# POLICE COMPLAINTS AUTHORITY

Report of the Police Complaints Authority
on the Ivan Curry Investigation

# Police Complaints Authority

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## THE IVAN CURRY INVESTIGATION

### INTRODUCTION

There was screened on Television One in New Zealand on Sunday 12 July 1992 a programme entitled "The Remand of Ivan Curry" which is described by its author, Keith Hunter, as "A partially dramatised documentary for television". Such programmes are conveniently described as docu-dramas for they are partly dramatised accounts of actual events which in this case was the charge laid by the Crown against Ivan Curry of murder, and the subsequent trial which resulted in his acquittal. Throughout this report the programme will be described by that name, or as a documentary. The trial took place at the High Court in Wanganui over two weeks in July/August 1990. The programme is described in detail below, but as expected by its author, it made an impact on the viewing public which was reflected in media comment the next day, and in the weeks that followed.

In anticipation of the impact the author had written to the Minister of Police, Minister of Justice and the trial Judge, Mr Justice Neazor, in the week before screening, sending to those persons a VHS copy of the programme. Copies of those letters have been passed to the Authority. Different points were made to each of the recipients, which will be dealt with hereafter, but the central point of the author was contained in the letter to the Minister of Police in which he said the documentary is critical of the Police prosecution in 1988-90 of a profoundly deaf man on a charge of murder. He said his documentary investigated the manner of Mr Curry's arrest and the quality of the Police investigation into the death of the child involved. He said it indicates that while the formalities were observed, Mr Curry was not afforded justice. Mr Hunter further stated:

*I submit that the arrest and prosecution of Mr Curry and also the conduct and competence of the police during both investigation and trial require further enquiry."*

The Minister of Police was interviewed on the National radio programme "Morning Report" on the day after screening, 13 July 1992, when he denied any misconduct or incompetence on the part of the Police in the handling of the prosecution and treated the documentary and letter of the author as a complaint against the conduct of the Police, and said it was his intention to refer the matter to me as the Police Complaints Authority. The reference was duly made to my office.

On receipt of the complaint I determined it was a matter of sufficient importance for me to carry out an independent enquiry into the complaint pursuant to s. 17(1)(a) of the Police Complaints Authority Act 1988, being the statutory authority under which I perform my functions. My enquiry has been conducted independently of any other body. I formally advised the Commissioner of Police of my intention to act independently under s.17(1)(a) of the Act. With the assistance of staff in my office I have conducted the enquiry and now report on the result of that enquiry.

THE FACTS

In October 1988 Ivan Curry was aged 21 years, married and living with his wife. Mr Curry has been properly described as profoundly deaf, having lost his hearing as a result of suffering meningitis and other serious illnesses at about the age of 9 months. Because he lost hearing at such a very young age his condition is described medically as pre-lingual deafness as a result of which he has never acquired speech in the ordinary way. On the morning of 5 October 1988 Mr Curry was left alone in a house situated at Waitotara with Hauata Sandy Wirihana-Tawake (Sandy) then aged 15 months, who was the child of his wife's sister. Mr Curry's wife and her sister, the child's mother, had gone out shopping together leaving Ivan Curry alone in the house with the child. About 25 minutes (it could have been shorter) after they returned the child was observed by the mother to be in extreme difficulties and

probably dead then, but as the Judge observed in his summing up, the evidence about the condition of the child when they returned was very sparse. The pathologist, Dr Samuel Chan, who carried out the post mortem examination of the child, was of the opinion that death would have followed about 5 to 10 minutes after injuries were sustained.

The evidence of Dr Chan was that Sandy had suffered four broken ribs, together with damage to his heart and liver, so it seems probable he was dead by the time the two women first saw him, but of course they were not to know that. Apparently death would have resulted from internal bleeding.

The death of Sandy, who had suffered the injuries just described, called for a homicide investigation by the Police. A team went to Waitotara in the afternoon of the next day, 6 October, headed by Detective Senior Sergeant Scott. The three persons occupying the house on the day of Sandy's death were Raeone Wirihana-Tawake (child's mother), Whetu Curry and Ivan Curry and they were interviewed by individual members of the Police team. Constable Kerrisk was first instructed to interview Ivan Curry as a witness and not as a possible offender. Constable Kerrisk confirms that before he left Wanganui he was deployed by his superior to carry out the interview with Ivan Curry and he understood then Ivan suffered from hearing disabilities and had later called for an interpreter. The conduct of two interviews by Constable Kerrisk resulting in admissions is at the heart of this investigation and will be examined in some detail hereafter. The first interview was conducted in a school room at Waitotara by Constable Kerrisk without the assistance of an interpreter for the deaf. The second interview was conducted some hours later at the Wanganui Police Station. This second interview conducted in the Wanganui Police Station by Constable Kerrisk with the assistance of a trained teacher of the deaf was ultimately ruled admissible by the Court of Appeal and Ivan Curry faced a trial for murder. The Court of Appeal decision is important and is dealt with in greater detail hereafter. On 3 August 1990, after a trial lasting two weeks, he was acquitted by the jury of both murder and manslaughter, which

latter charge also went to the jury. In other words, by the jury's verdict he was exonerated of all blame.

Within the fact pattern the Police investigation was complicated because the person who became a suspect, and had been alone in the house at the probable time of this death, was profoundly deaf. However, after a lengthy trial process, in which Mr Curry's deafness was a central issue throughout, he was acquitted by a jury. The case engaged the interest of Mr Keith Hunter and he was the author of the television programme which was broadcast on Television One resulting in a reference to this Authority to report.

BACKGROUND

Having outlined briefly the facts and events which led to Ivan Curry being charged with murder it is appropriate to say this is a case which is most unusual, and for reasons that will become clear, raised difficult and complex issues in both fact and law. A charge of murder is dealt with in the justice system by trial before Judge and jury with the judgment of the Court being the jury's verdict of guilty or not guilty. It is not uncommon for there to be no formal written judgments of a Court in such cases other than occasional rulings on evidentiary, or other issues, that may have arisen. This is not such a case, and is testimony to the unusual features that emerged during the fairly long time lapse between the death of the 15 month old boy on 5 October 1988 and the Jury's verdict of not guilty to both charges on 3 August 1990.

There was a major pre-trial application before the trial Judge sitting alone in Auckland over 5 days on the question of admissibility into the evidence at the trial of statements made by Mr Curry to the Police investigating officer, Constable Kerrisk, and that resulted in a reserved judgment of the Judge occupying 55 pages. By that judgment the two statements, which were in effect confessions, taken from Mr Curry were ruled inadmissible as evidence in a trial. It is probable that if the statements had remained excluded the prosecution would have been dismissed pursuant to s.347 of the Crimes Act 1961 because there was not sufficient other evidence to support the Crown

case. There was an appeal to the Court of Appeal on behalf of the Crown over one of the two statements taken from Mr Curry, which succeeded, and the trial Judge's ruling was overturned and the statement containing admissions reinstated, which virtually ensured the case would proceed to a jury trial. The Court of Appeal judgment ruled the weight to be given that statement of admissions was a jury question under proper instruction from the trial Judge. I will need to return again to the Court of Appeal ruling.

Notwithstanding the Court of Appeal's judgment, because defence counsel argued new evidence had become available, a further three day hearing was conducted before the trial Judge sitting at Wellington for the purpose of reconsideration of the second statement, seeking its exclusion. That application by the defence was made to the trial Court at Wanganui on the day the jury trial was set to begin on 25 June 1990. The trial was delayed and the hearing of the further application occupied 3 more days, 10-12 July 1990, when extensive expert evidence was heard by the Judge and he delivered another lengthy judgment dated 13 July 1990 holding the evidence was admissible. See R v Curry 6 CRNZ 657. That judgment also deals with events up to the hearing of the application which began on 10 July. After the ruling the trial proper commenced on 23 July 1990 and proceeded to its conclusion.

