. The Applicant was distressed and, according to this witness, crying hysterically.[249]

215. Another of the police officers soon on the scene was Constable Leslie Andrew. He actually saw the Applicant fall backwards between the bed in his room and the wall.[250] He did not observe the Applicant hit his head or strike any part of his body when he fell.[251] Constable Andrews actually straightened the Applicant out and placed him in a recovery position.[252] Constable Andrew was cross-examined in some detail about his observation. It was one of the Applicant's Counsel who put to this witness that the Applicant was 6'4" in height.[253] She did not put directly to him that he fell in such a way, or that his head, particularly the front of it, did or would come into contact with objects that could have caused the bruising present on examination shortly afterwards. Mr Andrew was not, however, in a position when the applicant fell to see whether there had been contact of such a kind as would cause bruising.

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249 Retrial Notes of Evidence pp 252–253.
250 Retrial Notes of Evidence p 341.
251 Retrial Notes of Evidence p 345.
252 Retrial Notes of Evidence pp 342–343.
253 Retrial Notes of Evidence p 341.

216. The effect of the evidence given by the various ambulance officers, Mr Craig Wombwell,[254] Mr John Dick,[255] and Ms Jan Scott[256], although not identical in every detail, is that the Applicant was shaking on arrival but was not fitting. They were all pressed in cross-examination to say that the Applicant's pulse rate was excessive and that he may have been unconscious for a time. Mr Raymond Anderson was confident that the Applicant was not in need of any medical intervention.[257] He and another of the ambulance officers formed the opinion that the Applicant's shaking was coordinated, and quite unlike the uncoordinated shaking of a person who was fitting or who had suffered a fit. Mr Anderson was not even prepared to accept that the coordinated shaking could have been shivering from the cold.[258] This question and answer capture the nature of the exchange between the Applicant's cross-examiner and Mr Anderson. It also involves a proposition which I do not think was by any means clearly established on the evidence, rather the contrary so far as I am concerned, that in falling between the bed and the wall the Applicant lost consciousness.

> "Q. If I put to you that the evidence reveals that David Bain started to shiver or shake, fell back against the bed and between the bed and the wall and lost consciousness, would you accept that what you were seeing when you went into the room was consistent with someone recovering from a faint?
>
> A. No I'm sorry, I couldn't accept that, the conclusion of all the vital signs and signs and symptoms weren't consistent with that."[259]

217. There is also evidence from these witnesses that the Applicant said words to the effect that black hands were coming to get him.[260] His behaviour otherwise was a little strange in that, having just seen the corpses of his parents, he talked about his singing and returning to university.[261]

218. The first police officer to question the Applicant was Detective Sergeant Gregory Dunne. He told him that it was important for the Applicant to recount what had

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254 Retrial Notes of Evidence p 353.
255 Retrial Notes of Evidence pp 400–401. Mr Dick noted very little movement. His evidence was essentially that the Applicant was very still for a number of hours.
256 Retrial Notes of Evidence p 425.
257 Retrial Notes of Evidence p 376.
258 Retrial Notes of Evidence pp 385–388.
259 Retrial Notes of Evidence p 388.
260 Retrial Notes of Evidence pp 400, 402, 408, 416, 424, 440, 473.
261 Retrial Notes of Evidence pp 402–403, 408, 410–411, 424, 435, 438.

happened.[262] After some responses about his family the Applicant described the activities of the family on the night before the murders. It was apparently an unexceptional evening with all of the family watching television and the Applicant retiring to bed at about 8.50pm. He said that he woke at about 5.30am and dozed until 5.40am. He left the house at about 5.45am accompanied by the family dog Casey.[263] He then said:

> "Arrived back about 20 to seven. Took off my running shoes, Walkman, went downstairs. Put a wash on. Washed printer's ink off my hands. Is this the sort of stuff you want? … I went back to my room and switched on the light … I noticed shells on the floor. I picked up the box and the plastic thing fell out. I went to mum's room and she was dead. She didn't move. I went to the lounge and he was there. Then I called the police. I remember loud noises and lots of banging but I don't remember anything else until the ambulance officer came in."[264]

219. Detective Sergeant Dunne was present when Dr Thomas Pryde examined the Applicant. The Applicant was cooperative and provided samples as requested.[265] At about midday on the 20th, Detective Sergeant Dunne took a more formal and complete statement from the Applicant. When asked how his mum and dad got on, he said:

> "Not very well … She felt that she has given him everything and he just took, without consideration for her. Whenever they were together, speech was always terse, they were always finding fault with each other."[266]

220. When asked what happened after his alarm went off at 5.30am that morning, the Applicant said:

> "I got up, put on my running clothes and shoes. I have a new pair of Laser running shoes, the socks, bike pants, black rugby shorts and t-shirt I was wearing. And the red t-shirt that I put into the wash."[267]

221. The Applicant said he wore a watch which he looked at when he was at the bottom of Every Street. This was his evidence:

> "About 22 minutes past six, I was at the bottom of Every St at the last bundle. Then I did the rest of Somerville St, did Marne St and at 20 minutes to seven exactly, I was just past Heath St on the way up to my place."[268]

He said that he ran most of his paper route.[269]

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262 Retrial Notes of Evidence p 463.
263 Retrial Notes of Evidence pp 463–464.
264 Retrial Notes of Evidence p 464.
265 Retrial Notes of Evidence p 465.
266 Privy Council Record of Proceedings p 0383.
267 Privy Council Record of Proceedings p 0385.
268 Privy Council Record of Proceedings p 0386.

222. The Applicant said that he did not turn his light on when he first went into his room. There he took off his shoes and put the [paper] bag on the hook behind the door. He thought he took his shoes off in front of the cupboard. He said that he put his Walkman on the bed and then went downstairs, turning the kitchen light on by the switch at the top of the stairs and the bathroom light. He put coloured clothing and a jersey or two into the washing machine. He thought that there were "a black skivvy, jersey, maybe some trousers, just the coloured clothing".[270]

223. Detective Sergeant Dunne asked whether they were all his clothes. He replied:

> "No, just whoever put them on. I didn't have my glasses as I had an accident with them on Thurs night and they are in the optometrist getting fixed."[271]

224. The Applicant said that it was normal for him to do the washing in the morning and hang it on the line before going to university. After putting the washing on, he washed his hands "of the printer's ink".[272]

225. The Applicant told the detective that it was then that he checked on his mother and went through to the lounge calling for his father and found him and called the police.[273]

226. The Applicant says in effect that he checked on his mother because he had, before doing so, re-entered his room to see cartridges on the floor.[274] His rifle was no longer in the cupboard where he usually kept it.[275] He was confused and scared.[276]

227. He pulled a curtain back that separated his mother's room from the hall. He spoke to her but she did not respond. He went to the side of the bed and saw blood all over her head, on the side of her face, everywhere. He ran out calling for his father and went into the lounge. The light was not on there. He saw his father, grey/white with blood on his temple. He saw only his father's face. He ran into his room dragging the phone with him, and rang emergency services.[277]

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269 Privy Council Record of Proceedings p 0387.
270 Privy Council Record of Proceedings p 0387.
271 Privy Council Record of Proceedings p 0388.
272 Privy Council Record of Proceedings p 0388.
273 Privy Council Record of Proceedings p 0388.
274 Privy Council Record of Proceedings p 0388.
275 Privy Council Record of Proceedings p 0389.
276 Privy Council Record of Proceedings p 0390.
277 Privy Council Record of Proceedings p 0390.

228. When asked, the Applicant said that the computer in the lounge was used "basically [by] all of us. Mum doesn't, Laniet doesn't anymore."[278]

229. Detective Sergeant Dunne asked specifically whether anyone had any recent arguments with his father. He said that he had argued with his father about the chainsaw the previous night. He also said that:

> "Mum had an argument with him on Saturday over the guttering. We had to put new guttering in. I don't know what it was about only heard the raised voices."[279]

230. The Applicant did make the comment that his father would do things for Laniet that he would not do for the others.[280] He also said that Stephen "wouldn't know the pain that mum felt".[281] He described his father's expulsion from the house by his mother as a "minor victory".[282] He also claimed that Mr Robin Bain's treatment of Stephen made the boy feel oppressed and angry with his father, and that Stephen needed a father figure but that his father would treat Stephen as his progeny and would try to involve him with what he was doing.[283]

231. Detective Sergeant Dunne pointed out to the Applicant that when he telephoned the emergency number, he said "help, they're all dead."[284] He asked him why he said that. The Applicant's response was specific and inconsistent with his evidence at the trial: "I don't know. All I saw was my father and mother."[285]

232. Again, the Applicant was in no doubt when asked that he had not touched his mother or father.[286]

233. The Applicant shared his mother's animosity towards his father. Because he had taken Mrs Bain to Papua New Guinea as a missionary, she was denied an opportunity to complete a musical degree. According to the Applicant, Mr Robin Bain treated Mrs

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278 Privy Council Record of Proceedings p 0393.
279 Privy Council Record of Proceedings p 0393.
280 Privy Council Record of Proceedings p 0394.
281 Privy Council Record of Proceedings p 0394.
282 Privy Council Record of Proceedings p 0395.
283 Privy Council Record of Proceedings p 0395.
284 Privy Council Record of Proceedings p 0396.
285 Privy Council Record of Proceedings p 0396.
286 Privy Council Record of Proceedings p 0397.

Bain as "the housewife, mother, lady-in-the-kitchen, etc". She was starting to realise that her life was for his gratification. She felt oppressed by him.[287]

234. Detective Sergeant Dunne asked how the Applicant "got that lump on [his] head". He replied that he could not remember anything that would have done it, except when he blacked out. He added that he did not know how he got the skin off his left knee as well.[288]

235. Detective Sergeant Dunne described the clothing that the Applicant was the wearing, as "a white "Queens Baton Relay" jersey with a blue collar, green bike shorts, black pants and white running socks".[289]

236. Detective Sergeant Dunne took another statement from the Applicant on the next day, the 21st of June 1994, at the house of the Applicant's relative where he was then staying. After discussing the household finances the Applicant told Detective Sergeant Dunne that he had not taken the newspaper from the letterbox at the residence. (The relevance of this is that the newspaper was found untouched on a table in the hall, giving rise to the probability that it had been brought inside by Mr Robin Bain when he came into the house.)[290]

237. Detective Sergeant Dunne asked the Applicant where he left his necklace [with a key to the trigger lock on it] when he went on his run. He said that he left it on the set of drawers beside his bed with the light and clock on it. He said he did not know why he did not take the necklace with him on the morning of the fatalities. The other key, he said, was kept in a fairly shallow, cream, square pottery jar with a lid. He said that no one knew about the keys to his gun lock:[291]

> "... I didn't tell anyone about that key. I think the others might have known about the one around my neck."[292]

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287 Privy Council Record of Proceedings p 0398.
288 Privy Council Record of Proceedings p 0398.
289 Privy Council Record of Proceedings p 0399.
290 Privy Council Record of Proceedings pp 0400–0401.
291 Privy Council Record of Proceedings pp 0404–0405.
292 Privy Council Record of Proceedings p 0405.

238. He did not think that anyone else in the family knew about the one inside the pottery jar, not his father and not anybody else in his family, although everyone knew where the gun and the ammunition were kept.[293]

239. On this occasion, the Applicant was asked to be more specific about the coloured clothing that he put into the washing machine. He could recall a green rough knit jersey belonging to Arawa, a black skivvy, a couple of pairs of socks, a green-striped business shirt of his father, a pair of dark trousers of whose ownership he was unsure, and two towels.[294] The Applicant said that he thought there had been a spill in the laundry when he was away on the previous Sunday. He was then questioned in some detail about the cycles of the washing machine.[295]

240. I interpolate to reiterate that I would regard the evidence about the cycles of the washing machine, the times that the cycles took to complete, and any cycle chosen by the Applicant, as being in a similar category to the evidence about the time of and taken for the switching on of the computer and the tapping of the message into it. I make it clear that I think that the many uncertainties about these and the experiments and reconstructions that were undertaken in respect of them make reliance on them unsafe. In short, I do not regard the evidence about the timing of the cycles of the washing machine as inculpatory of the Applicant, or the evidence conflicting as it was about the switch on and other timings concerning the computer, as exculpatory of him.

241. In the final interview, the Applicant affirmed that he did not touch his mother when he went into her room and that he had gone straight into the lounge calling for his father. He had thought further about that. He might have "gone straight to the lounge because his influence was concentrated there, more than anywhere in the house. His computer, his instruments on the wall".[296]

242. The Applicant said he came no closer than about a foot away from his father's feet. He noticed nothing else in the room.[297]

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293 Privy Council Record of Proceedings p 0406.
294 Privy Council Record of Proceedings p 0408.
295 Privy Council Record of Proceedings pp 0409–0411.
296 Privy Council Record of Proceedings pp 0412–0413.
297 Privy Council Record of Proceedings p 0414.

243. The Applicant further reaffirmed that he did not go into Stephen's, Laniet's or Arawa's rooms on the morning of the 20th of June 1994. He was "positive" about that.[298]

244. The Applicant was asked whether he could explain the "25 minutes in the house" before he called the ambulance. He could not. He said that he had recently been spacing out.[299]

245. Detective Sergeant Dunne returned to the address where the Applicant was staying at about 9.30pm in the evening of the 21st of June. After referring to black hands the Applicant discussed with the detective the possible culprits. The detective suggested that there were only two possibilities, Mr Robin Bain or the Applicant.[300] Detective Lowden questioned the Applicant on Friday the 24th of June at 10.30am. The former gave a conventional warning and told the Applicant, as was the fact, that the police had located bloodied fingerprints on the rifle. The Applicant said he could not explain those prints, nor could he explain the time that elapsed between his discovery of his parents' bodies and his call to the emergency service. He suggested that he may have had a blackout.[301]

246. He was asked to explain, but was unable to do so, a palm print on the washing machine and the presence of blood on it. He denied washing bloodstained clothing on the morning of the fatalities.[302]

247. A full record was made of a formal session of questions and answers by Detectives Croudis and Lowden. The Applicant accepted that he had washed some clothing that did belong to him on the Monday morning.[303] Asked about blood on the white t-shirt that he was wearing when the police arrived at the residence, he said that he could not explain how it got there. As to blood on the sole of one of his socks, he said that there was no reason why he would be wearing any bloodstained clothing unless he had stood in some blood. He was questioned about his white gloves and said that he kept them with his dress scarf in a drawer. He denied any knowledge of the presence of

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298 Privy Council Record of Proceedings pp 0414–0415.
299 Privy Council Record of Proceedings p 0415.
300 Privy Council Record of Proceedings p 0417.
301 Privy Council Record of Proceedings pp 0419–0420.
302 Privy Council Record of Proceedings p 0420.
303 Privy Council Record of Proceedings p 0425.

bloodstained white gloves in Stephen's room. After making that denial, he asked whether he could have a solicitor present and the interview ended.[304]

248. I refer next to statements made from time to time by the Applicant to people other than police and ambulance officers.

