IN THE SUPREME COURT OF NEW ZEALAND

SC 8/2007

BETWEEN **LAXMAN RAJAMANI**

Appellant

AND **THE QUEEN**

Respondent

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Hearing: 25 July 2007

Counsel GJ King, TJ Darby and C Milnes for the Appellant
JC Pike and KBF Hastie for the Respondent

CRIMINAL APPEAL

King Yes if it pleases the Court I appear together with my learned friends Mr Darby and Miss Milnes for the appellant.

Elias CJ Thank you Mr King, Mr Darby and Miss Milnes.

Pike May it please the Court I appear with Miss Hastie from the Crown Law Office for the respondent.

Elias CJ Thank you Mr Pike and Miss Hastie. Yes Mr King.

King Yes thank you Your Honour. This Court is undoubtedly aware leave to appeal has been granted in respect of four grounds – really three I suspect because grounds one and two both relate to the issue of the trial proceeding to verdict with only 10 jurors. Mr Darby will be addressing the Court in respect of that. I will be addressing the Court in respect of the two other grounds which relate to firstly provocation and secondly the hearsay evidence. We're really in the Court's hands of course as to how you wish to proceed but I would propose giving my submissions now in respect to provocation and hearsay and then Mr Darby in respect of the 10 jury point which is quite a distinct point of course.

Elias CJ Yes that's fine.

King Yes thank you. In the written submissions filed on behalf of the appellant a summary of the grounds of appeal is contained in the first several pages. In respect of the provocation ground there are fundamentally three propositions advanced on behalf of Mr Rajamani. The first one is that the learned trial Judge wrongly directed that the defence of provocation was not available to someone who acted deliberately and it's noted and obviously will be elaborated on that the concepts of deliberateness and intentional were somewhat interchangeably used in the course of both the summing up and in the written material that His Honour handed to the jury. The second issue relates to the concept of what it means to be deprived of the power of self-control and the submission on behalf of the appellant is that the learned Judge directed that what was required was a state that was really akin to automatism or certainly a higher threshold than has previously been considered appropriate. The third issue, and it's a discrete one and short, is that the trial Judge direction in respect of the hypothetical person's loss of power of self-control offended one of the fundamental principles from *Queen v Timoti* and that is it related the loss of self-control of the ordinary person to the extent of acting as this appellant actually acted, and it's the appellant's submission that on all of those basis say substantial miscarriage of justice has occurred. The starting point really of course is that provocation was effectively, and I think it was accepted by the Court of Appeal, the only real defence that was available to Mr Rajamani. He had advanced on his behalf at trial also defensive lack of intent, in fact lack of any intent requiring a complete acquittal; lack of murderous intent requiring a verdict of manslaughter and also provocation, but with the greatest of respect it was accepted and properly accepted that provocation was realistically the only flyer. So I don't propose unless it's required to do so, to take the Court through the background of the case. In my submission it's adequately set out in the material, certainly the Court of Appeal judgment accurately sets out and details the types of characteristics and so on that were relied on and there's certainly no dispute about the way the Court of Appeal encapsulated that, but it is fundamental I suppose to the appellant's case that there was a sufficient evidential basis for provocation to be left to the jury that his Honour was correct in allowing the cultural characteristic of Mr Rajamani to go before the jury as well. I don't understand that to be the subject of challenge

Elias CJ Well it's not really an issue and Mr Pike's made some comments about it but I don't understand it to be an issue.

King Certainly the Court of Appeal didn't say that was wrong and in my submission unless the Court requires then I'll certainly move straight into the provocation issues. The bulk of the directions that the learned Judge gave in respect of provocation set out in paragraphs 28 to 33 of the Court of Appeal judgment, which is to be found in tab 2, volume 1

of the casebook, pages 40 to 42, and I should also refer the Court as I've done in my written submissions that under tab 9 of volume 3, the last few pages, or the last two pages, we have the hand-outs that were provided to the jury by the learned Judge.

Tipping J Is there anything in them that would pass specific attention as opposed to the oral directions Mr King?

King Only Sir if you look at the very last page, page 333, when His Honour is taking the jury through the steps of murder. At step 2 culpable homicide we have as bullet point number 2, 'did Mr Rajamani do so intentionally or deliberately rather than accidentally'? So, and you'll see that in the bottom one 'murderous intents' we have 1 and 10 to cause death and 2 and 10 to cause bodily injury, talking about it as murderous intents, so it's really just an example Sir of how His Honour in the structure of his summing up interchanged the concepts of deliberateness and intentionally, and that obviously is in bullet point number 2 of step 2. That's really the only relevance. It's not suggested that there are other issues in respect of that.

Tipping J So that the word 'or' presumably is intended to signify 'that is'

King There's a distinction between

Tipping J That the two are equated. In other words it's not a distinction, it's an equation

King That's right Sir, indeed, yes they are interchangeable.

Tipping J Yes.

King Yes. Paragraph 27 of the Court of Appeal judgment, the Court accepted that the Judge had used the words deliberately as a synonym for 'intentionally' and the Court concluded that really that was something best avoided but held that in the context of this summing up as a whole the jury could not have been misled into the approach which the appellant sees as a real and substantial risk that in fact they were led into. Now if one actually looks at the summing up at para.48, which is at page 315 of volume 3, His Honour talks about the two types of murderous intent. The essential difference between the first and second types of intent is just this, 'the first is concerned with deliberate intentional killing, the second is concerned with injuring another person, deliberately taking the risk of killing while doing so'. Now it's clear that what His Honour was perhaps intending to convey, it's clear to lawyers I should say, and in the position of the appellant is that it wouldn't have been clear to a jury, is to really talk about the concept of premeditation which is often of course something that lay jurors are concerned about, but in my submission the interchangeability of the concepts of deliberateness and intentionally in the concept of describing the requisite murderous intents has a flow-on affect when

the jury is to consider the concept of provocation. It's the submission that by repeatedly telling the jury that provocation is not available to someone who acts deliberately that the effect was that the defence is taken away from the appellant and of course a jury only get to consider the concept of provocation once they are satisfied beyond reasonable doubt that the accused acted with the requisite murderous intent. So here we have the effect, the appellant submits, that the jury are told to be guilty of murder he has to have acted deliberately when if you get to that stage you then consider provocation, but provocation is not available to someone who acts deliberately.

Elias CJ Well isn't that the context that means that they can't logically have been the same in the jury's mind because the jury will have appreciated that it couldn't have gone past murder. It wouldn't have been necessary to deal with provocation if that was the total answer deliberately.

King In a case Your Honour where effectively the jury are also being directed that he lacked any intent at all, an argument advanced on the appellant that was never going to get any type of traction, then the jury may well have been of the view that the Judge was required to put defences to them that have just had no basis in reality, and in my submission although it's readily understandable by lawyers what His Honour was intending to convey, it's not something that a jury could be expected - a jury could well in my submission have been left with the overriding view that a person who acts deliberately. Now this point runs into the second one.

Tipping J Mr King just further to what the Chief Justice has put to you, at para.62 of the summing up the Judge used the word 'deliberately' in conjunction with the concept of deciding to kill.

King Yes Sir.

Tipping J Now doesn't that ameliorate the problem to some extent, or you'll say I'm sure that that's too subtle

King Yes and of course the very next line we have it again and acts on that intention.

Blanchard J But then a couple of lines, three lines further down, he's talking about 'considered hatred, resentment or frustration'

King Yes.

Blanchard J In relation to questions of self-control, so I think it's clear enough that he's using the word 'deliberately' there in a different way and he's done the same thing at para.55

King 55, yes Sir.

Blanchard J At the top of page 317 where the word ‘deliberate’ is used as a synonym for ‘calculated or reasoned’.

King Well in my submission the fact that he used ‘deliberate, calculated or reasoned way’ tends to show that they may be different things. A person who acts in a reasonable way; a person who acts in a calculated way; or a person who acts deliberately cannot avail themselves of the defence. But certainly para.55 is where the direction start and so we have the concept of deliberateness, and I’ve tried to summarise the particular directions in page 10 of my written submissions commencing at the paragraph that Your Honour has just referred to, para.55, ‘provocation is not available to a person who is motivated by anger or who acts out of revenge or in a deliberate calculated or reasoned way’. And my emphasis and I don’t know if the Judge emphasised that, but it submitted that those would have seen and appeared to the jury to be discrete in separate concepts.

Tipping J But this all follows from the introductory observations which are not challenged, and rightly not challenged, that refer to sudden and temporary loss of self-control, not the master of his mind and so on but I would have thought in that context, although it’s unfortunate I don’t disagree, that one can reasonably take it that the jury would have been understanding what this meant in the right way.

King Yes, well that of course was the view that the Court of Appeal took.

Tipping J Well one has to read this in a sort of a contextual way I would have thought Mr King. I’m not at all comfortable with it but it’s a question of whether it really would have put them astray.

King In my submission Sir, it wasn’t a momentary slip as such, it was something that was repeatedly emphasised. Of course it was

Blanchard J But counsel didn’t object after the summing up to it.

King No they didn’t Sir

Blanchard J And we have experienced counsel – three of them – and they didn’t hear it that way. Things look different when you see them in print.

King Indeed. I can’t answer that with respect Sir and I know what Your Honour means

Blanchard J I mean what I’m just putting to you is not a complete answer, I readily accept that.

King Yes.

Blanchard J Counsel sometimes don't hear things that perhaps they should have, but it did seem to me in this instance it is an indicator that as the Judge said, it may not have meant the same to listeners as it does when you are a reader.

King Or it may not seem the same to lawyers. It's difficult as a lawyer in a trial environment to put yourself in the shoes of the jury. The issue is not in my submission how we as lawyers interpret it or how the lawyers at the trial interpret it, the issue is did the jury appreciate the distinction, and it was a concept that was just repeatedly given throughout, including in the answers to questions by the jury during the course of deliberations where these passages were all repeated as I've set out. Now my submission if it was confined and one can look at each individual context and say well when it's first mentioned in para.55 that follows on from the introductory comments about sudden and temporary loss of self-control. Paragraph 62, well one could say that he deliberately decided to kill and acted on that intention, well that might have some distinction, then we go on and we have the jury retiring at 12.25pm. 3.05pm requested a transcript of what the Judge had said about provocation and again we have the concept being repeated, so it follows that if the accused deliberately decided to kill the deceased and acted on that intention, it could not be said that her death was provoked by loss of self-control. So my submission when one stands back and looks at the totality of the directions on deliberateness, the fact that His Honour does use **(coughing)** when talking about the requisite mens rea for murder, then there is the real and substantial risk that a jury held that provocation was not available to someone who acted with the requisite murderous intent.

Tipping J So I suppose you could say that the jury might not quite see the point, that it's only if you deliberately kill someone that you need provocation

King Yes.

Tipping J I mean that's putting it rather loosely but

King Yes, it's manslaughter or an accident.

Tipping J Well if you deliberately kill someone absent provocation it's murder beyond a shadow of doubt so it certainly is confusing, I agree with you.

Anderson J I think it might be ameliorated Mr King by the very first point made in the handout. 'If you're otherwise satisfied beyond reasonable doubt Mr Rajamani murdered the deceased' and then it goes on to deal with the provocation.

King I think the Judge with respect made it clear, you only get to consider provocation once you've got to the point of finding the accused had committed murder. However it's my submission Sir that the way that it was addressed there was considerable overlap and on the facts of this

case the jury would have concluded okay we go on to consider provocation but because he acted deliberately it doesn't apply in this case.

Anderson J The difficulty might be the reference to anger in 55 because provocation is always a matter of being angry.

King Well it's a matter of degree of course, absolutely, and he talks about it being an extreme state subsequently

Tipping J I think it's all these points together Mr King quite frankly

King Oh I would think so Sir

Tipping J If you're going to succeed it's probably going to be on that premise than any individual one as if it's still alive.

King Well

Tipping J I know you won't agree with that but I think your case comes if you like

King Of course.

Tipping J Because of the other two points.

King The combination of issues. The deliberateness as I started to say earlier, does actually flow into the second point and I'll finish unless there's any questions I think, the written submissions refer to all the various extracts and the Court of Appeal certainly took the view that a jury wouldn't have been misled by that and in my submission the Court of Appeal really should not have made that final conclusion. It is a real risk that a jury would have been misled by that, but the concept of acting deliberately is in my submission troublesome when one also considers it in the context of what does it actually mean for a person to have been deprived of the power of self-control, and fundamentally it's my submission that a person who is acting under an irresistible impulse or is unable to prevent themselves from doing it may in fact be acting deliberately but nevertheless be in a state where they have been deprived of the power of self-control. It's my submission that when one looks at the historical rationale for provocation it was put forward as a recognition of the frailties of the human condition and recognises that people can be compelled to do things under provocation that they wouldn't do otherwise. They can in fact lose their power of self-control.

Tipping J The problem as I see in your second point, and it's not a problem for you, that the issue as I see it Mr King is that ex-hypothesi you're going to be acting deliberately

King Yes.

Tipping J And the Judge seems to have at least arguably conveyed the impression that if you were acting deliberately, as if you had murderous intent, you somehow or other wouldn't have lost the power of self-control.

King By definition if you're acting in that way you haven't lost the power of self-control.

Tipping J Yes, that's an issue that I feel is a little difficult.

King Indeed, and I've set that out at para.25 of the written submissions Sir, page 11, where I've again recorded the particular directions to the jury. Paragraph 28 of the Court of Appeal judgment sets it out at page 41. 'To amount to evidence of provocation at law the conduct must lead to a sudden and temporary loss of self-control'. Well there's no debate about that at all, that's what it is. 'It must cause the person who kills to lose their ability to reason'.

Tipping J Well that's not right.

King Well that's right, with respect and I think Your Honour has made the point Sir, if you have lost your ability to reason, then presumably you're not acting with a murderous intent in the first place.

Tipping J Well exactly, I would think you must be automatic.

King It's automatism really that's my submission is that the state is being

Tipping J Well it's open to that construction anyway.

King He must be in a state where he is no longer the master of his own mind. Now that in itself is age old law - McGregor talks about that.

Elias CJ Old fashioned.

King But in this case we have it extended later on where His Honour says 'you must not be master of your own mind and conduct', so must not be master of your conduct, and in my submission there's a distinction there.

Tipping J Well the problem with conjoining that with ability to reason is that you would then be invited to construe that no longer the master of your own mind, is to have lost your mind.

King Exactly.

Tipping J As opposed not being able to control your mind. That's to me the crucial point there.