The question of delay from date of arrest on 6 October 1988 to date of trial commencement on 23 July 1990 (a period of just over 21 months) will be addressed directly later in this report. However, the foregoing account is mentioned early in this report for three separate reasons. First, the necessity for three full scale Court hearings that took place in Auckland, Wellington (Court of Appeal) and Wellington (High Court) respectively, that entailed nine sitting days on the three separate occasions before commencement of the main trial, testifies of itself to the complexity of the legal and factual issues raised. Secondly, those hearings resulted in three lengthy and carefully considered judgments which ultimately ruled prosecution evidence was of sufficient strength to go to a jury. Thirdly, in the course of those hearings on admissibility of the evidence of admissions by Mr Curry to a

Police officer, no issue was ever raised of Police misconduct in the prosecution investigation in any shape or form. There was complaint of inexperience and even mishandling of the interviews, which will be addressed, but not straight misconduct. On the contrary, the President of the Court of Appeal specifically referred to that fact in that Court's judgment. The subject is also specifically referred to in the prior judgment of Mr Justice Neazor (11 December 1989) by which judgment the statements were excluded. It is to be remembered that throughout Mr Curry was represented by a senior member of the Criminal Bar, Mr M H W Lance QC (now a District Court Judge but will be referred to hereafter as Mr Lance, being his form of address at the time), and Mr C P Brosnahan, also an experienced lawyer in criminal cases.

"THE REMAND OF IVAN CURRY"

Earlier in this report the programme was described as a docu-drama because it contains elements of straight documentary but the points the author wished to highlight and illustrate for dramatic impact are recreated. The dramatic segments of the programme are played by professional actors excepting Ivan Curry himself, and the interpreters or signers, who performed that function in the Court trial and communicate with Ivan by use of sign language. Ivan Curry plays his part in the documentary with considerable poise and obvious understanding of his role in the dramatic sequences, and also when he is the subject of a straight interview. For example through his signer he was able to give a lucid account of the first interview by Constable Kerrisk making allegations of overbearing and threatening conduct by one Police officer, although he stopped short of alleging actual violence, stating the blows aimed at him missed. It is appropriate to state here that Ivan Curry never once went into the witness box either in the two pre-trial hearings in the High Court, or at the main trial. It is permissible for an accused in a pre-trial hearing for the purpose of ruling on confessions, which takes place in the absence of the jury, to go into the witness box and give evidence relevant to the application on his behalf with limitations on what questions he may be asked in cross-examination, and then for him not to give evidence at his

trial before the jury. It also should be mentioned that neither did his counsel at the pre-trial hearings, or in the main trial in cross-examination of Constable Kerrisk, put to him Ivan Curry's accusations made in the programme that he was threatened with violence. They knew of these accusations after briefing their client but made a tactical decision not to advance them and for sound reasons. Mr Brosnahan said, at interview for this report, he did not believe that Constable Kerrisk did threaten violence, reaching that conclusion from his prior knowledge of Constable Kerrisk as a good Police officer. Later in this report I return to this issue and offer a possible explanation. As stated, the consistent theme of the defence throughout pre-trial hearings and in the main trial was that Constable Kerrisk was inexperienced and did not properly communicate with Ivan Curry so that his alleged confessions were not reliable enough to be either put to the jury, or, eventually, to be accepted by the jury in the trial. It would seem by the jury's verdict the confession which went to them was rejected.

I think the programme is most accurately described as a documentary for the dramatic segments are faithful to the actual Court records. However, throughout the 64 minutes running time of the programme there is a regular narrative comment the central theme of which is direct criticism of the Police investigation in several respects that are nominated hereafter, and direct and implied criticism of a justice system that put Ivan Curry on trial for murder. The theme of the documentary is contained in this opening comment by way of overvoice:

> *"This film is an account of a police investigation into the death of a child, and the resulting arrest and prosecution for murder of a man who was innocent."*

By that downright statement as an opening comment the producer required from his audience an acceptance that Ivan Curry was innocent not because of the jury's verdict, but that he was so clearly innocent he should never have been put on trial at all. That important distinction was the central theme of the

programme. The use the programme makes of the jury's verdict of acquittal is to reinforce the message of the programme that he should never have been tried. The trial came about because of Police rigidity and incompetence in the investigation, and a justice system that was powerless to provide a remedy, was the programme's contention.

Treating the programme as a documentary I have no criticism, but subject to the comments I make below. It is a lucid example of television journalism which takes a very complex subject, shapes and condenses it to understandable issues of public interest. The overall approach is not disinterested investigation because it started from a given premise of absolute innocence. The central thrust of the programme is to level unambiguous criticism against Police conduct and less noticeable, but nevertheless powerfully present, is encoded criticism of the justice system that allows an innocent man to be put through such a terrifying experience over nearly two years as to be charged with murder. The programme is entitled 'The Remand of Ivan Curry' to focus attention on the time spent in custody awaiting trial, not the trial itself. Using the word 'remand' seems to be another way of emphasising he should never have been charged at all.

The subject is dealt with in a responsible manner but there are some questionable assertions in the narrative and by some persons interviewed. The documentary deals with the tragedy of a man it holds was wrongly accused of murder when the final denouement is that the death of the 15 month old baby was not in any way criminal but the result of an accident, through his wife, caused by panic and wrong emergency treatment brought about by agonising circumstances.

The programme is television journalism and had as its foundational fact the indisputably safe and secure position, a jury had acquitted the accused of criminal conduct. It also was not journalism that permitted the viewers to reach their own conclusions after a cool and detached exposure of the facts, but it was advocacy journalism aimed primarily at stirring viewers' indignation. This is a very different programme from the several docu-dramas which have been produced

in recent years in England by the BBC programme "Rough Justice" which have exposed injustices because accused were convicted, often through heinous Police conduct in tampering with evidence. The recent quashing of the convictions by the Lord Chief Justice of England sitting in the Court of Appeal and the freeing of the Darvell brothers, who had been convicted of a sex shop murder in June 1986 when they were in fact innocent, is an example. It was "Rough Justice" and the Justice group which brought to light the case of the Darvell brothers.

In this instance of Ivan Curry because he was acquitted by the jury within the justice system the programme was not really about the trial of Ivan Curry but about the remand of Ivan Curry to stand trial. As stated earlier, the acquittal by the jury is used to reinforce the proposition he should never have been placed on trial. In some ways it is paradoxical that there should be an attack upon a justice system in which an accused was acquitted.

I have had considerable correspondence with Mr Hunter for the purpose of this report, and I personally interviewed him. The totality of my investigation leaves me in no doubt at all about the sincerity of his motivations and views.

In an unusual case such as this one was, lasting nearly two years, it is possible to set about a review of conduct which exposes weaknesses in procedure and better ways of performing tasks. As outlined hereafter so it showed in this case. However, one central fact that must never be lost sight of is that the evidence of Ivan Curry's wife as to her acts that fateful morning of 5 October 1988 was never revealed in its full significance until she went into the witness box on the 4th day of the trial as a defence witness on 26 July 1990. I am satisfied the investigation has also shown that the true extent of her actions were only discovered by his defence team some three weeks before the trial and, as the defence are perfectly entitled to do in the adversarial trial procedure, did not reveal that evidence to the Police, or to Crown counsel. The prosecution only became fully aware of that evidence supporting innocence on the part of Ivan Curry as it unfolded from Mrs Curry as she was giving her evidence,

although the Crown Prosecutor had been told earlier in the trial Mrs Whetu Curry and a Mrs Lisa Duxfield would be giving evidence. The latter person will be referred to hereafter. Notwithstanding the foregoing, an important issue in this investigation is whether the Police ought to have discovered Mrs Curry's evidence earlier. That is specifically addressed below. However, the central point remains, the defence only discovered the full extent of Mrs Curry's actions that morning, about three weeks before the trial, and did not disclose the defence until after the Crown had closed its case, and the defence called its evidence. That is possible in the adversarial system described below. Concealment by the defence in a criminal trial is one of its legitimate weapons. Mr Lance in his final address to the jury had to spend time explaining why Whetu Curry had not prior to her evidence disclosed the extent of her actions on the child that morning.

