He Confessed To Me

The continuing use of in-custody informers in New Zealand criminal trials

A background paper

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1. Introduction:

In late 1999 I began to take an interest in the trial of Scott Watson for the murder of Ben Smart and Olivia Hope. My interest was aroused by the amount of evidence about yachts, as yachting has been a lifelong interest for me. So after he was found guilty I decided to investigate further and went through all the records of the trial and the police investigation and talked to the key witnesses. I explained my findings in the book 'The Marlborough Mystery' in 2001.

That exercise brought me face to face with the phenomenon of the court stories given by 'in-custody informers', or 'jailhouse snitches' or 'jailhouse informants' as they are called in the USA and Canada. (An in-custody informer is someone who was either in custody at the time of their evidence, or whose evidence was sourced during a period in custody.) A grand Jury investigation in the USA and a number of Commissions of Inquiry into cases of wrongful conviction in Canada had painted a sorry picture of the jailhouse informants and their devastating effect on criminal trials.

In the Watson case two jailhouse informants testified that, while Watson was in prison on remand awaiting his trial, he had confessed to them that he was guilty. Their testimony was the evidence that not only had Ben and Olivia disappeared but they had been murdered and it was Watson who had murdered them, after raping Olivia.

I found it quite extraordinary that there was no other credible evidence of death or of rape. There was no blood, no bodies, no human tissues related to death, no witnesses to a murder, no crime scene, no remains of teeth or human organs, and no trace of their belongings. No date of death, no manner of death, no place of death.

Reading the findings from the Canadian Commissions of Inquiry and Bruce MacFarlane's paper 'Convicting the Innocent' had led me to expect that the use of jailhouse informants would soon be abandoned in New Zealand criminal trials.

Then at the 2015 retrial of Mark Lundy the prosecution called a jailhouse informant who testified that Lundy had confessed to him that he had 'done it'. I was frankly surprised that in spite of the overseas studies jailhouse informants were still being called as 'witnesses'.

So I decided to look into the matter further – what is going on?

Firstly I read the overseas research to get a more exact picture of the behaviour of the jailhouse informants and the sort of testimony they come up with. Then I started to try and find out which trials they had performed in throughout New Zealand and started to look at what they said and why. Perhaps we had a better class of criminal in New Zealand; after all it is a good place to live generally speaking. Perhaps in New Zealand, at least in some trials, they provided some evidence that actually contributed to an understanding of the crime. Perhaps some of them provided some evidence that they hadn't just made up to curry favour and receive a benefit.

I appreciate the courteous co-operation of the High Courts in Auckland and Whangarei, within the bounds of the secrecy orders which surround the identity of the secret witnesses.

2. Overseas studies

By way of background: The Northwestern University School of Law Center on Wrongful Convictions published a report *The Snitch System: How snitch testimony sent Randy Steidl and other innocent Americans to Death Row,* in Winter 2004-2005.

> In all there have been 111 death row exonerations since capital punishment was resumed in the 1970s. The snitch cases account for 45.9% of those. That makes snitches the leading cause of wrongful convictions in U.S. capital cases – followed by erroneous eyewitness identification testimony in 25.2% of the cases, false confessions in 14.4%, and false or misleading scientific evidence in 9.9%.

2. a) 1932 Convicting the Innocent[i] by Edwin M. Borchard – Unites States

Edwin Borchard was a Professor of Law at Yale University and in his book he examined sixty-five cases of wrongful convictions including 29 murder cases.

The first relevant case from Borchard's book is that of the brothers Jesse and Stephen Boorn. Their sister, Sally, was married to Russel Colvin and he disappeared from their home in Vermont in 1812. In 1819 Jesse was arrested and charged with Russel Colvin's murder. Jesse then blamed his brother Stephen for the murder. He said Stephen had struck Colvin with a club and fractured his skull, but he wasn't sure where the body was. Stephen was then arrested, but claimed he was innocent. In jail with the brothers was Silas Merrill, a forger. When the Grand Jury met in September, Merrill was presented as the chief witness against the suspects. Merrill said Jesse had confessed to him in jail that Stephen and Colvin had had a fight; that Stephen struck Colvin but the blow did not kill him; that later Jesse and Stephen, assisted by their father carried Colvin, who was still unconscious, to the old cellar, where their father cut Colvin's throat, after which he was buried there. Merrill said that Jesse told him that about eighteen months after the murder he and his brother dug up the remains and took the bones to the old barn which had burned. After the barn was destroyed, some of the bones were again gathered up, pounded into dust, and thrown into the river. After telling this story Merrill was allowed freedom to roam about the town. Before the trial started in November, the town was once more thrown into a furor when it was learned that Stephen admitted his guilt, but did not implicate Jesse or his father. Stephen eventually confessed after he was told that the evidence against him was overwhelming and that a confession was his only hope to avoid the death penalty. The Boorn brothers were sentenced to hang on 28 January 1820. Jesse's sentence was commuted to life imprisonment. While awaiting the hangman's noose Stephen suggested that an advertisement be published to attempt to locate the 'deceased' Russel Colvin. It turned out that Colvin was living in New Jersey.

The second relevant case was in Florida in 1901 J. B. Brown was arrested on circumstantial evidence for the murder of Harry Wesson. Following the discovery of Wesson's body a number of suspects were arrested including Lucius Crawford. At five o'clock in the evening, Jailer Hagan was standing on the jail porch, when he noticed a coloured man come up to a crack in the fence and call for the prisoner Crawford, who was in the jail yard. Hagan said it was J. B. Brown a

former brakeman on one of the Plant System trains and that he heard Brown say to Crawford, 'Keep your mouth shut and say nothing'. This was reported to the sheriff, and in less than an hour Brown was arrested. One day a prisoner, Brown's cell mate, Alonzo Mitchell, called the sheriff, and told him this story: Brown had just confessed to him that he and Jim Johnson plotted to kill Wesson for his money, and they had waylaid him by the woodshack, where Brown had shot him with Johnson's pistol. Brown took Wesson's money, $4.75, and Johnson took his watch and the pistol. Henry Davis, another cell mate in the prison, corroborated Mitchell's story and said that he had heard Brown confess. Brown denied that he had gone to the jail fence on October 17 to talk to Crawford. Jailer Hagan claimed to have recognized Brown by the sound of his voice and by seeing his back. As to the confession, Brown absolutely denied ever having made it. He admitted that Mitchell had tried to get him to confess the murder. Other persons who had also been in the prison testified that Mitchell conferred with the authorities at times while he was locked up with Brown and that they heard Mitchell try to get Brown to confess but that Brown always said that he was innocent. Brown was convicted and sentenced to be hanged. Later Brown was led to the gallows, and the rope adjusted about his neck. Hanging formalities proceeded, but to the great astonishment of all, when the death warrant was read, it ordered the execution of the foreman of the jury which had found Brown guilty. Brown's sentence was commuted to life imprisonment. In 1913 J. Johnson, in a deathbed confession, admitted that he alone had shot Wesson, and that Brown had had nothing to do with it. Realizing the unreliability of many such confessions, the officials checked carefully all corroborating details and became convinced that Johnson really was the guilty man, and that Brown was innocent. He was granted a full pardon.

I will refer later on to three other murder cases cited by Borchard where the supposed victim was in fact still alive.

2. b) 1990 LA Grand Jury[ii] – United States

The report describes the events that led to the Grand Jury.

> In October 1988, Sheriff's Department deputies at the Hall of Justice Jail learned that an informant (Lesley Vernon White) was writing an article for California magazine in which he planned to expose the fact that informants were using the telephone to acquire detailed knowledge of criminal cases and construct jail house confessions from inmates they had never met.
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> At the invitation of a Sheriff's Department sergeant, the informant agreed to demonstrate his technique for gathering information. The demonstration, which was tape recorded with the informant's consent, occurred on October 24, 1988, at the Hall of Justice Jail.
>
> The sergeant gave the informant the name of an inmate who was being held in the Hall of Justice Jail on murder charges. The informant, representing himself to be an

employee of a bail bond company, called the jail's Inmate Reception Center and was able to obtain the inmate's booking number, date of birth, color of eyes and hair, height, weight, race (Caucasian), bail ($100,000), case number, date of arrest, arresting agency (Sheriff's Special Enforcement Bureau), next court date, and where the inmate was housed in the jail.

The informant next called the records section of the District Attorney's Office. He said he was a Deputy District Attorney and asked for information on the inmate's case. He was given the name of the Deputy District Attorney prosecuting the case, the Deputy District Attorney's telephone number, and the name of a witness.

A few calls later, the informant called Sheriff's Homicide and said he was "Sergeant Stevens" at the Central Jail. He was able to obtain the name of the murder victim, and the victim's age and race.

The informant then called the Deputy District Attorney who was handling the case, initially identifying himself as "Sergeant Williams" with the Los Angeles Police Department. The Deputy District Attorney responded to the informant's questions by stating, "I'll tell you anything you want to know about the case," and proceeded to provide details about what the victim was wearing, where his body was found, the fact that the coroner's report said that death resulted from suffocation and/or drugs, that the victim's blood contained a fatally high amount of methamphetamine, that the defendant confessed to stuffing the victim in a trunk, and the prosecutor's personal opinion of the likely defense in the case. Near the end of the conversation, the informant gave his name as "Sergeant Johnson".

At this point, the informant said he had obtained enough details about the case to enable him to fabricate a jail house confession which would be accepted by detectives. He then proceeded to demonstrate how he could arrange for contact between himself and the inmate to support the fabricated confession.

The informant called a department of the Superior Court in Van Nuys, identifying himself as Deputy District Attorney "Michaels" with the Organized Crime Unit downtown. In response to the informant's request, the court bailiff ordered the informant and the inmate to be transported to Van Nuys the following day.