249. One of these was a witness the publication of whose name is, as with the witness next mentioned, the subject of suppression orders. She was a friend of another witness. The former recalled meeting the Applicant on the 13th of June in the music department. He said that he wanted to talk to her. She suggested that he come to her apartment which was nearby. The discussion that he requested did not, however, take place until the next day when he arrived at about 11.00am.[305] He wanted to talk about the latter witness. A long conversation ensued. The Applicant expressed concern that he had not been aware until recently that the latter witness had another boyfriend. He referred to another girlfriend and said "anybody I've ever loved I've ended up hurting".[306]

250. He spoke of some kittens that he had owned in Papua New Guinea. The conversation which s 18(c)(ii) recounted suggests some confusion on the part of the Applicant about his relationship with the latter witness. The topic of his parents' relationship was raised. Rather curiously, the Applicant spoke of his mother's project to build a new house as a "sanctuary".[307] If his parents separated formally or divorced the house would have to be sold and the project would not happen. His mother and Stephen would get a flat in town together. The Applicant said that the [new] house would be:

> "like a peace centre or a meditation centre. It was going to be massive … about seven bedrooms … David had worked very hard … this was very important too … this is one of the examples where he's really frustrated and irritated with his dad because his dad had … come home with a trailer load of soil and dumped it all over everywhere he's been working. And he'd worked quite hard because he had callouses on his hands."[308]

251. In the long conversation, the Applicant spoke of having experienced déjà vu and of having been unaware of what was going on around him on occasions.[309] At one point the Applicant said that Laniet had gone flatting because she was the one who stuck up

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304 Privy Council Record of Proceedings pp 0425–0427.
305 Retrial Notes of Evidence p 2350.
306 Retrial Notes of Evidence p 2352.
307 Retrial Notes of Evidence p 2353.
308 Retrial Notes of Evidence p 2353.
309 Retrial Notes of Evidence p 2354.

for Robin. The family was divided: all but Laniet did not want Mr Robin Bain to continue to be part of the family.[310]

252. The conversation ended on an ominous note. The Applicant said that he thought that something horrible was going to happen.[311]

253. The first of the women mentioned in paragraph 249 above spoke to the Applicant after the murders and before his arrest. He asked her whether she thought he should tell the police officer Mr Dunne about his premonitions and déjà vu.[312] He had mentioned to her that there were 20 minutes or so before he rang emergency services on the morning of the murders for which he could not account. It was in this context that he said "I can't remember getting this". And as he did so, he moved his shirt and showed her some scratches on his left side, about four or five light grazes.[313]

254. I need not dwell upon it here, but this witness, as did others, not surprisingly thought the Applicant's attitude to and proposed arrangements for the funeral for his family were strange.[314] He was very specific, for example, about what he would wear and the music that would be played. He descended into great detail including with respect to her underwear regarding the clothing in which Arawa should be buried.[315] He proposed to her and Mrs Clark that he invite Arawa's friends to a birthday party for her on the date of her next birthday in a few days' time.[316]

255. In the discussion before his arrest, he referred to what he intended to do with his life in the future. He said that he would sell the house, and buy a home for himself. He was quite concerned to recover a loan that had been made to friends of his parents.[317]

256. The second woman referred to in paragraph 249 was a witness at the retrial. Her relationship with the Applicant began in late May. On an occasion early in it he spoke to her about the proposal to build the new house in Every Street. She mentioned

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310 Retrial Notes of Evidence p 2356.
311 Retrial Notes of Evidence p 2356.
312 Retrial Notes of Evidence p 2362.
313 Retrial Notes of Evidence p 2363.
314 Retrial Notes of Evidence pp 2367–2368, 2474–2475.
315 Retrial Notes of Evidence p 2475.
316 Retrial Notes of Evidence pp 2369, 2480, 2584.
317 Retrial Notes of Evidence p 2368.

something about his father and mother and he said "Dad's got nothing to do with it."[318] Subsequently, he described Laniet's having left home "because of his father".[319] His mother did not want his father to be there.[320] This woman was present with the Applicant at a concert at which he seemed to fall into a trance.[321]

257. The couple continued to meet. The Applicant's father was a topic of conversation again. The Applicant said that:

> "he didn't really see him as a father figure and that there was somebody in Papua New Guinea who he had seen as a father figure".[322]

258. The woman and the Applicant saw each other on a number of occasions thereafter. She visited the Applicant's home.[323] They went to see the film *Schindler's List* together.[324] She accompanied him to a ball at Lanarch Castle.[325] It was there that he wore the white gloves which he had purchased for the occasion,[326] and which were found heavily bloodstained under Stephen's bed on the morning of the murders.

259. The couple arranged to meet at the Polar Plunge at St Kilda on the 19th of June 1994. Both the Applicant and Stephen were participating in the event.[327] It was there that she met Mr Robin Bain who was intending to drive the Applicant to university after it. In the event she and the first woman referred to in paragraph 249 above took the Applicant back to a theatre where he was rehearsing for a play in which he was performing and which she thought was *Oedipus Rex*.[328]

260. The play *Oedipus* was written by Sophocles of a fifth century Greek mythological character who kills, unwittingly, his father, and marries his mother. It is a basis for the Freudian theory of the Oedipus Complex involving competition between a son and father for the psycho-sexual possession of the mother (or of a daughter for a father) which is said to lead to an aggressive attitude and conduct towards the father and

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318 Retrial Notes of Evidence p 2320.
319 Retrial Notes of Evidence p 2330.
320 Retrial Notes of Evidence p 2330.
321 Retrial Notes of Evidence p 2331.
322 Retrial Notes of Evidence p 2332.
323 Retrial Notes of Evidence p 2321.
324 Retrial Notes of Evidence p 2325.
325 Retrial Notes of Evidence pp 2326–2328.
326 Retrial Notes of Evidence p 2328.
327 Retrial Notes of Evidence p 2333.
328 Retrial Notes of Evidence pp 2333–2334.

husband. Dr Love, who was a tutor at the Applicant's university, and director of the production of *Oedipus Rex*, gave evidence at the retrial. He found the Applicant to be perfectly likeable and approachable.[329] It was put to him in cross-examination that to say that the play was a rather dark tragedy was an understatement. He rejected that there was any reference in the play to black hands, or indeed to a black sea as the cross-examiner put to him.[330]

261. The Freudian theory has been much discussed and is not uncontroversial.

> "Thanks to the almost miraculous survival of the Freud-Fliess correspondence, we know how the idea of the Oedipus complex occurred to Freud. The crucial letter was written by Freud to Fliess on October 15, 1887. Freud was engaged in his self-analysis when it "suddenly ceased for three days." He became disconsolate. Freud then proceeds to ask his mother about a childhood memory dealing with the disappearance of a beloved nurse when he was between two and two-and-a-half years old. Without even beginning a new paragraph, Freud interrupts the historical narrative to write the lines that would become famous.
>
> > A single idea of general value dawned on me. I have found, in my own case too, [the phenomenon of] being in love with my mother and jealous of my father, and I now consider it a universal event in early childhood. If this is so, we can understand the gripping power of *Oedipus Rex*. … The Greek legend seizes upon a compulsion which everyone recognizes because he senses its existence within himself. Everyone in the audience was once a budding Oedipus in fantasy and each recoils in horror from the dream fulfilment here transplanted into reality, with the full quantity of repression which separates his infantile state from his present one."[331] [References omitted]

262. It is neither possible nor necessary to explore the details of the various translations of the play, nor the diverse theories of Freudian psychology about them. I am no more willing to make a sinister connexion between the Applicant's knowledge of and participation in the play than I am to make one between Mr Robin Bain's light reading of murder mysteries and the fatalities at the Every Street residence.

263. In conversations that the second mentioned woman had with the Applicant between the murders and his arrest, he complained to her that the police had misled him: that it was from the newspaper that he had learned that Stephen and Arawa were not found on their beds and that they were killed in their sleep. She specifically asked him whether he had seen his father: "he said, 'Yes', but he – he didn't – he hadn't seen the chil – the

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329 Retrial Notes of Evidence p 3091.
330 Retrial Notes of Evidence p 3093.
331 Martin S Bergmann, 'The Oedipus Complex and Psychoanalytical Technique' (2010) 30 *Psychoanalytical Inquiry* 535 p 535.

children."[332] He said that if it was his father, he could never forgive him. He mentioned to her also that he was at home for about 25 minutes, of which he could account for only five.[333] The Applicant told this woman that he had a bump on his head which he did not know how he had suffered.[334]

264. There was another occasion, again before the arrest, when the woman secondly referred to in paragraph 249 above conversed with the Applicant. She and the first mentioned woman had gone with him to St Clair on the beach. He became very upset and fell to his knees and cried out. I would regard this behaviour as consistent with grief as with despair or remorse.

> "... it was a terrible sound, it was like he was trying to get something out, it was very, from the stomach is the only way I can describe it, it was a real sound of pain."[335]

265. Several of the parents' relatives gave evidence. Mr Boyd was one of Mrs Bain's brothers-in-law. He explained how the dilapidated house at Every Street came to be burned. This evidence is only relevant to rebut an assertion that was made in cross-examination and repeated in Mr Karam's book *David and Goliath* that the police burned the house down, by implication, intending to destroy evidence. The house was burned because it was so dilapidated, indeed, beyond repair, and was likely to attract people of morbid inclination. Withheld under s 18(c)(ii)

The decision to destroy it was a considered one, and was made after consultation with the Applicant.[336]

Withheld under s 18(c)(ii)

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332 Retrial Notes of Evidence p 2336.
333 Retrial Notes of Evidence p 2337.
334 Retrial Notes of Evidence p 2338.
335 Retrial Notes of Evidence p 2345.
336 Retrial Notes of Evidence p 2417.
337 Retrial Notes of Evidence p 2431.

Withheld under s 18(c)(ii)

Withheld under s 18(c)(ii) There is no evidence that Mr and Mrs Bain travelled or lived other than in Papua New Guinea, and perhaps Australia.

266. Mr Michael Bain, Mr Robin Bain's younger brother, was a witness. He described Mr Robin Bain as an enthusiast and at Christmas 1993, when they spent 3 weeks together, as excited by his plans for the school. He also confirmed that Mr Robin Bain was very interested in, and capable with computers. [340]

267. Mr Michael Bain visited the Applicant in prison in December 1994. In a conversation there, the Applicant said that his father was a domineering person and that the rest of the family felt dominated by him. Laniet had left home because of the domination. Margaret and Arawa resisted.[341]

268. Mr Michael Bain's description of the Applicant's father was of a humble man not proud of his own achievements but of his family's.[342]

269. Mrs Valerie Boyd, Margaret Bain's sister, gave evidence. She described Mr Robin Bain as "relaxed, very gentle, pleasant. [A] very calm person".[343] She noticed little change in the family but she did not see them on a regular basis.

270. This witness also described what she thought was inappropriate behaviour by the Applicant in the making of his elaborate plans for the funeral of his family.[344] The Applicant was staying with another aunt and uncle-in-law, Mr and Mrs Clark (as was Mrs Boyd for a time) before he was arrested. One evening, Mrs Boyd discussed family matters with him. The Applicant said that his father was sneaky, he used to listen in to conversations that had nothing to do with him. He said that he hated his father. He was not wanted at the house, but his father said that it was his family and his house and that he was staying.[345]

271. On the Wednesday following the murders and after the Applicant had read details of them in the local newspaper, he spoke about Stephen: "He was shot through the hand".

Withheld under s 18(c)(ii)

340 Retrial Notes of Evidence p 2439.
341 Retrial Notes of Evidence p 2450.
342 Retrial Notes of Evidence p 2450.
343 Retrial Notes of Evidence p 2471.
344 Retrial Notes of Evidence pp 2474–2475.
345 Retrial Notes of Evidence p 2476.

After a response by Mrs Boyd the Applicant said: "He was so strong and he had to have fought – he fought hard, he'd get very angry… he was a really nice lad but he could get very angry."[346]

272. It is also relevant to point out that the Applicant apparently told Mrs Boyd, and I take it to be the fact, that Laniet's boyfriend was staying at the schoolhouse at some stage at Taieri Beach Mouth with Mr Robin Bain.[347] Contrary to the hearsay evidence, this might tend to negative the existence of any incestuous behaviour, at this period and at any rate. The evidence about the presence of the boyfriend was not in any way challenged as there was no cross-examination at all of this witness by defence Counsel.