Before turning to the precise complaints against the Police which can be extracted from the material, I feel bound to make the following observations on the television programme. Given that the programme was television journalism it nevertheless did not demonstrate any concessions, or a full understanding, of several relevant factors.

In this country, as in very many countries throughout the English speaking world that have adopted the common law of England, a criminal trial is governed by the adversary system. In an adversary trial the prosecution gathers all the relevant evidence which under our system is made available to the defence by way of a preliminary hearing (depositions) and discovery (disclosure of all relevant material) long before trial. The onus of proof of allegations of the commission of a crime rests on the Crown throughout and that is to a standard of proof beyond reasonable doubt. The task of the defence in the adversary system is to take the Crown's evidence and subject it to close critical scrutiny and expose its weaknesses and deficiencies so as to falsify it in the eyes of the jury. There is no obligation on the defence to call any witness or to produce any evidence. That applies to an accused himself, and he is not obliged to give any evidence, and at no stage did Ivan Curry take the witness box. That was his clear legal

entitlement. Moreover the defence is legally entitled to keep to itself any evidence it might call, or any defence to a charge it might advance, until it chooses to use it. The defence lawyers in this case, for legitimate tactical reasons, never disclosed that the defence was accidental death caused by Ivan Curry's wife until she went into the witness box. The first inklings in the trial of such a defence emerged in the cross-examination of Crown witnesses, but particularly Dr Chan, as Mr Lance conceded in the interview for the documentary. Also, it must be stated, there is no prohibition on the defence disclosing before or during trial to the prosecution a defence or evidence it intends to call. The straight adversarial system has its critics but that is the law of criminal procedure in this country and it is the one by which Ivan Curry was tried. It is also the system that gave him a complete acquittal in his first trial.

Arising out of the foregoing and probably the major point the documentary could have made and failed to make clear, is that New Zealand's highest Court in criminal appeals, the Court of Appeal, by its judgment, ruled that the confession of Ivan Curry that he had struck the child in the chest some three times on that morning was a jury question. Briefly, in a criminal trial the law is in the hands of the Judge but most importantly of all, the facts are for the jury. It is trial by jury and it is the jury who deliver the verdict after instruction by the Judge as to the law. In the first pre-trial hearing the trial Judge, after an appraisal conducted over five days, excluded the confessional statements made by Ivan Curry at both interviews of him. In the course of that hearing there was a thorough scrutiny of Police conduct and particularly that of Constable Kerrisk. There was equally considerable expert evidence of Ivan Curry's disabilities in communication. The Crown, and I mean to indicate at this stage the handling of the case was outside of direct Police control for they had effectively completed their role by production of evidence, elected by its then senior counsel, Mr P A Moran, to appeal that decision of the trial Judge to the Court of Appeal. Before the main trial Mr Moran was appointed a District Court Judge and the trial was conducted by Mr T C Brewer for the Crown. The Court of Appeal had before it the complete record

of the pre-trial hearing which took place in Auckland and heard legal argument when again any relevant matter of Police conduct would have been placed before the Court of Appeal by the defence lawyer. I quote from the Judgment of the Court of Appeal delivered by the President, Sir Robin Cooke:

> *"There is enough evidence available to the Crown in our view to justify leaving the issue of the reliability of the oral and written admissions to the jury. In essence the question of reliability reduces to the reliability of the oral admissions, for they were merely translated into the written document and, as we have already mentioned, the jury will realise that the written statement and the evidence of the oral admissions is very much under attack.*
>
> *With regard to the view of the Judge that the prejudicial effect of the evidence exceeds the probative value, we are respectfully unable to share that. Again the question reduces to one of reliability and again it is essentially a jury issue ....*
>
> *For these reasons we are compelled to think that the Judge went too far in this unusual and difficult case in excluding from the jury material which in the public interest should be available for consideration by a jury."*

The Court of Appeal ruled the admission obtained in all the relevant circumstances known then to the Court was a jury question which meant it went to the jury for them to decide whether basically to accept it or reject it. That strengthens the role of the jury in our system for the verdict is delivered with all available and admissible evidence before it. It gives confidence to the public in a jury verdict. There is in our legal system respect, even reverence, for a jury verdict. As a mechanism for decision in serious crime it occupies a paramount place. The Court of Appeal decision, by its wording as reproduced above, was making no other finding than there was sufficient evidence to go to the jury. Beyond that the Court of Appeal did not go. In making that Judgment the Court of Appeal would have understood the full significance of two interviews (the ruling excluding the first interview was not

challenged by the Crown) and how there might have been some connection between the first and second interviews. The Court of Appeal decision was the most crucial pre-trial ruling that ensured the prosecution of Ivan Curry would go to trial yet it received but a passing mention in the documentary.

One final observation on the Court of Appeal's decision. This programme was well researched and without question the significance of that decision would have been understood by the programme's producer. That there was virtually no reference to the effect of the decision in the programme must have been the choice of the producer and not by oversight.

The third matter I will content with mentioning only shortly. The documentary gave no recognition to the careful treatment the justice system of New Zealand gave to this case. There are problems and they will be faced, but it was at least worth a mention that the case was very unusual, and complex. As far as I could ascertain there was hardly a positive comment made in the documentary about a system that, in my view, worked properly with a satisfactory result. The starting point of the documentary was that Ivan Curry should never have been put on trial in the first place, but my investigation does not justify that proposition. The Crown in bringing the prosecution, with its plainly justified reasons on the available evidence, was simply not given a hearing in the documentary.

## THE COMPLAINTS

The complaints which I am about to identify arise out of the programme itself, and the letters addressed to the Ministers of Police and Justice and to Mr Justice Neazor, the trial Judge, by the author of the programme, Mr Keith Hunter, in the week before its showing. Since I have undertaken this enquiry Mr Hunter has supplied to me a list of his complaints but not all are relevant to my enquiry. It is important to note that Mr Ivan Curry himself had not lodged a complaint over Police conduct until he was interviewed by an investigator from my office. His complaint is that a punch was aimed at him in the first interview but it missed because he ducked. That is dealt with below.

In my view the specific complaints that can be extracted from the material fall into the following categories:

1. Deployment of Constable Kerrisk by Det. Snr Sgt Scott to interview Ivan Curry.
2. Failure of Detective Sutherland to investigate the evidence of Mrs Curry.
3. Failure to have stomach contents of deceased analysed.
4. Delay and bail.
5. Miscellaneous complaints about the investigation and trial, and other matters.

The complaint to the Minister of Police was about Police conduct in the investigation and the Minister therefore referred the complaint to this office. This Authority is empowered to carry out investigations into complaints against Police conduct and does not act outside its statutory powers. In the public interest, and so as far as possible to dispose effectively of the issues, I have interpreted my powers liberally and looked at matters and commented on them which perhaps strictly speaking may not be complaints against Police conduct. The issues of delay and bail and some of the miscellaneous matters raised may not be about Police conduct. Moreover, I think it is necessary to state quite firmly that it is not my function, and it has not been done, to use the Ivan Curry case to carry out a generalised enquiry into the criminal justice system of this country.

I mention that my investigating officer and I have carried out a full investigation of all relevant complaints drawn to my attention. We have interviewed counsel engaged on both sides, and Mr Justice Neazor has willingly made himself available to assist the investigation. He has very helpfully supplied a copy of his summing up to the jury. The Police officers whose conduct has been under direct surveillance have been interviewed. All Police files and the full Court records have been made available to me. As a result of the publicity three letters were received in this office and they have been replied to. One was from the National Foundation for the Deaf and that organisation has assisted us. Mr Hunter himself was seen by me and his further helpful input into the investigation is acknowledged. Mr Curry and his wife, Whetu, have also been interviewed.

For the sake of completeness, I mention that no formal hearing has taken place but it is not apt to describe the investigation I have carried out as having been done in secret. It has been an investigation but it has, I hope, been open and flexible.

Finally at the forefront of this investigation has been the welfare of Ivan Curry himself. I am not unaware of ethical and privacy considerations in respect of him and others in this investigation. After his acquittal Mr Hunter prepared his documentary with the co-operation of Mr & Mrs Curry and that has resulted in much public interest.