King Yes, must act instinctively, again in the context, individually that might pass muster, but in my submission when one actually looks at the totality of these directions, and of course the starting point is that the legislation says that it is a question of fact as to whether the accused has lost their power of self-control. So by putting all of these legal precepts on it, the issue perhaps couldn't be seen by the jury as being legal tests or matters of law rather than questions of fact. It's for a jury to decide in my submission what constitutes a loss of self-control and that obviously will vary in case to case. That loss of self-control must continue from the time – well there's no issue about that. So the totality of the directions are that he must have lost his ability to reason; he must be in a state where he no longer the master of his own mind and later on, conduct. He must act instinctively in an uncontrolled fashion. That loss of self-control must continue from the time of the provocation to the time of the killing. That doesn't really arise in this case because there wasn't suggestion of a cooling-off period. The appellant's case was that there had been a series of built-up events but it was the final act of the deceased telling him that she was leaving him for a

Tipping J Is there any precedent that your aware of in the precedent books or anything for summings-up or anything that you've seen in your wide experience Mr King that supports the view that provocation is not available to a person who is motivated by anger?

King I think

Tipping J I understand what the judgment is driving at

King Yes, he was trying to say just being angry is not enough

Tipping J Yes.

King And he

Tipping J But that's not what he said.

King No exactly, and no I'm not Sir but I suppose as a matter of common sense murders don't get committed by happy people.

Tipping J Well he later does say though doesn't he that loss of self-control is greater than merely getting angry.

King Yes, that's right, and I've set that out in para.26 of the written submissions. 'Could the effect have been to bring him to a state that he ceased to act rationally' – again reference to not acting rationally – 'and ceased to be master of his own mind and conduct'. Now that precludes

Tipping J What paragraph in the summing up is that Mr King?

King That is para.60 Sir, page 318.

Tipping J Thank you.

Blanchard J I'm not sure that the reference 'grand conduct' adds much because your conduct is directed by your mind.

King Again it denotes in my submission a completely automatistic act

Tipping J This is an extreme state. There's a sort of connotation through here of completely having lost it.

King Well that's my point Sir and again one takes it back to the historical rationale.

Tipping J Well in a sense, but that's not quite the law of provocation is it?

King No it's not, and it's a question of fact anyway, for a jury to decide.

Tipping J Well leaving that aside.

King Yes, no in my submission

Tipping J Provocation doesn't imply you've completely lost it, it implies you've done something that's murder but in circumstances where your murderous intent is as it were excused.

King Yes, now in my submission His Honour gets it right when he talks about the introductory comments, really the history of provocation, and this is at para.54 where His Honour talks really about the historical basis of it, 'The law requires all of us to exercise a reasonable degree of self-control or restraint over our emotions, however in certain circumstances it makes allowances for the frailties of human nature; it recognises that conduct whether by words or acts may provoke another to lose his self-control to the point where he is no longer able to restrain himself with the result that he kills that other person'. Now in my submission that historical rationale that His Honour tells them is absolutely correct, but when he gets in to defining what is required by state of self-control then we're not talking about someone who is no longer able to restrain themselves, we're talking about someone who is completely acting instinctively, acting automatistically in my submission. And again we have these same directions being repeated to the jury in the question that they asked. So during the course of the jury deliberations - this is set out at tab 9, volume 3 of the casebook, para.101, page 330 –'you need to ask yourself is it reasonably possible that one or other of the acts that you find proven could have caused him to lose his power of self-control in that way? Could the affect of those acts have been to bring him to a state whereon the 13th January in the morning he ceased to act rationally and ceased to be master of his

own mind and conduct. Again that is an extreme state; to lose the power of self-control is much greater than merely getting angry, even very angry'. And I'll put the quote there from *Adams* o*n Criminal* Law, paragraph 29 'for actual loss of self-control, it is necessary that the accused was unable to restrain himself or herself, but it has been held to be incorrect to suggest that there must have been "complete" loss of self-control to the extent that he really did not know what he was doing'. And in my submission that is a true statement of the law. It is consistent with the historical rationale for provocation in the very first place, but what we have on the totality of the directions by the Judge repeated during the course of the jury's deliberations in response to a direct question, we have the state being elevated. And again although it's been dealt with somewhat discretely, this relates back to the 'you can't be acting deliberately' as well of course which is the first point.

Tipping J Just remind me, what did the Court of Appeal say about this particular facet of the argument?

King Their view was that it did not overstate it and was consistent with I think they held *McGregor* - I'll just get it. Yes, *Queen v McGregor*. And this is para.41 really of the Court of Appeal judgment, page 45 of the case which is tab number 2. Essentially the Court of Appeal

Tipping J But not the master of your mind, which is the classic phrase which was used in *McGregor*, does that mean incapable of thinking rationally?

King Well that's my point Sir, is that in my submission the Court of Appeal effectively held that the directions in this case were not inconsistent with *McGregor* and in my submission they are. For a start *McGregor* in the quote just cited talks about an accused being so subject to passion. Now that colours in my submission the next part about 'so as to not make him master of his own mind' because you have a

Elias CJ It would be much better if he was not master of his own passions rather than his mind, because that does suggest

King Passion is the cause and not master of the mind is the effect.

Anderson J You're master of one's conduct.

Elias CJ Conduct, yes you're right.

Tipping J Now control yourself.

King So it's my submission I don't seek to challenge the *McGregor* formulation of that aspect of the case

Elias CJ Well it's sought of past isn't it, it's very dated.

King It is, it really is, and I've tried to set out some suggestions that really it needs to be emphasised to a jury that what it means to be deprived of the power of self-control is an issue of fact for them. When we talk about these concepts

Elias CJ The Judge does say that of course in his summing-up. He starts talking about provocation

King But then he effectively says that the framework in which you approach that is this must be irrational, must be this extreme state and so on and so on. So I really think I've said all I can say about it in paras.32 to 36 of the written submissions. I make the point of course of a well-known case in *Campbell* where the error that resulted in the conviction being overturned was because the impression the jury may have been left was that the Judge was elevating the concept of proportionality into a question of law rather than a question of fact and it's my submission that when one really over-defines a concept in the way that His Honour did and uses these examples, that it would have seemed to the jury in the same way that it was a question of law. Fundamentally the issue is, has the accused acted in the throws of passion and that with respect is a concept which people can understand. Obviously by virtue of the fact that someone has ended up dead as a result of that, a jury are going to see that that is not just getting angry and slamming a door, that is something that is a greater state.

Tipping J What about the concept of being driven by uncontrollable passion?

King Irresistible impulse, well that's precisely

Tipping J Or uncontrollable that the idea is then linked with the power of self-control – uncontrollable something or other.

King Indeed, and in my submission that's an inability to control their response. It means that they know what they're doing; they might even be acting in a sense with a murderous, well obviously they have to act with a murderous intent, and it's the reconciliation of those concepts of course. Remember you've got to find that someone either intended to kill or 167(b) generally, unless we get into felony murders and so on, but that's relatively infrequent thankfully. The irony was of course this trial was taking place in the Courtroom in the High Court in Auckland at the same time and next door to where the *Timoti* retrial was taking place, so we were able to compare notes during adjournments and so on.

Tipping J Neither was

King Neither was successful. Oh there was certainly good grounds to bring *Timoti* back but the client had had enough and we'd certainly had enough. But the submission is that the state was really too advanced. It wasn't consistent with what the historical rationale basis of

provocation is. It wasn't really reconcilable with the concept of the accused having acted with a murderous intent in the first place. What we almost get into the position of doing, and this should probably be avoided, is we're almost bringing in a quasi type of automatism, because a Judge directing in this way really does is I think Justice Tipping recognised earlier, if the jury conclude that the person's acting in the state defined by the Judge then it's not provocation, it's not anything. It's acting without a murderous intent in the first place, well probably any type of criminal intent. *Campbell* number 2 deals with this, and that's in the bundle of authorities where we looked at the concepts of involuntaryness and the concept of sane and insane automatism. I don't think there's anything particularly revolutionary about it, but it certainly is descriptive of the various states that can constitute involuntary conduct and so on. Now the final provocation point is the *Timoti* point, and that is set out in the written submissions on page 14, paras.37 and so on. The direction in question is at para.64 of the summing-up, page 320 of the casebook, tab 8, volume 3. My learned friend in his submission says that I've pounced upon this point and he's probably right. Second bullet point 'if so would that hypothetical person more vulnerable to the increased level of provocation have been unable to maintain his self-control and resist reacting as the accused did in the circumstances of this case'. Now there's no such thing as say a non-brutal murder, but here we have the deceased, the fatal injuries being the cutting of her throat with a knife presumably while she was kneeling down, so it had an almost I suppose, and certainly the way it would have appeared, an almost execution-type element to it. The direction to the jury in this regard would an ordinary person with the characteristics of him and so on have been able to resist reacting as the accused did in the circumstances of this case, is in my submission a fundamental misdirection. The issue is would the ordinary person have lost the power of self-control? In *Timoti* that was held in the context of provocation in the context of homicide to mean loss of power of self-control to the extent of forming and acting on a murderous intent.

Blanchard J *Timoti* was a case in which it all took some time.

King Yes, there was a long period of time

Blanchard J A bit like *Rongonui*. This is a case where he loses self-control and it's all over very quickly.

King On one level Sir, that's what the appellant was saying. He was saying that there were a number of events. The final triggering event was when the deceased told him she was leaving him for a Pakistani man and he

Blanchard J But the actual acting under the influence of provocation was quick.

King Yes, according to the appellant's case, but His Honour did leave two other grounds of provocative acts to the jury as well. Firstly that she had belittled him in front of his friends and colleagues sometime earlier and so on. So there was the basis for the jury concluding that even if they rejected the appellant's suggestion as the Crown invited them to that the deceased had told him, they said that just didn't happen, that she was leaving him for a Pakistani man, then there were two other components of provocation which related to earlier events. One the night before when a friend told him that his wife was leaving him and he was upset that she hadn't told him directly, but it's accepted Sir that really those acts would not in themselves one would have thought provided a sufficient basis for provocation and what was necessary was for the jury to accept as a reasonable possibility that moments before the homicide the deceased told the appellant she was leaving him for a Pakistani man.

Blanchard J And there was no reference to proportionality?

King No Sir, no there wasn't and of course in *Timoti* there was and that's accepted that is a point of differentiation but the principle from *Timoti* was not a case specific, I mean that was general guidance and that was saying that Judges should not direct jurors that the issue is would an ordinary person have reacted in the same way as this accused did. I think in *Timoti* it says, oh I have set out the quote there at para.41 of my submissions 'there is a material difference between provocation which is sufficient to deprive the statutory hypothetical person of the power of self-control on the one hand and provocation which is sufficient to make that person do as the accused did on the other'. The difficulty in my submission is it rarely confuses the concept of the hypothetical person by essentially putting the hypothetical person in the shoes of the appellant, so it's one thing to say well a hypothetical person could have been driven to lose their power of self-control and have formed and acted on a murderous intent. I mean the natural reaction one would suspect of jurors is I would never do that.

McGrath J Mr King would you agree that the place of those words in their context is really simply to explain what maintaining self-control is?

King Well in my submission it's to compare the loss of self-control of the ordinary with the loss of self-control of this accused. With respect

McGrath J That starts getting it back to be close to *Timoti* but I'm really wondering whether it's not rather different

King Maintain his control and resist reacting as the accused did in the circumstances of this case, so there's two references, the circumstances of this case and the accused.

McGrath J Well the word 'and' is used but I'm wondering whether it's not to be sort of understood as meaning 'that is'.

King In my submission I don't know how a jury could see it any other way. The best I submit that can be said about it is not repeated anywhere and it's not repeated for example in the written material that's provided to the jury when the issue was simply put forward 'would an ordinary person have been deprived of the power of self-control', it's not qualified

Blanchard J Actually it is repeated.

King It is sorry Sir?

Blanchard J Yes in para.105 there's a kind of repetition

King Oh in the re-stating, yes Sir.

Blanchard J Four lines from the end.

King That's right, effectively the entire provocation directions weren't done. It's not bullet pointed there as it is but Your Honour's absolutely right. If it does with the hypothetical person more vulnerable to that increased level of provocation have been unable to maintain their self-control and resist reacting as the accused did in the circumstances.

Tipping J Well it's those last words isn't it?

King It doesn't say in the circumstances of this case as it does earlier. It seems it's not recorded as saying that.

Blanchard J But the circumstances had to be the circumstances of the case.

King Yes it has to be, but that's actually said in the circumstances of this case at page 320.

Tipping J Assuming clear enough that this is not a desirable, putting it at this low it's not a desirable thing to say, like my brother Blanchard I'm just struggling for some help as to what actually it might have led them to do – the juries minds that is – that was improper as against what actually happened in this case. I mean there's no doubt what the actus reas was. It was just a simple

King It was a bit more prolonged as there were bricks used and so on.

Tipping J Yes bricks

King But no it was an execution type killing. Now in my submission what it does is it confuses the concept of the ordinary and ineffectively merges the ordinary person with the accused. In other words if they find that the accused is not an ordinary person then the defence fails in my submission.

Tipping J But I'm asking this question on the premise that it is a misdirection.

King Yes, yes.

Tipping J I doubt anyone could say it's not a misdirection. I don't think even the Crown suggests that. I'm not quite sure what the Crown stance is on this but presumably it is that it couldn't reasonably have made a difference if you like.

King Yes, but in my submission to adopt Your Honour's words, there's a material difference between what the actual accused did and what a hypothetical person may have done. It's my submission that confronted with the direction a jury will consider would an ordinary person have done what Mr Rajamani did. That automatically confuses the concept of ordinary person by equating effectively to the accused. The inquiry then becomes was Mr Rajamani an ordinary person.

Tipping J Is it part of the argument that this in effect an extent of loss of control concept coming in through the back door or even the front door?

King Yes, it's the front door. One can easily envisage a person I suppose forming and acting on a murderous intent in a less graphic, less brutal, less clinical way perhaps

Blanchard J What Mr Rajamani did was brutal but any killing in these circumstances is going to be brutal. You don't have the kind of contrast that you have in *Rongonu*i where if you have this kind of direction in *Rongonui* the jury might think that you had to have lost your self-control sufficiently to strike 150 blows with a knife.

King Yes.

Tipping J I'm on the same wavelength as my brother here. It's a question of what is the material harm if you like?

King Yes, well in my submission it is possible to envisage a less bloody death, less gruesome death like poisoning or

Tipping J Well what if he'd shot her.

Blanchard J Poisoning is a bit unlikely in provocation

King Yes true, indeed.

Blanchard J That's very calculated.