The informant described the success of his demonstration:

"{I've got the} complete description of the crime, including the method of death, method of homicide, how the crime occurred, what the victim was wearing . . . the fact the victim was stuffed in a steamer trunk, I've got the date of death and location of death, I have date of birth, I have enough information to put a story together that's very believable, accurate, detailed story. Like I said, any homicide detective is gonna go for, cause they're gonna think the only way I could get these facts is to get 'em from the suspect. Secondly, I now have the defendant or whatever ordered out to a court where I can say that I was with him . . . ."

> The informant speculated that normally, he would probably be able to trade his fabricated confession to a homicide detective for "a hell of a deal" such as time served on his case. He observed, *"Actually the system becomes a game, whereas homicide and the DA's Office they want to win."* He went on:
>
> *"{T}he key thing is they want to win. So if I come forward with the information as detailed as that they're gonna use it. Because the jury not knowing the system or how it works, is going to believe when I get up there with all these details and facts, that this guy sat in the jail cell, or he sat on the bus, or he sat in the holding tank somewhere, or told me through a door or something, they're gonna believe me."*

On pages 10-12 the Grand Jury report considers some of the incentives for in-custody informants to lie:

> Because of the serious nature of the charges pending against informants, and their history of recidivism, informants often face potentially lengthy prison terms. As such, these individuals are highly motivated to curry favour with the authorities perceived to have control over their destiny.
>
> The myriad benefits and favoured treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony. This premise is a basic concept to the understanding of the jail house informant phenomena. The courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such testimony because of the strong inducements to lie or shape testimony in favour of the prosecution.
>
> Jail house informants want some benefit in return for providing testimony. The more sophisticated may attribute their willingness to testify for law enforcement to other motives, such as their repugnance toward the particular crime charged, a family member having been a victim of a similar occurrence, the lack of remorse shown by the defendant, or other explanation to account for their assistance to law enforcement. Nevertheless, in the vast majority of cases it is a benefit, real or perceived, for the informant or some third party that motivates the cooperation.'

Page 16 of the Grand Jury report considers whether in-custody informants frequently lie:

> Informants testified before the Grand Jury to repeated instances of perjury and providing false information to law enforcement. With one exception, each informant who testified claimed he himself had committed perjury or provided false information incriminating another inmate one or more times.
>
> In the mid-1970s, one informant even falsely confessed to a crime he had not committed. In 1979, a psychiatrist described this informant as a pathological liar. According to the informant, the prosecution thereafter used his perjured testimony in five or six cases.

Page 79 of the Grand Jury report gives an example of benefits to such informers:

> The third informant who had four prior felony convictions (three burglary convictions and one conviction for armed robbery) was facing three different felony burglary cases. The informant testified as a prosecution witness in two murder cases and a rape case about jail house confessions he allegedly obtained from the defendants in those cases. In each case, the informant testified he had received no promises in exchange for his cooperation.
>
> Following his cooperation, the informant was able to resolve his three burglary cases by pleading guilty and receiving a suspended sentence of twenty-six years imprisonment on condition he serve ten years' probation. A memo written by a supervisor in the District Attorney's Office described the informant's sentencing and stated the commissioner who imposed the sentence had been advised of the informant's cooperation.'

Page 90 of the Grand Jury report:

> Cases have been described where an informant has testified to two sets of diametrically opposite facts in the same trial and also wherein testimony is given which is completely contrary to earlier taped statements. Cases have been identified where judges, after hearing testimony of informants have stated their disbelief.
>
> Still other cases establish informants have testified in one fashion, and then later either said that they lied or testified under oath in other proceedings that they had lied.

Lastly from the Grand Jury, page 146:

> "Juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." People v. Perez, 58 Cal.2d 229, 247 (1962) (case questioned on other grounds in People v. Green, 27 Cal.3d 1, 32 (1980)). In a similar vein, juries might consider informants who testify for the prosecution inherently more credible than those called by the defense. The jury perceived the prosecutor's purpose in calling his witnesses to be only to seek the truth.

2. c) 1993 Report On Investigation Into The Use Of Informers[iii] - Australia

The Australian report made some additional points that are worthy of note:

> Up until a few years ago there was a widespread belief that some police manufactured evidence against criminals they were keen to convict, most frequently by falsely testifying to an oral confession by the person charged. However "verbals", as they came to be known, have become less fashionable. There are two reasons. One is that juries became sceptical of relying upon the word of police when it was substantially unsupported by evidence from impartial witnesses or evidence of a physical sort. Secondly, Government began to move towards a legal requirement that most

> confessions to serious crimes be recorded on tape. While that process is not yet complete, advances have been made. It has been clear for some time now that the day of the verbal is pretty well behind us.
>
> In the late 1980s or thereabouts there developed a belief, particularly in the ranks of prisoners and criminal defence lawyers, that a ploy in substitution of the verbal was being increasingly resorted to. It was evidence from one prisoner alleging that another prisoner confessed to him.
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> Bold people have asserted, and the more circumspect have suspected, that the testimony of prisoners was being bought in exchange for favours.'

2. d) 1998 Morin Inquiry[iv] - Canada

Guy Paul Morin was charged with murdering a nine year old girl who had died in 1984. In 1986 he was acquitted. The Crown appealed and he was found guilty at a retrial. In 1995 his conviction was overturned because of DNA tests that proved his innocence.

The Honourable Fed Kaufman commented on the evidence of two jailhouse informers who claimed to have overheard a confession made by Morin while all three were inmates in jail. Morin had supposedly become upset and cried out 'Oh fuck, why did I do it, oh fuck, man, fuck. I killed her, I killed that little girl.'

The first informant was described by Dr Jansen as having a 'personality disorder, mixed type, with antisocial narcissistic and passive aggressive characteristics'. She considered Mr. May to be a pathological liar. Someone like him, she continued:

> Rather than apply their talents toward the goal of tangible achievements, they will devote their energies to construct intricate lies, to cleverly exploit others, and to slyly contrive ways to extract from others what they unjustly believe is their due. Untroubled by conscience and needing nourishment for their overinflated self-image, they will fabricate stories that enhance their worth and succeed in seducing others into supporting their excesses.

Dr Cameron described the same informant as having an anti-social personality disorder. He described May as a con man, a liar, a manipulator, one who was very good at deception. Mr. May later recanted his testimony, and later still recanted his recantation.

The description of the second informant showed that he was cut from the same cloth as the first. He did remember telling various people at various times that he was losing contact with reality, that he heard voices in his head, and that the voices were so loud that he thought his head was going to explode. He had a lengthy record for sexual offences against children. Both informants also offered to provide testimony against inmates other than Mr. Morin, provided there was something in it for them.

After an exhaustive review, Justice Kaufman determined that the informers were 'totally unreliable witnesses' and should not have been called.

> Since these witnesses were motivated by self interest and unconstrained by morality, they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed… was easy to make and virtually impossible to disprove. These facts, taken together, were a ready recipe for disaster.
>
> In-custody confessions are often easy to allege and difficult, if not impossible to disprove.

Recommendation 51, from the Inquiry states:

> Where an in-custody informer has lied either to the authorities or to the Court, Crown counsel should support the prosecution of that informer, where there is a reasonable prospect of conviction, to the appropriate extent of the law, even if his or her false claims were not to be tendered in a criminal proceeding. The prosecution of informers who attempt (even successfully) to falsely implicate an accused is, of course, intended, amongst other things, to deter like-minded members of the prison population. This policy should be reflected in the Crown Policy Manual.

2. e) 2001 Sophonow Inquiry[v] – Canada

Barbara Stoppel was only 16 years old when she was brutally strangled to death at her workplace. Sophonow was tried three times. His conviction at his third trial was overturned on Appeal in 1985. In 2000 the Winnipeg Police Service announced that Sophonow was not responsible for Barbara's murder.

Before the third trial of Thomas Sophonow, no less than eleven jailhouse informants had volunteered their services. The police and the Crown took pride in narrowing it down to the three who were called on the basis of their 'credibility and reliability'.

The first informant Mr. Cheng stated that Thomas Sophonow said that the girl who was in the shop was to tell him where the rest of the money was located. She was to do this because they were friends. When she did not do this, it made him mad and he took her to the washroom and used a rope to kill her.

Aside from the hope that he would be treated in a more kindly manner, the only other reason that motivated him to come forward was that it bothered him to see a murderer on the street. He offered to testify in the hope that charges pending against him would be dropped, so he could avoid deportation. Mr. Cheng was facing 26 counts of fraud which were withdrawn by the Crown.

The second informant Adrian McQuade was well known to the police as an informant and was dealing with them on at least five matters. He was pressured by the police into testifying. His testimony was that Sophonow had confessed to him on 19 March. However McQuade was not

actually arrested until 27 March. He attempted to exchange information about drugs for a deal pertaining to his charges. This was refused. He then offered to go into a cell with Thomas Sophonow whom he knew. The police accepted this offer and arrangements were made to place him in the cell with Sophonow. On 29 March he told the police that he and Sophonow 'did not talk of the murder'. He later testified at trial that Sophonow had confessed to him.

The third informant had testified as a jailhouse informant in no less than nine criminal cases in Canada. One of his prior convictions was for perjury. Inquiries were made regarding this conviction but it was thought that there was a reasonable explanation for it, namely, that threats had been made to his wife and that he perjured himself in order to protect her. This informant convinced an experienced police officer that he was a credible witness – he came across as a truthful type.