He has been acquitted by a jury and his ordeal is not to be added to any more than is absolutely necessary so as to dispose of the complaints that have been made largely on his behalf. For the protection of his privacy, and that of others, I have as a policy not mentioned some matters that have come to my attention in the course of the investigation. Differing opinions have been expressed by persons interviewed for this report about issues that arose during my enquiries, and about the trial, and some have deliberately not found their way into the report. These matters were treated by me as opinions only, which do not affect the relevant facts. I do not believe these omissions have in any way affected the serviceability of this report primarily concerned with Police conduct.

Finally, on these topics, the mother of the deceased, Mrs Raeone Wirihana-Tawake, agreed to be interviewed by my investigator and also her two sisters, Mrs Lynette Guilford and Mrs Raewyn Hurley. I understand they were all approached by Mr Hunter to take part in the documentary but the Whanau made a deliberate decision not to become involved. All three sisters of Mrs Whetu Curry confirmed they had never been told by Whetu of the extent of her actions in relation to Sandy on the morning of 5 October 1988 and the first they knew of her evidence that she had in fact administered adult CPR, as set out hereafter, was when they read about it in the newspapers reporting the conduct of the trial. Mrs Wirihana-Tawake had been called as a Crown witness some days before Whetu Curry went into the witness box for the defence, but no questions were asked of her which would have disclosed what Whetu had

done. The documentary has created further stress within that side of the family and in particular for the deceased's mother, Mrs Raeone Wirihana-Tawake, who had wished to put the whole tragic episode behind her.

1. Deployment of Constable Kerrisk to Interview Ivan Curry

The two interviews carried out by Constable Kerrisk on the afternoon and evening of 6 October is one of the central criticisms of Police conduct arising out of the documentary. It is as well to state explicitly the conduct that is the issue here is that of Det. Snr Sgt Scott, who was the Police officer in charge of the homicide enquiry. It is his conduct and competence that seemed to be under criticism. This complaint encompasses the issue whether Ivan Curry should have faced trial at all.

At the date of the interview Constable Kerrisk had been in the Police force for seven years and was working in the Criminal Investigation Branch where he had been for six or seven months on enquiry work, and had completed a detective's induction course prior to interviewing Ivan Curry. He was not the most junior officer who went in the team to Waitotara on the afternoon of 6 October but he was the most junior officer detailed to carry out interviews. His experience at that date included work on two previous homicide enquiries which included the actual arrest of a suspect who faced trial. He was regarded by his superiors as a capable young officer with some experience in homicide enquiries.

I now focus on the afternoon of 6 October 1988 being the day after Sandy had died. The post mortem examination of the body by Dr Chan began at 10.30am that day and was completed by 2pm. Dr Chan had found external bruises on the child's body and on the internal examination injuries in the heart and liver. The three injuries to the heart caused bleeding which was the cause of death. Dr Chan said the external bruises were less than a day old on the chest and consistent with knuckle marks. The marks indicated more than one blow, which he described as punches, and there could have been two or three. His view was

that death would have occurred within a few minutes of sustaining the injuries.

When Constable Kerrisk set out for Waitotara, having been detailed to interview Ivan Curry, he said his knowledge was basically that the child had sustained chest injuries and the nature of the injuries disclosed violence. He also said before leaving Wanganui he knew that his interviewee had hearing difficulties and that he was to interview him as a possible witness, not as a suspect. Although at the very first knowledge of the death the Police thought it might have been entirely innocent, such as a cot death, by the time the Police team departed for Waitotara it was pursuant to a homicide enquiry. It is as well to deal here with a conflict as a result of investigations. Constable Kerrisk is firm that he knew he had been detailed to interview a deaf person before leaving for Waitotara, yet Det. Sgt Scott says he himself did not know of this and would not have mentioned it at the briefing. I think this is a conflict of importance. I do not think it unreasonable to hold if Constable Kerrisk knew of the hearing disability of one of the persons, then so should his superior officer have known. That he did not know may have contributed to the error of assigning Constable Kerrisk to interview Ivan Curry.

There were conducted by Constable Kerrisk two separate interviews at two different venues. Constable Kerrisk had no material prior experience of communicating with deaf people.

The first interview of Ivan took place in the Waitotara School and began at about 3.35pm. Before the interview began Constable Kerrisk had telephoned the Wanganui Police Station requesting that an interpreter be obtained from the Hearing Association. Constable Kerrisk commenced the interview with Ivan at the school at 3.35pm and it concluded at 4.59pm. This interview was conducted by Constable Kerrisk communicating himself with Ivan, without any professional assistance such as that of a qualified sign language expert. The two were most of the time alone in the school although Det. Sgt Scott, the officer in charge, said he looked in from time to time but as

the interview was apparently proceeding satisfactorily he felt no need to intervene. Constable Kerrisk said his first interview of Ivan Curry was being supervised by Detective Cunningham who also looked in at the interview without directing or participating in it. Again there is another discrepancy. Constable Kerrisk has no recall of observing Det. Sgt Scott looking in when he was interviewing Ivan Curry but Det. Sgt Scott said he did. It is possible they are both right, but the inconsistency does not require resolution.

Constable Kerrisk adopted the procedure of recording answers of Ivan to questions put to him. The record of the answers suggests there was a meaningful level of communication between them. At first Ivan gave exculpatory answers but on more insistent questioning from Constable Kerrisk he made admissions of punching Sandy three times in the chest. Constable Kerrisk categorically denied at interview with one of my officers that he or anyone else had ever verbally or physically threatened Ivan Curry by feinting or prodding him or in any other way. As stated, these allegations were never put to Constable Kerrisk in any Courtroom.

The second interview took place in the Wanganui Police Station after the interpreter, Mr J W Abernethy, arrived. In the first pre-trial hearing his qualifications as an interpreter able to communicate with a pre-lingually deaf person were not challenged but doubt was cast on the reliability of the product of the interview. It is worth mentioning that Mr Abernethy had had prior contact with Mr Curry having visited his home in his capacity as an itinerant teacher of the deaf. He had met Ivan Curry on 3 or 4 occasions over a period of 3 months. In short he was no stranger to Ivan. Constable Kerrisk gave evidence in the first hearing that took place in Auckland how, with the interpreter's help, he began taking a written statement from Ivan Curry. The interview began at 6pm and lasted until 7.15pm when it ceased because Mr Abernethy had an engagement elsewhere. It recommenced at 9.30pm and concluded at 10.44pm. That statement in writing was admitted in evidence at the trial together with other oral admissions that Ivan had struck the child in the chest.

Constable Kerrisk had, for both interviews, given the usual caution to Ivan that he was not obliged to make statements and if he did they would be used in evidence at a trial. Whether Ivan understood sufficiently the meaning of the caution were pre-trial, and for the second interview, appeal court issues. The statements of the first interview were entirely excluded but as stated, the written and oral admissions of the second interview were admitted at his trial.

The material issue of the complaint is not concerned with admissibility of statements in a trial for that is now history, but whether there was demonstrated by the officer in charge, Det. Sgt Scott, a failure to adopt professional Police standards, by deploying a junior and inexperienced officer to interview the prime suspect who suffered from pre-lingual deafness. The theme consistently advanced by the defence lawyers to support their proposition that the statements taken by Constable Kerrisk were unreliable and ought to be excluded was that Constable Kerrisk had failed to communicate, not that he was simply inexperienced. In the programme there was criticism that Det. Sgt Scott had not been present at the interviews so as to supervise Constable Kerrisk. Mr Lance said he had been surprised to learn of Det. Sgt Scott's occasional presence at the interviews. Mr Lance said to me that he knew Detective Cunningham had come into the interviews being conducted by Constable Kerrisk.

Det. Sgt Scott, when interviewed by us, conceded he never spent any material time in the interview but when he looked in he found a normal interview but with the acknowledged problem of communication. Det. Sgt Scott was not called at any stage of any hearings about the interviews.