273. A brother-in-law of Mrs Bain, Mr Robert Clark, gave evidence. It was he who provided the Applicant with the newspaper to read when he asked for it. The Applicant was visibly upset when he told him that he had learned from police that Laniet had been a prostitute.[348]

274. This witness was told by his wife that the Applicant had said that his glasses had been broken and that he had been wearing a pair of his mother's glasses which were not one hundred per cent but sufficed.[349]

275. Mr Clark gave his impression of Mr Robin Bain's physique:

> "A lightly built man, I would – yes, I suppose in comparison to myself, I would say he was, you know, a rather small build. Um, frail, I suppose that would be the one word of describing it, yes… I did observe his hands and arms and um, I could by looking at them, I could say they were very small, yes…"[350]

276. In cross-examination, Mr Clark agreed that the Applicant was very fond of his father, and his father of him. He recalled in cross-examination that the Applicant had told him that he would never forgive his father for what he had done, and that he wished he had run faster on his paper run so that he might have been in time to save his family.[351]

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346 Retrial Notes of Evidence p 2478.
347 Retrial Notes of Evidence p 2478.
348 Retrial Notes of Evidence p 2560.
349 Retrial Notes of Evidence p 2561.
350 Retrial Notes of Evidence p 2562.
351 Retrial Notes of Evidence pp 2563–2565.

277. Mrs Clark was also called at the retrial. She was unaware of the degree of estrangement between Mr Robin Bain and his wife. She did say in evidence that Mrs Bain had been very disappointed when the Applicant had failed to pass any of his examinations in his first year at the university.[352] She had the impression that the relationship between Mr and Mrs Bain had, however, been improving.[353]

278. I have also seen Mrs Clark's unabridged statement which forms part of Schedule 4 to this Final Report, as does Mr Karam's response to it. I note some matters in it which may be of some relevance: the Applicant may have had "special [educational] needs"; he was unhappy with other members of a choir which he had joined; the Applicant's behaviour towards his siblings had been inappropriate; according to the Applicant nothing had happened over the weekend to cause the tragedy; and the Applicant, without explaining why, had encouraged Laniet to come home for the evening: the Applicant had been explicit, he had said that he "really need[ed] his glass," as he had been wearing his mother's glasses. He also said unequivocally that he had only seen his parents after the fatalities.

279. Elsewhere I made the point that I was disinclined to have regard to statements attributed to Laniet because I think them unreliable. One that she had made was that, in effect, the Applicant had pressed her to spend what turned out to be the fatal Sunday night at home. There is no reason, however, not to have regard to Mrs Clark's evidence that the Applicant himself actually told her that he had in fact gone to the museum café and "talked her" into coming home.[354]

280. Mr Boyd was called in the Crown case in rebuttal. He denied some evidence which had been given by Mr Mayson in the Defence case that one of the police officers, on the afternoon of the funeral, at the South Dunedin police station, had said "David is the enemy and we're going to get him."[355] Mr Boyd said that he would have been very upset had such a remark been made.[356]

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352 Retrial Notes of Evidence p 2572.
353 Retrial Notes of Evidence p 2577.
354 Retrial Notes of Evidence p 2578.
355 Retrial Notes of Evidence p 3027.
356 Retrial Notes of Evidence p 3688.

281. Mrs Clark, too, in rebuttal, was quite specific that no statement of the kind alleged by Mr Mayson had been made. She was "absolutely astounded" by the suggestion.[357]

The Applicant's Evidence at the Trial Re-Read at the Retrial

282. As I indicated earlier, the Applicant did not give evidence at the retrial. His evidence in its entirety at the first trial was read to the jury at the retrial, who accordingly did not see and hear him as a witness.

283. Both in tone and in some matters of substance, the Applicant's evidence differed from the various statements which he made to police officers and to which I have referred above.

284. More than once, the Applicant referred to the relationship between his parents. He said that it deteriorated on their return from Papua New Guinea. His relationship, he said, with his mother was a wonderful relationship, even though "some of the things she did [were] a bit odd looking from the outside perspective".[358] The Applicant said that he had "a great relationship [with his father], the old father-son relationship that we had".[359] This evidence is more than curious and difficult to accept in light of the Applicant's expressed antipathy towards his father on other occasions. The evidence shows that Mr Robin Bain was very interested in his family and supportive of them. As recently as the day before the murders, he had accompanied both of his sons to the Polar polo swimming event, just as he had regularly attended musical performances in which the Applicant participated. Was this fond relationship on the part of the father reciprocated by the Applicant? As I have said, evidence on other occasions, of statements by the Applicant himself, is to the contrary.

285. The Applicant said this in his evidence-in-chief:

> "Evidence has been given about comments I made after the events of 20 June about me hating my father as to whether I can recall a conversation in which I used the term hating my father, I can't recall anything clearly. But I would have to say that was only meant to express the anger I 10 was feeling if he had done it. At that stage I didn't know what had happened, what the full story was and was pretty confused. I told the detective about a heated argument about the chainsaw on the weekend before the shootings, it wasn't

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357 Retrial Notes of Evidence p 3691.
358 Retrial Notes of Evidence pp 2664–2665.
359 Retrial Notes of Evidence p 2665.

heated. Basically I wanted to use the chainsaw during that week for work around the house Mum had wanted me to do and I also knew that Dad 15 would use the chainsaw as well down at the school, so I said to him I wanted to use the chainsaw and basically he and I just had a fight of words I suppose, but it wasn't a heated argument at all.."[360]

286. The Applicant's relationship with his father was explored in detail in cross-examination. He claimed it was a close relationship, that they got on well and that they had a strong interest in music in common. "We had a– I loved him a great deal. I mean he was my father."[361]

287. The cross-examination continued:

> "Question. Did you make comment to the effect that it was up to Robin to realise he was not wanted, and to move out of Every Street?
>
> Answer. Yes I did. I think I said that to s 18(c)(ii) and I was passing on what Mum, trying to describe the relationship that Mum had with him.
>
> Question. Did you tell Val Boyd that you hated your father?
>
> I think I did, but I cannot remember exactly clearly.
>
> Did you say that he was sneaky and listening to conversations that did not concern him?
>
> Yes.
>
> Did you say to the police that Arawa was able to deal with him without the feelings of guilt he brings out in me?
>
> Yes I did.
>
> Question. What did you mean by the feelings of guilt he brings out in me?
>
> Answer. That was his way. He never used to do it before hand, like in the years previous. But as he was being pushed out by Mum, it was his was of controlling, to get things within the family and would, like this argument over the chainsaw, he brought that sort of stuff up as well. Basically guilt trips, like you could have used it over the weekend and I need it a great deal. Sorry, that is talking about the chainsaw, whereas Arawa wasn't affected by that but I was. I think I'm more sensitive to that sort of thing.
>
> Question. The argument between you and your father on the Sunday evening, was that over the chainsaw?
>
> Answer. Yes it was.
>
> ...

360 Retrial Notes of Evidence p 2666.
361 Retrial Notes of Evidence p 2685.

> Question. Do you agree that you said to the police that he, meaning your father, had constant battles pulling and pushing over the chainsaw.
>
> Answer. Yes. … We were constantly at it to see who could get the chainsaw for that time."[362]

288. Later in cross-examination, the Applicant asserted that his father would try anything to get back into the family. He admitted that he had told s 18(c)(ii) that he had not felt that his father was his father. He agreed that there was someone in Papua New Guinea whom he did see as a father figure. He had told, he accepted, Mrs Boyd that his family was a family of four: his mother, Arawa, Stephen and himself.[363]

289. In evidence in chief, the Applicant described his father as stoic.[364] After the Applicant bought the rifle, his father showed an interest in it and helped him to sight it. His father was aware of the difference between subsonic and supersonic ammunition.[365] It was the latter that was used, necessarily with a silencer, to ensure the muffling of the sound of the shots. It cannot be suggested that, having acquired the silencer and possessing himself of a quantity of subsonic ammunition, the Applicant had not become well aware of the difference between the two types of ammunition.

290. The Applicant was interested in sport as well as music. He was "involved in just about every sport that was around. … a runner with the running club … did triathalons … in swimming clubs at various stages, orienteering".[366] As well as being athletic, the Applicant was tall, indeed very tall (his own Counsel put to a witness that he was 6'4" in height,[367] and evidence to a similar effect appears elsewhere).

291. A contrast can be drawn, therefore, between the respective physical capacities of the Applicant and Mr Robin Bain. The latter was about 5'9" of 5'10" in height and of slight build. A witness without contradiction described him as "wasted",[368] another as "frail".[369] The contrast is relevant to Stephen's death. Stephen, although not very

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362 Retrial Notes of Evidence pp 2685–2686.
363 Retrial Notes of Evidence pp 2686–2687.
364 Retrial Notes of Evidence p 2666.
365 Retrial Notes of Evidence p 2665.
366 Retrial Notes of Evidence p 2667.
367 Retrial Notes of Evidence p 341.
368 Retrial Notes of Evidence pp 3026, 3029.
369 Retrial Notes of Evidence p 2257.

"sporty", at 14 years of age was wiry and undoubtedly very brave. He fought for his life but succumbed by being, as well as shot, almost strangled to death.

292. The Applicant was asked about his white gloves. He accepted that they were the gloves that were found in Stephen's room. They were different from his father's gloves.[370] He made no suggestion that his father was aware of the place where he kept the gloves, which he had only recently bought.[371] He agreed that he kept them in a set of drawers on the right hand side of his room along with a pair of purple gloves and some other woollens.[372] To his knowledge, his father had not gone through his drawers and had not been informed where he kept various items of clothing in his room. He added that his father, however, knew "pretty much where I kept my stuff".[373]

293. There is no doubt that the Applicant's own glasses were broken and were with an optometrist for repair over the weekend of the fatalities. A lens was found on the floor in Stephen's room. A photograph and evidence about it wrongly suggested that it was in an open or clear space on the floor in Stephen's room, whereas in fact it was lying, partly concealed at least, under or close to a skating shoe in that room. That Detective Sergeant Weir had planted it there, or that it had otherwise been displaced, has not been established by the Applicant.

294. Unless refuted, inferences would be available that: the Applicant needed glasses for some purposes; he was wearing the glasses in his struggle with Stephen before killing him; the glasses frame was damaged, and a lens detached from it in the struggle; and that the distorted frame was worn or carried into and left in the Applicant's room where it was found. The issue was clouded not only by the optical illusion presented by a photograph, but also by a question of ownership of the glasses, whether they were an old pair of the Applicant, or of his mother, the extent to which the Applicant needed spectacles, that the lens found in Stephen's room was dusty, and a failure to correct some evidence of which the investigating police became aware arising out of information provided by the optometrist. Some of the questions raised by these matters remain unanswered. Five matters may, however, be safely stated. The Applicant did

370 Retrial Notes of Evidence p 2668.
371 Retrial Notes of Evidence p 2701.
372 Retrial Notes of Evidence p 2700.
373 Retrial Notes of Evidence pp 2700–2701.

ask for his glasses on the morning of the 20th of June 1994 when he was in his room and before he was taken away from the residence.[374] He did tell Mrs Clark, his aunt, that he had been wearing an old pair of his mother's glasses over the weekend.[375] The distorted glasses frame was found in his room, and he could provide no explanation for that.[376] The lens found in Stephen's room was probably the lens detached from the frame. The glasses would have been of no use to Mr Robin Bain.

295. In evidence-in-chief, the Applicant claimed that he could read and drive without glasses.[377] On occasions, he had worn his mother's glasses, but only for watching television. He denied that he had used his mother's glasses, or even seen them during the weekend or for at least a year before. He had never worn them with one lens in, and one lens out.[378] The Applicant was asked in cross-examination whether he was aware that one of the lenses could not be fitted into the frame because of the damage to it.[379]

296. There was a suggestion that the distortion of the frame of the glasses found in the Applicant's room might not have been consistent with damage caused during a struggle of the kind that must have occurred before Stephen's death. Mr Gordon Sanderson, a well qualified optometrist, concluded that the lens found in Stephen's room belonged to the distorted frame found in the Applicant's room.[380] Considerable force would have been required to dislodge the lens. It was his opinion that the Applicant's vision, wearing the complete glasses, would be within driving licence standards, and a great deal better for his vision than without them. It was he who proved that the glasses would have been of no use to Mr Robin Bain.[381] I also note that the cross-examiner put to this witness, in effect, that the bruising on the Applicant's face did not match the loss of the lens with the distortion of the frame. The witness was unwilling to accept this and the proposition implicit in the cross-examination about it. The Applicant has not, in my opinion, proved on the balance of probabilities that he neither used nor wore the glasses over the weekend, and that they were not damaged in a struggle with Stephen.

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374 Retrial Notes of Evidence p 415.
375 Retrial Notes of Evidence p 2579.
376 Retrial Notes of Evidence pp 2669, 2703–2704.
377 Retrial Notes of Evidence p 2668.
378 Retrial Notes of Evidence p 2669.
379 Retrial Notes of Evidence p 2703.
380 Retrial Notes of Evidence p 2156.
381 Retrial Notes of Evidence p 440.

297. In evidence-in-chief at the first trial, the Applicant said that the green jersey was his father's, that it did not fit him, that he did not wear the jersey, and that his father was wearing it on the Saturday afternoon: he thought he wore different clothing on the Sunday. Arawa wore the jersey on occasion, just to slop around the house.[382]

298. I have already recorded the exchange about the size of the jersey between the prosecutor and the Applicant in cross-examination regarding it. On the assumption that the green shreds under Stephen's fingernails came from it (which seems to be a reasonable assumption), it is likely that the killer was wearing the jersey in his struggle with Stephen. It seems to me to be likely also that the green jersey would, if worn during the murders, have been bloodstained, probably quite heavily bloodstained because of the amount of blood in Stephen's room, and because of the likelihood of direct contact between it and Stephen and the rifle. These probabilities raised the question as to how the Applicant could have handled the green jersey without becoming aware of the bloodstaining, and the probably noticeable dampness of blood on it. Nor does the Applicant explain why he did not obseve blood smears around the bowl of the washing machine.[383(a)]

299. In chief, the Applicant said that he washed his hands in the laundry to remove printers' ink. He then "sorted out the colours, jersey and the like and put them in the washing machine", that he washed just about everyday and usually sorted colours from whites. He could remember putting in some dark trousers, a black skivvy, a couple of jerseys he thought, and some underwear into the washing machine. He interpolated at this point that he was sorry, his memory was not "that clear". Continuing, he said, "I can recall a couple of the jerseys, I can't recall if one was the green jersey identified as my father's. I accept his jersey was found in the washing machine by the police. At that stage I did not notice if there was any blood on my hands".[383]

300. The Applicant described the Sunday evening of the 19th of June 1994 as a fairly typical family evening, with perhaps two minor exceptions. He heard a car drive off at about 11:00 pm. Other evidence establishes that in all likelihood his mother was the driver of the car and that she went out to collect cash from an ATM. An amount of cash

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382 Retrial Notes of Evidence p 2669.
383(a) Retrial Notes of Evidence p 2294.
383 Retrial Notes of Evidence p 2672.

consistent with such a withdrawal was found on a table beside her bed. She was, as I have elsewhere pointed out, something of a nocturnal creature. Mr Robin Bain never drove the car.[384]

301. The Applicant, in his evidence at the trial, described the occurrence of what could possibly have been an argument, although he referred to it as "just raised voices, that was all".[385] I will refer later to the way in which this matter was dealt with in cross-examination.