Justice Cory commented:

> If experienced police officers and Crown Counsel can be so easily taken in by jailhouse informants, how much more difficult it must be for jurors to resist their blandishments. How difficult, if not impossible, it is for jurors to appreciate the polished and practiced facility with which they deliver false testimony.
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> They have, as a class, established a unique record of consistently giving false testimony.
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> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts.
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> They rush like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety, they are in every instance completely unreliable.
>
> They constitute a malignant infection that renders a fair trial impossible.

In summarizing his findings about in-custody informers he stated:

'All confessions of an accused will be given great weight by jurors.

'Jurors will give the same weight to "confessions" made to in-custody informers as they will to a confession made to a police officer.

'"Confessions" made to in-custody informers have a cumulative effect and, thus, the evidence of three jailhouse informers will have a greater impact on a jury than the evidence of one.'

Justice Cory further stated that as a general rule, the evidence of jailhouse informants should be inadmissible. They might be permitted to testify in a rare case, such as kidnapping, where they have, for example, learned of the whereabouts of the victim AND THAT LOCATION IS CONFIRMED BY THE POLICE INVESTIGATION.

2. f) 2002 Report of the Governor's Commission on Capital Punishment[vi] – United States

The report refers to some wrongful convictions that are relevant.

> The murder conviction of former death row inmate Steven Manning was based almost completely upon uncorroborated testimony of an in-custody informer. No physical evidence linked Manning to the murder he was said to have committed, nor was there any solid corroboration of the alleged statements he made admitting to the murder.
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> Hernandez and Cruz were tried separately for the 1983 murder of a child. Evidence from in-custody informants was presented against both men at various times, including the testimony from another death row inmate who claimed that Cruz had made incriminating statements while on death row. DNA testing subsequently excluded both Hernandez and Cruz as the source of the semen at the scene. Another man, who was in custody on unrelated charges in another county, made statements suggesting that he had committed the crime.

After the original convictions were overturned Hernandez and Cruz were convicted again at a second trial.

2. g) 2003 Benedetto and Labrador v R – United Kingdom

In *Benedetto and Labrador v R [2003] UKPC 27* the two men (Alexander Benedetto and William Labrador) had been convicted of murder on the basis of the supposed confession to an in-custody informer (Jeffrey Plante) together with insubstantial circumstantial evidence.

> P also gave evidence. He admitted that he was facing criminal charges and that he was being held in the Police Station. He said that he had previously been an inmate at the prison when he was facing charges for using his wife's credit card which had later been dismissed. He admitted convictions in the US amongst which were convictions for theft for which he had been sentenced to 45 years imprisonment. He said that he had served 9 years of that sentence, that he had a parole violation after being released and that he had been re-incarcerated. He had then been released again on parole on condition that he must report to his parole officer. He admitted that he had not been reporting to his parole officer while in BVI. [British Virgin Islands]
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> As the trial judge was later to observe in his ruling on the submission of no case to answer, the only substantive evidence against B was to be gleaned from the evidence which P gave about conversations which he said he had overheard while he was in the prison. He said that in the course of one of their frequent arguments about attorneys and costs when B and L were together in the same cell B had run up to L and told him that he had better pay his father back the $350,000 that he owed him and stop acting so pious and that he, L, was more guilty than he was.
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> The prosecution case against L was also crucially dependent on P's evidence about the confession which he said L made to him while they were in the same cell. He said that he had had a discussion with him on or about 19 April 2000. What he said was that he had bibles and prayer books and was doing some praying when L asked if he thought God would forgive him if he had anything to do with killing someone. P said he was uncomfortable with that and he ought to talk to the priest. P asked him directly, did he have anything to do with killing LM and he answered yes. P

asked him why. He said it was over money and that she was no good. P asked him how, and he said that they were driving and they were arguing, she tried to pull into the police station and he prevented that and that one thing led to another; it got out of control and that he dragged her into the water and put his foot on the back of her neck and drowned her. He then went on to say that her jeep was taken to the ferry landing and that he took a trail from there up to S's house and it took about 45 minutes.

P claimed that L had a long knife with him in the cell and that it had been found by the prison officials. P was cross-examined at some length about his past conduct to show that he was a liar and a thief and a witness whose word was not to be trusted. Although he denied some of the things that were put to him, he made a number of admissions too. He admitted that he had been married 10 times. He admitted that he had pleaded guilty to overstaying on his visa in BVI. He admitted that he had given evidence of a confession which he said had been made to him by a fellow inmate who was on trial for murder in Hawaii in 1995, and that there was a warrant out for his arrest for a parole violation in Texas as he had left the USA without permission and had failed to report to his parole officer. But he insisted that when he gave his statement to the police there was not even a remote hint of any kind of a deal and he had not been promised that he would be released from custody. He said that he expected to be released from custody because of advice which his attorneys had given to him about his preliminary inquiry. He said that the evidence which he had given about his fellow inmate in Hawaii had lasted for less than 5 minutes. He agreed that a letter had been written to the parole board because he had testified in that case. He said that he was concerned about going back to Texas until his attorneys had done their work there, but that he expected to be exonerated by the parole board.

In answer to questions that were put to him about the content of the confession which he said had been made to him by L, he accepted that he had not mentioned in his police statement the fact that L said that he had put his foot on the back of LM's neck when he was drowning her. He was asked whether he knew that LM had drowned before he made his statement. He said that he did not think that the cause of death had been mentioned in the press and that he did not read it there anyway.

The main thrust of the appeals by both B and L was directed to P's evidence. It was submitted that the failure by the trial judge to give an express warning to the jury to regard P's evidence with caution had resulted in a miscarriage of justice.

The evidence which P gave about the things allegedly said by B and L while they were in prison lay at the centre of the Crown case against each of them. The circumstantial evidence, such as it was, was plainly insufficient on its own to implicate either of them in LM's murder. In this situation the case for the Crown stood or fell on the credibility and reliability of P's evidence. Without that evidence the case against them was bound to fail. This case therefore raises once again, as did *Pringle v The Queen* [2003] UKPC 9, the problem of how to deal with evidence of a confession which a prisoner is alleged to have made while in his prison cell.

> It would be hard to imagine a witness who was less deserving of belief than P. Even those facts about his background which he was prepared to admit to while he was giving his evidence were more than enough to show that he was not to be trusted. He was a thief and he was a liar. The fact that he had been married ten times added further weight to the argument that he was utterly cynical in his dealings with others and totally unscrupulous. So, even without the additional material sought to be adduced in evidence before the Board there was more than enough material at the trial to raise the issue as to whether the judge ought to have directed the jury to be cautious before they accepted his evidence.
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> We have concluded that no value whatever can be attached to P's evidence. He has been shown to be a compulsive liar. His evidence is so lacking in credibility as to make it impossible to regard any conviction on his evidence alone as safe. This conclusion has a direct bearing on the question whether it is in the interests of justice that there should be a new trial in L's case. The Board will normally leave it to the local court to decide whether or not it is in the public interest that there should be a retrial. But in this case all the relevant factors have been fully deployed in argument before the Board. In the light of what is now known about P and all the defects that have been revealed about the content of his evidence their Lordships are in no doubt that it would be wholly contrary to the interests of justice for L to have to face a new trial based, as it would have to be, wholly on P's evidence.

3. A new Zealand Inquiry – 1980 Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas

Whilst some criminal convictions in New Zealand have been overturned (David Dougherty, Rex Haig, David Bain, Teina Pora) no other commissions of inquiry have been established. Other convictions which have been a miscarriage of justice have not been overturned at all; apart from cases examined in this paper I mention the convictions of Peter Ellis, Kevin Harmer and John Barlow.

In 1980 after Arthur Thomas had been wrongly convicted twice for a double homicide, and after the various appeals and controversies Thomas was granted a full pardon and a Royal Commission of Inquiry was established. The Commissioners consisted of a retired judge from Australia, a churchman and a politician.

During Thomas' two murder trials no jailhouse informants were brought forward to testify. During the Inquiry Thomas made a formal complaint that police were questioning prison inmates as to whether they would state that Thomas had 'confessed' to them. The police produced two informants for the Inquiry.

The Inquiry heard the evidence of two jailhouse informants in private because 'it seemed to us that the evidence was on the face of it highly improbable, and unfair to Mr Thomas unless the credibility of the witnesses was first established'. The first informant was a man who claimed to

be of royal blood, to have millions in a Swiss bank, that he was being hounded by the secret service of Yugoslavia, and that his life was in danger. He had been diagnosed as having paranoid schizophrenia, as being deluded in a grandiose way, and was aurally hallucinated. In a 1970 psychiatric report he was described as 'a psychotic man who has, according to his wife, never known fact from fantasy, and who suffers rapidly changing delusions of a grandiose type. In my opinion [he} is psychotic and not fit to plead or stand trial. I suggest he be certified and sent to a psychiatric hospital.' His criminal history included multiple frauds.

After hearing from this witness the Commissioners commented: 'It was obvious that he was disordered and deranged in his mind. We adjourned, and it was our opinion that the further questioning of this man would be inhumane. He is ill mentally.' Counsel for the police insisted that the informant continue. The witness then gave a very detailed account of supposed confessions, preparations before the murders, the actual murders, the disposal of the bodies etc. There were various maps drawn by Thomas – of the Crewe house and farm, of the general district, and of the Thomas house and farm. He claimed that the second jailhouse informant had overheard him talking with Thomas on a number of occasions.

The Commissioners weren't impressed with the maps or plans:

> We turn now to the plan. It is truly remarkable that, if Mr Thomas confessed in such detail, no incriminating remark appears on the plan. They have the appearance of plans drawn by a man anxious to explain the circumstances in which he came to be convicted. They do not corroborate the notion that he confessed to the crimes and that he was therefore rightly convicted.