I must assess the validity of the complaint that essentially Constable Kerrisk was too junior and inexperienced to be deployed to interview Ivan Curry, and in any event he was not properly supervised. For the purpose of clarity I note that the attack on the admissions in the trial process was principally inability to communicate adequately. The complaint now seems to be inexperience on the part of the interviewing officer.

I deal first with the complaint relating to Constable Kerrisk's inexperience alone. I mean by that to exclude inexperience for Police interrogation of a profoundly deaf person because that clearly might apply to a very large number of Police officers of whatever age or experience. In the course of the interview with Mr Lance which was included in the programme he said this:

> *"What they did was to take the most junior officer they had out there, a person who was in the uniform branch but had recently been seconded to the CIB, and they directed him off to interview the most difficult person that was there to be seen. Now that was just plain stupidity."*

That is strong criticism, perhaps the strongest and most direct contained in the whole documentary, and I think from the viewpoint of an ordinary person watching the programme, would have had the most telling impact about wrongful Police procedure and aroused indignation. The issue must therefore be faced squarely.

I do not have any doubt that it was an error of judgment on the part of the Detective in charge of the investigation to have deployed Constable Kerrisk as the interviewer of Ivan Curry. He was not the most junior officer outright in the Police team but he was a junior. The more experienced an officer the better he should be able to cope with the undeniable difficulty of interviewing a profoundly deaf person in a homicide enquiry. It is also true that Ivan Curry as the person alone in the home with the child at time of death was probably the prime suspect, even if at first he might have been thought of as a witness. If a more experienced officer had been given the task of interviewing Ivan Curry he might have assessed immediately a one to one interview with a profoundly deaf person without the crucial assistance from an interpreter should not take place. Furthermore, there was a Detective A R Harrod (now deceased) in the Police team that went to Waitotara that day and he knew the family and had had prior dealings with Ivan Curry himself. He should have been detailed to interview Ivan Curry.

Having passed the foregoing comments, in fairness I would now make other observations. Any homicide enquiry is always attended by tension, especially at the beginning, when the issues are usually anything but clear. Quick decisions must be made and Ivan Curry was possibly only a witness.

There are more substantial points that can be made. Inexperience alone, on the part of Constable Kerrisk, is not sufficient to brand Det. Sgt Scott's decision as anything worse than lack of judgment. An experienced officer may have conducted the first interview at Waitotara School better (or not undertaken it at all), but it must also be said the Constable's conduct of the second interview was criticised on the grounds of the failure to get through to Ivan Curry by reason of his disabilities. In the trial process there was not an attack on the ground of deployment alone. The inexperience argument was not advanced alone to Mr Justice Neazor, and Sir Robin Cooke said in the Court of Appeal judgment:

> *"One must agree also with Mr Brosnahan who stated with some emphasis that no criticism is made of the Police .... The theme that there is no criticism of the Police is endorsed by the Judge in his observations in his main judgment."*

If the inexperience of Constable Kerrisk emerged in the first interview the system dealt with that and the interview was excluded, never to be used in a trial. However, having deployed Constable Kerrisk to interview I think there was probably lack of adequate supervision, particularly for the first interview.

Finally, it also must be said, Constable Kerrisk was not all that inexperienced. At the time he was aged 26 years and had been in the force seven years and involved in two prior homicide enquiries in which he had made the arrest in one. Inexperienced or not on this occasion, with a very much more than usual close scrutiny of Police conduct by one High Court and three Court of Appeal Judges, his conduct did not merit any kind of judicial rebuke and in fact the opposite. Moreover the

comment from the Court of Appeal judgment reproduced above would have embraced all Police decisions, including Det. Sgt Scott's to deploy Constable Kerrisk as he did.

2. Failure of Detective Sutherland to investigate the evidence of Mrs Curry

I now wish to concentrate on an issue raised earlier in this report and it is when, how and to whom, Mrs Whetu Curry revealed that she had applied adult cardiopulmonary resuscitation (CPR) to Sandy's chest when she and her sister found Sandy in a parlous condition after they had returned home. In the trial this evidence of Mrs Curry apparently had a dramatic effect when it was given, and it seems a reasonable supposition it might have been very influential evidence leading to Ivan Curry's acquittal.

Some preliminary statement on CPR might be helpful. CPR is basically applying rhythmic pressure to the chest of the distressed person so as to encourage resumption of breathing and heart action, if they have stopped. Degree of pressure is obviously closely related to the type of patient and some relevant factors are size, age, condition, appearance of distress etc. The application of CPR to a baby of 15 months is quite different in degree of pressure to that applied to the chest of an adult. Generally speaking for babies it is essentially a two finger application using comparatively little pressure. In an adult sufficient pressure to depress the chest 1 1/2 to 2 inches is required; in an infant a movement of only 1/2 to 1 inch is sufficient. Much would depend upon the knowledge and training of the person applying CPR.

In a statement given by Mrs Curry on 6 October 1988, from which her deposition was prepared (for reasons which I need not explore Mrs Curry was not called by the Crown), Mrs Curry said she had given Sandy mouth to mouth resuscitation as he lay on the bed and pushed on his chest with two fingers four times. She said she did not do it very hard. At the trial of her husband, and it was apparently quite accurately reproduced in the documentary, Mrs Curry (played by an actor) demonstrated that she had, in circumstances of panic and emergency, with one

hand open and crossed over the other open hand, given Sandy adult CPR by pushing, or near falling, from a material height above him onto his chest. She said she did this six times. The documentary reproduction used a cushion from which her action caused air to almost explode outwards making a distinct sound. As stated, the documentary on this was quite an accurate reproduction on what had occurred at the trial. The real point is, when should the Police have known of this material change in evidence of Mrs Curry?

Mrs Curry had a friend, Mrs Lisa Duxfield, who was an older woman and acted as a kind of mentor for Mrs Curry. Mrs Duxfield, at interview for the purposes of this report, presented as a helpful, straightforward person who was able to give material background to this issue. It would seem that Mrs Duxfield first learned about 4-5 days after Sandy's death Mrs Curry had used considerable pressure that morning. It is not clear then whether the full implications of Mrs Curry's conduct was entirely appreciated by the women, but probably not because they did not then know the findings of the pathologist. There was no reason for Mrs Duxfield ever to have been interviewed by the Police, and apparently she was not, excepting as set out hereafter.

The focus shifts to Detective Mark Sutherland. At the date the enquiry at Waitotara commenced, on 6 October 1988, Det. Sutherland was on leave and not himself involved in the investigation. His involvement began after Ivan Curry had appeared in Court and entered a not guilty plea requiring the Police then to prepare a file for trial. Basically Det. Sutherland's duties were to prepare the Police case for the depositions' hearing. The important part of that work is ensuring depositions are prepared from statements taken from witnesses and that those depositions are signed and the person advised of date of hearing. Essentially Det. Sutherland was the administrative manager of the prosecution file and not involved in active investigations.

For reasons set out hereafter the depositions hearing date of 22 December 1988 was shifted to 10 February 1989. It is not entirely clear what exactly motivated the two women to call on Det. Sutherland but it seems reasonable to infer Mrs Duxfield was concerned about the relevance of the acts of Mrs Curry on discovering Sandy's condition on 5 October and that those acts were materially different from what Mrs Curry had at first told the Police. When summing up to the jury the trial Judge said it was from Mrs Duxfield the idea of CPR being the possible cause (ie. of death) seems to have come; but he added there did not seem to be any suggestion Mrs Duxfield had any ulterior motive in making that suggestion of the possibility to Mrs Curry.

At all events, and seemingly at the instigation of Mrs Duxfield, the two women called on Det. Sutherland. As stated by Det. Sutherland under cross-examination in Court, no note was taken of what passed between them at that meeting and even the exact date it took place is not fixed. However, there is general agreement between Mrs Duxfield and Det. Sutherland it was shortly before 10 February, the depositions date, and probably at the end of January or beginning of February 1989. The documentary stated "a week after the child died" and this would appear not to be correct. This is what Whetu Curry said in evidence but she may have been confused.

