

Summary of key findings Hon Dr Robert Fisher QC

Key areas of concern (page 6):

1. Justice Binnie went beyond his mandate. He did not have authority to express any conclusion on the question of whether there were extraordinary circumstances such that compensation would be in interests of Justice. Nor was he invited to make any recommendation as to whether compensation should be paid. Those errors have been compounded by the publicity given to conclusions on matters which ought to have been for Cabinet alone to decide. (Note Binnie J has subsequently requested that those recommendations be deleted)
2. In assessing innocence, Binnie J made fundamental errors of principle.
3. In assessing misconduct by authorities, Binnie J has also made fundamental errors of principle
4. Correct principles should now be applied to the evidence afresh. That is not saying a fresh assessment would produce a different outcome. It is possible that it would vindicate Binnie Js conclusions
5. Binnie J criticised named individuals without giving them adequate opportunity to respond.

Finding of innocence (page 7):

- Instead of assessing each piece of evidence to see whether it increased or reduced the likelihood of innocence, and if so by how much, Binnie J discarded any item that was not individually proved on the balance of probabilities.
- Instead of considering the cumulative effect of all relevant items of evidence, he arrived at a provisional conclusion of innocence based on one item (luminol footprints) followed by a serial testing of that conclusion against others in turn.
- Instead of requiring David Bain to satisfy him on the balance of probabilities throughout the enquiry, he imposed an onus on the Crown wherever the Crown suggested a factual possibility inconsistent with innocence
- Instead of founding his conclusions exclusively upon the evidence available to him, he drew an inference adverse to the Crown in cases where, in his view, the Police ought to have gone further in its investigations.
- In addition:
 - He appeared to regard the jury acquittal as something that was relevant to the question whether David Bain had proved his innocence
 - He appeared to accept David's version of events without question except where it directly conflicted with other witnesses

- He relied on “innocent openness” defences to turn seemingly incriminating admissions or clues into points to support David’s genuineness and credibility.
- His decision to disregard any item of evidence that did not prove a subsidiary fact on the balance of probability was contrary to the law of NZ and to a proper understanding of the probability theory.
- Discarded were evidence of blood stains on David’s clothing, broken glasses, David’s fingerprints on the rifle, arguable shielding of part of the rifle, Robin’s motive, Robin’s mental stability, David’s post-event admissions, factors consistent with suicide, David’s admission that he heard Laniet gurgling, David’s gloves, and knowledge of the trigger key.
- The way in which Binnie J approached the cumulative significance of the evidence in its totality seriously skewed the exercise towards an innocence outcome which is contrary to the law of evidence in NZ when dealing with circumstantial evidence.
- Binnie J generously relied on background facts sourced from David Bain. (Paras 35 – 39 of Mr Fisher’s advice)
 - Everyone is agreed that the murders must have been committed by either Robin or David Bain. David is not an impartial source of evidence and the victims are not here to speak for themselves. Nor is there any living witness.
 - The conclusions must be based upon an analysis of the surrounding circumstances.
 - The way in which probabilities are assessed in circumstantial evidence is critical to David Bain’s case.
 - Logic and experience suggest that if a suspect has lied in denying his responsibility for the crime itself, he will scarcely shrink from lying about the details. For the purpose of drawing inferences from surrounding facts, most decision-makers will prefer sources other than the suspect.

Finding of serious wrongdoing by authorities (page 9):

- Note Binnie J has subsequently altered the report by removing his recommendations that compensation should be paid based on his assessment of what he considered to be the relevant extraordinary circumstances.
- Binnie J made errors of principle in determining which type of authority misconduct might qualify as relevant extraordinary circumstance in this case.
- The historical purpose of the ex gratia payment is to compensate the innocent, not to root out official misconduct. Condemning official misconduct should be reserved for those cases that are so bad they threaten the integrity of the judicial system. Planting evidence is a classic example. Overlooking a possible line of investigation is not.