302. The Applicant maintained in his evidence that he was at Heath Street on his paper run "at 6:40 am exactly". He said that he told an officer that it took two to three minutes from there to reach his home, but he was unable to be exact about that. On his run, he wore a red sweatshirt which was recovered from the washing machine by investigating police. He had left his red anorak in his father's van with his keys (on their string) in one of the pockets of it. He had left it in the van with his running shoes when he competed in the Polar Plunge on the Sunday.[386] The Applicant had told the police that he had left the necklace in his room before he left for his paper run.[387] (If he was correct about that, someone else must have taken it and put it in the anorak in the van while the Applicant was on his paper run).

303. Included with the items on a string and left in the pocket of the anorak was, in fact, the second trigger lock. I quote the Applicant's evidence with respect to the key on the lock that was almost certainly used by the murderer:

> "I have another key for it, that is kept in the porcelain piece of pottery that has a photograph of a happy sack on it. That key was put in there deliberately by me so that it wasn't open for anyone else to find easily, yeah. No one else in the family knew there was two keys. When I bought the fittings for the rifle, I took one key off and hid it so that no 30 one else knew there was a second key.."[388]

304. The Applicant was asked to describe what he did when he entered the house on the completion of his paper run. He noticed that his mother's light was on, but he went into his room and took his paper bag off after he opened the door to hang it on the back of it.

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384 Retrial Notes of Evidence p 2670.
385 Retrial Notes of Evidence p 2670.
386 Retrial Notes of Evidence p 2671.
387 Privy Council Record of Proceedings p 0404.
388 Retrial Notes of Evidence p 2671.

He took his shoes off in front of the cupboard, and put his walkman on the bed. He went downstairs and washed his hands to remove the printer's ink and sorted the clothing in the way in which I have summarised earlier. He used washing powder from a container above the washing machine and turned the machine on. He just flicked a button to the wash cycle somewhere to start it. He did not flick it around to the special cycle. The bathroom floor was wet. He could feel the wet carpet in his stockinged feet. He said someone had put on a wash on the Sunday and there had been a spill. That person had forgotten to take towels out of the sink. He went upstairs and turned his light on, noticing for the first time the bullets and the trigger lock on the floor and the casing for the bullet. He went into his mother's room, calling her, and saw blood on her face when he moved into the room. He saw she was dead.[389]

305. It was at that point in his evidence that a much more important revelation was made for the first time:

> "And then I think I went through into Stephen's room and over to Stephen. In Stephen's room, I can only remember seeing Stephen and the – he was covered in blood, his face was 5 red. He looked as if he had blusher all over his face and down his neck. In his room I can't remember seeing anything else, just him. I touched him, I got down beside him and touched his shoulder to see if I could wake him but he didn't move at all, and then I left the room".[390]

306. The Applicant in evidence said he could not remember walking through anything else. Then there was another revelation. He did remember walking into Laniet's room and hearing her gurgling with blood all over her face and the pillow. He could not rememeber if he touched her. He walked right up beside the bed. He must have left the room at that stage, he could not recall it.[391]

307. The next thing he remembered was being down in Arawa's room. She was lying on the floor. He could not recall how close he came to her. He did not touch her. She was white.[392]

308. Then, he said, although he could not remember what happened after that, he did recall going into the lounge and seeing his father there. He saw the wound in his head. He

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389 Retrial Notes of Evidence pp 2672–2673.
390 Retrial Notes of Evidence p 2673.
391 Retrial Notes of Evidence p 2673.
392 Retrial Notes of Evidence p 2673.

did not remember seeing the rifle or touching it or anything at all. He did not kill any of these people. He did not kill anybody.[393]

309. The Applicant attempted to explain why he had made it clear to the detectives who interviewed him that he did not go into any of the other rooms than his father's and his mother's.[394] No attempt was made in evidence in chief to explain why he had told other people in quite definite terms that he had not seen his dead siblings before he called emergency services, or at all after their deaths.

310. Well after June, between the 13th and 19th of December 1994, on five different occassions over a total time of 7 hours, the Applicant was seen by Professor Mullen, a psychiatrist. I do not have any transcript of any evidence Professor Mullen gave at the first trial. His evidence was apparently before the Privy Council. He was not a witness at the retrial. What I read of his evidence is what Mr Karam says of it in his narrative submissions in paragraphs 7.114 to 7.127, and a mention of it by Dr Brinded. According to Mr Karam, Professor Mullen said that a significant pathology could be excluded: that déjà vu and trance experiences were not abnormal for young adults. Mr Karam says that Professor Mullen helped the Applicant to explore his memory to see if he could fill in any of those gaps.[395]

311. It is not irrelevant that despite Dr Brinded's close and early professional acquaintance with the Applicant, he was not apparently very, if at all, successful in reviving the Applicant's claimed repressed or forgotten memory.[396]

312. So far as "blackout" is concerned, I make these observations. The Applicant himself offered blackout as an explanation for lack of recall both of events which he claimed subsequently to recall, and of matters which he could not later recall, including the missing twenty minutes. The question of the Applicant's fitness to plead at the first trial must have occurred to the Applicant's advisors or other responsible people. That was the or a reason why Dr Brinded became involved. Having regard to the dreadful nature of the killings and the evidence apparently inculpating the Applicant, it would be very surprising if fitness to plead did not come under consideration. Dr Brinded was of

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393 Retrial Notes of Evidence p 2673.
394 Retrial Notes of Evidence p 2673.
395 Applicant's Narrative Submissions in Support of Claim of Innocence pp 182–184 [7.114]–[7.127].
396 Retrial Notes of Evidence p 3109.

the opinion that the Applicant was not unfit to plead, but he nonetheless made a diagnosis of dissociative amnesia, accepting that it can be caused to a perpetrator as it can be to a witness or a victim. Professor Mullen accepted that literature on the topic was to the effect that it occurred in about 70% of actual murderers.[397] In diagnosing dissociative amnesia, Dr Brinded and presumably Professor Mullen, so far as the evidence goes, turned their attention particularly to the question of the Applicant's recall, or lack of recall of his movements inside the house, and his observations of his dead siblings. There is no evidence, therefore, and I do not need to consider any possibility that the Applicant, in a state of automatism, or some other form of dissociated compulsion, or as a result of infirmity of mind, killed his immediate family and then mentally dissociated himself from having done so. The question does not arise because the Applicant was apparently neither thought to be unfit to plead nor has ever relied on any defence of automatism or infirmity of mind of any kind.

313. There is also this. As will appear, the Crown briefs in the case were made available to the Applicant and his advisors before Professor Mullen's consultations. By then the Applicant would likely have known what the bulk of the evidence against him was, including of blood-staining, blood typing, and other relevant matters. What is also important for present purposes is that Dr Brinded had said in cross-examination when he did give evidence that dissociated amnesia, here memory loss, could be present in either a witness or the perpertrator, and further, that recovered memory may be genuine or feigned.

314. The Applicant was cross-examined about the revelations that he had in fact entered his siblings' rooms and seen that they were dead. He agreed that the preliminary hearing had been almost completed in October and was supplemented with the scientific evidence on the day before the consultation with Professor Mullen. He was asked whether he was aware then that blood on his clothing had been identified as being of other persons'. As to this, his memory again deserted him. He said he could not recall, although he did agree that he was aware that droplets of blood on his socks had been identified as Stephen's or Laniet's.[398]

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397 Retrial Notes of Evidence p 3110.
398 Retrial Notes of Evidence p 2693.

315. I do not at this point deal in detail with the explanations advanced by the Applicant with respect to his trances, déjà vu, premonitions and black hands. Nor is it necessary to dwell here upon some equivocal statements by the Applicant to police officers and others as to who the culprit might have been. There is, however, some evidence to which I will refer, and that is of the Applicant's unusual request with respect to the music to be played at the funerals, and the way in which one or more of the corpses should be clothed for it. Another oddity about the Applicant's behaviour in this regard is that he wanted to have a birthday party on what would have been a birthday for Arawa if she were still alive.[399] The conduct in question may have fallen short of a diagnosable psychiatric condition but I find it difficult to regard it as natural or normal.

316. The Applicant was asked in cross-examination what he meant when he described the proposed new house as being a "sanctuary or a retreat". He explained that "we … (presumably his mother and he) found [New Zealand] very urban, very concrete." The gardening that his mother and he had done "had been to block off that outside world … [to] be at peace and rest from the outside world".[400] Nothing very much turns on this except to suggest the unconventional nature of the Applicant's ambitions, and his intense attitude to various members of his family, especially his mother.

317. The Applicant was asked about the "misfeeding" of the rifle. He agreed that freeing a jammed round was not too difficult a task. It could be done by shaking the rifle. So too, changing the magazine was a simple task.[401]

318. The Applicant was asked about the condition of the house. He agreed that it was filthy and that there were things cluttering the whole of it. He claimed that he had raised the state of hygiene in the kitchen with his mother, who had given up on housework and basic hygiene. He agreed that she stayed up late at night watching television programmes.[402]

319. It is common ground that the Applicant's face was bruised on the morning of the 21st of June 1994. I have already referred to the claim made on his behalf that this may have ocurred when he fell over in his room in the presence of ambulance officers and police

399 Retrial Notes of Evidence p 2584.
400 Retrial Notes of Evidence pp 2690–2691.
401 Retrial Notes of Evidence pp 2695–2696.
402 Retrial Notes of Evidence pp 2697–2698.

who arrived there as a result of his call to the emergency services. It appears that he fell backwards on to the floor, although again, no timely suggestion was made by him of possible contact between his face and a cupboard or chest of drawers then. In cross-examination the Applicant was asked whether he could account for the injuries to his face. His answer was:

> "No I can't ... I did not have the bruise or the scrape on my knee while doing the paper round or immediately after it while entering the house ... my memory is clear up until seeing my mother ..."[403]

320. The Applicant was asked about, but said he could not account for, his fingerprints on the rifle found in the front room. Nor could he account for bloodspots in the basin in the bathroom or elsewhere in the laundry.[404]

The Applicant's Condition and Behaviour on the Morning of the 20th of June 1994

321. Different views have been taken about the Applicant's condition and behaviour on the arrival of ambulance officers and the police. He was seen to be shaking, in a coordinated way or otherwise is not clear.[405] From time to time he slept or appeared to be sleeping.[406] At one stage, he fell over backwards and was moved whilst he was on the floor.[407] There was a great deal of evidence and argument as to whether the Applicant was feigning or not; whether he was in a state of dissociative amnesia or the like; whether he was "fitting"; or whether, in effect, he was in shock. Expert opinion, on this, which with respect, seems to accord with ordinary human experience and observation, holds that post-traumatic stress can produce symptoms and appearances of the kind described by the various witnesses. For present purposes, what is important is that such stress can occur, and does frequently occur, both in perpetrators and witnesses to a shocking or painful event.

The Ambulance Officers' Evidence

322. Even so, I have found the evidence of the ambulance officers of assistance.

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403 Retrial Notes of Evidence p 2704.
404 Retrial Notes of Evidence pp 2704–2705.
405 Retrial Notes of Evidence pp 282–283, 333, 376–377, 379–380.
406 Retrial Notes of Evidence pp 405, 422–423.
407 Retrial Notes of Evidence pp 333, 341–342.

323. The tragedy to which the ambulance and police officers were summoned was a very unusual one. It is not surprising that the circumstances of it were likely to stay in their minds. The opinions of experienced ambulance officers is not to be lightly dismissed. Mr Wombwell in 1994 was the Chief Ambulance Officer for the Otago region. He arrived at Every Street and entered the Bain residence at about 7.30am or just after. At that time Mr Wombwell was not only an experienced ambulance officer, but also had been a qualified registered general nurse for 18 years. He was quite emphatic as to the condition of the Applicant as he observed him. The Applicant was not in a clonic or active fit. A person in an active full blown fit has quite violent movements and no control over what is happening. Neither was he in a classic state of a clonic stage of a fit, which is the period of unconsciousness immediately after a fit where a person is normally quite flaccid and floppy and "doesn't move at all". The person he found did not fit into either of those categories.[408] Mr Wombwell recalled that the Applicant mentioned a bump on his head. He could see nothing obvious and took no further action in relation to it.[409] Mr Wombwell confirmed other evidence that the Applicant's breathing, circulation and level of consciousness were "ok".[410] Mr Anderson, another experienced ambulance officer, made a physical assessment of the Applicant on arrival at the house. He found a normal resting rate of about 76. The pulse oximeter registered an oxygen level of a normal resting person of 99% saturation. He could find no signs of injury, or indeed any sort of trauma at all. To test the level of consciousness, Mr Anderson brushed a finger across the eyelashes of the Applicant. This produced a fluttering or a flickering of the eyelashes, eyelids. Mr Anderson formed the opinion that the Applicant was not unconscious.[411] Nor did he think that the Applicant's shaking was typical of a seizure.[412] Indeed, Mr Anderson went so far as to say that based on his previous experience of other people on other occasions, the Applicant's movements were similar in presentation to persons who were trying to have him believe that they are having a fit, but in actual fact they are not.[413] In cross-examination, Mr Anderson said that he observed no goose bumps or normal shivering such as he would expect of a person on the floor and cold. He refused to accept that the Applicant's

408 Retrial Notes of Evidence pp 349, 353.
409 Retrial Notes of Evidence p 358.
410 Retrial Notes of Evidence p 367.
411 Retrial Notes of Evidence pp 374–376.
412 Retrial Notes of Evidence p 377.
413 Retrial Notes of Evidence p 380.

movements and general condition were consistent with those of someone recovering from a faint.[414] Mr Dick was an ambulance officer of some 15 years standing when he attended the Bain residence just before 8.00am after the slayings. He could recall that the Applicant said "the black hands are coming".[415] The Applicant also told him that he had a headache and he felt nauseous.[416] He could also recollect that the Applicant had said that he wanted to go to university.[417] He found him emotionless but not disorientated.[418] Ms Scott, another ambulance officer, was present at the scene. She was experienced, but less so than the other ambulance officers. There were two particular matters that she could recall of the Applicant's conversation. One is that he spoke about his university course, and the other is that at one stage he asked for his glasses. She and others looked around the room until they found a pair sitting on a chair. A police officer said "no these can't be the pair because they were broken".[419] She was unable to recall whether the Applicant answered questions or not.[420] She agreed that he complained of being cold, and well he might have, because by all accounts it was a very cold morning.