Now more than 3 1/2 years after that meeting it is difficult to state with certainty what exactly took place but there is some agreement. It is now impossible to give an order to the subjects discussed, the emphasis placed on the different topics and the subtle nuances of the exchanges for they certainly play a part as will be observed. The meeting probably lasted about 15-20 minutes. I am satisfied that Mrs Duxfield acted as spokesperson for the women which may have affected Det. Sutherland's assessment of the importance and relevance of what he was being asked and told. Mrs Duxfield had had no involvement directly with the events of the morning of 5 October. The enquiry was made by the women of what the autopsy revealed as to the cause of death. They were told by Det. Sutherland the substance of the pathologist's report. Mrs Duxfield said the purpose of the visit was to ascertain the

cause of death identified by the autopsy. It seems Mrs Duxfield asked in a hypothetical way, she says without disclosing what Mrs Curry had told her earlier about the use of CPR; whether adult CPR could have caused the injuries revealed by the pathologist's report and she said Det. Sutherland said no. That was not a misleading reply in view of the pathologist's report itself and Ivan Curry's admissions for which at that stage there was no legal challenge. Detective Sutherland says he witnessed a demonstration by Mrs Curry of the CPR she had used and according to his version it was appropriate for a child and not adult CPR. Det. Sutherland states no-one at that interview suggested to him that adult CPR had in fact been used. Det. Sutherland has no recollection of the hypothetical situation being put to him as Mrs Duxfield said it was, as set out above, but he does recall that as the women were leaving Mrs Duxfield said to him that she knew of a child that had died as a result of the application of CPR. Det. Sutherland said he replied that this was not the case here as only child CPR had been applied and it could not have caused the injuries. Det. Sutherland stated there was no mention of adult CPR in a hypothetical or conditional sense. This aspect differs from Mrs Duxfield's recollection.

It is now quite impossible to state with confidence exactly what was said. Mrs Duxfield was, I think, cautious in what she was prepared to say to Det. Sutherland, conscious that she was uncertain what the possible consequences of full disclosure would mean for Mrs Curry and I think in so far as Mrs Curry was concerned she also wished to be cautious for the same reason. In the documentary which dramatised her answers in the trial she said she was concerned others would lay blame on her, but particularly her own family. It is to be recalled at no stage before the trial had she confided to the child's mother, or her two other sisters, what she had done. When giving evidence for the defence in the trial both Mrs Curry and Mrs Lisa Duxfield admitted neither had told Det. Sutherland that Whetu Curry had in fact administered adult CPR.

I now examine directly the complaint that Det. Sutherland as a Police officer did not actively pursue this line of enquiry, namely that the injuries could have been caused by Mrs Curry herself using a form of adult CPR. It is difficult and the standard to be applied in examining Det. Sutherland's conduct must be a reasonable one taking into account the circumstances at the time and not to impose an unduly high standard looking back at the event.

I think there are some areas in which criticism can be made of Det. Sutherland's conduct on that occasion. Mrs Curry's call at the station could not have been categorised properly as a kind of routine enquiry by a relation to inform herself of the progress of a case against her husband. Det. Sutherland would have known that the death occurred in Mrs Curry's own home, and whilst she was absent from it for only a short time. Also it was Mrs Curry with her sister that virtually simultaneously discovered the then apparently lifeless body of Sandy. It is not possible to be certain, as stated above, but I think overall the enquiry had a much sharper focus than about the cause of injury which brought about death of the child and the application of child CPR by Mrs Curry. I think Det. Sutherland treated the call by the women as a routine relative enquiry. He made no note of the interview which, if done, would at least have fixed the date, and if note taking had been undertaken it would naturally have led to a record of content of the interview. The documentary of Mr Hunter in which there was a dramatisation from the trial of the cross-examination by Mr Lance of Det. Sutherland on this issue was telling, and as a criticism soundly based.

I do not believe it is an unreasonably high standard to impose on an experienced Detective to say he should have questioned first himself as to the real motive of the enquiry by these women and if he had done that I think it would have led him to interrogate them more closely as to exactly what they were there for, and what was behind their enquiries.

Even if he had done all that and uncovered Mrs Curry's evidence as it was given at the trial that does not mean the prosecution would have been there and then stopped. It does mean the prosecution would have been better prepared at the trial to deal with the unquestioned surprise element the defence were able to use in the adversarial procedure. Furthermore it was a separate issue from the confessions and it is not uncommon for there to be two possible causes of death to go to the jury.

3. Failure to have stomach contents of deceased analysed

The failure nominated in the heading was for the purposes of the trial in July 1990. As the subsequent account of events discloses, those stomach contents were scientifically analysed and produced a negative result.

It is necessary to recap very briefly some of the facts already mentioned. The date of death was Monday 5 October 1988. The post mortem examination by Dr Samuel Chan, at that time a pathologist employed at the Wanganui Hospital, was carried out the next day, 6 October. Dr Chan found the injuries to the body of the deceased child which have already been referred to. He concluded that the cause of death was as a result of those injuries. The central purpose of such a post mortem was to discover cause of death.

To deal with this aspect of the complaint of Mr Hunter it is necessary to divide the issues into two parts. The first part is to deal with the issue up to and including the trial and the second part is to deal with the events that have occurred since trial and basically arise out of Mr Hunter's further investigations.

I turn to the first part and begin by dealing immediately with a matter that arises mostly out of my investigations and it concerns strictly speaking Police conduct and therefore is squarely within my jurisdiction. It is standard Police practice to attend post mortem examinations being carried out to establish the cause of death as revealed by the circumstances of Sandy's death. The reasons are too obvious to mention. The Police possibly at first thought Sandy's death

was a cot death but that does not excuse non-attendance at the post mortem. Det. Sgt Scott was Officer-in-Charge of the investigation and he was at fault in not attending the post mortem examination carried out by Dr Chan. He conceded that when interviewed and that was included in the programme. There was a Police presence at the examination occasioned by Dr Chan calling the Police in as suspicious and relevant evidence emerged in the course of his examination.

Dr Chan was called to give his evidence on two occasions, the first for the pre-trial hearing conducted in Auckland in October 1989. He was then quite extensively cross-examined by Mr Lance but not about the stomach and its contents. Dr Chan again gave evidence at the main trial over two days on 24 and 25 July 1990. He was again extensively cross-examined by Mr Lance and he established that the contents of the stomach were unusual because of its pinkish colour which could have come from something Sandy ingested. Dr Chan conceded he did not keep any sample of the contents and that no analysis was made of that material. No direct mention was made in the evidence of the trial that the stomach and its contents had been mislaid or possibly destroyed. However this state of affairs was known to the defence because Mr Lance had been advised before the trial in June 1990 that the stomach contents had not been analysed or retained.

It was quite properly an issue at the trial and defence counsel was correct in pursuing it and criticising the Crown case for the failure to have the stomach contents analysed. It was important to the defence case that it be established with some credibility that Sandy had been in a parlous physical condition when found by the two women for a reason other than an attack by Ivan Curry. There had to be a credible justification for Whetu Curry needing to revive him at all. The defence wished to pursue the line of enquiry that Sandy on that morning may have consumed something that might have poisoned him. However, failure to analyse an organ or its contents is usually in the realm of the pathologist and not the Police to direct what ought to be done. Nevertheless there may be circumstances when the obligation is on the Police to direct further analysis.

There was no particular reason to suspect poison as a cause of unconsciousness or death in this case.

I turn now to the second part and this arises directly out of Mr Hunter's investigations. He has provided me with correspondence between himself and Dr Chan and the latter was interviewed on tape by Mr Hunter. These exchanges took place in 1991, about a year after the trial. At the trial Dr Chan was not asked specifically where the stomach and its contents were but he agreed he had not carried out any analysis on them. In June 1991 Dr Chan discovered, to his surprise, the stomach and its contents in a jar at the hospital mortuary identified as those of Sandy. It was sent to the DSIR for testing which reported no significant drugs or poisons were detected in the stomach contents. Mr Hunter raises the possibility that the stomach found and so labelled may not be the stomach of Sandy. He suggested DNA testing could resolve the identity question but that procedure is intrusive and unless absolutely necessary for a compelling reason should not be undertaken. Such a reason does not now exist.