Anderson J Domestic homicides involving lives usually involves the knife going into the centre of the chest

King Knife or a weapon being used to strike, I would accept that, but where in my submission it bites in is that it does rather blur the concept of the hypothetical person and requires the jury instead to make an assessment was the accused a hypothetical ordinary person and if they say he wasn't because an ordinary person wouldn't have cut his wife's throat in that way, then that's the end of the inquiry, so it is a misdirection which the appellant submits has a consequence on the juries consideration of the hypothetical person. At page 16, para.42 I've set out a whole series of bullet points which are effectively a summary of the submissions to be made about the net effect of the directions on provocation. 'Firstly that they place the threshold for what it means to have lost self-control too high. Secondly that the directions as given and what it means to be deprived of the power of self-control are inconsistent with the fact of murderous intent in the first place. That the effect of the directions is that the concept of loss of self-control excludes a state where an accused knows what he is doing but is unable to restrain himself or is compelled to act by irresistible or uncontrollable impulse. That over-defining the concept of loss of self-control was inconsistent with historical rationale provocation being a concession to the frailties of the human condition etc, and the real concept of loss of self-control was that a person is no longer able to restrain himself. That the maxims that we use to define what it means to have lost the power of self-control are confusing and precise, often contradictory and based on outdated laws. It is enough to say that the accused acted in the heat of the moment and was not able to control his or her reaction. The learned Judge failed to direct the jury that the directions he gave defining what it means to have lost the power of self-control were not legal tests for provocation, it is submitted that the jury may well have been left thinking, and indeed could not in my submission be thinking anything but that these were the legal frameworks in which they were to place their factual consideration of the issues'. So at the top of page 17, the issue of whether the accused has lost his or her power of self-control is a question of fact for the jury and there is a desire to avoid over-complicating and over-defining the issues.

Tipping J Surely your proposition it should have been for the jury to decide what loss of self-control actually means in a given case, they must properly understand the concept in its legal setting, but it's over to them ultimately to say whether it is or isn't

King Indeed, and there are a number of checks and balances along the way. Firstly juries aren't stupid. Secondly they know that they are by definition dealing with someone who has killed another person so they're not going to lightly excuse that, so they're going to approach it on the basis that it is not justified lightly when one human being takes the life of another. The concept of the ordinary person is a major check and balance because it's not enough if this accused was provoked into acting in that way, the provocation must have been sufficient that an

ordinary person could have been compelled to commit the act. So all of these are checks and balances on it.

Tipping J Yes, I just felt that your sentence starting 'it should be for the jury' was perhaps a little over-stated Mr King. That's all I was tentatively suggesting.

King I'm sorry, so unless the Court has any questions I think that's as far as I can take things at this stage unless you have provocation.

Elias CJ Thank you Mr King.

King Other than make the usual observation that the sooner we get rid of it the better.

Elias CJ I think you have others who would support that.

King Indeed, indeed. The next issue is the decease hearsay evidence. In my submission this can be dealt with relatively quickly. The starting point is that the Court of Appeal accepted that the direction that the Judge gave regarding the applicability of the decease hearsay statements to the accused's state of mind and to the defence of provocation were simply incorrect. It was argued in the Court of Appeal that the hearsay evidence that relating to what the deceased was alleged to have told to the two real estate agents, Mrs Barnes and Mr Long, should not have been admitted at all. That it was at least more prejudicial than probative, but the Court of Appeal held, and one can accept the basis for them doing so, that it was relevant. Of course it was relevant to the likelihood of whether the deceased would have told the appellant that she was leaving him for a Pakistani man, because the Crown case was that that wasn't said and that she wouldn't have said that because she was terrified of him and she would have known that this would have infuriated him, so one can understand that, and of course we raise and I quote Your Honour Justice Tipping's words in *Howse* in the Court of Appeal about the duality of purpose of the hearsay evidence. But in this case the distinction is we don't just have an absence of direction, we have what the appellant submits is a patently erroneous direction that the deceased saying to persons days before her death that the appellant was going to kill her could never in my submission be relevant to the accused's state of mind or to the defence of provocation. The only possible conceivable basis that would be relevant to provocation is of course to say that well this guy hadn't lost his power of self-control because he'd been plotting this for days beforehand.

Tipping J Well it was presumably the Judge was inviting the jury to take into account this hearsay evidence both on murderous intent and on deliberation if I may be forgiven for using that word, in the provocation context.

King I think that's right Sir, yes, it must be. And was accepted by the Court of Appeal that it was a misdirection and shouldn't have been said, so the question becomes was the Court of Appeal correct in saying that no substantial miscarriage of justice applies as a result. The appellant's position is that this was a clear sharp unambiguous direction, there must at least be the possibility that the jury in fact followed the directions they were given, that in this regard it's worlds apart from no direction having been given on the issue. It can be just so distinguished and the Court has always said that where things slip in that shouldn't – Your Honour said it of course in *Rongonui* – where things slip in that shouldn't, directions are required to tell juries not to use it, warnings and cautions. Here we have the exact opposite where we have it in; the jury obviously risk using it for that duality of purpose to undermine the central issue in the trial and it really was intending provocation and deliberateness were the issues in the trial, and so on this fundamental issue in the case, really the only issue in the case, we have a clear unambiguous direction that the jury can use that when assessing his state of mind and the defence of provocation. It's my submission that it was not an error that could simply be dismissed. The fact that it wasn't repeated, wasn't amplified, there must at the very least, I mean it's strange to say it, but of course there must at least be the possibility the jury in fact followed the directions they were given and did that, and if they did so then the defence provocation was completely and utterly undermined.

Blanchard J We have an unusual situation in which we're hearing this appeal. Assuming that you were successful on this point and the matter went back for retrial, it will be tried under the Evidence Act. Now what would the position be there? Wouldn't it all come in subject to appropriate directions.

King Well in my submission the Court of Appeal effectively held it was admissible on the basis of the deceased's state of mind in any event, so the starting point here is that it's properly admissible, but it would inevitably require the firm proper use direction. The Evidence Act in my submission does not seek to change it in that way, it simply puts the emphasis on proper directions to the jury about the proper use

Tipping J But mightn't the Evidence Act, arguably too, the decision of the Court in *Manese* arguable, let it in as hearsay evidence for the so-called prohibited purpose?

King Well in my submission it's a very interesting point and I don't think anyone at this stage knows the – oh Your Honours probably have got a better idea than most – but the

Tipping J I haven't thought about it much frankly.

Blanchard J Well I thought what the Evidence Act was doing was saying never mind that something is hearsay, it comes in, but because it is hearsay

there'll need to be directions so that the jury is aware that it is dealing with hearsay.

King Yes, well His Honour certainly alerted the jury to the fact that this was hearsay and certainly alerted

Tipping J Yes.

Blanchard J And he gave them certain warnings.

King He said that they had to be satisfied that it had been said.

Blanchard J But the point I was making perhaps clumsily Mr King is that it seems to me that if this would come in subject to appropriate directions under the Evidence Act, the shadow of the Evidence Act is over us now.

King Indeed, the Evidence

Blanchard J Is there a miscarriage of justice merely because under the old law this might not be kosher?

King Yes.

Blanchard J If under the new law it's going to be.

King My reading of the Evidence Act is that it really simply codifies *Manase*. It doesn't seek to take it beyond that and so my submission is that it doesn't really change the law. It still has the overriding discretion of the Court to exclude it and in my submission if the Court admitted it then it would be proper; there would be a strong argument to say that at least that dual purpose of his state of mind should be excluded because it is just so prejudicial.

Blanchard J I wonder whether the purpose of the Evidence Act wasn't to get away from that kind of distinction and get back to a more common-sense approach where you treat juries as being collectively intelligent and simply point out to them that something is hearsay and that they must take care about

King On an issue as fundamental as the intent of an accused murderer, on an issue as fundamental as the provocation with the effect of reducing murder to manslaughter would in my submission to allow in hearsay evidence from a deceased person days before the event would be a fairly radical departure from everything that has gone before

Blanchard J I'm not sure about that.

Anderson J It seems pretty logical to admit it when someone says this freak, he's going to kill me, he's going to kill me, and he does kill her. It sounds pretty reliable hearsay.

King The *Manase* requirements of reliability. There was actually evidence available to show that the deceased was telling people at the Immigration Service that it was a stable loving relationship and she had no concerns, presumably on the basis of assisting her residency applications and so on. There was I guess always the possibility that someone who is seeking new accommodation is going to try and queue jump. I'd love to write a book one day about people's explanations for trying to get upgrades at airports because I've heard stories that people just advance everything under the sun. One can imagine

Tipping J Can we go from that to the Evidence Act Mr King?

King Yes, well yes Sir.

Tipping J Section 18 says, 18(1) 'a hearsay statement is admissible in any proceeding if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker is unavailable, well clearly unavailable here, so it's the sort of screening process that was adumbrated in *Manase*

King Yes, indeed

Tipping J And the issue would be whether the trial Court would think that the circumstances related to its making gave reasonable assurance that it's reliable.

King Yes, but in my submission though Sir that's entirely consistent with what the Court of Appeal said that this was hearsay. Of course it was, and it was admissible as relevant to the deceased's state of mind and the likelihood of whether she would have said it. To take that to the different level and to say that someone else's hearsay statement on a fundamental issue from which the, if one extrapolates it, you've got murderous intent and you've got no loss of self-control

Tipping J One of the things the new Act, I don't know whether it does very precisely, is that a hearsay statement as to an actual fact and a hearsay statement as to what the speaker thinks someone is likely to do or is going to do is quite another matter.

King And that's just related to her state of mind, to say that

Tipping J No, no, I'm relating it to his state of mind.

King Her state of mind as to what she thinks he's going to do has somehow evidenced that he was going to do it.

Tipping J Well it's issues that have yet to be worked through I think under the small liberal approach to hearsay.

King Well yes indeed.

Elias CJ Well isn't that really though as far as you need take it, because you simply say that first of all the Evidence Act hasn't come into effect and the Courts can't themselves do a *Fitzgerald v Muldoon* but secondly when it comes into effect there will be a discretion to be exercised in the context of that legislation and you can't assume that what happened here would pass muster.

King And in fairness a Court may well believe that because Mr Rajamani's trial took place before the Act, that would be a factor to exercise their discretion against admitting it for the duality of purpose. And of course the Crown never argued it on basis it seems

Blanchard J Because his trial took place, but any retrial would take place afterwards.

King Yes but the Court,

Elias CJ It's unlikely I think that

King It's like in a situation Sir where a retrial takes places in the concept of a new Court of Appeal judgment that's coming out increasing the tariffs for sentences and things

Blanchard J But on questions of admissibility you apply the law at the time of the trial.

King In my submission but with the overriding discretion would incorporate fairness, a Court may well conclude that even if it was admissible on every other basis and I'm not to be seen as conceding that it is because my position is that it isn't, but the Court may conclude that it would be unfair in these circumstances to effectively burden Mr Rajamani with the effects of this evidence. I don't know, and so again the written submissions are set out there and they talk about *Manase* and so on. Gosh they go on for pages don't they? Duality of purpose.

Blanchard J Sorry, you shouldn't be apologetic, they are very good submissions.

King Oh, thank you Sir. The 10 juror points, that's set out from page 24, and unless there are any questions I'll ask Mr Darby to address the Court.

Elias CJ Thank you Mr King, yes Mr Darby.

Darby May it please the Court, as Mr King has indicated I propose to address Your Honours on Grounds B(1) and B(2). I think logically B(1) should come first. That's the issue of whether the question was amenable to examination on an appeal at all.

Elias CJ Mr Darby, sorry to interrupt at the outset, but we haven't got any legislative history put before us. Have you had a look at the position?

Darby Yes, I have Your Honour. I've got, if you'll bear with me for a moment, the current subsection 8, I presume that's the one Your Honour is referring to of s.374 has been the law since 30 April 1981. Before that there was a very similar proviso that was then ss.4 which was worded differently and I think arguably significantly differently in that it said it shall not be lawful for any Court to review the exercise of any discretion under the section. I have copies of that available if that would assist.

Elias CJ I was really referring to the 10 Juror Amendment which I think was 1997.

Darby No I'm sorry Your Honour I can't help you on that

Elias CJ No that's fine, yes

Darby At the moment. I just approached it on the basis that the existing 374 applied at all material times and the research that we've done simply identified as far as the probative clause is concerned, the item I've just mentioned about the

Tipping J What I'm interested in as well is when did the Court acquire a power to go on with 10 jurors in exceptional circumstances?

Elias CJ Since 1997 according to the annotations in this, but I haven't checked the position.

Tipping J Because it used to be 11, or there used to be no power to go on with only 10 as I recall when I first became a Judge.

Darby We understand 10th December 1997 which would perhaps coincide with Your Honour's view is when this

Tipping J Well the Chief Justice is averted to that, that that has been what she understands to be the time when the power to go on with 10 came in.

Elias CJ But it's alright, if you haven't looked at the legislative history perhaps Mr Pike will be able to tell us something about it. Just at the back of my mind I thought there might have been a Law Commission report which preceded it. It just would be useful to know what the amendment was designed to achieve. But that's alright Mr Darby, carry on with your submissions.

Darby I have the history note on the legislation

Elias CJ Yes I have that too. Yes that's fine thank you.

Darby The essential argument for the appellant if it pleases the Court is that this subsection 8 does not deprive the Court of jurisdiction and I'm referring to the Court of Appeal or indeed to this Court on a second appeal situation. That subsection 8 would be one of the most perhaps clear examples of a probative clause that one would find it's so simply 'no Court may review the exercise of any discretion under the section'.

Blanchard J I suppose the question is what's the discretion? Is there determination of whether there are exceptional circumstances properly described as an exercise of discretion or is it a matter of judgement?

Darby Well in my submission Sir it's a matter of judgement. There must be findings of fact and a determination reached by the Judge who is dealing with the matter

Blanchard J So first of all you may give judgement as to whether they're exceptional circumstances and then having done that and decided that there are, presumably decided that correctly, then you decide whether in the exercise of discretion to allow the trial to proceed.

Darby Yes I would say at worst for this appellant subsection 4A(b) contains not one but two determinative types of matters to be addressed. One is the exceptional circumstances; the other is the interests of justice test, and those two are not discretionary at all. It could well be as Your Honour suggests that 4A(b)1 progresses to a point where the discretion does become relevant, because having got through, if the Court does, those first two barriers that subclause 1 says the Court may proceed, but I have a more fundamental argument I'd like to put to Your Honours that the mere use of the word 'may' doesn't necessarily mean that there's a discretion of the type envisaged by subsection 8. I'd like to refer briefly if I may to a comment from Professor Burrows book, *Statute Law in New Zealand*, where he says that if the task of interpretation is to discover meaning, this involves an admission that the meaning of the words of certain Acts have changed as a result of the enactment of the Bill of Rights, and he goes on to refer to s.6 and says 'there is no doubt that when before the Bill the Courts wished to uphold longstanding human rights and values, they would sometimes substantially strain the wording of the legislation to do so'. And then he says significantly 'for example privative clauses in legislation attempting to restrict access to the Courts always received a narrow interpretation, sometimes to the point of artificiality' and he discerns in the law a presumption that the Act that did not deprive the individual of access and would only hold it did if no other interpretation were possible – in other words giving effect to s.6

McGrath J But does that principle have any application where we're actually dealing with the exercise of a judicial function here, whether that should be reviewed. I mean it's not as though we're looking at a Minister's decision or someone to exercise for statutory power by a non-judicial official. There is access to the Courts here. There is just a

provision that so far as it applies precludes review of what the Judge decides.