The Royal Commissioners considered the briefs of evidence put before them in relation to the second jailhouse informant and recorded:

> The second inmate was prepared some years ago to break the law for the purpose of personal gain. He is, as a consequence, serving an exceptionally long sentence. His prison file reveals him as shrewd, cunning, devious and manipulative, and a man who would go to considerable lengths to shorten his sentence. In addition, evidence we have received established that he has been a police informer on other matters. This second inmate would have had every reason to lie in support of the first. He must have hoped, realistically or not, that the police would use their influence to shorten his sentence or improve conditions for him. The only possible disadvantage which his story could bring him would be a prosecution for perjury. It may be that he refused to give evidence before us because he feared such a prosecution.
>
> We are satisfied that the "prison confessions" never took place, and that the evidence of the two prisoners was a tissue of lies. It causes us grave concern that very senior Police officers were so obviously ready to place credence on such unreliable, self-interested, and, in the case of the first inmate, deluded evidence.

4. New Zealand cases

4. a) 1990 David Tamihere

The police investigation into the presumed murders of Urban Hoglin and Heidi Paakkonen was in the charge of Detective Inspector John Hughes. It is noteworthy that Hughes had been involved in the Thomas case. At the first Thomas trial Hughes had testified that Thomas had told him that he had worked at the Crewe farm, had had morning tea with the couple and that Harvey Crewe appeared to be a decent type of bloke. The truth is that Thomas had last worked on that particular farm two years before the Crewe family moved there. Hughes also ran the investigation into the murder of Rex Bell and the first in-custody informer in the Tamihere case was also an in-custody informer in the case of Rex Bell's murder.

Hoglin's body was found intact by pig hunters ten months after Tamihere's conviction 73km from where the police alleged the murders took place. Paakkonen's body has never been found.

At the time of trial there was no evidence, other than that of three in-custody informers, that Hoglin and Paakkonen had in fact been murdered.

Three in-custody informers testified that Tamihere had confessed to them that he had 'done it'.

The first informer took his 'job' very seriously. He had been sentenced to 13 years in prison in another country for killing his de facto wife, but as an informer this sentence was later reduced and he actually served only 3 years in prison. In New Zealand he and his fellow criminals had been caught committing a serious crime so he turned against his fellow criminals and received a sentence of only 12 years. Subsequent to that he was an in-custody informer in the Tamihere trial and the Rex Bell murder trial. As he was known by the authorities as a willing informer he 'coincidently' appeared in the cell next to Tamihere and they shared the same exercise yard. He did actually talk with Tamihere and even tricked Tamihere into scrawling down a little map of part of the Coromandel peninsula. Tamihere thought this was a diagram of an area that they had both been talking about, but the informer took it to court and claimed it as the place where Tamihere had committed the murders. (As was done in the case of Natasha Ryan in Australia (see 5.a), and at the Commission of Inquiry into the Thomas case.)

This informer would talk to Tamihere and then go back to his cell to write detailed notes on what he was to claim as the confessions Tamihere made to him. The informer testified that Tamihere 'and three of his mates rooted them both and that she was a good fuck'. Further on he said 'I said to Dave killing two people would be pretty messy business and he said not if you know what you are doing and he said if you break their necks and leave their bodies for a while the blood sets, there is no mess. And he said you have to get rid of the bodies and in the bush the best place to hide bodies is to bury them by the edge of the bluff.' 'He said that the biggest dangers of bodies being found in the bush are pigs and pig hunters and they never go near the edge of a bluff.'

Later the informer went into greater detail about the supposed 'orgy' that Tamihere and his three mates had with the young couple. I will spare the reader the details of the supposed orgy – but it does seem typical that such pornographic testimony is very graphic and paints the

accused in a very bad light. The graphic nature of such testimony seems intended to obscure the fact that there is no factual information included in the testimony other than that picked up from media or the police.

Under cross examination he stated that he did not want immunity from prosecution on the charges he was facing, 'all I wanted was for the import charge to be dropped'. Along with the informer admitting his self-interest he also spoke of his noble intentions. 'I disagreed with what he did to those young people and I consider it a duty as a citizen of this country to do some right.' '..initially I was thinking of myself but when he started telling me of the horrible things he done to those young people and I was told by the police they are not interested in any deals with me but they would appreciate any help I felt it was my duty to forget about myself for a change because I already had a deal with the drug squad anyway.' The Court of Appeal later reduced his drug importing sentence from 12 years down to 8 years.

The second informer against Tamihere in his charming way with the English language described Tamihere's purported confession about the disposal of the victim's bodies: 'He said he had cut the cunts up.' That was basically all he had to contribute to the trial. Later in the trial a prison official testified that this second informer had not had the opportunity to meet Tamihere, let alone hear his confession.

The third informer was serving a life sentence for the murder of a husband and wife, he had served quite a few years and could face a parole hearing in about a year's time. He said that Tamihere had confessed to assaulting Urban Hoglin and tying him to a tree, then raping Heidi Paakkonen, and sexually assaulting Hoglin. 'He said that he disposed of the guy by beating his head in with a lump of wood'. After a few days 'he ended up strangling her in the tent'. His testimony was coloured with pornography but no evidence that could be corroborated. He had 'taken the bodies out to sea and disposed of them in some area between Thames and Wilson Bay.' (Firth of Thames) He had 'disposed of the guy first and 2 or 3 days later he disposed of the girl'. 'He weighted the bodies down, he took them 15 to 20 minutes out to sea'. 'He mentioned a watch, he said he had given this Swedish guy's watch to one of his sons'. He was asked by the defence lawyer if there were any other people with Tamihere: 'No' he replied.

When Hoglin's body was eventually found on land it was 73km from where it was supposed to have been and his watch was still on his wrist. (This brings to mind that at the first trial of Arthur Allan Thomas it was also claimed that Thomas had brought in a bloody and mucus-covered watch for repair just after the Crewes were murdered.)

There are marked contradictions between the testimony of the informants; the location of the crime scene, the story of the watch, and whether Tamihere had supposedly acted alone or with three other people. There are three contradictory accounts of the disposal of the victims' bodies and none of them match the later discovery of Hoglin's body.

The third informer had been serving time for murder. Two years after the above trial he was released from prison but was back in prison within two years after further offending. Back in prisoner he recanted his evidence. He claimed the police were responsible for his perjury. Then he recanted his recantation and claimed that he had lied after receiving threatening letters. He was released ten years later, but after an indecent assault on the day of his release ended up

back in prison. More recently in a claim for compensation his case was dismissed because of 'contradictory testimony' and forged letters, including forged threatening letters.

Tamihere's conviction has not been overturned.

4. b) 1999 Scott Watson

Scott Watson was convicted of the murders of Ben Smart and Olivia Hope in 1999. The crown case was that he had confessed to two separate in-custody informers. The bodies of the presumed victims were never found and there was no forensic evidence of death, let alone of murder. The only evidence produced at trial to prove that two murders had been committed was the testimony of the two informers. Evidence was produced that Ben Smart and Olivia Hope were no longer around, it was plain that they had at least disappeared. It seemed improbable that they had met an accidental death which remained undiscovered. There was no evidence that they had eloped or been kidnapped. So it was not implausible that they had been murdered. Other than the testimony of the informers there was no evidence as to the manner of their death, the time and date of death, or place of death.

Both witnesses testified on 20th August 1999. Their testimony and cross examination took up the whole day. The importance of their testimony was highlighted by the directions that the judge gave to the media:

1. *These two witnesses are not to be identified outside the courtroom. There is to be no television or sound reporting. All equipment is to be turned off.*

2. *There is to be no reporting of their names or anything leading to their identity. An interim suppression order will be in place until their evidence is completed. Specific passages of their evidence may need to be the subject of further order.*

3. *The media are particularly cautioned against inadvertently using the information gained by listening to the evidence and seeing the witnesses in releasing the identity, whereabouts or description of the witnesses.*

4. *The security and safety of the individuals concerned could be involved.*

5. *There must be no follow up or attempt to trace the witnesses concerned.*

6. *All cameras are to be out of sight and removed now.*

The media were allowed to remain in court along with the Watson, Hope and Smart families. The public were excluded. The psychiatric report on witness 'A' by A. B. Marx MB, ChB,

FRANCCP, reports that: 'The diagnosis of severe Antisocial Personality Disorder traits indicates a reasonable possibility that [the witness] will not tell the truth. In my opinion acceptance of [the witness's] statement of events should only occur if it is corroborated from other sources. In a medical context it is usual to distrust what is said by people with Antisocial Personality Disorder or the traits of such a disorder.'

The National Study of Psychiatric Morbidity in New Zealand Prisons in 1999 found that a diagnosis of antisocial personality disorder was ten times more frequent among male prisoners than among the general population.

In the book Silent Evidence, author John Goulter described the evidence of Witnesses A and B as a 'bombshell.' 'As [inquiry head] Pope put it, their appearance in the courtroom created an "atmosphere you could cut with a knife,"' wrote Goulter.

Some years after the trial Mike White interviewed Olivia's father as part of an article 'The Dubious Justice Of Jailhouse Confessions' in 'North & South' magazine October 2011:

> Olivia's father, Gerald Hope, is still uncomfortable remembering what happened when the secret witnesses gave evidence.
>
> "The effect on us was absolutely devastating; it was the worst aspect of the trial, the description of how Olivia was supposedly murdered. It was like coming home and finding someone had been murdered in your own house."
>
> At the time, Hope believed the evidence: he believed the secret witnesses had come clean because they felt sympathy for the victims and their families. "We were so focused on convicting Scott Watson. I think objectivity was something we never considered. It was something that came to me much later as I reflected on the whole court case. At the time, we just wanted Watson put away. We wanted retribution."
>
> Hope has no doubt the evidence had an impact on the jury, as it did on him. "It had to have. It was absolutely riveting. You stopped breathing. It was just awful. But the whole thing was a stage set. It was rehearsed and, from a prosecution point of view, it was a pivotal part of the trial. I know that the police, in a very methodical way, groomed these witnesses – no doubt about it – to go through the story and stick to the script."