324. Mr Dempsey, an ambulance officer with seven years of experience, was in the control room just after 7.00am on the morning of the 20th of June 1994 when he received the call from the Applicant. A tape recording of the ensuing conversation was played to the Court at the retrial. The Applicant provided, without difficulty, the essential details of the location, name of the caller and telephone number.[421] Ms Sandra Wiblin was a service assistant supervisor in Christchurch at the time of the fatalities. She had formed the view that the call to the emergency centre had occurred earlier than other witnesses said it had. She accepted that the recorded time of the initiation of the call was about 7.10am but she believed that it came in earlier.[422] Indeed, she contacted Mr Karam to tell him that principally because she said that a detective who had interviewed her had declined to include her opinion about the time of the call in her statement. Her whole basis for her belief seems to be that another woman who usually came on duty at

414 Retrial Notes of Evidence pp 387–388.
415 Retrial Notes of Evidence p 400.
416 Retrial Notes of Evidence p 402.
417 Retrial Notes of Evidence p 403.
418 Retrial Notes of Evidence p 408.
419 Retrial Notes of Evidence p 415.
420 Retrial Notes of Evidence p 423.
421 Retrial Notes of Evidence p 496.
422 Retrial Notes of Evidence p 503.

6.55am or 7.00am told her that she had "missed all the excitement".[423] She was unable to give any explanation for the recording of the telephone call at 7.10am.[424] It is not clear when Ms Wiblin first contacted Mr Karam. I have to regard Ms Wiblin's evidence as an example of the sort of evidence which can be excited by the sensational nature of the events despite a merely passing and rather ill-informed acquaintance with them.

Incontestable Objective Facts

325. I reiterate that I have not attempted to deal with every issue that has been raised over the years. I have to say that I cannot think of any other criminal case in which so many issues have been raised, and in which there have been so many conflicts or inconsistencies of opinion, and also of evidence. Some issues I have not found it necessary to explore, or to explore in any detail. In truth, it is beyond the capacity of anyone to resolve with any degree of confidence some of the issues. Whatever Detective Sergeant Weir may have been wrong about, he was, with one qualification, right when he said in cross-examination that nobody will ever *know* what happened. The qualification is that if the Applicant was the murderer, he knows.

326. I have found it helpful in my consideration of the case to identify incontestable facts, and to consider case theories or counter-factuals available to each side.

327. It seems to me that these are objective or otherwise incontestable facts:

    1. The rifle used by the murderer was the Applicant's.

    2. The silencer used by the murderer was the Applicant's.

    3. The Applicant had used the rifle from time to time.

    4. Mr Robin Bain was familiar with firearms and had helped sight the rifle.

    5. The key to the trigger lock to enable the rifle to be fired was the Applicant's.

    6. There were two keys to the trigger lock.

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423 Retrial Notes of Evidence pp 504–505.
424 Retrial Notes of Evidence p 505.

7. One key (with other objects) attached to a necklace was found in a pocket of the Applicant's red anorak in Mr Robin Bain's van.

8. The other key to the trigger lock was on the trigger lock on the floor of the Applicant's bedroom immediately after the murders.

9. The bullets fired from the Applicant's rifle belonged to the Applicant.

10. The key referred to in paragraph 8 was kept in a lidded pottery jar on a chest of drawers in the Applicant's bedroom.

11. The white opera gloves used by the murderer were the Applicant's.

12. The white opera gloves were kept in the Applicant's bedroom in a drawer with another pair of his gloves and other items of clothing.

13. Stephen Bain was partially strangled as well as shot.

14. Stephen Bain fought for his life before his murderer killed him.

15. Stephen Bain was a healthy, fit adolescent of 14 years when he fought unsuccessfully for his life.

16. One of the Applicant's bloodstained white gloves was found under Stephen's bed.

17. Mr Robin Bain had available to him leather gloves which were found in his caravan. (In an interview with Detective Lowden and Detective Sergeant Croudis on the 24th of June 1994 as to gloves, the Applicant had said that Mr Robin Bain kept his dress gloves (and his formal gear) in the caravan.)

18. Mr Robin Bain was in his late fifties, about 5'9" tall, and of slight, somewhat wasted, frail build when he died.

19. The Applicant was 22 years old, 6'3" or 6'4" tall, and a fit athletic young man in June 1994.

20. The Applicant's fingerprints were found on the murder weapon.

21. There was a palm print of the Applicant on the washing machine in the laundry.

22. The Applicant's clothing on testing was found to have the blood of one or more of his siblings on it as appears from the table which forms part of this Final Report.

23. The Applicant sorted clothes for washing and caused evidence (blood stains that may have been on them) to be irretrievably lost.

24. The soles of the Applicant's white socks were bloodstained, one more than the other. There were blood spots on the upper part of one of these.

25. On post-mortem, Mr Robin Bain had a full bladder, some 400mL, consistent with an overnight collection.

26. The Applicant was unable to explain the bruising on his face, although he was clear that he had not been bruised before he went out on his paper run.

27. There were a number of scratches on the Applicant's body before and at the time of his arrest and charging. Dr Pryde, who examined the Applicant a few hours after the murders and who was dead by the time of the retrial, made no note of any such scratches.

28. The Applicant had a fresh scratch or abrasion on one knee which he did not suffer on his paper run.

29. The Applicant was quite emphatic to the investigating police and to others from his first interview with the police to his arrest and changing that he had not entered Stephen's, Laniet's or Arawa's rooms.

30. A distorted or damaged glasses frame which belonged to his mother was found in the Applicant's room very soon after the murders.

31. The Applicant had asked for the glasses on the morning after the murders. He told others that he had been wearing his mother's glasses over the preceding weekend.

32. The lens found in Stephen's room was the lens missing from the glasses found in the Applicant's room.

33. There was no conceivable reason why Mr Robin Bain would wear his wife's glasses.

34. Mr Robin Bain was a very competent operator of, and enthusiastic about, computers.

35. There were spent shells that could or had been used in the rifle in the caravan occupied by Mr Robin Bain.

36. The house smelled and was in an extremely dirty and untidy state.

37. The family (with the exception perhaps of Arawa and Stephen) was dysfunctional by reference to the standards of ordinary, educated people.

38. There was blood on the light switch to the Applicant's room, as to which the Applicant was unable to offer any explanation.

39. There were faint traces of blood on Mr Robin Bain's hands.

40. There was no blood detected inside the Applicant's new running shoes.

41. The daily newspaper was on a table in the hall when the police arrived and it had not been put there by the Applicant.

42. The Applicant told more than one person that he hated his father and that he wanted him out of the house, indeed out of his family's lives.

43. The possession and use of the chainsaw was a recurrent source of friction between the Applicant and his father.

44. A small minority of the children whom Mr Robin Bain taught had written gruesome stories which were published in a school publication.

45. There was reason for Mr Robin Bain to be unhappy.

46. The Applicant's parents were estranged.

47. The Applicant at his first trial gave a different version of his movements after he returned home from those he had given to police officers in interviews and to

others, among other things: of hearing Laniet "gurgling"; of entering his siblings' rooms; and of his affection for his father.

48. The Applicant was unable to account for his movements for a period of about 20 minutes before he called emergency services.

49. There were instances of unusual behavior by the Applicant before and after the murders.

50. There were no fewer than five, indeed, six bloodied footprints in the house of varying sizes and states of completeness.

51. The Applicant did not say that he saw or felt any blood or bloodstains before he entered his mother's room.

52. There was a note typed on the computer on the morning of the murders which read "sorry, you are the only one who deserved to stay"

53. The Applicant particularly wanted Laniet to sleep at home on the evening before the fatalities.

Contestable Facts

328. As I have already observed, there were many contested issues. On some of them, I have taken a view, which I express in discussing them. Some, I am simply unable to form confident conclusions about. The exact timing of the activation of the computer and the typing of the message into it are two of these. Another is the time at which the Applicant activated the washing machine. The footprint evidence is inconclusive.

Applicant's Case Theory or Counter-Factual

329. For the purposes of my inquiry the onus is reversed. It is for the Applicant to make out his case on the balance of probabilities: he needs a case theory or counter-factual that will do that. It seems to me that any such theory needs to involve and deal, as a matter of logic, with the propositions or steps set out below (and perhaps others). I raise in relation to each proposition or step such questions and comments as I think important.

330. Mr Robin Bain, in deep despair or depression, or in order to prevent the disclosure by

Laniet of a long and criminal relationship with her, decides to kill her and two of her siblings and his wife. He decides to spare the Applicant, because he "is the only one who deserved to stay."

Such a relationship has not been proved. Even if it had, it would not as a matter of probability cause Mr Robin Bain to murder all of his family except the Applicant. Why would he not simply commit suicide himself? There is no evidence that Mr Robin Bain knew that Laniet was about to reveal the shameful secret. Why should the Applicant be spared? He did, after all, have a fractious relationship with his father on much of the evidence. Why did he alone deserve to remain? What had poor, blameless Stephen done to deserve to be killed? What had Arawa done to deserve to be killed, and for that matter, why would he kill poor misguided Laniet of whom, according to a deal of direct evidence, he was very fond in an appropriately fatherly way? Mr Robin Bain was continuing to tolerate, and was not discouraged by his wife's abnormal behaviour and her rejection of him. Mrs Clark thought the relationship was improving.

331. Mr Robin Bain "snapped". He had to act quickly to prevent the disclosure of his evil relationship. He devised a plan to enable him to shoot (or in Stephen's case, in addition strangle him) the three children and his wife while the Applicant was walking or running his paper run.

I am not prepared to find that Mr Robin Bain was involved in such a relationship for the reasons that I have already given. On the evidence, there had been no disclosure over the weekend. Mr Robin Bain would well know the time required to complete the paper run because he had filled in for the Applicant to carry it out on previous occasions. He would have known that he had only about 40 minutes or so in which to commit the murders, clean up and kill himself if he were the culprit.

332. Although Mr Robin Bain was a literate man with access to pen and paper, he decided that he would communicate his suicide note by a message on the computer.

Handwriting is, generally speaking, unmistakable and very difficult to simulate. It is "hard copy" and suffers less risk of loss than an entry on a computer.

333. There was nothing unusual about the contents of the suicide note.

I disagree. Why would the message be so cryptic? Why would it not explain why the Applicant was to be spared? Why would it not also explain why the others *deserved* to die? Why would it not explicitly exculpate the Applicant?

334. Mr Robin Bain woke in time to watch and wait to see the Applicant leave for his paper run with the family dog Casey.

Mr Robin Bain would have needed to do something of this kind to ensure that he would have unrestricted access to the house, yet his alarm clock was set for 6.30am or thereabouts. On the Applicant's case, bent on multiple murder, he picked up the newspaper and placed it on the hall table.

335. Mr Robin Bain, when he woke, donned the clothes he would wear to commit the murders. They and the shoes he wore somehow escaped any blood staining of any of his victims.

Did he carry or find in the house other clothing and footwear to don for his suicide? Why would he change in order to commit suicide? Why, in fact, would he do anything that might in any way at all tend to inculpate the one who deserved to stay, and might also cast doubt upon whether he was suiciding? Why, indeed, would he do anything that might impinge upon the time within which he had to undertake the killings and suicide?

336. Neither on rising nor at any stage after it did he relieve himself of the overnight collection of 400mL of urine in his bladder. Such collections without relief can and do occur.

The evidence that such a collection can occur does not mean that it is a usual or normal occurrence. There is no evidence of abnormality of function, except for Mr Robin Bain's slightly enlarged prostate. It seems unlikely that a person would not wish to relieve himself of such a collection before calculatedly murdering five people, washing, changing clothing and suiciding.

337. Mr Robin Bain quietly made his way into the house most likely by the front door, but possibly by a downstairs door.

There is no way of knowing how or in what order the family were killed.

338. Mr Robin Bain enters into the Applicant's room: he knows where the gun and ammunition are kept and takes them from their cupboard. Somehow he becomes or has become aware of, or finds the hiding place of the key to the trigger lock. He searches for and finds the Applicant's recently acquired white gloves in drawers with other clothing. Having decided not to wear his own leather gloves, he puts on the Applicant's gloves, unlocks the trigger lock and leaves it on the floor of the Applicant's bedroom. He spills some ammunition on the floor. He takes magazines of bullets that, when fired from the rifle with the silencer fitted to it, are barely audible.

Why would Mr Robin Bain wear gloves of any kind? He had no reason, if he were the murderer, to conceal his purpose, or to ensure that he left no fingerprints on the rifle, or elsewhere, that could be incriminatory. Why would he wear gloves that might tend to incriminate "the one who deserved to stay"? Why would Mr Robin Bain not use his own gloves? I am not persuaded by Mr Karam's imaginative theory that Mr Robin Bain wore the Applicant's white gloves as part of some kind of a purification rite.