After the trial Mr Hunter has uncovered some anomalies in procedure and in so far as Det. Sgt Scott was wrong in not attending the post mortem I have said that. I must make a decision where to draw the line and examine the point of continued investigation of events arising after the trial. I am not competent nor empowered to investigate proper post mortem examination procedures and therefore pass no more observations. In my judgment no useful purpose is met by continuing to rake over these events as the child is deceased and the person accused of his death acquitted.

## 4. Delay and Bail

Delay and bail for an accused person are inextricably bound together and will be dealt with as such. This strictly speaking is not a complaint against Police directly but was an underlying theme in the documentary as a whole. If a person accused of a crime is granted bail instead of remaining in

custody then the personal effects, and consequences of the delay are ameliorated.

I deal first with delay. The law's delay is renowned, and it is possibly one of the most difficult subjects either to avoid, or to distribute blame once it has occurred. It is not possible to generalise on how long it should take to bring a prosecution to trial of the seriousness of a murder charge.

Every single case is unique. Initially the time ball is unquestionably in the hands of the prosecution after arrest of a suspect. The prosecution has charge of progress if not exclusively, then nearly so, until the preliminary hearing at depositions in the District Court. Up to the depositions hearing the file is primarily the responsibility of the Police. If the decision at that hearing is to commit to the High Court for trial, which it was in this case, then the progress of the case passes out of the hands of the Police with the prosecution henceforth in the hands of the Crown Solicitor who prepares the indictment for presentation in the High Court. It is important to emphasise that the offence charged in the indictment is the responsibility of the Crown Solicitor who not infrequently after review of the Police prosecution file will change the original charge. An indictment is simply a formal method of accusing a person of a crime. In this case the Crown Solicitor, at that stage Mr P A Moran of Wanganui, laid an indictment charging murder.

If there are no unusual events or complicating issues in the case (for example multiple accused or multiple counts) then from arrest to deposition, the period of prime Police responsibility, the lapse of time might reasonably be from 3-4 months. With an arrest in October it would need speedy Police work for the depositions hearing to take place before the summer vacation at Christmas/New Year. This was achieved in this case and the depositions hearing was set for 22 December 1988 but had to be postponed because Mr Lance for the defence was unavailable. The depositions hearing took place at Wanganui District Court on 10 February 1989 which does not suggest any delay caused by the Police handling of the investigation and prosecution. After the depositions hearing,

which in this case resulted in committal to the High Court on the murder charge, control of the case for both prosecution and defence effectively passes into the hands of the legal profession. I do not find any reason to criticise the Police for delay.

It must be faced that a lapse of time of nearly 22 months from arrest to trial, or a lapse of time of 17 months from depositions hearing to trial is an unacceptably long delay unless there are most unusual circumstances. The proper time in examining delay is the 17 month period. I will now as briefly as possible mention some of those circumstances that contributed to what I find are unusual circumstances which explain the delay.

The first question to ask is, apart from the particular circumstances of the case, could the Court system accommodate a hearing whenever the lawyers on both sides were satisfied it was ready for trial? The answer is firmly yes. There was no backlog in the system, unavailability of courtrooms, or a High Court Judge to conduct the trial in Wanganui. The Court system itself was not responsible for any delay. The only qualification to that is High Court trials in Wanganui take place at sessions and at one session in May 1989 the trial was not reached. That is a very ordinary occurrence.

This report examines the causes of delay in the 17 month period. Once depositions were taken the prime target of the defence lawyers was to have the two separate admissions of Ivan Curry excluded. Without those admissions the Crown had very little evidence and if excluded as a matter of law the Crown could hardly have resisted an application pursuant to s.347 of the Crimes Act to dismiss the charge. A great deal of time and effort had to be expended on both sides in the preparation of expert evidence on the true extent of Ivan Curry's ability to make admissions. It is a notorious fact that the assembling of busy professional men for a Court fixture is very time consuming, and at times frustrating. The first cause of delay was a dispute by some expert witnesses about payment of adequate fees to the experts. Because of that the trial date

of 21 August had to be abandoned. It would appear that the jury trial was set to commence at Wanganui on that date. It had even been set down for hearing in May 1989 but could not be reached at those sessions. It would appear the strategy of the defence lawyers at August 1989 was to challenge the admissibility of the confessions at a voir dire, which is a trial within a trial, but not in the presence of a jury. For the reasons given, the trial was adjourned and apparently the defence at that point decided the challenge to the confessions would be so lengthy that it was more conveniently dealt with at a separate pre-trial hearing, thereby avoiding serious jury inconvenience as well as providing other advantages such as appeal against the decision before the main trial.

The designated trial Judge, to meet the convenience of expert witnesses, agreed to travel himself to Auckland to conduct the first pre-trial hearing which lasted five days. That hearing took place on 16-20 October 1989 and a reserved decision of 55 pages was delivered on 11 December 1989. By that decision both confessions were excluded but that was not accepted by the Crown and an appeal was lodged with the Court of Appeal. This was a perfectly conventional step for the Crown to take in the trial process. The Court of Appeal heard the case quite speedily but there was the unavoidable delay caused by the summer vacation. The Court of Appeal gave judgment immediately following argument on 27 March 1990, restoring the second confession on the basis it was a jury question. The case was then set to proceed to trial.

There was another delay of four months during which time apparently the defence team carried out further investigations and mounted another application to exclude the then only admission on the grounds of new evidence. Again expert witnesses had to be assembled. A further hearing of three days took place in Wellington and the decision was made on 13 July 1990 and the trial commenced on 23 July 1990 in Wanganui.

A delay of 17 months is a long time by New Zealand standards which has an enviable reputation for fairly speedy disposal of all crime in its Courts. The delay resulted from the unusually

determined efforts on Ivan Curry's behalf by his lawyers to exclude the admissions. Those efforts were partially successful and reference has already been made to the complexity and novelty of the issues. Apart from the fact that Ivan Curry was in custody, which will be dealt with next under bail, the delay was in his interests not anybody else's.

To sum up on delay it was regrettable but for reasons dealt with in this report understandable. The Police were not responsible for any delay, and the 17 month period was in the interests of Ivan Curry himself.

I turn now to bail. Ivan Curry was arrested on 6 October 1988. He appeared first in the Wanganui District Court charged with murder on 7 October when a remand was sought to 10 October. Application was made for bail, but it was opposed by the Police and declined by the Court. Over the last 15 years or so, Courts have been more inclined to grant bail, even on charges as serious as murder. However, it is also a fact that with the greater willingness of Courts to grant bail there has been public disquiet reflected in some political agitation on the issue. There have been alarming cases of very serious crimes, including murder, being committed whilst an accused for another crime has been on bail. Parliament last year passed the Crimes Amendment Act (No. 2) 1991 (previously bail had largely been within the discretion of the Courts) which cuts down the Court's discretion on bail applications. That Act did not apply to Ivan Curry's application but the background is important. Even before the Amendment Judges were being very cautious in granting bail where the allegations are of violence, even in the face of not guilty pleas.

There were several Court appearances for Ivan Curry in October and November when each time he was remanded in custody. On 21 November 1988 Mr Curry was remanded to 22 December 1988 for the taking of depositions. On 24 November 1988 Mr Lance made an application to the High Court for bail. An application is able to be made to the High Court even though the proceedings are at that stage in the District Court. Such an application to the High Court is treated to all intents and purposes as a fresh

application for bail, notwithstanding it has been declined in the District Court. That application came before Mr Justice Greig on 24 November with depositions still set for 22 December 1988 and bail was declined.