Jailhouse informant 'A' claimed that Watson had screamed in his sleep and when asked 'are those people haunting you' had said 'Yeah mate.' 'A' then said to Watson 'How the fuck can you fuck somebody when they are screaming?' (The Morin Report recounts that a jailhouse informant testified that Morin had become upset and cried out "Oh fuck, why did I do it, oh fuck, man, fuck, I killed her, I killed that little girl.")

'A' went on to say that Watson had said that 'the bitch kept on punching and kicking him.. she was fighting back heaps… he pulled her down…' Watson demonstrated to him how he had strangled her.

There was no information about the date, time, or place of death.

The defence cross examined ‘A’ on his extensive criminal and psychiatric history. His psychiatric history included attacks on staff and other patients. He had a history of substance abuse, alcohol and drugs. The defence asked ‘You changed your story completely between October of last year and May of this year?’ Answer: ‘Yeah.’

In the November 2000 ‘A’ was arrested in Napier for car conversion. Presumably as part of his negotiations with the police, he recanted his evidence at the Watson trial to the NZ Herald reporters Alison Horwood and Eugene Bingham. ‘A’ talked of his preparation for the trial: ‘It was like I had to get ready for a play, you know perform something that wasn’t real. I had to make myself believe what was in that statement so I had to train myself to believe that something that wasn’t real was real. That demonstration- that didn’t even happen.’

The Assistant Commissioner of Police said that Witness A told police in February or March that he wanted to recant his evidence.

Another man became concerned after overhearing a conversation between Witness ‘A’ and two detectives in a North Island prison. He heard police telling ‘A’ that he could not recant his damning evidence against Watson. Basically they said to him, if he didn’t go along with what he said during the trial they would make life very difficult for him.

The Police Complaints Authority investigated this slur on the integrity of the police force, and witness ‘A’ recanted his recantation. After officially recanting his recantation, ‘A’ then told the NZ Herald reporters that he lied to the Police Complaints Authority and that he wanted the real truth out.

This series of events was triggered by ‘A’ being charged with car conversion. The owner of the car told me that he is doubtful that the car conversion case was ever heard in court.

Jailhouse informant ‘B’ claimed that Watson had confessed to him through the peephole of ‘B’s cell door. ‘B’ claimed he had ‘A very good friendship, a trustworthy friendship’ with Watson. He claimed to have asked Watson if he did it, and that Watson replied ‘you know I can’t tell you that, but I am still having wet dreams about it.’ Watson supposedly said that ‘if he went down for this, that he would sell where the bodies are placed.’ ‘I don’t know the exact words but he admitted to killing Ben Smart and Olivia Hope.’ When ‘B’ was asked what Watson said of the whereabouts of the bodies he replied ‘.. the Sounds. Um saying that the sea lice would have them, they would be fucked, deep water. Literally the Cook Strait.’ When ‘B’ was asked if Watson had said anything else on another occasion about the whereabouts of the bodies he replied ‘Yeah … he spoke of Lyttelton about how the silt, its in a volcanic thing and the silt just endlessly goes down to an endless pit and he could dispose of the body and get away with it.’

When ‘B’ was asked why he was coming forward and giving this evidence he said ‘Because I don’t believe in hurting innocent people.’

The defence raised the question as to whether ‘B’ also had other motives for his evidence:

> Go back to this little chat you had with the police officer in the earlier hours of the morning of Tuesday 28 July? … yeah
>
> And that is when you first told the police anything about what you say about Mr Watson wasn't it? … yes
>
> And then did you go off to Court. Just trying to get these dates right. Did you go off to Court later that day on the 28th to Blenheim? … what day was that?
>
> It was a Tuesday? … yeah
>
> And there was an application made that day to adjourn your case for a day wasn't there, to the 29th for depositions? … yes
>
> And you went back to the Blenheim Police Station? … yes
>
> And then on the morning that you were supposed to go back to court the next day, Wednesday 29th of July did another police officer arrive at the police station and take a statement from you regarding what you could say about Scott Watson
>
> And that started at about 7.30 am before you went off to Court? … yes
>
> And then you went off to Court and then you went home didn't you? … yes
>
> You got bail all of a sudden? … yes
>
> And the charge of injuring with intent to cause GBH that was withdrawn wasn't it? … that's correct
>
> Do you think that had anything to do with what you just told the police about Mr Watson? … nothing at all.
>
> That serious charge was dropped the very same day that you made the statement to the police wasn't it? … because I pleaded guilty in Court to the lesser charge yes.
>
> To a charge of male assaults female? … yes

The defence also asked 'B' about the police providing him with a motor vehicle and a cell phone.

During 'B's' evidence reference was made to 'B's' cellmate being present when Watson confessed to him through the peephole of the cell door. The cellmate later signed an affidavit saying that 'B' was lying about Watson's supposed confession.

Watson's conviction has not been overturned.

In Canada it was the work of the 'Association in Defence of the Wrongly Convicted' (AIDWYC) that led to the overturning of the wrongful convictions of Guy Morin and Tom Sophonow (and

quite a number of other cases). Then because those convictions had been overturned the Morin and Sophonow Inquiries were established.

AIDWYC has reviewed Scott Watson's case in detail and regard him as a person who has been wrongly convicted. However in New Zealand Watson's application to the Governor General for the exercise of the Royal prerogative of mercy was turned down.

4. c) 2000 Teina Pora

Susan Burdett was raped and murdered in her home in March 1992.

On 18 March 1993 Pora, aged 17, was arrested in relation to a vehicle which had been stolen. He asked whether the police had apprehended anyone for the murder of Susan Burdett. He was then told about a reward of $20,000 for information leading to the conviction of the offenders. He was told that an indemnity against prosecution could be available for anyone who was not a principal offender. Over the next four days Pora gave various accounts (without a lawyer present) of his knowledge of and later his involvement in the invasion of Ms Burdett's home, the attack on her, the rape that was perpetrated on her and, eventually, the circumstances in which she was murdered. Pora's accounts were strewn with inconsistencies, contradictions, implausibility and vagueness. At various times his replies to questions are halting, hesitant, incoherent and bizarre.

In May 1994 Pora was convicted of both crimes. Malcolm Rewa was convicted in December 1998 of raping Susan Burdett. Rewa and Pora were associated with rival gangs; Rewa with the Highway 61 gang, and Pora with the Mongrel Mob. The NZ Court of Appeal ordered a retrial and Pora was again convicted in 2000. At the retrial the Crown case relied heavily on the confessions Pora had made. Evidence was also given of an association between Rewa and Pora. The Privy Council in the United Kingdom quashed his conviction in March 2015. The Privy Council had been informed that Pora suffered from foetal alcohol spectrum disorder

At the 2000 retrial, which followed Rewa's conviction (based on DNA) for the rape of Ms Burdett, it was important to be able to link Rewa and Pora to be able to get a conviction. A jailhouse informant who was on remand for armed robbery supplied the missing link. He claimed to have met Rewa and Pora together on a number of occasions. He duly received a letter from police noting that he had been of assistance. He not only gave a link between Rewa and Pora but recounted Pora's supposed confession to him at Mt Eden prison: 'The conversation went something like this: Um, "The police have got nothing on me. I've killed once and I can kill again. It's just like stealing a car. Once you've done it once you never forget" sort of thing'.

This is the only New Zealand case in which a jailhouse informant contributed towards a miscarriage of justice AND the conviction has been finally quashed. No commission of inquiry has so far been ordered.

4. d) 2009 Stephen Hudson

Nicholas Pike was last reportedly seen alive in March 2002. Pike's body has never been found. . Hudson was arrested on unrelated assault charges in May 2002. Hudson was convicted in November 2009 of Pike's murder. As with the cases against Scott Watson and David Tamihere, at the time of trial there was no evidence of the death of the supposed murder victim apart from the performances of the jailhouse informants.

In March 2007, the police offered a $50,000 reward for information and two prisoners came forward saying Hudson had confessed to the murder. In September 2007 the police sent information on the case to 300 other prisoners who'd been in jail with Hudson, five more came forward claiming he'd admitted the murder to them as well.

The Supreme Court dismissed his appeal on 19 May 2011[vii]:

> Informant 'A' claimed: that there was a fellow who had owed him drug money amounting to $2,000 and he had killed the guy. He had picked the guy up with a story that he needed some drugs picked up in Tauranga and that he picked him up in Palmerston North and driven through to Tauranga, to the outskirts. He had clubbed him, pretty much bashed him in the face and knocked him down and then caved his head in.
>
> Informant 'B' claimed that Hudson told him that he had got rid of a body. Hudson supposedly then described what he thought would be the best way to get rid of a body. The Supreme Court noted that this description was not consistent with the hypothesis that Hudson had disposed of the body of Mr Pike in the vicinity of the Desert Road near Waiouru as claimed in the prosecution's case.
>
> Informant 'C' claimed Hudson had confessed to blowing away someone called Nick the Dick. He did mention something about a girl or a woman or something like that.
>
> Informant 'D' claimed Hudson had said that a guy named Nick had ripped him off for drugs and tried to move in on a girl that he was seeing "And I kill cunts for that mate, and I did." Hudson had supposedly shot Nick in the head with a revolver.
>
> Informant 'E' was supposedly talking to a prison officer at the grille and as Hudson had walked past he yelled out "Hey fuck I killed that Nick Pike." Hudson said they would never find the body and mentioned something about some plantation somewhere around about the Desert Road somewhere.
>
> Informant 'F' said Hudson felt certain that the police would not be able to recover the body. Hudson had killed Nicholas Pike using the revolver that he'd been convicted of being in possession of in the Tauranga District Court and he was particularly concerned that if the body was ever found that the bullet that would be found in Nicholas Pike's body would be able to be forensically linked to that particular revolver. Hudson had murdered Pike because Pike owed him money for pure methamphetamine which he had been selling on Hudson's behalf, and because of a woman.