339. Removing his shoes and leaving them with some fresh clothing that he has brought from the caravan (if he has brought fresh clothing) in a place where he can retrieve them, wearing only socks on his feet, for silence perhaps, he sets about murdering four people. He has repossessed or brought with him and is wearing his baggy green sweater, which is sometimes worn by Arawa.

I add nothing to what I have said elsewhere about this matter.

340. The Applicant's white opera gloves remain on Mr Robin Bain's hands until such time as Stephen is killed. Mr Robin Bain then removes them and puts one or both of them under Stephen's bed or coverlet.

Again, the question must be asked why Mr Robin Bain would do anything by way of concealment (if that occurred deliberately) of the gloves. Any attempt at concealment of them as they were the Applicant's gloves, had the potential to further inculpate the Applicant.

341. The order in which the family were killed cannot be ascertained: however, neither Laniet, nor Stephen in particular, succumbed easily. Mr Robin Bain, almost 60 years old and in doubtful health, overcame and almost strangled Stephen, a strong and brave

14 year old, to death with Stephen's t-shirt. That was not enough: he fired a shot to finish him off. Laniet too required more than one shot to be despatched to her death.

It is a serious question, whether Mr Robin Bain had the physical capacity to do what was done to Stephen. The degree of asphyxiation was almost fatal. Stephen was wiry and determined to live. A great deal of persistence and strength would have been required to kill him.

342. Mr Robin Bain was the maker of the footprints, which were exposed and photographed under lights after the application of luminol. The anomalies in the sizes of the footprints do not detract from the identification of Mr Robin Bain as their maker.

I have nothing to add to what I say elsewhere in relation to the probative value of the footprints as measured.

343. After or in the course of the murders, Mr Robin Bain went to the laundry, leaving bloodstains in various places in the house and in the laundry. There, he showered or washed (albeit incompletely, leaving traces of blood on his hands), carefully placing clothing that he was discarding, including the green jersey, into a washing basket. Either there or elsewhere, he put his shoes back on and replaces some, at least, of the other clothing that he had been wearing.

Again, the question has to be asked why he would trouble to shower or wash, and thereby create some ambiguity as to who the murderer might be. He should have been indifferent to whether he continued to wear bloodstained clothing or not. If he did put on his shoes again in the laundry, he must very carefully have avoided walking into any wet blood in his passage to the room in which he was found dead. The Applicant in his evidence suggested that there had been a spill and perhaps a clean up at some time over the weekend in the laundry. If that had happened, it would still not explain such bloodstains as there were in that room. It would be remarkable if he could have avoided copious bloodstaining from Stephen (and others) on the clothing he wore if and when he killed them.

344. Mr Robin Bain's otherwise careful washing was incomplete because there was diluted blood from one of his victims on his hand, and a small spot of blood on his thumb. This blood was not tested. Somehow, a very small quantity of blood also dripped on to

the top of one of his shoes. (This was tested and is referred to again in paragraph 392 of this Final Report).

Such blood (if any) was never tested. There is no evidence as to whose blood it was.

345. Mr Robin Bain's next act was to tap his suicide note into the computer in the alcove.

No further comment is necessary in relation to the significance of the message and the use of the computer.

346. Somehow, a magazine fell, or was balanced precariously on its curved surface on the floor, whether by action of Mr Robin Bain or by accident.

The Crown contention was that this was part of a staging of a suicide by the Applicant.

347. Mr Robin Bain's penultimate act was to place himself in a somewhat contorted position, possibly supporting the butt of the rifle on a chair, with a view to shooting himself in the temple.

I accept that this is possible. I do not, however, accept the probability of the reconstruction advanced on behalf of the Applicant.

348. The rifle misfed: he cleared the bullet, and then shot himself; again, in an awkward position as he did so.

The evidence is that it is easy to clear a misfed bullet. Mr Robin Bain did have the capacity to do so, but the Applicant was more familiar with the rifle. A misfeed would certainly have delayed death, but probably only momentarily. If the Applicant were the assailant, he could have quickly cleared the bullet before firing the fatal shot.

349. The Applicant was entirely innocent and was able to explain some of the discrepancies or inconsistencies in his evidence as to his movements and what he saw and did on returning to the house. Any of such as he could not explain to the investigating police officers but recalled later, resulted from consultations with doctors which he had, with Professor Mullen in particular.

I have nothing to add here to what I have said earlier and will say later in this Final Report in relation to Professor Mullen's and Dr Brinden's psychiatric evidence.

350. The Applicant could not, having regard to the expert evidence, his own evidence and the evidence of the witnesses who saw him on the paper run, have had time to enter the suicide note into the computer.

I do not think the evidence establishes on the balance of probabilities that the Applicant could not have done this for the reasons which I have stated earlier in this Final Report.

Further Points in the Applicant's Case

351. The submission of behalf of the Applicant makes these further points: that the Applicant was cooperative in his dealings and interviews with the police officers, and that his accounts must have been frank and honest because they included statements or concessions which were capable of incriminating him. I agree that the Applicant was cooperative up to the point that he asked, not unreasonably, to have a lawyer present during his last interview before he was charged. Of a similar character was his conduct in not divesting himself of the bloodstained socks before the arrival of the police. These matters certainly argue in favour of the Applicant. Perhaps the most frank and potentially self-incriminating statement that the Applicant made was that his father did not know where he kept the second key to the trigger gun lock in his room. That he made that statement has to be taken into account, and has to be considered in the light of the fact that one or more other people knew of the second key, if not necessarily of its location. That one or more other people did know of it does not affirmatively prove, however, that Mr Robin Bain did, and nor does it disprove the Applicant' unequivocal statement that his father did not know. I also have to take into account in weighing up the relevance and strength, and indeed the significance to be attached to, the matters to which I next refer. There are the subsequent changes in the Applicant's account when he gave evidence at the trial, and his claim that he had had recall of memory, but was never able to account for the missing 20 or so minutes that elapsed between his discovery of the bodies of his parents and his call to the emergency services. It is to that gap that I now turn.

352. It is impossible not to regard these missing 20 minutes or so as important. The Applicant himself thought they were important because he discussed them with other people after the killings. Even a distraught, highly-stressed person who did have the presence of mind to ring the emergency services, belatedly as he did, could reasonably

have been expected to ring them as a matter of urgency and immediately. Any expectation that that should have happened is heightened by the fact that on the version given by the Applicant for the first time at his trial, he had entered Laniet's room and that she might have been alive then, and making gurgling noises: in other words that she might still benefit from emergency treatment.

Case Theory of the Crown and Counter-Factual

353. I look now to a case theory or counter-factual of the Crown.

354. For some weeks before the 20th June 1994 the Applicant had on occasions been behaving abnormally. He fell into trances.[425] He experienced "déjà vu" and had premonitions.[426] Once, for example, he inexplicably stood up suddenly in the middle of a choir, bumped one of them and moved away on his own.[427] He also told several people that there were black hands, that they were coming to get him and his family.[428]

According to Dr Brinded (called by the Applicant at the retrial) some of this behaviour is not uncommon in young people:

> "A. Firstly, déjà vu experience is very common and is not part of a psychiatric disorder, it's not a psychiatric problem.
>
> Q. How common is déjà vu? Are you able to access research materials that can assist?
>
> A. Yes, déjà vu is variously described as been not experienced by about 10% of the population. It's described as one of the most, at times, unusual and disturbing experiences that a normal person can have. It's, appears to be that a combination of parts of the brain are stimulated at the same time although the exact mechanism is not really understood. But it's about the part of the brain that recognises things as being familiar, part of the brain that mediates memory, so people feel that something looks familiar but they don't remember actually why it is. And it appears that it's also mediated to a degree by mood and by the person's state of mind. It occurs more frequently in young people, more frequently in people who are anxious or tired. But I would just reiterate it's not a psychiatric condition and it's part of a spectrum of normal experience for most people
>
> Q. And the trances, have you got any comment to make about the trances. We can recall the instance that s 18(c)(ii) told the Court of been at the orchestra with

425 Retrial Notes of Evidence p 2331.
426 Retrial Notes of Evidence p 2354.
427 Retrial Notes of Evidence pp 2124–2125.
428 Retrial Notes of Evidence pp 416, 473, 2427, 2558, 2581.

David and he had to be nudged to be told that it was over. Do you make anything of that evidence at all?

A. My impression of that was that, um, it was a – perhaps a dissociative experience, I've used that term before with the post-traumatic stress disorder but dissociative experiences where the mind kind of splits off from the body's actions or the environment that you're in, is also a 30 normal experience. I mean the commonest example people give is driving down the road and realising you're a lot further down the road than you thought you were and you don't remember driving that bit. I took it that the description appeared to be consistent as far as I was concerned with that kind of normal dissociative experience or daydreaming."[429]

355. The Applicant himself, however, was troubled by it. The doctor says nothing here of visions of black hands. Only about 10% of the population (albeit a majority of those being young people), so far as the literature goes, report the condition. It is true of course that people grieve in different ways and seek to process and accommodate trauma by putting it out of mind, as Dr Brinded in effect says in his report in support of the Applicant's application for a pardon in 1998. But I need to take into account the evidence as a whole on this issue in relation to the Applicant, which includes déjà vu, premonitions, what he did and said after the slayings to the police, his relatives, his friends, the undertaker, the psychiatrist and others, and his evidence at the trial, his animosity towards his father, his somewhat excessive support for his mother, and his failure at the university in his first year there. The retrieval of information by the Applicant was entirely, or almost entirely, of matter tending to exonerate him, or explain matters emerging from the investigation and results becoming available to him, for example, blood testing and grouping.

356. Withheld under ss 9(2)(a) and 9(2)(ba)

429 Retrial Notes of Evidence p 3104–3015.

Withheld under ss 9(2)(a) and 9(2)(ba)

357. I do not doubt Dr Brinded's and Mr Wells's sincerity in believing in the Applicant's innocence. But with respect to Mr Wells, who has no qualifications as a psychologist or a psychiatrist, the position is that he was not a witness and his opinions have not been tested. His formal qualifications are in English Literature, Religious Studies and Social Work. Moreover, he seeks to rely, among other things, on Bayesian Theory which other lawyers and I (as is discussed elsewhere in this Final Report) think, provides an unsatisfactory basis for fact finding. Long experience in the law teaches that some criminals have the capacity to charm, confuse, and mislead, even psychiatrists. They can be manipulative. Neither Dr Brinded nor Mr Wells deals with or analyses all of the objective facts, let alone the totality of the evidence and the submissions as I have to do.

358. The Applicant wanted the whole family to be at the residence for undisclosed reasons, including especially Laniet, whom he made a point of seeing and encouraging or urging to come home overnight. This evidence was not only hearsay: it was by way of direct evidence from Janis Clark who said that the Applicant told her that.[430] This evidence is different from the Applicant's statements to Detective Sergeant Dunne on 21 June 1994 that "we offered her the bed and a ride in the morning."[431]

The Applicant would say that neither version has any relevance to the murders, that his was an unusual but close-knit family who had become used to their solitude in Papua New Guinea and longed for it again, that is apart from perhaps Laniet and Mr Robin Bain. Yet he had expressed on occasions an antipathy towards Laniet for supporting Mr Robin Bain.

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430 Retrial Notes of Evidence p 2578.
431 Privy Council Record of Proceedings p 0416.

359. The Applicant bought and owned the rifle and the silencer,[433] both of which he had used from time to time but not for some months.[434] He had used it for hunting.[435] He was competent with the gun.

Mr Robin Bain had greater competence with firearms according to the Applicant. He helped the Applicant sight his.[436] Mr Robin Bain knew the difference between subsonic and supersonic bullets.[437] Subsonic bullets used with a silencer fitted make a barely audible sound. Mr Robin Bain may have used the rifle unbeknown to the Applicant, who however told the police that his father had not used the rifle for some time.[438] His father would know, he said, where the gun and ammunition were kept.[439]

360. But the Applicant was quite clear that his father did not know where the second key to the trigger lock was kept.[440]

People, one of whose names may not be published,[441] knew where the second key to the trigger lock was kept. Others, therefore, including Mr Robin Bain, could have known. The latter is speculation. The Applicant asks to be disbelieved on his own earlier unqualified statement. The Crown says this is a telling point. The key more accessible to Mr Robin Bain was the one on its necklace in the pocket of the Applicant's red anorak which lay in Mr Robin Bain's van probably throughout the Sunday afternoon and the morning of the murders. The question must be asked: would Mr Robin Bain (if he were the murderer) be more likely to know of the key on the necklace, taken off as it could have been in Mr Robin Bain's presence for the Polar Plunge, and to have used it, rather than the other, even if he knew of its hiding place?

361. Two possibilities need to be discussed:

1. The Applicant planned the murders. Planning would have been necessary. The other victims were dead when Mr Robin Bain entered the house.

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433 Retrial Notes of Evidence p 2664.
434 Privy Council Record of Proceedings p 0406.
435 Overview of the Crown Case and Summary of Legal Principles p 7 [20].
436 Retrial Notes of Evidence p 2245.
437 Retrial Notes of Evidence p 2664.
438 Privy Council Record of Proceedings p 0406.
439 Privy Council Record of Proceedings p 0406.
440 Overview of the Crown Case and Summary of Legal Principles p 5 [13].
441 Retrial Notes of Evidence p 2383.

This latter is only one possibility. There is no evidence which absolutely excludes that Mr Robin Bain could have been killed before the paper run, but this seems unlikely. The survivor, the Applicant, is the only living person who knows for certain the habits of the members of the household.

The Crown had a case theory at the retrial but was unable to provide all details because it was not there. It could and may now, if it wishes, put other or further case theories.

2. Possibly, the Applicant killed his mother, two sisters, Stephen and Mr Robin Bain in the 20 or so minutes for which he cannot account after he finished his paper run. Perhaps he had to "finish off" Stephen and Laniet, the former by almost strangling him, or by shooting him after strangling him.