Darby Well effectively if it's interpreted the way the respondent would wish it to be interpreted, it means that there simply is no way be it appeal or review or anything at all that a decision can be revisited, not even for the first time

McGrath J Yes Mr Darby but my concern is really just with the principle you take from *Burrows* as to the general approach of the Courts to privative clauses, and I actually had thought there were some cases that indicated it didn't apply when in fact what was being reviewed was a judicial decision and was simply controlling the extent of review afterwards. I'm really just I suppose questioning what *Burrows* says applies in this type of situation where a Judge has made the decision.

Elias CJ Racal Communications and cases like that.

McGrath J That and the Malaysian Sabah Bricks or something of that kind in the Privy Council. Sorry if it's a bit rusty on this Mr Darby but it's only in that narrow way that I'm questioning whether *Professor Burrows* is addressing the situation you're concerned with.

Darby I have copies of this if it's of any use to Your Honours

McGrath J I think we know the principle and we can certainly find it in *Burrows.*

Tipping J Mr Darby isn't the point simply this that obviously subsection 8 prevents the Court from reviewing something that's done under the section? The question is how much?

Darby In my submission Sir it's only that may part of it at worst for this appellant and there is the obvious argument of course that those first two matters, as I say the exceptional circumstances test and the interests of justice test, must be met without anything to do with using a discretion of the type referred to in subsection 8.

Blanchard J There have to be exceptional circumstances, there's no discretion about that. That's a pre-condition to the Judge's decision. Isn't the argument as simple as that?

Darby Yes

Tipping J What the Judge then does deciding to go on or not to go on is not capable of review.

Elias CJ In other words I think you can take it that the Bench agrees with the thrust of your submission that it's the 'may' that is excluded from review.

Darby Your Honour I'd like to be bold enough to take it even further and say that that may not even be subject to the review because of the particular wording of this section. We find that in subsection 1 the word 'discretion' itself is used but in the subsection we're particularly interested in here, namely 4A, the legislature has chosen not to use that word. Now I concede of course that

Elias CJ I don't think there's any difference at all, it's just in the layout of the provision Mr Darby, because in subsection 1 it's in the case of any emergency or casualty rendering it in the opinion of the Court highly expediently and for justice to do so, so that's the condition in that subsection and the 'may' is the Court may discharge the jury, so it's exactly the same.

Darby But in that case Your Honour it's preceded by the words 'in its discretion'

Elias CJ But 'may' is in its discretion.

Darby Well if that is so then there's no point perhaps in advancing the argument that there's a difference in a subsection that contains the word 'discretion' and then something may be done and one that does not use the word 'discretion' and says as 4A does 'that something may then be done'.

Anderson J On your approach subsection 8 would apply only to subsection 1?

Darby Yes Your Honour, exactly, that's my point.

Blanchard J Are you arguing that if there are exceptional circumstances the Court has got to decide to proceed – that there's no discretion?

Darby No, no I'm not Your Honour because if the Court were to make a factual finding that there were exceptional circumstances, it then under 4A(b)1 has to then decide what to do

Blanchard J But that's where the discretion comes in - that's the point I'm making.

Tipping J I think you'd be better off addressing whether there were exceptional circumstances because frankly with great respect I think your almost vertical on this and you are so far uphill that I think you're not really going to get any traction. You may get traction on the premise that there were no exceptional circumstances, I agree with you, but that is subject to the Crown, that is reviewable, and that's the essence of this case isn't it, that you say there were no exceptional circumstances so the Judge had no power to order the trial to continue?

Darby Yes, well that's my second argument, but

Tipping J Well I think the sooner we get to it the better.

Darby As Your Honour pleases.

Anderson J The Judge I think perceived four matters amounting to exceptional circumstances and it might be helpful if you went through each of those and made your submissions on them.

Darby Well in the submission of the appellant there were no exceptional circumstances of the type that were necessary to enable the trial to continue. There may well have been exceptional circumstances that quite properly enabled the trial Judge to excuse that particular jury member and in my submission the two tests were confused. There's two different tests here; one is to decide whether to let that, in this case the second jury member go, and then having done that the Judge must make another determination and that is are there exceptional circumstances that permit the trial to go ahead with only 10 jury members because of the clear prohibition placed upon it. In 4A the Court must not proceed with fewer than 11 except. So the exceptional circumstances identified by the trial Judge in my submission related mainly to the circumstances of that jury member. The ones that he did identify

Elias CJ They don't have to be exceptional of course for discharge of a jury member, they just simply have to fall within one of the criteria in subsection 3.

Darby Yes I accept that.

Elias CJ Yes, yes, it's just that you've been talking about exceptional circumstances relating to the juror and that may put it a bit more highly than you need to.

Darby Thank you Your Honour.

Tipping J But no one's complaining about the second discharge, or either discharge, the sole question is whether there were exceptional circumstances for the purposes of the going on with 10.

Darby Yes.

Tipping J And are you saying the Judge directed himself as if he was considering a discharge of an individual juror? I don't really think with respect that's a tenable proposition. He seemed to be very closely aware of what his task was, that is to decide whether to go on with 10.

Anderson J Can we just look at each of them**,** focus on them and see if there's any weight to the Judge's conclusion. He says first of all the charge was a serious one. Is the implication that if the charge is serious you can have 10 jurors? I mean what's the significance of seriousness? Do you get a fair trial if it's not a serious offence and an unfair trial if it is?

What's the point do you think? The next question is the issues provocation – again so what? What does that amount to in terms of exceptional circumstances? Is that type of analysis that we would find helpful?

Darby Yes well in my submission Sir if I could go through them there was nothing exceptional about the trial taking as long as two weeks; nothing exceptional about it being murder trial, as Your Honour indicates a serious one. There are unfortunately many many serious offences alleged in the Courts. His Honour also referred to it progressing into its second week, we again there's nothing exceptional about that. Indeed it would be perhaps exceptional if it did not get into the second week of its two weeks scheduled hearing.

Anderson J I would have thought speaking for myself the only point that might amount to exceptional circumstances is that a witness had given evidence on what became the crucial point in the trial, provocation would not be compellable on a retrial. All the other matters are either mundane or case management issues which shouldn't cloud the right to trial by at least 11.

Darby Yes, that particular witness Your Honour was the one who had been brought over from Sydney and in my submission again that nowadays is not really exceptional, indeed it's

Anderson J Well it's not the distance, it's the compellability. You can bring a witness from anywhere if they're willing, it's a question of whether that witness would in fact be compellable on a retrial, his evidence being on a crucial issue.

Darby Well there's no suggestion that he was describing any unwillingness to appear

Elias CJ Did he have to be compelled to appear originally? He didn't did he, he just came from Australia so presumably he wasn't subpoenaed.

Darby He came as a Crown witness Your Honour. I don't know whether he was subpoenaed or not. Perhaps the Crown could comment on that.

Anderson J Well he might or might not but the point is he would not be compellable if he decided not to and perhaps he might decide not to when he realised that his evidence in relation to his friend had become as crucial as it did. But is that an exceptional circumstance? How does it weigh against the assumption that you'll have at least 11 jurors?

Darby Well I'd submit that it's not exceptional in that if he was the friend that he was represented as being of the appellant, he would willingly have assisted, but certainly one would have thought that it's not incumbent on the appellant to show that there were no exceptional circumstances, rather the connotation of exceptionality in itself seems to indicate that

because it's a departure from the norm, whoever is advancing the cause – in this case it would be in His Honour's mind obviously should I or should I not carry on, that the person seeking or proposing to carry on would have to find the exception. But the short answer is there was just nothing exceptional about that.

Anderson J Just looking at the Oxford Dictionary first definition of 'exceptional', it doesn't put it all that high. It says 'out of the ordinary course, unusual, special'.

Darby Yes well with respect Sir I'd suggest that the context of the Crimes Act is perhaps more useful than a dictionary because if these words here 'must not proceed' it seems to be a very strong prohibition and in any event just reverting to the other points, Mr King has just brought to my notice the situation that even if Mr Handley were proving to be an unwilling witness for another trial, the Crown could seek to have his previously given evidence read out under the Evidence Act.

Tipping J Which would be opposed no doubt.

Darby Well one would have to await the circumstance but

Tipping J Well you're not going to agree. He turned out to be a rather unfortunate witness from your client's point of view.

Anderson J Well coming into the document on hearsay provisions at s.8, 'because it was the evidence given in the course of duty – duty to testify'.

Tipping J It might, it might. The Judge made a few remarks that I agree with my brother Justice Anderson where it were a little bit unpersuasive, but he did focus on this witness from Australia. He didn't directly address the question of compellability, which I agree is the essential question, or at least a primary question and surely that must have been what was in his mind.

Blanchard J I think it's implicit from the last sentence in para.12.

Elias CJ Well he's reciting what the Crown submitted and his reasons are in para.14 – 'the number of witnesses never been called'.

Tipping J Well he certainly didn't do himself full justice in those reasons because I think the point is primarily surrounds this difficulty about the Australian witness.

Darby Yes. He did use the word 'quite extraordinary' but that was in the context of talking about the burglary that the jury member had experienced and again obviously there's nothing exception about a burglary, particularly in South Auckland.

Elias CJ But that's to do with the discharge of a juror and that's not an issue.

Tipping J But there are also exceptional circumstances as the Chief Justice has pointed out in para.14 where he doesn't make specific reference to the Australian problem. I think that's about all that can be said about it.

Elias CJ Paragraphs 9 to 13 are simply setting out the Crown submissions.

Darby Yes I take the Chief Justice's point about those words having a different application of course to do with excusing the jury member, but because the word 'extraordinary' was used there and the test of excusing jury members does not require any aspect of something being extraordinary, it's possible that His Honour had confused the two notions and sort of run the two tests together erroneously in my respectful submission.

Tipping J What was the key dimension for the Court of Appeal Mr Darby?

Darby The Court of Appeal interpreted the subsection 8, if I read the judgment correctly, very

Elias CJ Where can we find it

Darby Sorry Your Honour?

Elias CJ What paragraph are we looking at in the Court of Appeal judgment? Sorry I didn't mark that

Darby At paragraphs 12 and following which are at pages 36 and following of volume 1.

Elias CJ Oh well that's a bit odd isn't it, para.17 'does not allow a reconsideration by an appellate Court of the grounds upon which the Judge reached his decision'. Yes that's right they simply decided it on the basis that it couldn't establish a substantial miscarriage of justice.

Darby Apparently they just collectively put all of those factors in the one group and said subsection 8 precludes it.

Tipping J But if a trial goes on in circumstances where there was no justification for it going on, in other words the criteria literally not present, that's the premise which you're putting to us?

Darby Yes.

Tipping J The idea there hasn't been a miscarriage of justice requires some fairly careful thought I would have suggested.

Darby Well Your Honour the problem could come under B(c) or (d) of 385(1). The (d) is the nullity point and in my submission a nullity is a nullity and

Tipping J But you can proviso a nullity apparently.

Darby So that the proviso would have no effect at all or if it did it would have very limited effect. But in any event in the context of this trial as Mr King has pointed out the really only live issue was that of provocation looking at it broadly and the test there is the ordinary person which seems to resonate very strongly with the notion of jury members and if the defendant is wrongly deprived of his right to have prima facie 11 – the 12 can come down to 11 quite easily as is well known – but if he loses that right, if one jury member when the main issue they have to decide is the provocation one with the ordinary person tested could make a significant difference

Elias CJ I don't think you need to go there really because it would be impossible to establish the miscarriage of justice ground from the fact that the case had proceeded with 10 jurors unless proceeding with 10 jurors is an illegality which means that the trial shouldn't have taken place. Sorry I didn't express that very well but you know what I mean.

Darby Well if it's a nullity under (d)

Elias CJ Well this nullity concept is a bit problematical really. I would have thought if there's an error of law and the trial has proceeded with 10 jurors in circumstances where it should not have proceeded, then the conviction must be quashed unless the proviso applies.

Tipping J And it's hardly a fair trial if you're going to have the benefit of your 11 in circumstances where you should have.

Darby Yes Sir

Tipping J I would put it as simply as that.

Darby Yes well I would respectfully adopt that hypothesis Your Honour.

Blanchard J It's really the same as the trial having started out with 10 instead of 12.

Elias CJ Yes, exactly.

Tipping J I mean either there was grounds for going on with 10 or there weren't. If they were we can't challenge his decision; if they weren't it's not a fair trial.

Darby Yes, yes.

Tipping J Is that about it Mr Darby?

Darby I think so Your Honour, I think so.

Elias CJ Oh yes, I'm reminded that it's time for the morning adjournment thank you.

Darby As Your Honour pleases.

11.34am Court Adjourned
11.53am Court Resumed

Elias CJ Yes Mr Darby.

Darby I don't think I need say a great deal more. I'd simply like to draw the Court's attention to paras.80 and 81 of the written submissions where particular reference is made to the factors identified by the Judge in 80 and the submission following from it in 81 that they were not exceptional and I should say that 80(c) is perhaps being a little bit generous in that although we know that Glen Handley featured in this, when we look carefully at para.14 of His Honour's ruling we said that this matter was not mentioned at all. As pointed out previously the only matters referred to by His Honour were the two-week trial, the stage the trial is at, the number of witnesses called so far and that's it.

Blanchard J We're not concerned with the reasons that the Judge gave on that. We have to determine whether there were exceptional circumstances.

Darby Yes I take the point Your Honour.

Blanchard J Otherwise we're getting into the exercise of a discretion.

Darby Yes. Well perhaps that's about as far as it needs to be taken that the argument is simply repeated that they were not exceptional circumstances. That is the submission on that point for the appellant may it please the Court.

Elias CJ Thank you Mr Darby.

Darby Thank you Your Honours.

Elias CJ Yes Mr Pike.

Pike Yes may it please the Court the starting point in the Crown's reply is not unusually the trial context and that I submit has some considerable relevance in respect to the actual weight on the alleged or enumerated mistrial points especially in relation to the directions on provocation. The starting point is fundamentally the case here was a contest between the second version of the appellant's stories of what happened on the day of the killing, that is that he had been told in short terms by his wife that she was about to take up with a Pakistani gentleman and that he became enraged at that and left the house; found some bricks;

returned to the house with the bricks; assaulted her without any further provocative action, which he accepts was his sequence of events; that he gravely injured her and as she crawled off, his evidence, she crawled off to get help by using the telephone or something, he from behind clinically cut her throat in what Mr King accepts as an execution.