The judge had directed the jury to put aside the testimony of another informant as it was shown that he had not actually been able to meet Hudson in prison.

An NZPA news item recounted 'means of death so far including shooting, stabbing, kicking and having his head smashed in. Mr Pike's body had been reportedly either wrapped in chains and floated out to sea, or buried in a graveyard, a forest, a plantation, or on a backroad near Tauranga, the Desert Road, or Te Awamutu.'

As Hudson supposedly murdered Pike near Tauranga and by the Desert Road near Waiouru it is worth noting that they are 260 kilometres apart.

Stephen Hudson is still imprisoned.

4. e) 2010 Christopher Ngarino

Ngarino was convicted of the armed robbery of the Four Square store at Hikurangi in Northland on 29 June 2005. The Northern Advocate article (23/5/2008) stated that the police summary of facts stated three men had tied up supermarket manager Jawahir Lal and his two sons and robbed the store.

Ngarino was firstly convicted in 2008. That conviction was overturned by the Court of Appeal in 2009. It was a circumstantial case bolstered by a supposed confession to an in-custody informer. The Court of Appeal decided that the warning to the jury about the possible unreliability of the purported confession to an in-custody informer had been insufficient. Ngarino was then retried in 2010 and convicted again for a circumstantial case bolstered by a supposed confession to an in-custody informer.

An appeal was lodged and the Court of Appeal gave its judgement on 8 June 2011:

The Court of Appeal described the store as being 'robbed by masked men armed with a shotgun and a machete. The robbers tied up the occupants and put them in a chiller. The robbers then escaped with takings of some $3,000.'

The Court of Appeal then described the Crown case against Mr Ngarino: 'It was built on an alleged confession and on circumstantial evidence. A key plank was a confession Mr Ngarino had allegedly made to Justin Wallace, who at one stage was in prison with Mr Ngarino. According to Mr Wallace, Mr Ngarino had confessed to being involved in the robbery and gave details of it. Mr Wallace recounted those details in evidence. If this confession was true, Mr Ngarino was guilty. But, of course, it came from a prisoner so was subject to the caution properly exercised with respect to alleged jailhouse confessions.'

The jailhouse informant claimed that Ngarino told him in prison that he had robbed the Hikurangi Price Chopper shop. Included in his evidence were statements that as well as robbing the safe the robbers also took cigarettes and cleaned out the till in the shop. The owners of the shop said no cigarettes were taken and no money was stolen from the till.

The second appeal was turned down as the warning by the judge to the jury at the second trial about the need for caution about the possible unreliability of the evidence of the jailhouse informant met the requirements of *Section 122 of the Evidence Act*.

4. f) 2015 Mark Lundy

Mark Lundy's wife and young daughter were brutally murdered in August 2000 whilst he was away on business. In 2002 he was convicted for their murders. In 2013 his conviction was overturned by the Judicial Committee of the Privy Council, and a retrial was ordered.

At the 2015 re-trial an in-custody informer (witness X) testified:

> He asked me what I was in for. I told him it was a bank robbery and I wouldn't be in there if it wasn't for my mum telling the police. He said he wouldn't be in there if his daughter hadn't come in and seen what he was doing to his wife.
>
> I just thought he was in there for beating his wife up or something like that.
>
> When I finished the conversation about what I'd done he told me that he'd been planning his for a while and that she had it coming to her.

These few sentences, and only these, contain his account of Mark Lundy's supposed confession to him. They are his account of a confession which he claimed had taken place in 2002. A man who was in prison at Paremoremo at the same time as Lundy said to me he did actually ask Lundy if he had murdered his wife and child – Lundy replied 'no'.

The informer's first statement about Lundy's daughter coming in seems to assume that the daughter had not been murdered and had been able to say that her father had assaulted her mother.

In the course of the witness' testimony and cross examination some other points of interest can be noted.

At the time in 2002 of the supposed confession the witness was on remand on charges of aggravated robbery, of a bank. His criminal offending dates back to 1994 and he is a recidivist offender, amassing about 20 convictions for offences of dishonesty. He was also subject to several domestic violence protection orders, so one can suppose that the words 'she had it coming to her' came easily to the mind of the witness.

He was described in his probation report as having 'antisocial, personality and borderline personality disorders'.

In a letter the witness wrote, but did not send, to a judge.

> Sir, I have the smoking gun of all smoking guns. I have information from 12 years ago that will put a cold blooded murderer who was recently released

> from – released before Christmas on an Appeal back where he belongs rightfully. Today I stand in front of you asking for my release on bail on the 22nd, as my current prison sentence expires on that date. I have another charge to face on the 11th of February…..

Witness X said that letter was never sent because his lawyer suggested he would not be seen as a credible witness if he sent the letter.

> Q. So what made you come forward?
>
> A. Just the right thing to do, yeah, that's all it is.

A psychologist would be doubtful that a witness could accurately recall the words said to a witness 12 years before.

	Thomas	Tamihere	Watson	Pora	Hudson	Ngarino	Lundy
Multiple informants	Y	Y	Y		Y		
Contradict each other		Y	Y		Y		
Was a crime committed?	Y	?	?	Y	?	Y	Y
Claimed confession	Y	Y	Y	Y	Y	Y	Y
Was evidence corroborated?	N	N	N	N	N	N	N
Mental health problems	Y		Y		Y		Y
Recidivist offender	Y	Y	Y	Y	Y	Y	Y
Probative value	N	N	N	N	N	N	N
Claimed noble intentions	Y	Y	Y	Y	Y	Y	Y
Benefit to informant	Y	Y	Y	Y	Y	Y	Y
Should witness have been called	N	N	N	N	N	N	N

5. Assessing the New Zealand situation

The use of in-custody informers to gain a conviction requires the participation of many governmental organisations. Firstly the Police need to put them forward. Then the Crown Law office and prosecutors need to decide to call them as witnesses. Then the judge at trial needs to accept them as witnesses. Then they need to be rewarded for their perjury by the Police reducing charges against them or a judge reducing their existing sentence or by some other means. Any concept of 'sensible sentencing' gets thrown aside when a court reduces a criminal's sentence as a reward for perjury. In-custody informers are repeat offenders – so guess what they are going to do when a judge reduces their sentence and they leave prison early? I have not found any evidence that an in-custody informer has ever been prosecuted for perjury in New Zealand; so one would assume that it would be in their personal interest to be an in-custody informer again.

Our parliament is responsible for the laws which allow the in-custody informers to testify.

The pattern of testimony of the jailhouse informants in the New Zealand cases examined above is an extraordinarily close match with that described in overseas reports. The testimony is typically extremely prejudicial with no trace of any credible evidence that is not available from other sources. The testimony is from recidivist criminals who are not remotely interested in any moral considerations.

The incidence of various forms of mental illness amongst the informants is not only above that of the general population, it also seems to be higher than that of the general prison population.

Some years ago I received some unsolicited emails from Nigeria offering access to a pile of money. The nature of the scam in the case of the typical jailhouse informant is actually quite similar in its nature to that of the Nigerian fraudsters. One of the jailhouse informants in the Hudson case has been convicted of fraud committed whilst in prison.

Witness A in the Watson trial and witness X in the Lundy trial were both diagnosed with Antisocial Personality traits. Of the seven informers in the Hudson trial I am quite sure that one or more of them also had Antisocial Personality Disorder traits. It is also quite possible that one or more of the Hudson informers had been informers in other trials. The crimes for which the Hudson case informers have been convicted make them amongst the worst criminals in New Zealand. The offending of just one of the Hudson informants covers a huge range including murder, sexual abuse, burglary, kidnapping, fraud, extortion and intimidating witnesses. I have been credibly informed of witness B from the Watson case giving false evidence in another trial.

In none of the six New Zealand cases did the evidence of the informers lead to the discovery of a murder weapon or a body or any other credible evidence. In the Lundy case the informer seemed to be confused as to the nature of the crime, and there was no evidence that led to the discovery of the murder weapon or discarded blood-stained clothing. In the Ngarino case the robbery was committed by three people but the supposed confession did not even lead to the discovery of the identity of Ngarino's supposed fellow criminals.

5. a) Was a crime committed?

The legal phrase 'corpus delicti' (the body of the crime) refers to the principle that a crime must have been proven to have occurred before a person can be convicted of committing that crime. It follows that an accused may not be convicted of a crime solely on the basis of an uncorroborated confession, and multiple confessions or admissions do not alone serve as independent corroborating evidence in establishing the corpus delicti. In three of the New Zealand cases (Tamihere, Watson and Hudson), where multiple jailhouse informants testified there was no independent evidence to corroborate the informants' testimony that a crime had occurred. In all of these three cases the jailhouse informants gave contradictory testimony about the supposed crime. This characteristic is reminiscent of the Gospel of St Mark (14.56) 'For many bare false witness against him, but their witness agreed not together.' It seems clear that St Mark at least was of the opinion that the reason that the witnesses contradicted each other was because they were lying. The Canadian inquiries warned about the cumulative effect of multiple jailhouse informants. Joseph Goebbels is often quoted as saying: 'If you tell the same lie enough times, people will believe it.'