An opposed bail application takes place in the Judge's Chambers with the public excluded. This is for very sound reasons because both sides are able candidly, even bluntly, to put relevant issues to the Judge of which likelihood of offending whilst on bail, and answering the bail by appearance at the remand date are to the forefront. The fact that the charge is one of violence is of the utmost importance. I have examined a document which sets out the reasons for the Police opposition to bail, and they are such that a Judge was most likely to refuse bail. One of the reasons was in Ivan Curry's own interests. Furthermore, an important consideration on whether to grant bail or not is where the applicant would live whilst on remand because certainly there would be a reporting clause included if the decision was to grant bail. Apparently there was no available residence for Ivan Curry in the community and it is not entirely clear but no-one came forward on his behalf to offer a place to live. There is no written decision setting out reasons, which is quite usual, but bail was declined.

It is possible to renew applications for bail at various stages in the proceedings but another application was never made on his behalf, and Mr Lance mentioned reasons why in the documentary, of which no place to live was one. Moreover, I interpreted Mr Lance's comments in the film as not seeking to lay any blame on the Police or the Court system over delay or failure to grant bail and he has confirmed that to me when I interviewed him. At interview for this report Mr Lance said it was his recollection that Mr Justice Greig had indicated when declining bail on 24 November 1988, another application could be made if a suitable residence for Ivan Curry could be found.

It carries no greater weight than an observation at a great distance in time now, but I would have thought if a suitable residence had been available whereby Mr Curry could have been cared for by a person prepared to accept the responsibility of

ensuring he met any bail conditions, then bail most probably would have been granted, especially as time passed. It would appear the foundations for a successful bail application were never present. Bail applications were exclusively in the control of his lawyers and not in any way the responsibility of the Police.

Either on delay or bail applications I do not find any justified criticism of Police conduct or of the justice system.

## 5. Miscellaneous complaints about the investigation and Trial, and other matters

Under this heading I will deal with complaints that have come to my notice, one is mentioned elsewhere in this report, and give my findings or reasons why I decline to deal with them.

(a) Ivan Curry made allegations of physically intimidatory behaviour in the first interview conducted in the school room by Constable Kerrisk. It is fair to say Ivan made those allegations to his own counsel very early in the piece. They decided, as his counsel, after due consideration, not to raise those matters in the course of the several hearings, and therefore no Judge has had to rule upon them. As stated earlier, Ivan never himself gave evidence in any judicial hearing. Ivan repeated the allegations when interviewed for the documentary and they appeared therein. He did not then allege he was actually struck by a Police officer and still does not.

Ivan Curry has been interviewed by an investigating officer from the Authority and so has his wife, Whetu. The interview was carried out with the assistance of a properly trained interpreter and in the presence of several members of his family. Ivan was adamant that there were two Police officers present when he was interviewed at the school room. He said that on the programme and repeated it to my investigating officer. He

maintains one of them had a moustache and at the time Det. Sgt Scott had one but it could not have been him. Constable Kerrisk, at interview, maintains he conducted that interview largely alone, although he says Det. Cunningham came into the room on occasions. Whether there were one or two officers present when the alleged intimidatory behaviour took place cannot now be resolved.

Ivan said to my officer that one punch was aimed at his head but he avoided it landing by moving. He still does not say any blow actually landed on his body. Constable Kerrisk unreservedly denies the allegation and so does Det. Cunningham, in so far as he is able to give any evidence on the point. I cannot now resolve with complete satisfaction whether physical threats were made, and subject to observations I do make in the next paragraph, I must leave it there.

I do suggest, and no more than that, Ivan Curry could have been mistaken as to Constable Kerrisk's body movements if it was him. Constable Kerrisk has said he was communicating with Ivan by body signs and lip reading and it is at least conceivable that he gesticulated with his arms and hands to the extent Ivan, not unreasonably perhaps, thought they were physical threats. Also punching, as such, was part of the essence of the interview. It is also to be noted his counsel did not use the information in any way at a hearing, when they easily could have if they had thought it valid and of substance.

(b) Mr Hunter has alleged to me in writing that a jury member had a close familial relationship with a member of the Wanganui CIB office at the time of the trial and was also acquainted with the principal prosecution witness, a policeman. I say immediately it would be a category mistake to include this allegation as misconduct in regard to the Police, but it has been made to me and in a letter addressed to the trial Judge and for the sake of disposal it was investigated.

Mr Hunter stated he had interviewed the juror at her home and he recorded to me that she had said she knew Constable Kerrisk who had "been to dinner here".

Mr Hunter also stated the juror had a son-in-law working in the CIB during the course of the trial. That is correct as a fact but other than that there is no other allegation of anything in the nature of misconduct over the relationship. The son-in-law was not engaged in the enquiry.

The juror has been interviewed by the Authority's investigator and concedes she knows Constable Kerrisk and he says he knows of the juror, but both deny any social contact with each other, specifically both deny Constable Kerrisk has ever entered the home of the juror for dinner, or any other reason. The juror claimed she never told Mr Hunter Constable Kerrisk had ever "been to dinner here" and it seems he never has been. Mr Hunter on the other hand maintains that is what he was told. The dispute is not critical and is left as a conflict on a minor matter.

Finally, the juror was a member of the jury that unanimously acquitted Ivan Curry of both charges.

(c) One of the most startling assertions made in the programme was by a fellow prison inmate, also quite severely afflicted in speech, who said that Ivan Curry "didn't know about murder. One year later I told him." He said it was him who was able to communicate to Ivan that he was in prison for murdering the baby. In his version Ivan thought he was there for drunk driving. There was no corroboration at all for this assertion but nevertheless if true would disclose a grave situation.

By way of background, once a suspect is arrested and charged the Police no longer have access to a prisoner on remand in respect of the charge. He was represented by counsel from the time of his arrest and all further contact had to be through his counsel.

The state of an accused's knowledge of the charge is essential to enable him to instruct his counsel. There was never any question but that Ivan Curry could give instructions to his counsel. In short, he was always treated as fit to plead, which was at all stages, not guilty.

This assertion had to be investigated by me and was. I spoke with his senior counsel, Mr Lance, and he assured me he had many sessions with his client whilst he was in prison on remand and he was never in doubt Ivan Curry knew he was in prison at all times because he was charged in connection with the death of a child. Furthermore, Ivan Curry had been extensively examined by many experts directly concerned with his ability to understand and communicate for the purposes of evidence in the first voir dire in Auckland one year after his arrest. There was never a suggestion that for a year he was under a fundamental misapprehension as to why he was in prison. I regard all that as authoritatively disposing of the assertion. In my view the prison inmate's statements are completely unreliable and without foundation and I reject them.

(d) Mr Hunter, at interview and in writing to me, has made several complaints about Det. Sgt Scott's alleged prevarication throughout Mr Hunter's interview with him for the programme and that he failed to take a responsible attitude to the interview and thereby brought discredit upon the Police. I have viewed the full tape of the interview between Mr Hunter and Det. Sgt Scott and confine my remarks to the extent I believe Det. Sgt Scott was doing his best to answer Mr Hunter's questions. In any event, it is not a complaint I intend to explore further because I do not believe it is germane to my enquiry.

(e) Mr Hunter also makes complaints generally about the Police dealing secretly with the various sections of the media with the objective of subverting media attitudes by discrediting his programme, its message, himself, and Ivan Curry. I firmly state I will not attempt to explore that

issue because it would lead me into an inextricable mess, and would be a disadvantage to the overall value of this report.

## SUMMARY

I have endeavoured to condense lengthy and complex issues for the purposes of this report. So as to bring together the issues I summarise my principal findings on the reference.

1. I find the Police and the Crown acted properly in charging Ivan Curry as occurred. On the evidence available he should have faced trial so that all concerned, and the public, could have the assurance of a jury verdict.

2. For the reasons set out in the report no valid criticism could be made of the Police, or the justice system over delay, or bail.

3. The investigation by the Authority revealed some deficiencies in Police work which are identified in the report.

4. I would recommend that the 2 officers have this report brought to their attention and be given such counselling as the Commissioner believes appropriate.

5. Other issues are contained in Section 5 of this report.

J F Jeffries
POLICE COMPLAINTS AUTHORITY
4 September 1992