Elias CJ Well what is this submission directed at? I mean we're not the jury and the points that have been raised on the appeal are points about the fundamental flaws in the process, so there's no point in convincing us that he's guilty Mr Pike.

Pike It's not a question of convincing the Court that the person is guilty, although there is a substantial issue as to the proviso in which case the Court does have to be convinced that he is guilty.

Blanchard J If you're not wanting to start with that

Pike No I don't want to start with that. What I do want to start with however is to put in context because there has been no context from the appellant and that is not unusual.

Elias CJ Well we've read the case Mr Pike. We do understand the context and indeed a lot of your submissions are directed to that.

Pike Well indeed, but the important point about deliberation in that particular point is that background which I spent only a few minutes addressing and I don't address it further, but I mean that is the point that the context is all important in the sense that why the Judge was talking about deliberation and deliberate action, was simply because the Crown's case, as is very clear from the record, was that the appellant was mendacious in his claim that there was provocation given by the words on the morning that he killed his wife, of the nature said and that indeed the murder was planned. That obviously is the Crown's case. It was a premeditated deliberate killing in that sense and the Judge made that distinction in his summing up between the two cases, hence the use of the language. The use of the first matter complained of; the use of a deliberate intention to kill, which is seen as misleading but I would submit that in the context of the opposing case it is not misleading and that's the point that the Court of Appeal made and I would simply wish to underscore that the decision of the Court of Appeal on the point is supportable by reference to the background facts. There is nothing to be said of any actual confusion and if I can simply refer to something which is time hallowed – the idea of a deliberate intention is a time hallowed phrase which has stayed with us for years and it is used and was used, I would just simply refer the Court, it's not the most decisive point, but in one of the original criminal code drafts on the Criminal Law of Provocation which is in a volume of British Parliamentary papers in the 1834 sessions on Criminal Law where the criminal codes that were done from 1828 up

to the time *Stephens* came on the scene are reproduced, the extenuated homicide was seen in the common law as this – the guilt of an offender is extenuated where the Act being done under the influence of passion from sudden provocation or of fear or alarm which for the time suspends or weakens the ordinary powers of judgement and self-control is attributable to transport of passion or defect of judgement so occasioned and not to a deliberate intention to kill or do great bodily harm'. And so that has been one of the points that provocation's fundamentally always had, with it is that it excuses premeditated murder so it excludes murder that is not premeditated murder, that is a murderous intent is formed on the sudden, and of course deliberate intention to kill was always understood as one that was not formed on the sudden, and this is no more less what this case was about, although in somewhat more modern times. We don't talk about premeditated murder any more, but here it is submitted that, well the primary point for the appellant is on the misdirection we simply underscore. I'm not saying we can't do more or put it better and I don't seek to do so, and what the Court of Appeal in what I would submit was that full and careful consideration of the point decided that the jury would not have thought, or could not reasonably be thought to have thought that there needed to be a premeditated intent before any question of provocation even arose.

Elias CJ Why do you say that though?

Pike For the very same reasons as the Court of Appeal did with respect.

Elias CJ Well they merely indicated that conclusion but I just wondered if you wanted to elaborate on this Mr Pike?

Tipping J 43.

Pike 43 onwards there's a full discussion of it may it please the Court. We simply submit that there is no reversible error in what the Court of Appeal did. The appellant's submission in some regards in all of the points is to indicate that this is a second criminal appeal and does not trench on the fact that the Court of Appeal decision is what is under review here and that he must show that it's reversibly wrong, not simply that it could be seen by another Court of Appeal as different, and with respect we say that the Court of Appeal's approach to it, especially where the Court says, sorry 43, 44, in 44 of the judgment, that's under tab 2, the case on appeal, first volume. 'First the Judge's use of "deliberate" in 55 must be understood in context and that was simply the point I was earlier making. This section of the summing up dealt with the significance of the delay between the provocative act and the killing. The Judge told the jury delay between provocative conduct and killing can negate evidence of provocation or essentially negate loss of self-control. The Judge then equated deliberateness with premeditation in this context. The Court says 'the thrust of this part of the direct was therefore focused on the time between the provocative

act and the killing'. And as the Court does go on to note 'we think it preferable to avoid in this context the use of the word "deliberate". However given the context the Judge's comments about deliberate or reasoned action were unobjectionable, we are satisfied the jury would have understood them in the sense we had just outlined'. Now with respect the Court of Appeal has to be shown to be wholly wrong in reaching that conclusion by an exercise of something more than a second appellate opinion, i.e., that it has erred in principle or it could not reasonably find that to be an interpretation which it is after all its task to make of the summing up, and as I earlier referred to, the use of the word in the context of provocation of deliberate intention is time hallowed and the Court of Appeal cautions about its use and I don't wish to criticise that at all. It is far more preferable to talk about premeditated rather than deliberate in the sense of deliberative but of course it comes back to the context and the context is that there was an issue, however it was handled by the jury, of the time from which the provocative words were uttered and that must not be lost sight in the case of up to 10 minutes

Elias CJ But the context though that the Court of Appeal is dealing with here is the context of the section on provocation only. What's argued is that the Judge had used deliberation in a different context in talking about the intent for murder.

Pike That is true but again that was in another area of a very very specific defence – accident, extraordinarily the defence of accident was raised. It doesn't seem particularly to have much traction

Elias CJ Well it was an illustration the reference to accident wasn't it?

Pike Yes, and so what the Judge did, I do accept while at the same time mindful of the difficulties of summings up in complex cases with overlapping and interleaf defences like this that have got, lack of criminal intent per se, accident, even more fundamental, and

Elias CJ Well, I mean accident was really it seems to me just an illustration to demonstrate what 'intent' is. It wasn't as if there was any suggestion of accident, but

Pike It was the defence Your Honour.

Elias CJ What?

Pike Yes, the defence argued that one of the defences

Tipping J That he cut her throat accidentally?

Pike Yes.

Elias CJ Oh, well I hadn't appreciated that thank you.

Tipping J That sounds rather implausible to me. I thought the accident was to do with some rock or something falling prior to the cutting of the throat.

Pike That's right, yes he's talking about the homicide as being an untoward event. I mean he doesn't use accident in the technical word, in the proper meaning of accident, but he uses it as an attempt to run an absolute lack of intent so that there would be an acquittal. It wasn't a manslaughter argument, so he

Blanchard J Is there any reference to the defence of accident in the summing up?

Pike I'll have to find the volume. 74 I think as my friend assists. 'The defence case in relation to murder is the accused did not have the necessary intention to assault the deceased with the knife' so that's why the Judge got drawn into

Anderson J Sort of like an automatism defence?

Pike I'm not sure what it was but yes it was

Blanchard J I mean no objections been taken to the summing up because of any absence of reference to accident, but what you say came as a surprise to me, because I hadn't realised that that was a defence.

Pike Yes it was

Blanchard J A totally implausible defence.

Pike It was an implausible defence but nevertheless there was a plea to the jury that this was entirely exculpated conduct – i.e. acquittal was on the table because there was no intention to use the knife. That's not accident any way but that's unfortunately confusingly how it ran, and then there was a lack of intent as lack of mens rea, manslaughter, and then there was provocation, but as Mr King very carefully describes to the Court, realistically this case is about provocation and nothing else.

Anderson J On page 323 of volume 3, para.74, 'the defence case in relation to murder is that the accused did not have the necessary intention to assault the deceased with the knife'.

Pike Oh yes, yes, so he was drawn into was it a deliberate act with the knife so that unfortunately got deliberate going again as wilful, meaning wilful or going to an actus reas rather than deliberative action which should have been the word used in relation to the provocation to isolate it out.

Elias CJ With deliberation?

Pike Yes.

Elias CJ Yes, we got into this because you were saying that the reasoning of the Court of Appeal can't be said to be wrong, but in this reasoning it is only dealing with the provocation direction.

Pike Yes.

Elias CJ It doesn't deal with the confusion because of the use of deliberate in a different context.

Pike No, sorry I rather thought it had touched on that but I may have been quite wrong.

Tipping J It confines itself to the two contexts relating to provocation – the last words in 43. It doesn't seem to reach back to the concept of deliberation in relation to meaning to kill, but I'm not sure how significant that point is.

Pike We certainly had it, I mean I think both counsel would agree that we certainly had that debate with the Court of Appeal and it was very much a live issue that this undercurrent of deliberate action and accident was running as well as deliberative action in relation, or deliberative or a deliberate intention in provocation, but I'm not sure and it may well be that it hasn't quite translated through

Elias CJ Well it's just that the most troubling aspect is paragraph 62 of the summing up which the

Pike What, we're missing pages? I'm sorry. This is really looking good, thanks.

Anderson J Yes, page 319.

Pike 62, yes.

Tipping J This is the deliberately decided to kill point.

Pike The deceased and acted on that intention, that's right and that was dealing with the time, this is what the Court of Appeal 'this is the question of whether there was loss of self-control' and the whole point of this case was about loss of self-control, a special characteristic parenthetically which the Court is not inclined to touch on but parenthetically the Crown raises it as a matter of serious concern in terms of endorsing racial hatred as it were

Tipping J There are two concepts bound up in the first half of this paragraph. There is the idea of deliberation excluding provocation altogether and then there is the idea of active provocation and then an opportunity by lapse of time to regain self-control. Now when you see those two in conjunction it does seem that the jury could have thought well if

there's deliberate action provocation's off the map altogether. I don't know. It's a most unfortunate way of approaching a summing up on this topic.

Pike And the Court of Appeal agreed using the word 'deliberate' in a number of settings was something that was obviously risk-laden.

Tipping J Planned is a good word to use because a plan can be long-term or even short-term, but there has to be a plan, but deliberate is a decidedly difficult word to use.

Pike Yes it is. The passage before 62 may help rehabilitate the point somewhat

Tipping J Well he does refer to plan but in another part of his summing up, so there is

Pike Yes he does, but his path here is dealing with whether there was in fact loss of self-control in those competing cases and in para.60 he talks about 'is it reasonably possible one or more of the acts you find have occurred caused him to lose his power of self-control that he ceased to act rationally and ceased to be master of his own mind and conduct' and it's on the other impudent passage. There is a related issue 'did the accused kill the deceased as the result of lost control caused by provocative acts on which he relies. If there was some other reason which did not entail this self-control such as frustration or despair, he could not rely on it unless that came from the acts referred to. The key is the loss of self-control and that caused the killings. So he then goes on to say 'it was as if the accused deliberately decided to kill the deceased and acted on that intention it could not be said that her death was provoked by loss of self-control'. And that's an unfortunate phrase because one obviously is not provoked by loss of self-control, it's loss of self-control from provocation, so unfortunately the words whether they've come out correctly or not I don't know.

Tipping J Mr Pike before you move on can I just ask you on a point of principle, I understood you to say a little while ago that we could only intervene if we thought the Court had earned principle - the Court of Appeal that is. Now I would have thought that if we were of the view that there was a real risk of the jury having misunderstood this, in other words if our view is different on that point from that of the Court of Appeal, the fact that they may not have erred in principle doesn't matter does it?

Pike No sorry it wasn't so much erred in principle if I said that.

Elias CJ Yes I think you said clearly wrong or something like that.

Pike If they were clearly wrong

Tipping J Clearly wrong – well that was triggering my mind to a sort of discretionary

Pike No I said plainly, one of those plainly wrong

Tipping J This is wrong.

Pike This is a difficult area in the sense that if what the Court of Appeal has said and done its simply been re-argued or re-litigated with the expectation or hope that the senior appellate Court will find they do not agree, then I would submit that that is not sufficient to reverse on that point, because that is essentially enjoining the Court as its often at times said itself is the second Court of criminal appeal. What it has to be I submit done is that the Court of Appeal's approach to it and holdings has to be demonstrably wrong in that sense

Tipping J What's the difference between wrong and demonstrably wrong in this context? If I disagree with the Court of Appeal on the real risk, am I not of the view that they're wrong?

Pike They're wrong but not necessarily demonstrably. I think it has to be that the Court

Blanchard J Well if they're wrong it will be a miscarriage of justice.

Elias CJ And if they're wrong the reasoning of the appellate Court presumably will demonstrate how they were wrong so they're demonstrably wrong. It really doesn't add very much does it?

Blanchard J I think Mr Pike you're in danger of trying to get us to apply the sort of test that we might apply at the leave stage, but once leave has been granted then it's a full-scale appeal on the points for which leave has been granted.

Pike Yes I recognise the Act, the Supreme Court Act makes it very plain it's a rehearing, nevertheless I would submit that the Court, but I can't put it as low or hopefully as objectionably as possible by saying that the Court must be cautious in terms of overturning the Courts below, the Court of Appeal on the basis only that it forms a different judgment, or would have formed a different judgment had it been sitting in that context in that argument, and so what the Court here will be constrained to find, assuming this is a submission, is something which shows that the Court of Appeal's approach to the matter is untenable in that sense, not simply that a Court, a senior Court, disagrees on exactly the same arguments, but would simply find that we would not if we were sitting in that Court have found that.

Elias CJ We wouldn't have expressed it like that. It's like the Court of Appeal saying it's better not to use that term but it's okay. I mean if we were of the view that it would have been better not to use term, but it was

okay, of course we couldn't, but if we took the view that it was material, nothing would preclude us from revisiting that determination would it?

Pike No indeed.

Elias CJ No.

Pike No.

Elias CJ Mr Pike one thing that's bothering me about this is the jury have with them a piece of paper and the Crown argument is that deliberate is use, deliberateness is used in two ways by the Judge in his summing up. That deliberateness is used by the Judge in two ways in his summing up and in context the jury can't have been misled about what the difference was, but when they go into the jury room they've got in front of them this definition in the context of murder that it intentionally or deliberately rather than accidentally which tends to suggest that there is no different sense because the concept is not used in the written directions in respect of provocation, so if they are sitting there looking at this written text they might say well look deliberateness is not accidental, it's intentional.

Pike This is step 2, little 2 of step 2?

Elias CJ Yes.

Pike Well that's really with respect to the actus reas of murder which I would submit is set out reasonably properly because again it comes back to the starting question which was in issue 'did Mr Rajamani kill the deceased by an unlawful act. Now that would never have been necessary if the Judge wasn't very much alive to the fact that there was this accident defence afoot which he left to the jury in a sense that they had to find did he apply force using a knife, and if the answer to that is yes, was that intentionally or deliberately rather than accidentally? So that was the point as to whether there was in fact a culpable homicide at all. It doesn't go to murderous intent, so to that extent I would submit he's kept it in the right box.