Hudson is supposed to have caved in Pike's head with a club near Tauranga AND to have shot Pike in the head near Waiouru 260 kilometres away – you don't need to be a rocket scientist to deduce that at least one of these stories is wrong. Tamihere is supposed to have disposed of his victims' bodies in three different ways and none of them match the later discovery of one of the bodies. Even at the time of trial one could deduce that at least two of the versions must be wrong.

In the Watson case the police wrote to the coroner:

> As to how they died is somewhat more difficult to define, particularly in the case of Ben Smart. Evidence was adduced by the prosecution at trial from a fellow prison inmate of Watson's as to how Watson had told him how he killed Olivia. It was during a struggle where she was fighting him inside the yacht and he strangled her.
>
> As part of the prosecution evidence another inmate related to the court how Watson had told him that he put the bodies in deep water. When it was put to Watson that the deaths had been the result of being hit with a solid object and then a strangling he said that was not how it was done.

Here are some examples of convictions without a corresponding crime.

In the Campden Wonder case in England in the 1660's three individuals were hanged for the murder of a local official who had vanished. Shortly afterwards the supposed victim appeared alive and well.

In part 2. a) I described the 1819 case of Stephen Boorn who was convicted and sentenced to death for the murder of Russell Colvin. He was saved from the gallows when Colvin turned up alive in New Jersey.

Borchard recounts the case of Ernest Lyons in Virginia who was convicted in 1909 of murdering James Smith the previous year. James Smith had disappeared and a similar body was found wearing an identical ring. Three years later Lyons was pardoned after Smith was found to be alive and well in North Carolina.

Borchard again, recounts the case of Bill Wilson in Alabama who was convicted in 1914 of the murder of his wife Jenny five years previously. In 1918 Wilson was pardoned after it was found that Jenny was alive and well in Indiana.

Borchard also recounts the 1926 case of Condy Dabney in Kentucky who was convicted of murdering a fourteen year old girl named Mary Vickery. She had disappeared and a body was found that was claimed to resemble her. A witness named Marie Jackson testified that she had seen Dabney kill Mary Vickery. The evidence of other witnesses conflicted with Marie Jackson's evidence in several respects. When Mary Vickery turned up alive and well, Dabney was pardoned and Marie Jackson was convicted of false swearing.

Antonio Rivera and Merla Walpole's protestations of innocence fell on deaf ears when they were convicted in 1975 of killing their 3 year old daughter ten years earlier. While imprisoned and awaiting a retrial, their then 13 year-old daughter turned up alive and well in San Francisco.

There was the English case of the trial of Patrick Nicholls for the murder of Mrs Heath in 1975. The case was that Mrs Heath had died of a heart attack brought on by the shock of being attacked during a robbery. The evidence of Jack Boorer was quite damning; he was a convicted criminal who at the time shared a remand cell with Nicholls and was expecting an eight-year sentence for burglary. He claimed his cellmate had admitted murder. But the *International Express* revealed that Boorer had made up the remand-cell confession as part of a deal with the police. A careful examination of the pathology evidence showed that Mrs Heath had not actually been murdered. She had firstly had a heart attack and then fallen down the stairs. There was no robbery. After being wrongfully imprisoned for 23 years, Patrick Nicholls was finally set free.

On 25 March 1987 Nebraska's governor posthumously pardoned William Jackson Marion on the 100th anniversary of his hanging for the murder of a man who turned up alive four years later.

In 1993, in New Zealand, Peter Ellis was convicted of sexual offences involving children. As with a number of similar overseas cases there was no credible evidence that a crime had occurred. His conviction has not been quashed.

In 1993 Clayton Johnson, in Canada, was convicted of murdering his wife who had died in 1989. The prosecution case was that he had killed her to claim the life insurance money and she had died from blows to the head. In 2002 Clayton's conviction was quashed after it was proven that his wife had died from injuries sustained from accidently falling backwards down concrete stairs and no crime had occurred.

In 1994 William Mullins-Johnson, in Canada, was convicted of the murder and rape of his four-year-old niece. He had been the babysitter when she died in her sleep. It was later established that his niece had died of natural causes and no crime had occurred. Bill's conviction was quashed in October 2007.

In 2002 Kevin Harmer, in New Zealand, was convicted of the murder of his wife who had been burnt to death when their Land Rover caught fire. The evidence against him was from Dr John DeHaan an American criminologist and fire expert whose evidence in some overseas cases has since been discredited. In recent years there have been some significant improvements in the assessment of how fires start and how they behave. It now seems to me to be highly unlikely that a crime ever occurred. Harmer's conviction still stands.

In 2003 Leonard Fraser was being tried for the murder of Natasha Ryan, in Australia. Half way through the trial Natasha turned up alive and the prosecutors dropped the charge. The Ryan 'murder' was partly based on testimony from a fellow prisoner who alleged that Fraser drew detailed maps showing where Ms Ryan's remains could be located. Detective Sergeant Tony Lohmann told the court that police had several maps allegedly drawn by Fraser relating to the disappearance of Ms Ryan and the whereabouts of her remains. Sergeant Lohmann said that Fraser had told a fellow prisoner he was 'getting frustrated' because police could not find the remains using the maps. Fraser had 'graphically described' to the prisoner how he murdered Ms Ryan near mango trees on a property near Rockhampton.

I am in no way trying to argue that 'therefore' Ben Smart, Olivia Hope and Nicholas Pike will necessarily turn up alive one day. The point is rather, that without credible evidence that a crime has actually occurred it is an exercise in speculation to convict someone for the supposed crime.

The *Coroners Act* provides that the first purpose of a coroner's inquiry is to establish, so far as possible,-

(a) That a person has died; and
(b) The person's identity; and
(c) When and where the person died; and
(d) The causes of the death; and
(e) The circumstances of the death.

5. b) Police and informers

Putting informers in the witness box to tell their stories is not an appropriate way of dealing with whatever they have to say. Outside of the prisons, informers are often useful to the police in their investigations. An informant may well be an honest citizen who suggests that in the case of some crime they should look at a particular person or who reports some information. At the other extreme some of the worst criminals in New Zealand history have been informers, such as the head of the 'Mr Asia' drug ring. The information offered by a criminal may perhaps be true and may warrant further effort to follow it up. An informer may simply state that a particular suspect is now driving a different car from the one he was driving before and this information may be quite useful. What is put forward by ordinary informants is raw material for a police investigation or operation. It can help the police in building up a picture of some activity. But the statement of an informer needs to be assessed as to whether it is true or false or useful. Once

the police have followed up what an informant has to say and their investigations have borne fruit then the results of their investigations can be put before a jury.

If the police interview an offender and that offender confesses to the crime this has a number of important benefits. Firstly it confirms their suspicion that the suspect is indeed the offender and that this should be the focus of their work. Secondly the offender is most likely to add relevant information about the crime; perhaps including a weapon, a body, recovery of stolen property etc. Thirdly it makes the prosecution of the crime much easier. So if a jailhouse informant comes up with the claim that a fellow prisoner confessed to him it is certainly a tempting offer. However the active recruiting of jailhouse informants by the police should be discontinued as a matter of public policy.

5. c) Prosecutors and informers

At the start of a trial the defendant is asked whether he pleads guilty or not guilty. If the defendant pleads guilty this obviously is fundamentally significant for the rest of the trial. But if the defendant has pleaded 'not guilty' and then a jailhouse informant testifies that the defendant confessed to him, then surely this is the next best thing to a plea of guilty.

The New Zealand Solicitor-General's Prosecution Guidelines (as at 1 July 2013) state:

> The Guidelines reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in a manner that is fundamentally fair, detached and objective. The prosecutor should act to foster a rational trial process, not one based on emotion or prejudice.
>
> The overarching duty of a prosecutor is to act in a manner that is fundamentally fair. Prosecutors should perform their obligations in a detached and objective manner, impartially and without delay.
>
> Prosecutors should always protect the right to a fair trial. Subject to that requirement, prosecutors may act as strong advocates within the adversarial process and may prosecute their case forcefully in a firm and vigorous manner. However, prosecutors should not strive for a conviction.

In New Zealand, even in the few cases addressed in this article, we have instances of senior prosecutors bringing more than one case reliant on jailhouse informants. For example one lawyer was a prosecutor in the Tamihere, Watson and Pora cases. In both the Tamihere and Watson cases a jailhouse informant later recanted his testimony. Another lawyer was a prosecutor in both the Hudson case and the Lundy retrial.

5. d) Judges and informers

The courts have dealt with the issues about criminals being witnesses for a long time. The saying arose that 'it is not in the interests of justice that there should be honour among thieves'. The

courts encouraged criminals to turn against one another. However the problem, of course, was that one or more criminals might be lying in court. The Vetrovec warning arose from a case involving conspiracy to traffic in heroin and the evidence of an accomplice. The Vetrovec appeal case in 1982 in Canada considered the need for the judge to warn a jury that the testimony of an accomplice may be unreliable. When the Evidence Act was updated In New Zealand section 122 incorporated the previous case law about judges giving a Vetrovec warning to the jury that criminals might lie in court. The wording of the section includes in-custody informers along with accomplices. The existence of this section has not limited the use of in-custody informers or the effect of their testimony.

The potential unreliability of the evidence of an accomplice who later gives evidence against his fellow criminals should properly be noted by a judge. The accomplice may, for example, downplay his own role and enlarge the role of his fellow criminals.

But to base the claim that a crime has actually occurred on the supposed confession to a criminal while in custody is in my mind quite a different scenario from that of the evidence of an accomplice. One needs to distinguish between the 'accomplice informer' and the 'claimed confessor informer'.