   The Crown would have to accept that these are only possibilities. The Applicant says that the apparent greater warmth of Stephen's body supports the contrary, his case. There is evidence however that the temperature of Stephen's body might have been affected by his exertion in fighting for his life.

362. The Applicant disliked, to the point of hatred, his father. The Applicant wished to be head of the household. His mother and he planned to build a sanctuary for themselves, a rather grand one. There was to be no place for Mr Robin Bain in it. Mr Robin Bain wanted to use the chainsaw (presumably paid for by him) at the school. The Applicant wanted to keep it at home. It was a constant source of friction. His father was sneaky. He refused to accept that he was not wanted.

Surely, the Applicant argues, no one murders his father over a chainsaw. He wanted his father out, not dead. That his father drove him as recently as the day before to the Polar Plunge is indicative of a cordial, caring father son relationship. Why would the Applicant want to kill his devoted mother and the others?

363. The Crown would say that the Applicant could not kill one without the others. Otherwise there would be survivors who could denounce him. The Applicant had showed some interest in the family finances. He must have been virtually penniless, not having worked for two years (except for the paper run), and was a university student again. He also remarked on his father's setting aside of superannuation

contributions.[442] In fact, as the evidence shows, Mr Robin Bain used little of his means for himself. His salary largely went into a joint account upon which Mrs Bain was free to draw.

The Applicant had failed badly in his first year of university to the disappointment of both parents. The extermination of his family would leave him (if he were not convicted) as the sole beneficiary of the estate.[443]

364. The Applicant woke early and ran the paper run quickly. He made a point of being seen at one residence in particular. He returned home close to 6.40am. He volunteered the time to the police as 6.40am when he was just past Heath Street: two to three minutes more being required to walk up to the house.

Who knows, he could have sprinted up. Why he would say 6.40am "exactly?" Why that morning did he break his arrangement with Ms Kathleen Mitchell (evidence read at second trial) not to come on to her veranda and make her dog bark? It is uncertain what he wore on the run. It does not matter. What would matter is what he wore for the killings if he did them.

365. The Applicant entered the house, silent on one account, not so on another, because Laniet's body is making a gurgling sound, "groaning type sounds muffled by what sounded like water".[444] But he notices nothing at first. He goes to his room and says that he did not turn on his light, putting his paper bag behind the door, and taking off his new shoes, that is if he wore them as he claimed, rather than an old odd battered pair that he still kept in his room.

All of this is plausible, except that he wore the old shoes. It is a little curious why he would not turn on his light. It was a dark winter morning. No blood is found on or in the new shoes. The Applicant does not see or come into contact with the shells on the floor or the trigger lock. He notices nothing untoward at all. There is no reference to any disturbance of a drawer or drawers from which it will be claimed his father took the Applicant's white gloves.

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442 Retrial Notes of Evidence p 2690; Privy Council Record of Proceedings p 0400.
443 Retrial Notes of Evidence p 2431.
444 For the discussion of this description of the sound, see p 68 of the Application for Royal Prerogative of Mercy dated 31 October 2000.

366. Having killed his family, whilst wearing his own white gloves to avoid fingerprints, the Applicant needs to destroy, insofar as he can, the evidence. Wearing only socks, he walks along the hall down to the laundry where he turns on the light. There, he places a green jersey, which he claims is his father's, into the washing machine with various other items: socks, some clothing of his own and clothing of others. He puts some washing powder into the machine and turns it on, choosing a normal cycle so that the bloodstaining of the green jersey, which he in fact wore, and other clothing, including a t-shirt, can be washed away. He clears up otherwise; imperfectly, leaving a bloodied palm print and other vestiges of blood on a towel, the washbasins, and another t-shirt.

367. I should here itemise the clothing that was extracted from the washing machine by the investigating police and subsequently hung out to dry:

(a) green woollen jersey;

(b) red sweatshirt;

(c) striped towel;

(d) black patterned towel;

(e) pair of swimming trunks;

(f) pair of tracksuit pants;

(g) facecloth;

(h) pair of sports socks;

(i) pair of blue swimming trunks;

(j) blue skivvy;

(k) pair of black cords;

(l) Pierre Cardin pale blue shirt;

(m) pair of blue/grey work socks;

(n) black skivvy;

(o) pair of bike shorts;

(p) Hanes t-shirt;

(q) pair of black and yellow swimming trunks;

(r) striped shirt; and

(s) white sock.

368. There is evidence, including the Applicant's own, that he was accustomed to doing the washing. The cycle on which he turned the washing machine was not contested although the Applicant did at one point say "I just flick the on/off button on to the wash cycle somewhere and start it,"[444(a)] and at another, "... after the very, very start of the superwash cycle..." and that it was a "full cycle."[444(b)] He denies that he wore the green jersey. His explanation for not noticing any blood can only be that the light was not bright. There is convincing evidence that the murderer's clothing would have been spattered or stained with much blood from his mortal combat with Stephen. There is an unanswered question why noticeable bloodstains may not have been made by contact between the whites and the coloureds as they lay in the basket together before or during their separation which the Applicant says he did.

369. The Applicant did tell Detective Sergeant Dunne that the clothing had been in a cane basket near the washing machine. In answer to the question whether they were all his clothes, the Applicant said:

> "No, just whoever put them on. I didn't have my glasses as I had an accident with them on Thursday night and they are in the optometrist getting fixed."

370. The Applicant said that it was normal for him to put the washing on and to hang it on the line before going to university.

371. Having regard to other statements made by the Applicant that his glasses were not essential for most purposes, his suggestion that their absence would have disabled him from identifying the ownership of the clothes that he sorted and placed into the washing

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444(a) Privy Council Record of Proceedings p 0994.
444(b) Privy Council Record of Proceedings p 1001.

machine raises another unanswered question. His actual evidence with respect to his sight was that:

> "[his sight was] a little difficult at night, but without glasses I can act and do things normally, it is just that the vision get blurry after a certain distance. I do not need glasses to read. Apart from a legal requirement I can drive without glasses ... If I had my glasses on I could identify some faces at the back of the court and upstairs."[445]

372. One would think that the disparity in sizes of the items would have given him some idea of the ownership of them. It is not only the size, shape and colour of the items which should have been apparent to him even without glasses, but also their wet, blood-soaked feel. In his statement made at about midday on the 20th of June 1994, the Applicant said that he had switched on the light in the bathroom before he washed his hands and put the clothing into the washing machine. In evidence, he was specific and in fact he identified a number of the items. He said that he did not own a pair of black cycling shorts or grey shorts with stripes down the side. He did recall that he had taken off his red sweatshirt and put it into the machine. When he was cross-examined at the first trial he was unable to account for blood on the light switch into his room, his partial palm print on the washing machine lid, and blood spots in the porcelain basin of the bathroom.

373. The soles of the Applicant's white socks are heavily but not evenly bloodstained. There is a very small amount of blood on the upper part of one of them.

The Applicant can only say of this that he noticed dampness under his feet, but where is not clear (whether in the laundry or elsewhere). He said that there had been an earlier "spill" over the weekend. It is not clear what the effect of that was.

374. The footprints in the hall, all of a right foot and probably of stockinged feet, were made by the Applicant. The Crown has no means of knowing at what stage the Applicant made them.

I have dealt so far as I can with the controversy about the maker of these prints. There are matters, however, not so far touched upon. One is that, wearing indisputably blood stained socks, the Applicant would likely have left footprints in them somewhere. There is no evidence (if there were, it was lost in the wash) of any other stained socks

445 Retrial Notes of Evidence p 2668.

in the household. The prints must have been applied by stockinged feet "positive prints": otherwise there should have been areas or pools of blood in which the prints were placed. The blood on the Applicant's socks was the blood of Stephen (as tested by Dr Sally Harbison). I do not accept the Applicant's theory that the absence of Stephen's or Robin Bain's blood on any other upper part of the Applicant's socks proves the Applicant's case.[446]

375. The Applicant waited in the alcove behind the curtains in the front room for his father to come in to pray. When he did, he shot him in the temple.

The Crown does not need to prove the respective positions of the Applicant and Mr Robin Bain when this occurred. It is not bound to the various hypotheses as to the positions in which the two men were when the shooting occurred. The great controversy which has raged about contact wounds, distance separating the end of the barrel of the rifle from the victim, trajectory of the bullet, bullet wipe, spatter, abrasions around the wound, and size and shape of the wound, remain that: a controversy. I have found the view of neither side's experts on these matters compelling or one more probable than the other's. If Mr Robin Bain were a determined suicide, he could have committed it. If the Applicant were a determined murderer, he could have done the killing. I doubt very much that the geometry of blood spatter, rifle position in relation to a victim, and body positions on a particular occasion and places can be replicated in any reliable way.

376. The Applicant, not Mr Robin Bain, typed in the suicide note.

The note, in its terms has unusual and, for me, puzzling features as I elsewhere discuss. For its entry on the computer, no special skill or aptitude for computers was required. So far as the Applicant was concerned, if he were the culprit, the immediate presence of the computer and its anonymity of "signature" would have been attractive.

377. There was sufficient time for the Applicant to despatch his father and type the note after he finished the paper run.

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446 Applicant's Submissions in Support of Claim of Innocence p 28.

This identification of the Applicant by the eyewitnesses and the experiments with the computer throw this proposition into doubt, indeed, Mr Karam argues, make it impossible. For the reasons I have given, I do not think it the Applicant has proved on the balance of probabilities that he did not have opportunity to do so.

378. The Crown relies on a number of other matters. They include the injuries to the Applicant's head, to one of his knees and his chest; his inability (until his claim of recovered memory in evidence at the trial) to account for the "missing twenty or so minutes" between his discovery of his parent's bodies and his alerting of the emergency services, the presence of Stephen's and Laniet's blood on the Applicant's clothing, the Applicant's fingerprints on the rifle, and inconsistencies between his various accounts to the police before he was charged and his evidence at the trial.

The Applicant makes the point that he was always co-operative, and made statements that a guilty, cunning murderer would not make. It is a point that I weigh in the balance.

379. What I have suggested is no more a comprehensive case theory or the only case theory that the Crown could advance, than the case theory or theories that the Applicant advances or may advance. Nor does either theory refer to all of the detail that arguably the evidence provides for its advancement.

Other Evidence

380. I touch, before stating my conclusion, upon some other evidence in the lengthy retrial. Mr Darren Young, a Commission Agent for business machines, claims to have seen Mr Robin Bain behaving unusually shortly before the murders. He gave evidence as the result of a call from Mr Karam about two or three years before the retrial.[447]

381. Another female witness whose name cannot be published knew Laniet in 1993. She said that Laniet was working as a prostitute because her parents would not sign the form that would allow her to receive youth benefits. Laniet told her that she had borne a child of whom she had a photograph, and that on the Thursday before the fatalities, she was about to disclose her incestuous relationship with her father. She admitted in

447 Retrial Notes of Evidence p 3123.

cross-examination that Laniet was quite a heavy user of marijuana and that Cottle was blackmailing her about her prostitution: that Laniet would get "quite wasted on marijuana before she'd go and see him [Cottle]".[448] According to her, Laniet told her that she was 10 years of age when she was raped and a baby conceived and born in Papua New Guinea. This witness also confirmed, however, that the Applicant wanted to see the whole family that weekend.[449]

382. Ms Linda Miller made contact with Mr Karam in June 2007. She had been working in massage parlours in 1993 when she had come to know Laniet who told her about a relationship with her father. She was unable to be specific about dates.[450]

383. The Applicant called Ms Sharleen Stirling at the retrial. She had been interviewed by a police officer on the 22nd of June 1994. She said that she had found the Bain family very polite but in cross-examination said that "when things [with Mrs Bain] were peaceful ... they were good, and when they weren't, they weren't." For periods, Arawa's relationship with her mother would be very strained. She referred to Mrs Bain's tendency to stay in bed during the day and said that she did so on one Christmas day, it seems for the entire day.[451]

384. Mr Darren Palmer was a meter reader in June 1994 who attended at the school where Mr Robin Bain was teaching, in order, he said, to read the meter at the schoolhouse there. He said a man who was probably Mr Bain told him that he wanted to put the power back into the Board of Trustees' name because he was moving back to town.[452] He said that this conversation took place a week or more before the fatal weekend.

385. Mr Philip Boyce was called by the Applicant as an expert in ballistics and gunshot wounds. He had no formal medical qualifications, but spoke from extensive experience in examining firearms and the characteristics of bullets and rifling. There was examination and cross-examination at some length about bullet wipe, margins, sooting or gun powder markings in the vicinity of bullet entry points and other related matters. Mr Bates was cross-examined about the ease or otherwise with which suicide could be

448 Retrial Notes of Evidence p 3131.
449 Retrial Notes of Evidence p 3134.
450 Retrial Notes of Evidence pp 3140–3141.
451 Retrial Notes of Evidence p 3148.
452 Retrial Notes of Evidence p 3153.

committed with a rifle by shot in the temple. He said that he found it quite easy to hold the rifle in such a position as would enable him to do so if he was so minded.[453] He accepted that there were easier ways to use a rifle to commit suicide: by shooting oneself in the mouth, under the chin, or by putting the rifle to the chest. Usually, right-handed people use their right hand to pull the trigger. He also accepted, as he was bound to do, that a close contact wound, as Mr Robin Bain's wound probably was, does not rule out homicide. To a question from the jury, Mr Boyce responded by saying that with a contact or near contact wound, he would expect blood from the victim to be on the end of the silencer.[454]

386. Ms Jeannine Basquin was another witness for the Applicant. She deposed to having become a member of the Board of Trustees of the school in November 1997. She assisted in cleaning up some old files and other papers at the school. She said that she found a document signed by Mr Robin Bain asking to be relieved from his duties as Principal because of stress. She could not say what the date or time of the letter was, or indeed if it were an original letter or not. She thought that it might have been April 1994. She said that she read the letter with others but thought that it would have come to the attention of the police. She may have put it back in the filing cabinet. It has not been seen since. The first time she was asked about the letter was in 2007 when a detective approached her to ask her about it. The detective kept prodding her, and then she said "yes, I do remember something". The detective called upon her about a fortnight after she had spoken to Mr Karam, who had apparently contacted her.[455] In cross-examination, she agreed that there had been three headmasters who had served at the school after Mr Robin Bain's death. She could not remember the date of the letter, or whether it was handwritten or typed, but she recalled it as being a very brief. She conceded that she was aware that the woman, Ms MacDonald, to whom she says the letter was addressed, did not recall seeing any such letter. Ms MacDonald was a trustee when Mr Robin Bain was serving at the school.[456]

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453 Retrial Notes of Evidence p 3228.
454 Retrial Notes of Evidence p 3229.
455 Retrial Notes of Evidence pp 3242–3243.
456 Retrial Notes of Evidence pp 3245–3246.