Elias CJ Well I don't have any trouble with the way he's put it there, but my point is rather that it's acknowledged that he has used deliberate in two different ways. He's used it as intentionally and he's used it with premeditation and that in the context of provocation you say in the context it would have been clear he was talking about premeditation. My point is that the only reference to deliberateness here is the reference to the meaning which is simply intentional non-accidental.

Pike Yes, as a I say it's difficult in a sense to have passed what the Court said because it rather encapsulated the argument for the Crown and I don't feel particularly able to improve on it, simply that one has to start

back with we do accept as the Court of Appeal accepted that it's a pity that the words 'deliberate' were used, possibly at all, well if they were at all that they were used in two very different settings, but what we do say is that one has to sit back and look at the case as a whole and ask the question obviously as Mr King says the question is, the jury might have thought that provocation was not available to this person as a defence if it found that what we would call there was an intentional killing - that's the proposition. And he also very kindly, I think he said that juries aren't stupid, and I would say that they're very far from that and that this would have to be an extraordinary conclusion to reach that if 'we the jury are satisfied he didn't mean to kill her', the provocation defence we can't look at it.

Elias CJ Well it's illogical which was a point I think I put to Mr King but

Blanchard J Because the last time the jury heard the word 'deliberate' from the Judge, which is subsequent to their having that written direction in their hands was at para.95 when he's answering the question. There he does use deliberate

Pike Or reason

Blanchard J As a synonym for reasoned.

Pike Yes, yes sorry this is sounding quite repetitive, but this of course in the context of that, classically in the context by the fact that the Crown says look the man went out up to 10 minutes and that's what time elapsed between the provocative words alleged and the return with the bricks. Now had he lost self-control, was this killing a loss of self-control, or was it in fact something he had planned, and of course one has to remind the Court that the planning wasn't only just getting the bricks and so on, it was the reference also to this is the traditional death under Hindu law which we have his word law and no one else that she would be stoned to death for her traitorous acts to India was part of it as well and of course the other element about setting up a reason to have an awful lot of petrol stored in the house. So those were the parts of the Crown's case which the Judge was at pains to try and tease out for the jury and to say the difference in these cases is 'was this act deliberative – i.e. was it a planned killing in any way which negates the whole idea of loss of self-control or was it something which he did respond to, not in a deliberate or reasoned way but in a way that was transport of passion or a really extreme state of something beyond anger. So those were the way the two cases were sort of grated up against each other and the argument, or the only argument that can be made that looking at passages and I respectfully say in isolation like this can sometimes lead to the proposition that a jury hypothetically could be confused when in the jury room and in the context of the trial, and the point has already been made, and that obviously in the minds of counsel who both prosecuted and defended, there was nothing untoward about the summing up whatsoever in the way that the two

cases went to the jury. So those are the points we make. We accept as we must as the Court of Appeal has said that using the words 'deliberative' or 'deliberate' especially in two different settings was something that was obviously going to raise a risk of misunderstandings, but the Court of Appeal having isolated out the two bases on which these words were used and what the jury's task was, what the competing cases were, was right we say to say that in the end the jury could not have come back with such a major misunderstanding in the sense that it would have decided it was murder because he intended to kill and for that reason provocation was excluded as a viable defence. This is too finely nuanced the argument to show such a clear and compelling possibility as our case. The argument is a very nuanced argument, and that's what we say happened in the Court of Appeal and we submit that the Court of Appeal was right to find as it did that the jury could not have been led into such howling error as that. Perhaps there's nothing much more that can be said about that point really. It's in the written submissions and so one comes on to the next trance of the provocation, defence argument, which is the proposition that the Judge has really misdirected on loss of self-control. In these circumstances the starting point is that none of the Judges epithets or descriptions of loss of self-control have really taken the matter to a level that is unprecedented in prior judicial decisions. These words as we demonstrate have popped up in cases as diverse of *Parker v R*

Tipping J Can you show a precedent for causing the person who kills to lose their ability to reason immediately following master of his own mind in that context?

Pike Most certainly the meaning of the master

Tipping J Yes, I know, I've done it myself many times but I don't think I've ever suggested to the jury that it has to lose their ability for reason.

Pike Well I would think that was implicit, they are the starting words of the statute and it's often overlooked.

Tipping J I think there may be a bit of a disagreement on the Bench here Mr Pike. Are you suggesting that is really just another way of saying not the master of your mind?

Pike I don't think it takes into an additional dimension.

Blanchard J If you're not the master of your mind you're not reasoning properly.

Pike Yes, reasoning means acting as a reasonable human. I mean that's the whole point. An accused must excusably depart from the standards of behaviour expected of ordinary reasoning people. The question was 'what is that standard, what is required to demonstrate that standard as being reached'.

Tipping J Are you suggesting that there's some idea of reasonableness here?

Pike There's an idea of an ability to be able to reason, yes, the words in the statute

Blanchard J Your mind is uncontrolled and your actions are uncontrolled.

Pike Yes. We do I would submit as a general proposition but not necessarily welcomed, that there has been a tendency of a raft of cases across the commonwealth to accept behaviour as provoked behaviour which is very far from transport of passion and loss of the power of self-control. It has accepted a loss of self-control but without necessarily focusing on the words of the statute.

Elias CJ Well the loss of self-control is directed to the actions of killing. I mean it's not general loss of self-control, general loss of ability to reason, so it's less than full loss of ability to reason.

Pike Well I would submit that

Blanchard J If you're not reasoning on what you focused on at the time, no doubt you'd be capable of doing some other reasoning quite unrelated

Pike Yes.

Blanchard J But there's a danger really

Pike It's deliberate and focused

Blanchard J There's a danger here of simply getting over-refined with terminology. It's not a very complicated phenomenon that we're talking about.

Pike No it's not.

Elias CJ Except in *Rongonui.*

Blanchard J No, the concept of loss of control is not a complicated phenomenon.

Tipping J Concept of loss of control is different I think from the concept of loss of ability to reason.

Pike Well.

Tipping J And this idea that it's not available to a person who is motivated by anger seems to me to be an extraordinary one.

Pike Or merely by anger. A person must

Tipping J He doesn't say that, he says provocation is not available to a person who is motivated by anger or, and then he talks about deliberate calculated reasoning.

Anderson J It's really mixing it up with self defence where it's not available, if its made later by anger.

Pike Yes, although I have got a feeling he might be in good company because I rather think that if one looks at *Holly* that Lord Nichols had already excluded that and the tightening

Tipping J Lord Nichols has never said that if you're motivated by anger you can't be provoked in law.

Pike Well I think it was both he and Lord Hoffmann agreed on that point that one isolated out mere anger from loss of self-control. That's all this Judge is saying and what he says

Tipping J Look with respect Mr Pike he hasn't put it that way, he simply said to the jury that if you're motivated by anger you can't be provoked, well provocation is not available to a person who is motivated by anger.

Pike Well that's at the time of the killing obviously, because that's the only time that it engages, so if one is acting is acting out of anger at the time of the killing, that is certainly not compatible with loss of self-control. That it's not a profound enough state.

Tipping J Well you're almost inevitably going to be motivated by some form of anger if you've been provoked.

Pike Yes but it has to be

Tipping J I mean

Pike I know, we're going in circles a bit but

Tipping J I know I run the risk of dancing on heads of pins in terminological sense, but I have never seen a summing up like this before on the subject of provocation.

Pike Well again what His Honour was driving at, and we submit here, arrived at, was saying that mere anger is not enough and that's what he was meaning when he talked about provocation is not available if you're motivated by anger, i.e. if there's nothing more than anger provocation will not be available as a viable defence. It has to be

Tipping J He's talking about motivation here, not loss of self-control, that's the problem. He excluding self-control from someone who is motivated by anger.

Pike Indeed, well as I say in the context that can only be understood or would have only been understood is the fact that as the Crown said that, of course the Crown's case was that undoubtedly Mr Rajamani was motivated by anger when he killed his wife.

Tipping J If he'd said it's not enough to be angry you've got to go

Pike Well he did

Tipping J Well no he didn't here.

Pike No not then

Blanchard J But later on he twice says that, once in para.60 and once in para.

Tipping J Maybe that's your better point frankly. You'll never persuade me that that's good as it stands, but if he's corrected himself that's a different matter.

Elias CJ He doesn't correct it.

Anderson J I think the difficulty is that juries in reality facing provocation directions have to grasp quite difficult elusive concepts. Their eyes glaze over very often in my experience, and introducing all sorts of other ideas in the motions and concepts simply makes it more difficult. It doesn't help them.

Pike No it may not help them.

Anderson J One just sticks to the words of the statute, I mean that's the purest form of it.

Pike Well that is

Tipping J Power of self-control, that's all they have to lose

Pike That's right.

Tipping J But it's everything they have to lose too.

Pike Yes indeed, but the loss of the power of self-control is important, i.e. it is quite a fundamental state, lost self-control is not enough – you must have lost the power of self control which is something more

Tipping J Well that's getting even more sophisticated.

Pike Well it's a very deliberate word in the statute and there are often times with respect it's overlooked. The immediate instinct for defence is to say lost self-control. We win and that's it, but it's fair and reasonable for a Judge to say or to remind a jury in whatever terms as long as they

are not wrong in law that what is to be lost is something much more fundamental than just self-control.

Elias CJ It's the ability to control.

Pike That's right, as *Ashworth* points out compellingly in many articles on provocation, do I lose self-control if I suddenly swear at the Court, meaning I have lost self-control.

Blanchard J I think we agree with you.

Pike So it's really

Tipping J It's losing self-control to the extent of forming and doing.

Pike Yes, so you basically have lost what the law describes as your rational cognitive ability to say this is wrong; I must not kill; I must not do these things; I must deal with this in some other way. That is wholly lost, and as the Judge says it is reasonable to describe it as an extreme state beyond anger or very angry. It must be one where there is a fundamental inability

Tipping J But wouldn't it be much better if Judges simply said to the jury loss of power of self-control means unable to restrain yourself or something like that, and not mix it up with all these complicated metaphysical concepts.

Pike Well yes

Tipping J I'm just looking to give some help. I mean I think this is as complicated a direction I have ever seen in para.55, mixing all these concepts up as to what constitutes loss of self-control.

Pike Well indeed and it may indicate a judicial and a demonstrably salvageable

Tipping J The difficult part of provocation is the second stage. This is making the first stage into just as difficult if you like as the first.

Pike Yes I certainly agree, it should not be over-complicated, however I would respectfully submit in relation to saying to you that you have simply lost self-control means pretty much in its own terms, you have lost the power of self-control, leaves it open to a jury to decide well that is in fact just losing it, just snapping, getting very angry, something a much lesser state than one where the person has lost the capacity, and that's a word I would underscore, has lost the capacity to exercise what ordinary people are expected to exercise in the face of unwelcome conduct as in this case. Wholly lost that capacity to prevent themselves from committing a brutal act of homicide. That is not a state which is to be left at its lower level than the Judge says extreme in some way,

and I would respectfully support that. Maybe too many epithets were laid down to try and get this message across to the jury, but the Judge did compatibly with the law it is submitted leave the jury in no uncertain terms that the state had to be something extreme, beyond super-anger as it were, and to an extreme state of passion, an inability to reason, an inability to bring judgement to bear on what was being done and an inability to resist the formation of an intent to commit homicide, and those are justifiable features that we submit are a loss of self-control. In this case the only arguable proposition which is put forward by my friend is that if the Judge has suggested that the person is an automaton then of course there's a misdirection, but the Judge with respect has nowhere come close to that in the use of these epithets. What he has is not ever said that he must have been in a state where he did not know what he was doing, which was the case of course, his strongest case which he relies on, where a Judge did say that and he hasn't come to that stage in this case. What my friend seeks to do is to say that *Richens* case which he relies on, which is the (1992) 98 Criminal Appeal case, the *Richens* holding was the Judge in that case went so far as to say that the accused must not be able to really know but not be conscious of what he is doing. Well of course that is plainly wrong and put the test in a way that was unsalvageably wrong because it does suggest something akin to automatism.

Anderson J Or instinctiveness. An instinctive response which is another

Blanchard J And instinctive response is not an unknowing response.

Pike But here with respect the Judge would have gone into error if he'd left this jury in this trial with the proposition that if Mr Rajamani knew what he was doing, i.e. that he was conscious of the fact that he was killing his wife, then he had no defence. If he had gone that far of course there would no question it would be an arguably reversible error, but he hasn't done that and what Mr King enjoins the Court to do is to say well the build up of words gets you to that point. That is really the equivalent of saying action without conscious volition, and with respect despite what was said in *Campbell* and other cases on the point, what the Judge says falls a long way short of that and has used very few epithets which are not known to the common law, including

Tipping J I think a lawyer would see that difference quite clearly. The difference between conscious volition and acting without the power to reason or whatever the Judge said, but I'm just worried about whether our jury would have digested this.

Blanchard J I just wonder how realistic it is though to take apart what is said on the subject of provocation in the main part of the summing up when in fact there was a jury question in which he went through it all again. It seems to me that that's where the focus should be, because that's what the jury last heard from the Judge. The chances of them remembering

the nuances from the earlier summing up which they heard only orally and didn't have in writing is very slight.

Elias CJ Very speculative.

Tipping J That's a valid point but I mean jury questions are asked for all sorts of reasons and often it's one juror who is being a bit different than others and it's difficult to make

Blanchard J Well they actually asked for the whole thing again.

Elias CJ You can't though speculate about jury deliberation. If there's an error in the summing up you cannot say well it's not likely to have put them wrong. It's impossible.

Tipping J Only if the Judge demonstrably says I got that wrong last time, ignore all that, here is the real oil, and I've known that to happen.

Pike Yes, with respect Your Honour you say it is not unknown for Courts and appellate Courts, mainly senior ones, to weigh what a jury would have thought. I mean there are dangers and speculative dangers and that point is well taken, but if one confounded on the record as to what the case was about, that's what I come back to perhaps incessantly

Elias CJ Yes I was really responding to Justice Blanchard's suggestion that the sequencing which may well be quite right, but I'm just signalling that I wouldn't want you to think that I think that that is appropriate speculation for the Court.

Pike Yes well the starting point is was there an error in the first place to overcome

Elias CJ Yes

Pike And of course we submit with respect that the Judge hadn't gone so far as to leave the jury with that impression. As I understand my friend's case is clear on the point that while he criticises the use of various words and enjoins the Court to essentially direct that, or to lay down as a principle, that Judges oughtn't to do this, what he does say in this case is that a test he set for himself is that the error lay in suggesting something akin to automatism. Now if he can't reach that point then I submit that there is no reversible error demonstrated on the record by my friend. The other question about his general proposition to the Court is one in which I share in some part is that Judges should at least keep to a narrow range of words which keep away from the proposition that the person was in such a manic stage that they really didn't have any conscious appreciation of what they were doing. That's too high.