It is the basis for the testimony of an accomplice that he was involved in the crime himself and therefore knows something about the crime from his own personal involvement. Such a basis does not exist in the case of a jailhouse informant.

The giving of a warning by the judge that the testimony of in-custody informers may be unreliable has proved ineffective. It hasn't reduced their ability to verbal the defendant.

In the 1989 Australian case that wrongly convicted Neil Chidiac in 1989 the trial judge warned the jury that Oti and Kwalu were 'the worst liars I have seen in eight years at the Bench', 'self-confessed perjurers and liars' as well as 'down-and-out villains' and that 'you will look carefully at what they said before you would hang a dog on their evidence'. That is an extremely blunt warning by the judge but Chidiac was still convicted based on Oti and Kwalu's testimony. In 1997 Oti repudiated the testimony he gave at the trial when interviewed for the Channel 7 Witness program.

The decision as to whether to admit the testimony of a jailhouse informer needs to be taken with the understanding that, in the words of Justice Cory in the Sophonow report, 'usually, their presence as witnesses signals the end of any hope of providing a fair trial'. The judge needs to decide whether their evidence has probative or factual value that outweighs the risk that their testimony will have an unfairly prejudicial effect under *Section 8 of the Evidence Act 2006*, in this context testimony that is graphic should not be confused with testimony that is probative:

S 8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
    (a) have an unfairly prejudicial effect on the proceeding; or
    (b) needlessly prolong the proceeding.

> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

There is not really an effective defence against the bald claim that the defendant confessed to a jailhouse informant. The defendant can say 'no I didn't….'

In-custody informers often later appear before a court or Parole Board to ask for a release on parole or a reduction of their sentence because of their assistance to the police and prosecution. As in-custody informers almost certainly commit perjury as their form of assistance, the court or Parole Board should also consider the question as to whether it is appropriate to reward a criminal for committing further crimes.

5. e) The jury and informers

In 'The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making' which was published online on 17 August 2007 a noticeable finding was that 'information about the cooperating witness' incentive (e.g., leniency or reward) did not affect participants' verdict decisions.' Furthermore 'mock jurors voted guilty significantly more often when there was a confession relative to a no confession control condition'.

Worldwide the various innocence projects regard having a jailhouse informant in a case as being a red flag. There are two reasons for this. The first is that the jailhouse informant was almost certainly lying. The second reason relates to the question of why the prosecutors decided to call a jailhouse informant at all. The informants are typically a sign of a weak case and often a case that is flawed with other problems.

For example, in the Pora case we have a situation where Pora's statements to the police were unmitigated rubbish, and the testimony of the jailhouse informant was also rubbish and lies. But the problems didn't end there. Phil Taylor is an investigative reporter with the NZ Herald and reported on additional points that he had discovered on Sunday 24 May 2015:

> A witness paid $3000 claimed that he'd seen Pora and Rewa together but then failed to pick Pora from a police photoboard. Another witness, paid $7000, testified in court cases to the effect that Pora and Rewa knew each other.
>
> Pora's aunty, Terry McLoughlin, was brought back into the picture. She gave evidence at his first trial and was paid $5000 by the police.
>
> She had been promoting her view that Pora was involved since hearing about the bat in the drain near the velodrome soon after the murder. But information from her and other family members was discounted as meddling by the police inquiry. A sister eventually told police she made up a story implicating Pora because "I don't like my brother. I thought he would get locked away."

> Pora denied involvement and provided a DNA sample and was dismissed as a suspect in June 1992. "False evidence and conspiracy" was cited by detective sergeant Karl Wright-St Clair (now Inspector) in a file note.
>
> "The motive for this was that neither aunt approves of Teina's criminal behaviour and they all wanted him placed in prison and out of the way," Wright-Sinclair wrote. "I suggest that no further action be taken in relation to Teina Pora as a suspect ... There has already been enough police resources wasted in relation to this matter."

In the Hudson case, Stephen Hudson later tried to bring charges against fourteen of the 'witnesses' for perjury. The charges never got anywhere on procedural grounds. Seven of these were the seven jailhouse informants. Included amongst the remainder was a prison warder.

5. f) Parliament and informers

The Supreme Court when it dismissed Stephen Hudson's appeal gave its view of the current New Zealand law of the admissibility of the testimony of jailhouse informants:

> It has sometimes been suggested that the evidence of admissions made by a defendant in prison to prison inmates should be treated as presumptively inadmissible.
>
> Such an approach would not be consistent with the scheme of the Evidence Act.
>
> Unlike the situation with hearsay evidence there is no reliability threshold for the admission of prison inmate confessional evidence. Nor did the legislature adopt the technique of declaring such evidence presumptively inadmissible.
>
> Specific provision for such for such evidence is, however, made in s 122(2)(d) and this is not couched in terms of exclusion but rather addresses the directions which the trial judge should give to the jury. We recognise that there may be scope for excluding prison admission evidence under ss 7 and 8 of the Act, but, that said, the legislative scheme as a whole is indicative of a legislative intention that reliability decisions ought to be made by a properly cautioned jury.
>
> There is nothing unorthodox in this scheme. In other common law jurisdictions, the courts have shrunk from treating confessional evidence as inadmissible simply because it is given by prison inmates. In that case of accomplices (in respect of whom similar reliability issues can arise), the English Court of Appeal has firmly held that concerns as to reliability should be addressed not by exclusion but rather by appropriate warnings and directions to the jury. The same approach to this general type of evidence is taken in Australia and in Canada as well.

So the current law in New Zealand allows the testimony of jailhouse informants to repeatedly lead to miscarriages of justice. The perjury of the jailhouse informants is not grounds for an appeal, and it is normal practice to reward the criminals for committing perjury. Is this what our lawmakers really intend? Do our judges seriously consider that this is a satisfactory situation? Does our Ministry of Justice recommend that we continue doing this, again and again?

An alternative approach that would lead to fewer miscarriages of justice would be that the information from a jailhouse informant was subjected to rigorous police investigation. If the police investigation led to the discovery of credible evidence such as the bodies of murder victims or a murder weapon then this would meet the requirement that there is some probative value in amongst the testimony of the jailhouse informant. However this would not necessarily mean that all of the informant's testimony was reliable so the warning specified in s 122(2)(d) would still be given.

When I set out to look more closely at New Zealand cases involving jailhouse informants I was open to the possibility that perhaps some lied and some told the truth. However I have yet to come across an example of a New Zealand case where the jailhouse informant told the truth. I would now be very surprised to ever find an example of a jailhouse informant telling the truth.

5. g) Conclusion

The Supreme Court in the Hudson case stated '*It has sometimes been suggested* that the evidence of admissions mad by a defendant in prison to prison inmates should be treated as presumptively inadmissible.' The footnote shows they were referring to the Sophonow Inquiry. This understates the position in Canada. Recommendations were made after the very thorough Morin and Sophonow inquiries. Then Bruce MacFarlane presented his paper "Convicting the Innocent" at the Heads of Prosecution Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003. This was followed by the 'Report on the Prevention of Miscarriages of Justice – FTP Heads of Prosecutions Committee Working Group' issued by the Canadian Department of Justice in September 2004. This report includes the statement: 'In-custody informers who give false evidence should be vigorously and diligently prosecuted in order to, among other things, deter like-minded members of the prison population.'

Canadian current practice is to presume the evidence of an in-custody informer is unreliable unless other evidence confirms the evidence of the witness and clearly addresses concerns about reliability. The general rule is that jailhouse informants should be prohibited from testifying. In 'The Path to Justice: Preventing Wrongful Convictions – The Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions' in 2011, for example, they report that since 2001 Manitoba had not called any in-custody informers as witnesses.

For example: the Province of Ontario Ministry of Attorney General Crown Policy Manual on in-custody informers dated 21 March 2005[viii] states:

> Experience has demonstrated substantial risks to the proper administration of justice may arise from the use of in-custody informers as witnesses. Crown counsel must be aware of the dangers of calling in-custody informers as witnesses. An in-custody informer can only be called as a witness at a preliminary inquiry with the permission of a Regional Director of Crown Operations. An in-custody informer can only be called as a witness at trial with approval of an In-Custody Informer Committee.
>
> In all cases, the guiding principle is that in custody informers will only be tendered as prosecution witnesses where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability.
>
> In-custody informer evidence requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability.
>
> A principal purpose of this policy is to help prevent miscarriages of justice, which can occur when in-custody informers falsely implicate accused persons.

We need to adopt the same policy in New Zealand.

Bruce MacFarlane's paper '*Convicting the Innocent – A triple failure of the justice system*' gives a comprehensive analysis of the whole problem of wrongful convictions. There are many factors that can lead to wrongful convictions and perjury by jailhouse informants is just one factor. So reform in this area will not immediately create a perfect legal system. However it is still a very necessary reform as the perjury of the informants tends to pollute the whole trial process, just as a drop of ink in a glass of water colours all the water. Jurors are meant to consider all the evidence presented and consider it as a whole.

MacFarlane[ix] points out the devastating consequences of a miscarriage of justice:

> Every time we convict someone of an offence for which they are innocent, the justice system fails in three ways. Along with the direct impacts on the person who is wrongly convicted, the actual perpetrator remains free to continue victimizing others. Equally disconcerting, we re-victimize the victim or the family of the victim by undoing the emotional closure that has already taken place, and reopening a wound which with an increasingly cold evidentiary trail, may never be healed.

I leave the final word to the Report of the Royal Commission to inquire into and report upon the circumstances of the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe[x]:

> The British system of criminal justice is an adversary system. It receives only such facts as are put before it by the parties, discovering only so much of the truth as this permits. Any such system to function properly is dependent upon fair and truthful information being put before it. Like a computer, given the wrong facts it will without doubt produce the wrong answers …

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