Conclusion and Further Reasons For It

387. The Applicant is, I repeat, the moving party. He could only expect that his case as he presents it would be subject to close scrutiny, just as those who represented him in the retrial scrutinised and took issue with the Prosecution case. He must prove his case. It would not be enough to leave his case evenly balanced with the Crown defence. In the following I state reasons for my conclusion. They are not, of course, the only reasons for my conclusion. The summary is to be read with the comments and conclusions which I have made and drawn elsewhere in this Final Report.

388. The Applicant's case leaves still unexplained, or does not include persuasive evidence on some matters to support his case. The Applicant was content with the so-called "record", but has, in his submissions, sought to travel beyond them. He has not, however, altered, supplemented, or withdrawn in any way, personally, on oath or otherwise, his evidence at the retrial. Theories or explanations offered by Mr Karam and Mr Reed QC remain theories and explanations: they are not evidentiary facts.

389. A great deal of evidence, much of it conflicting, was given at the retrial in relation to abrasions of skin at the point of entry of the fatal bullets, bullet wipe, blood spatter and direction or trajectory of any of the shots, with a view to establishing either suicide or the murder of Mr Robin Bain. Among other things, the Applicant sought to establish that the wound to Mr Robin Bain was from a contact or near-contact shot. In my opinion, the whole of the evidence does not establish, on the balance of probabilities, that the shot was a very close or contact shot. Even if it did, it does not follow, as a matter of probability, that Mr Robin Bain was not murdered, but committed suicide. Nor do I draw any conclusion from the number of shots fired at Laniet, and the theorising about the position of her and her murderer when the shots were fired.

390. I have to say that expert evidence adduced on behalf of the Applicant, or elicited in cross-examination, which pointed to possibilities, even reasonable possibilities, has failed to establish possibilities as probabilities. An example of this can be found in the evidence of Dr Grant Russell, the consultant urologist called by the Applicant at the retrial. That evidence does not establish on the balance of probabilities that Mr Robin Bain would have systematically murdered his family, entered a suicide note on the computer, and committed suicide without relieving himself of an overnight collection

of 400mL of urine in his bladder. Dr Russell was pressed to concede, as a matter of ordinary experience, that Mr Robin Bain would seek that relief and that it would not be normal for a person such as Mr Robin Bain to wait a couple of hours, or even an hour, after rising to do so. His failure to make the concession readily was not convincing.

391. Another example of another remote possibility can be found in the dental evidence given by Dr Adams. He did, however, make the obvious concession in cross-examination that almost a hundred different variables can come into play with respect to the dynamics and impact of teeth marks.

392. I am not persuaded on the balance of probabilities that any of the footprints exposed under luminol were Mr Robin Bain's footprints. There were too many differences in the various measurements made under different circumstances of the sizes of Applicant's stockinged feet. The particular function of luminol is the location of blood and not the measurement of the application of it. The theories of the experts do not satisfactorily explain the difference as measured between the footprints which were located. If Mr Robin Bain made the prints he must have been wearing bloodied socks or walking in socks which would themselves have been bloodied from blood on the floor. There was no blood on the socks he was wearing when he died of gunshot. Nor was there any blood in his shoes. If there were traces of blood on one of his shoes, it is unproved, and I think unlikely to have been a deposit that was made on the 20th of June 1994.

393. If Mr Robin Bain made the footprints, his socks must have become bloodied, and he must have changed them and carefully put them in the washing basket, before washing his feet and changing into fresh ones for his suicide. Did the Applicant put bloodied socks worn by Mr Robin Bain and left by him in the washing basket into the washing machine? If he did, he does not prove on the balance of probabilities that he would not have either felt or seen their bloodstained condition.

394. As I have said, the response of the Crown to the case sought to be made by the Applicant, that the linear marks on Mr Robin Bain's fingers proved that he had fired the rifle several times on the morning of the fatalities and was therefore the cause of them, is at least as persuasive as the latter, and the marks and the experiments made by the

gunsmiths and others in loading and unloading the rifle do not establish suicide by Mr Robin Bain.

395. I am not satisfied that Mr Robin Bain had seduced Laniet into, and was maintaining with her, an incestuous relationship. All of the evidence about this came from Laniet in the first place. The persons who claim she told them of it are either unreliable, for example, a procurer, and other prostitutes, who claimed to see and associated stretchmarks with childbirth, or drew their own inferences from ambiguous statements by Laniet as appears below. Laniet herself was unreliable, a prostitute and user, likely a heavy user, of marijuana. Dr Copeland, a medical practitioner, is, in my opinion, the best witness for the Applicant on this issue. But her evidence did not rise to a requisite level of probability. She diagnosed Laniet as suffering from a sexually transmitted disease before the samples that she took from her were tested. I take her diagnosis and prescription of antibiotics to have been responsibly precautionary. Dr Copeland was under a disadvantage in giving her evidence in not possessing all of her notes and records as some of these had been irretrievably lost. It is not clear on how many occasions she in fact saw Laniet. She did recall fairly clearly however that she told Laniet to abstain from sexual activity for four days. When she did that Laniet said to her "that's not going to be easy". This is evidence which has troubled me but again I am left with the concern that ultimately its relevance and force are diminished by the unreliability of its source, Laniet.

396. Let me assume contrary to what I have just said, that there was a guilty relationship between Mr Robin Bain and Laniet: that does not mean that Mr Robin Bain would possess a motive to kill her *and* the other members of the family except the Applicant. The only evidence about the weekend before the slayings is the evidence of the Applicant. There is not the slightest suggestion in it that there was a shocking revelation of relevant carnal conduct.

397. The Applicant's advocates may theorise about how and when the Applicant last handled the rifle, but the Applicant has not given evidence that when he in fact handled it some months earlier, it or his hands were stained with blood from a bleeding possum or rabbit. It does not strike me as probable that prints made in those circumstances some months before the 20th of June 1994 would survive: the handling of the rifle with initially dry, but subsequently heavily blood-stained gloves, its being carried from room

to room by Mr Robin Bain, handled to shoot others, and its manipulation to enable him to shoot himself.

398. Noticeable and sore bruising on the front/side of the Applicant's head is quite unexplained. I do not accept the Applicant's supporters' theory that it must have occurred when he fainted in his bedroom and fell between his bed and another piece of furniture. Again, the Applicant does not say that he suffered the bruising in this way. He made no complaint of such an injury immediately after he fell.

399. There was a large disparity between the physiques and strengths of each the Applicant and Mr Bain. The Applicant had a considerably greater physical capacity to overpower his valiant brother in his ultimately futile fight for his life. Strength and remorseless determination would have been necessary to strangle him almost to death with his own t-shirt.

400. Neither the Applicant nor any of his supporters has advanced an acceptable theory for the presence of the distorted spectacle frame missing a lens in the Applicant's bedroom. Although not his glasses, the lenses in those spectacles would have aided his vision to a useful degree. And I do not accept as a matter of probability that the detached lens, no matter what its position was on the floor of Stephen's room and how much dust there may have been on it, could not have been detached in a struggle between a person wearing the glasses and Stephen. It is a matter of ordinary observation that some people do not trouble to clean their glasses regularly. Nothing turns in my view on the presence of dust on the lens. The uncontested evidence is that the glasses were of no use to Mr Robin Bain.

401. The second Privy Council, during argument, asked the Crown to accept, and the Crown did accept for the purposes of argument there, that the Crown case could not accommodate the presence of one footprint by Mr Robin Bain in any of the positions in which bloodied footprints were found in the house. By parity of reasoning, the Applicant's case before he changed his story when he gave evidence at the first trial could not accommodate the presence of so much, or indeed any, of his siblings' blood on any of his clothing, because he had said up until that point, not only to the police but also to others, that he had not entered the rooms in which his siblings were killed. It is not irrelevant that Dr Brinded did not give evidence at the first trial but said when he

did give evidence at the second trial, that a reason why Professor Mullen was called at the first trial was that Professor Mullen had [extracted] recollections from the Applicant about which rooms he went into on the day that Dr Brinded had not been able to obtain in his interviews. But in any event, Dr Brinded accepted a study by a leading forensic psychiatrist (Pamela Taylor) which established that 70% of all murderers examined by her had some form of amnesia in relation to the murders. Not only psychiatric learning, but also ordinary human experience is that there are rarely claims of revivals of memory of criminal conduct, as opposed to claims of revivals of memory that are, as here, self-serving and exculpatory. There is further reason to be wary of the belated claims by the Applicant that he did enter his siblings' rooms because they occurred at about the time of, or just after, the presentation of the prosecution evidence of the blood groupings of the blood found on the Applicant's clothing.[457]

402. I do not understand why the Applicant would say that Laniet was at home during the weekend because we (whether his Mother and he, or his siblings and he is not clear) "offered her the bed" for the night. Why would it be necessary or appropriate for the Applicant "to offer" Laniet a bed for the night? Why was this night chosen? She was his sister. This was her family home. I cannot, as with so many other questions arising in relation to this family and the dreadful occurrences of the weekend in question, answer that question. It does not assist the Applicant's case that he, as the only survivor, does not offer an answer to this question and others that arise. The Applicant was of course not obliged in either of the trials, and certainly not in the retrial, to give evidence if he chose not to do so. There is still no obligation now, but the Applicant is left only with the various accounts that are in evidence, and the theorising of others about them. Here the Applicant has not personally attempted in any way to supplement his evidence by any further statements or otherwise. As a practical matter, in ordinary civil proceedings, he would be likely to have to give evidence; otherwise, an inference would be open that no further evidence that he could give would assist his case. I do not draw that inference here, but the position is that his evidence remains in the state that it was in at the retrial.

403. The Applicant is unable to account for the twenty minutes or so that elapsed between the discovery of the bodies and his call to emergency services. In effect, his mind in

457 Retrial Notes of Evidence p 2673.

this regard was "blacked out." In the Queensland case of *Cooper v McKenna, Ex Parte Cooper*,[459] Stable J, with whom Matthews J agreed, said that blackout was one of the first refuges of a guilty conscience and a popular excuse. The undoubted fact is however that the Applicant did not, as one might reasonably expect, immediately on discovery of his parents' bodies telephone emergency services. That expectation is raised in a situation in which, as he claimed at the trial, he had heard "gurgling" sounds from Laniet. Most people would think that if she were "gurgling" there might be a chance that she might possibly still be alive and respond to emergency treatment.

404. I do not overlook matters which argue in favour of the Applicant's case. His former good character is one. Another is his frankness in his early interviews with police officers, in particular his statement that no one, or at least certainly not his father, knew the location of the key to the trigger lock which was used to unlock the trigger on the morning of the 20th of June. Also in his favour is his ingenuousness in saying that he could not account for the bruising on his head. But everything that the Applicant says and everything that is said on his behalf have to be considered in light of all of the facts in the case including, in particular, the objective or otherwise incontestable facts which I have set out in paragraph 327 of this Final Report and need not repeat. There is also this: why did the Applicant "deserve to stay"? It was not as if, apart from his music, he had been an achiever. He wished his father to be expelled from the household and argued with him from time to time. And why, if the Applicant deserved to be spared, did Mr Robin Bain not provide an explanation for the exception he wished to make of the Applicant? Further, why would Mr Robin Bain, if he wished to see the Applicant live and flourish, conduct himself in such a way as to cast suspicion upon the Applicant: by using the Applicant's rifle, ammunition, and white gloves; by changing his clothes before committing suicide; and, perhaps by showering and not obviously leaving his own fingerprints on the rifle?

405. Readers of this Final Report should understand two other matters clearly. The first is that I answer the question which I am asked and no more than that. Secondly, I do not answer that question by reference to one or any particular piece or bodies of evidence,

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459 [1960] Qd R 406 at 419. The case is concerned with an alleged blackout or automatism at the time of the commission of the otherwise criminal act. But the proposition is equally apt to claims of blackout or of dissociative amnesia at the time of offering, or not offering, an account or explanation of the relevant events. For a further discussion of the topic see *R v Stone* [1992] 2 S.C.R. 290.

but on the basis of all of the evidence. That I may not have mentioned, or not dealt in detail with any particular piece or body of evidence in this Final Report does not mean that I have not considered it. The contrary is the case. The same applies to the submissions on both sides.

406. The conclusion that I reach will obviously be a disappointment to the Applicant. It would surprise me if it were any less so to Mr Karam. I pay tribute to the intelligence, resourcefulness, energy, skill, time, effort and money that he has invested in his crusade to establish the Applicant's innocence. I doubt whether the best and most highly trained and qualified legal advocate could have done more.

407. No matter which view a person might take as to who the perpetrator was here, there will be some unexplained or 'loose ends'. In the fictional murder mysteries that Mr Robin Bain was reading before his death, all of the ends are tied, and the crimes elegantly solved. People in real life and the courts that adjudicate upon conflicting facts know that all of the questions cannot always be answered, and all of the issues neatly resolved. This is such a case. Addressing the sole question that I am asked, and confining myself strictly to it, my answer is that the Applicant has not proved on the balance of probabilities that he did not kill his siblings and his parents on the morning of the 20th of June 1994.

I D F CALLINAN
Chambers
24 December 2015