Anderson J Is there any authority for the proposition that for there to be provocation you must act instinctively?

Pike No.

Anderson J He tells them that, twice.

Pike Yes but again it's in a context where he's dealing with premeditation. I mean as a general proposition of law you are right Your Honour, it is not to say that someone must act instinctively when indeed we have, and I don't quite know what that means, but to say that it's something which you don't think about to any degree at all isn't right, because we do allow time for a murderous intent to develop in some cases

Anderson J In some cases

Pike Including

Anderson J Some is an immediate reaction, I mean it's just probably the origins it's a defence, we're in that type of situation.

Pike Well it was on the sudden and the loss to the blood boiled. I mean that was the *Parker v R* and we were repeating those time hallowed ancient words now that the provocation must be a reaction on the sudden to insult and the insult must be such as to boil the blood and as the Privy Council said keep it boiling

Tipping J Keep it boiling. Keep it boiling, that was a marvellous metaphor.

Pike Well it was a very strange case was *Parker v R* but it boiled as he rode for about three and half hours across a desert on a push bike I think looking for revenge.

Tipping J It was a lot of boil.

Pike Yes, but the reality here is that one can, as always the case, clinically dissect the summing up and to say 'as general propositions of law, they're wrong. If they were general, but the question always for the Court is were they general and were they something that didn't apply to this case, and if they were said did they have the effect of removing or modifying the scope of provocation on the facts of this case in a way that indicates a clear miscarriage. Now we simply with respect come back to the point that the Judge has done nothing wrong except it may be said, may probably be said that he is not impressed with Mr Rajamani's testimony, but he hasn't left anything more to the jury than that to say that you must scrutinise with real care the question 'did this man lose self-control or was this a planned killing; is his story to be believed; is it not to be believed; if you have a reasonable doubt you acquit and so forth if you accept his story, and talking about instinctively or words of that nature or suddenness', the suddenness of the reaction in this case it is not misdirection that is submitted because that was essentially the defence case. There was a sudden reaction to

provocation, and so it didn't take anything away. There's no suggestion in anyone's mind that he slowly built-up to a loss of self-control, he lost it immediately he said when she told him about the Pakistani dimension; he then left the house and for some short time between five and ten minutes he returned with the bricks and the homicide occurred immediately on his return home, so nothing is taken away from him talking about instinctively, because on his testimony he had lost his self-control immediately.

McGrath J What you're really saying is if you have a sudden loss of self-control that you are acting instinctively?

Pike Well it's not incompatible. I don't know what the words mean Your Honour in that sense. It's

Anderson J Reflexive, that's the impression I get from it. Purely reflexive.

Pike Well that's

Anderson J Unreasoned, un-thought about, reflexive action.

Tipping J It comes pretty close to automatism in my book.

Elias CJ Auto pilot.

Pike Automatism is you don't act instinctively, you don't act at all in law of course, there's no actus reas because you're mind is not on the job at all. There's no suggestion here of that, in fact the person's mind may be on the job they can intend to kill and they can act with deliberate, in that sense, with deliberate goal directed reasoning to bring about their deadly intention. All of that's accepted in the law of provocation. But one accepts the propositions as one always must in this sense from the Bench that all of these words are simply taking away the markers if you like, the marking threads from a minefield, which is what we're in when we're dealing with provocation defences, and that's the risks and I can't shrink from them. What we seek to do in this case is to indicate that on the way it was run, the competing testimony and the way the case was run, these are ultimately harmless errors, although many of them are in themselves mistaken or inapt to use the phraseology, but it's not more than that in terms of its trial impact, but certainly the Crown's case is that it is right for a Court, in fact essential, for a Court to remind a jury that loss of self-control is something which is a state in the extreme range of known human behaviour because of the importance otherwise of the sanctity of life and all those other values that we stack up on the other side of the equation in relation to the scope of the defence, and as I say in my submission, and it's partly against me, self-control has become much more important now since the modification of the provocation defence if you like with a re-working of it, post *McCarthy and Rongonui*. The focus now is much more likely to be on actual loss of self-control rather than on a fight to

the death on whether it's a characteristic, whether it was aimed at the characteristic, all those were swept aside, and so there is an importance for both the defence and the Crown in the concept that here the Judge's submitted did not stray into an area where the jury would have been misled so again so gravely as to conclude that Mr Rajamani could not succeed in his defence unless he was acting without any conscious awareness of what he was doing. So that's simply all one can say on that point. That may well be the point where the *Timoti* point comes in and I deal with that quite briefly with respect and that is that it was material misdirection to leave the jury with the impression if that was what was done was that the provocation had to be such as to not only have the effect that the ordinary man, or person sorry, would lose self-control but that in fact it would have to be such that it would make that person do precisely what the appellant did in this case which was to obviously dispatch and kill his wife under circumstances of some peculiar brutality. It is submitted that no way again this was not quite what the Judge was saying, nor would it have been understood that way. What would have been understood or what was intended and would not have been misunderstood is the fact that it must be enough to induce the ordinary man to kill. That at ordinary person in Mr Rajamani's shoes at that time would have killed Chitra but not by necessarily the sequence of events that the record discloses, but that she would have been killed. It doesn't ask a lot for an impression to be left that the jury again could not find that there was sufficient provocation of what she said unless they thought that any of them facing the provocation would have gone to the lengths or killed her in the same way. That with respect makes no sense. I would submit that what the Judge was saying interestingly is exactly what's said in s.3 of the *UK Homicide Act* which reflects the common law and it says this 'where on a charge of murder there is evidence on which the jury can find the person charged was provoked', leave out a bit, 'to lose self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury in determining that the jury shall take into account everything said and done and to the effect in it's opinion it would have on a reasonable man.

Tipping J Well we expressly distanced ourselves from that intimate. That was the reason why we didn't follow *Philips* in the Privy Council, so with respect I don't think that's going to help you.

Pike Well that was on the idea of cooling however, I think that was

Tipping J The Judge has known exactly what intimating we said should not be done, the sole issue is whether it could rationally have made a difference.

Pike Yes, but in this case I would submit what he's done is simply said that in terms of what would be an acceptable common law idea that the

reasonable person would have to have been concluded to be likely to act or would have acted in the same manner, but

Tipping J Well in England it's that because that's what the statute says.

Pike Yes I'm very aware of that

Tipping J Our statute doesn't say that.

Pike No it doesn't, but it

Tipping J I don't know why you're hammering this Mr Pike. It seems to me your far better argument is that yes he did misdirect, but so what.

Pike Well it certainly is again a harmless error, but what I'm saying is he's saying no more than the Homicide Act says and we must accept that it has to be enough to make an ordinary man kill. A homicide act doesn't mean in the same way as do exactly the same thing either, i.e. kill by getting bricks and cutting throats and goodness knows what.

Blanchard J So do as he did simply means kill?

Pike Kill, it just means kill.

Elias CJ Well it does in that statute.

Pike And it does here.

Elias CJ Well that's the point.

Tipping J Why the reference to the circumstances of this case then?

Pike Well I suppose there was a truism really, it had to be

Tipping J It's not a truism; it's the whole malice in the direction.

Pike Well we don't see it as the malice in the sense that it's difficult to conclude that the Judge meant anything more than simply kill the wife.

Tipping J To form a homicidal intent and act upon it?

Pike Yes.

Tipping J That's all you have to say. Now why this business about in the circumstances of reacting as the accused did? It's a double whammy. It's a focused on the accused and the circumstances of this case. I just don't understand. Did this come after *Timoti*; the summing up or it did not have the benefit of *Timoti*? It was after

King The retrials were at the same time Sir.

Elias CJ It was after.

Tipping J Well I just can't understand why this direction was given. I mean is that completely to undermine the *Timoti* principle?

Pike Yes, well

Tipping J Now it may or may not in this particular case have done the harm that is ascribed to it, that's where I'm needing help.

Pike Yes will this is simply a matter of judgement in which case one can only suggest that again trial counsel mistook that and the same with the plethora of points that are at large that trial counsel might be blamed for that.

Tipping J It put no weight on the fact that the trial counsel missed. I don't think you can blame

Pike But the other point is that one would have to simply accept that the Judge has left the jury with no more than the proposition that they would never have understood again the very odd proposition that unless we would conclude that the reasonable person would have got bricks and used the bricks and partially disabled his wife and then as she crawled off for help cut her throat. Unless we're satisfied that all of those things would have been done the defence is barred by what the Judge has told us. I mean again it's an extraordinary proposition. It can look jarringly wrong on paper but the consequent has to be that the jury comes up with a notion which is really extraordinary. That's the only thing I can say about it, and I can't say more.

Elias CJ Alright we'll take the lunch adjournment now if that's okay.

Pike If the Court pleases.

12.59pm Court Adjourned
2.17pm Court Resumed

Elias CJ Yes Mr Pike.

Pike May it please the Court, the next issue is following on from the provocation points that the Bench are versed now which I intend as they are unless there is any contrary opinion on that matter and we'll track into the hearsay issue which revolves around the proposition complained of by the appellant which is at the top of 308 of the case, the summing up is under tab 8 as the Court has it at para.21 is where His Honour the trial Judge commences dealing with hearsay evidence in a mostly cautionary manner but of course there is the passage at four

or five lines into para.21 where the Judge wants to deal with hearsay again, having already at the time it was given reminded the jury of several of the pitfalls of hearsay evidence as they would be seen under the law.

Elias CJ Could you just, I didn't flag that when I read through it. Can you just tell me the reference to that? It doesn't matter.

Pike It's in, I'm sorry yes we can

Elias CJ No that's fine

Tipping J It's para.21 of the summing up.

Pike Oh sorry no there's an earlier reference, we've got it, it's in our case isn't it?

Elias CJ He gave a direction to the jury to call for the evidence.

Tipping J I'm sorry, I misunderstood.

Pike The Judge has gone into what the Court of Appeal accepted was error and the statement that reads as follows 'that hearsay evidence has been permitted as it is relevant to your consideration of the background circumstances to the parties relationship and it is also relevant to the accused's state of mind that the relevant times and the defence of provocation'. The question is what does that mean. It's unusual to find a reference to hearsay evidence being probative of someone other than the utterer's state of mind. The question indeed in ordinary context it is impermissible of course to prove a second party state of mind by reference to the person uttering the hearsay state of mind, but the Court of Appeal having identified it as an error, the question is is how harmful was it as again is the point, and here it is submitted that in one sense the hearsay was relevant to the accused's state of mind and the defence of provocation but in an oblique sort of way because plainly what the hearsay evidence was about or mainly directly to, was did Chitra say to the accused before he left the house and returning to kill her, did she utter the words to the effect that she was off to live with her friend who happened to be a Pakistani Muslim or did she not? So in a sense of course

Tipping J But surely if it's relevant in that very subtle way the Judge has got to tell them how it's relevant and to guard them against using it in a less subtle way. You can't just throw bread on the water and see what the jury make of it.

Pike Well I accept there's a, I mean I'm not going to attempt to sort of go behind what the Court of Appeal has indeed said

Tipping J Well I thought you were sort of three-quarters there by the point you were just trying to make.

Elias CJ I'm not sure that it's right to slide into his state of mind anyway. It's relevant to her state of mind and therefore whether she said the provocative words.

Pike Indeed it is relevant to her state of mind but if it is accepted as reliable and true, her state of mind is accepted as reliable and true, then she would not have said the words so of course then you would look at him to say well do we believe, now can we believe his account of what happened.

Tipping J Why don't we just accept the Judge got it wrong and concentrate on whether it made any difference? This attempt to sort of obliquely support it Mr Pike seems with great respect rather unpersuasive.

Pike Well it's

Elias CJ It is your point that although the Judge should have made clear in what way it was able to be used, he's not astray in saying that it was relevant to provocation because he just doesn't identify in what way?

Pike Yes, there's the process error.

Elias CJ Yes, yes.

Pike There is a reasoning process to be followed. In some cases if it wasn't followed it would lead to harmful error. What I'm not very elegantly trying to convey to the Court in this part of the submission is that it was harmless error because by dint of the right approach one would have still arrived at the same point.

Elias CJ No, because you'd be instructed how you could use it, and how you could not use it is as evidence that he had already formed a murderous intent.

Tipping J He'd been thinking of killing her for days.

Pike Sorry?

Tipping J The inference you would draw for being told you could use this as to the accused's state of mind was that he had been thinking of killing her for days and it couldn't have been sudden provocation, that's the harm.

Pike Well of course you could advance the case that if you accept her hearsay utterances then you do not accept his utterances given in direct testimony that she said I'm off with the Pakistani gentleman. So that's the point. We can certainly legitimately get to that point

Tipping J Well maybe you can legitimately get to that point but you've got to be very very careful as to what you can't use it for.

Pike Yes Sir, it certainly is not direct testimony as to what his intention was and if there was any danger that you would get a different result depending on what set of tracks you put this inquiry down, then of course there's a question of only getting to the proviso - one is left with that. Here the question is whether in fact it was in the first place such a egregious error that there was a mistrial point and then one in a case like this with some difficulty raises the proviso that it didn't make any difference in the trial, but here it is submitted what the Judge has done is he has directed on intent and the sate of mind in orthodox terms and that's at 48 or 49 where he does not avert to any other evidence as to the accused's intentions at the time of the act, that is intending to kill. Now I accept that this is again bedevilled with the accident defence, but at 49 he talks about to determine the accused's intentions at the time you need to consider the accused's state of mind at that time and he goes on to indicate that really you are looking from proved facts in the accused's only testimony and you cannot look any further than those matters. So it rather suggests that when he was taking in 21 about the circumstances of the accused's state of mind it was conflating the idea that if you, as I've gone through it before, if you accept what she says it's reliable, you accept it as true, then you can't at the same time accept what he says or have a reasonable doubt as to its truth that Chitra told him that she was going with a Pakistani gentleman. If she didn't say that, if you accept she didn't say that, his state of mind cannot have been loss of self-control because that was his case that that's what tipped him into a murderous rage. So we get the same point but we don't do it in the correct sequence of events and analytically it is unsound and there's no quibbling about that and I have to accept that and I do, and the Court of Appeal pointed that out itself, but by dint of its reasoning processes it saw the error as not significant in the context of the case and I would simply submit that that is all one can say about it.

Tipping J Did the Judge anywhere else tell them how it was relevant to the defence of provocation? My understanding is not.

Pike No, I think

Tipping J And did he anywhere else tell them as to what state of mind and for what purpose the evidence was relevant?

Pike Well the closest that that happens is in para.24 in a sense where 'if you are satisfied the deceased made the statements and accurately you reflected her concerns as to what the accused might do, you should not leap from that than finding the accused is guilty'. What he's saying there is that you mustn't leap into concluding that he did not lose self-control.

Elias CJ This is even worse. People may say things and even make threats for a variety of reasons. I haven't really appreciated this.

Tipping J The statements are relevant factors for you to consider, particularly if you accept … oh dear. But the key point is this suggestion, the hearsay suggestion that the accused had been going around saying he was going to kill his wife. It's as blunt and as simple as that.

Pike That's in 24, yes.

Tipping J Yes. Well you've got to be very careful with that sort of evidence. I had that in the *Calder* trial, the poisoned professor, you may recall Mr Pike and I believe Mr King will recall that too and we had to be very very careful with that sort of evidence.

Pike Yes indeed. But all that Judge is saying there is warning about the reliability of her utterances, he's not inviting the jury to use it as direct testimony as to his state of mind or whether it is true, he is there talking about

Tipping J But even in this context the difference between was it said per se and was it said with truth embodied in it is very difficult when it refers to a future state of action as opposed to a present or past fact, so it's all starting to come back to me now. It is very dangerous territory.

Pike Well it's *Baker* territory essentially isn't it where there were threats there

Tipping J That state of mind of the victim that's easy. This is state of mind of the accused.

Pike Well it is certainly only in a reversed sense as I read it but it may be that the Court doesn't. It's only in the sense that if you accept what her statement of mind or her fear, if you accept that as true then you cannot reason from that that he did make these or he meant them, i.e. was her state of mind one in which you can rely. I rather think what he's trying to do there at least he may not have achieved it is to caution the jury about relying on saying well because she said that he intended to kill, is that really cogent, is it reliable evidence. You must weigh it very carefully before you accept.

Elias CJ But he goes further. He says people may say things and even make threats for a variety of reasons. He's getting beyond the reliability of her report and the effect on whether she did give provocation to him. He's looking at the truth, he's warning them about the truth of accepting that the threats were intended if they were made.

Pike Well I rather read it with respect Your Honour more directly that he is really saying that even if you can rely on her statements that she said

there were death threats, you cannot rely on that as being evidence of her state of mind or i.e. that there was any real fear on her concern. You have to be sure that it wasn't a baseless fear on her part.

Elias CJ No he's saying that he may not have meant it.

Pike That's right he is, he's putting

Elias CJ He may not have meant it.

Tipping J But equally he might have.

Blanchard J He has of course in the preceding paragraph at the beginning cautioned the jury about the possibility of him making the statements. Chitra may have exaggerated or even simply been wrong or lied.

Elias CJ Why the deceased might have said a thing has to be considered though.

Pike Yes. Well I mean the impression the Judge is conveying to the jury it is submitted is simply you have to find that what she said is reliable in the sense that you can accept that she had a genuine fear as a state of mind. Was she telling the truth or was the fear one you can't accept as being genuine, because only if she's got a genuine fear that you can really use that evidence to counter the testimony surely of the accused who testifies that she had provoked him by saying those words.

Tipping J Surely on that premise which I agree with, he should have very carefully directed the jury as to what point the evidence was relevant to and that it should not be used for any other purpose.

Pike Yes I agree.

Tipping J That would be tenable but I personally don't know that I would have let this in on the balance of probative and prejudice, but if he's going to let it in, surely he's got to tell them precisely what they can use it for and nothing else.

Pike Well as I say my only submission can be that he essentially has by omission that he has not directed it could be used for any other purpose. That is simply these two passages

Tipping J Juries don't know what, they have to be specifically told what they can use it for. It's no good saying they weren't told, you know they weren't warned off. They'll use it for any old purpose if they're not told not to.

Pike Well be that as it may Your Honour, as I say I can't advance the submission further than saying that these two passages are essentially to protect the accused's position as trial position from having her evidence seen as cogent, reliable or credible that they had to weigh that

very carefully before they use it and then the question to use it for what? And then we come back to 21 where we've got the infelicity of going to his state of mind which then has to be saved on the proposition which I've already gone through and I won't do it in Court again.

Tipping J But you're saying it could have been admitted for, that it was relevant to the likelihood of her telling him that she was off with a Pakistani?

Pike Yes, and trial fairness which is of course predominately for an accused but not entirely, there was a public interest. Plainly the *Baker* decisions and other decisions of for instance and the Canadian or simply a randomly picked recent Canadian authority here to have in the casebook, the Crown's casebook, is simply done on the basis that given that the only witness is dead then subject to trial fairness and the importance of focusing on reliability of hearsay is entirely proper that the deceased's account get before a trial Court.

Elias CJ But the Crown could have led evidence that she was frightened of him.

Pike Well it did.

Elias CJ Yes, but it explained why in terms of the threats he was said to have made to kill her.

Pike Yes there were

Tipping J This was so prejudicial that unless you have a very clear direction as to proper use I would have thought you were in real difficulty.

Pike Well again with respect one somewhat mantra-like comes back to the proposition that there wasn't a clinically precise direction on the point. It has to be accepted, I can't get past that observation

Tipping J But it wasn't that there wasn't a clinically precise direction on the point it is that there was an erroneous direction on the point.

Pike Well you had to have a potential for being misunderstood but I would submit that the potential was slight, that's the difficulty.

Tipping J I see.

Pike Because

Elias CJ Mr Pike just thinking of what you were saying about trial fairness, because it is an issue that is of concern in terms of colour that is often adduced in evidence, why would it have been unfair if the Crown hadn't been able to say that he had threatened to kill her? Why wouldn't it have been adequate for the Crown to have led evidence that she was frightened of her husband?

Pike Well that simply that evidence would have no particular cogents. I mean you have to say why she was afraid.

Elias CJ Well it couldn't have been challenged because then you would have been able to lead evidence probably as to why she had that fear.

Pike Yes, yes, it's not clear, and certainly I know the Court's view of what's called colour evidence and for whatever part I have in it I don't understand it to be an acceptable practice to take the whole chunk of life that preceded in the event and throw it before a jury. I mean I accept that from the Court for myself, but here with respect the difficulty is that the same as in *Baker*, we accept as we must as prosecutors that the over-arching concern is that if a person gets convicted on what is ultimately a fair trial basis, that prejudicial evidence which has little probative value is unreliable to be not adduced, but having said that the difficulty is with provocation cases especially of this sort, that uniquely the only witness to the fatal act is dead at the admitted hand of the accused. In those circumstances submitted there was a public interest in having subject to reliability, focus, relevance, evidence that is hearsay, utterances of the deceased person as to her or his state of mind relevantly before the killing. It ought to be limited in terms of just mere prejudice, but this is focused evidence. If in fact it's believable that he threatened to kill her, that is powerful testimony from her, albeit from beyond the grave, that she did not say to him that that fatal morning 'I'm off to live with my Pakistani friend'. She would have done nothing like that. That is the whole point of the trial evidence and with respect there are cases, and probably too many where hearsay evidence is led under the banner of colour which personally as the prosecution we do not accept as proper and we will do what we can to relent it, but this is beyond colour, this is substance, it's not just a fuzzy background somewhere that we can rely on, but that's the best answer I can give at the moment. But as I say the passage again presented difficulties in the clinical and cold light of a second tier appellate Court because it is not focused and because it does lead to a risk that a jury mishandled it, but on the important point at the top of 308, it is our submission that in a sense the evidence was relevant and a right process would have got that same evidence into a relevance context and in this trial setting, and I accept that in many others it would be fatal because of the nuances of the facts, but in this trial setting that evidence could have got before the jury but it should have been done on a much more regimented and orderly basis of reasoning. I accept all that, but that's all one can say again

Tipping J It's not a question of admissibility, it's a question of use.

Pike Yes, well certainly it's a question of use and we say that what's happened is that he has short circuit, the Judge has short circuit a process that could probably and properly have been achieved by a proper dissection of the steps which is in accordance with Your

Honour's decisions in matters in other cases where the principles are set out

Blanchard J Under the Evidence Act, if hearsay evidence is admitted, is considered to be sufficiently reliable, will Judges be able to circumscribe use as opposed to giving careful directions cautioning the jury concerning the way in which they may use it?

Pike I have to confess Sir I don't know the answer to that or I couldn't give a reasoned answer to that but having a first look at the new hearsay provisions it would appear that the over-arching point is that certainly the Judges must focus on how it can be used in terms of, oh sorry not to the purpose it can be put, but as to whether it should be accepted and with what limitation should be placed around it which would bring New Zealand jurisprudence somewhat closer to the reliability and necessity test that the Canadians use. I rather see that as lying behind it, but it certainly appears to be arguable that there is indeed subtle distinctions between trial truth, background truth and actual testimonial truth will not be as distinct entities as they are now, but I honestly cannot answer the question because I

Tipping J There may be occasions to distinguish between use as to reliability but the primary touchstone seems to be reliability

Pike Yes

Tipping J But the Court may decide that it's sufficiently reliable to be used for a certain purpose but not for another. I mean I think the subtleties of this have yet to emerge and there's also an overriding, more prejudice than probative isn't there somewhere in the new Act?

Pike Yes.

Tipping J Yes.

Pike Yes, that hasn't been changed.

Tipping J See now this was a very close call as to whether it should have been admitted at all because of the risk of it being more prejudicial than probative, I'm saying assuming it was prima facie admissible.

Pike Yes I

Tipping J Because of the difficulty of confining it to proper use is often a reason for saying overall it's better not to let it in at all.

Pike Well indeed, but here I would respectfully suggest at least that this was not the sort of evidence that had caused concern in *Howse*, which because of its repetitive theme. This is much more focused and its admissibility would not I would respectfully signal was not a big issue.

Tipping J But the trouble is Judges don't look beyond admissibility so often. They simply say let's admit it and then no one then bothers about why it's been admitted and this is with respect a pretty good example.

Pike Yes I accept that the Judge has not said why and one can only fall back as it were, or rely on it, not so much falling back but relying on the proposition that that was in a sense that the proposition wasn't wrong, it was simply not expanded and it wasn't principles, but ultimately it was relevant but the way you get to that relevance takes many more steps than simply a line conflating probably three different ideas. But really I'm not at all sure that I can take the point past that Your Honour.

Elias CJ *Baker*, which I've just been looking at is really quite instructive isn't it because it's got the same dichotomy, the explanation of the deceased's actions, but the Court very firmly ruled out the evidence which was as to what the accused had said about wanting to kill her.

Pike Yes.

Tipping J It's not consistent with *Baker*?

Pike Yes indeed, and it had

Tipping J I thought at one time this might have been a slip of the trial Judge's tongue and what he meant to say was relevant to the deceased's state of mind.

Pike Well I did too.

Tipping J That's very candid of you Mr Pike, and in somehow or other it's come out the wrong way.

Pike Yes well I did wonder that but I've no tenable basis to advance the point, that's the difficulty, but I had wondered whether in fact he had meant to say deceased at one point, because he doesn't come back to it and because it just hangs there as rather a jarring note to it all.

Tipping J Yes.

Blanchard J It's also a bit inconsistent with the next sentence.

Tipping J It is yes, the also? Anyway you've done your best to defend it.

Pike Yes I've done my best, such as it is, yes, and I'll just quickly move on to the last point perhaps which is now the unrelated but the 10 juror point. The starting point in this case on the 10 juror point is we have made some headway in trying to figure out what has led up to this position and it's clear that this is the legislative history, and what is

clear is that from 1997, this was as we all agree, this was a new position reached, from the criminal code days, 1893 Criminal Code, a trial could not proceed with any fewer than 12 jurors at all unless the parties before the Court consented to that course. Then from 1981 there was an amendment which brought in the 12th Juror Rule which was of course that gave no right of hearing as it were that a Judge could continue on a trial irrespective of the parties views on the matter with 11 jurors if one had become incapable for whatever reason. That came in 1981. The reason for that all I can do is give you some if it's permissible, is to give you some background from the bar because that was part of what I did in the Justice Department in dealing with that particular proposition, but I can't give anything more from the bar I'm afraid, and the reason for it was that this was the time when the District Court jury trials were implemented and there was a considerable concern about the extra numbers of jurors that would have had to be found and the increase in the numbers, or a predicted increase in the number of jury trials, and the inconvenience if one had to

Elias CJ Is that 1997?

Pike No 1981.

Elias CJ Oh sorry 81, yes.

Pike So what is part of the reasoning and I can only remember part of it, was to deal with the fact that because of the anticipated steep increase in the number of jury trials, well at least that was one predicted outcome of the reforms in the 1980/81 era, there would be many more jury trials and the difficulty of getting jury panels together and so on which was a real concern, hence the Juries Act was also changed you will recall in that very year which tried to cut down excusals back to the bone which had also been a substantial administrative burden on the Courts, so what was done was simply a pragmatic solution that juries should be able to run on with 11 if one juror fell off the twig as it were in relation to the particular trial. It was simply pragmatic and it was in the interest only for the purpose of the interest of justice that there was no undue disruption to jury trials and there was no thought at the time there was a right to 12 jurors. There was a statutory entitlement to it and so there wasn't a rights based analysis and in any way it was ten years before the Bill of Rights Act. But be that as it may that's why the one juror rule that with one gone the trial goes on was part of the reasoning for it in 1981. In 1997 I don't know. We can't find reference to any of the preliminary working papers on this which of course brought in the particular problem we've got now of the 11th juror coming off the twig and falling down to 10. Simply we've got a proposition that the Judge may do that after a hearing and may hear protests on the point and may if the circumstances are exceptional and having regard to the interests of justice either discharge a jury or continue with 10. One can simply surmise, and it's a reasonable speculation, that it's a continuation of the thinking that underlay the 1981 amendment, that is as our prosecutors

and I think the defence bar would probably agree, these days Courts ending up with 10 jurors is not as uncommon as might be thought.

Tipping J Increasing length of trials I suppose is the significant issue.

Pike There's a number of issues with people who may be mothers and then on a couple of recent occasions I have been told of where mothers can be known to get care for their children, simple as that, and they're distraught, they're solo mothers. It's just a change in social pattern and we have an issue presumably where the legislator says right this cannot be done by simple judicial feat. Going down to 10 is a significant step. There must be a hearing. There must be a basis in law for doing it rather than because we're now trenching onto an area where we're down to 10 jurors rather than 12 to suddenly seems much more significant as perhaps it is.

Elias CJ Sorry Mr Pike I wasn't paying close enough attention. Are you saying that the form of s.374(4)(a) is in the same terms as when it was possible to drop down only to 11?

Pike No, no.

Elias CJ It's not, oh sorry.

Pike No, this is because the 11 was simply where the Judge does not require to have a hearing on the point, whereas the objection of the accused doesn't come into account, but of course when it goes to 11 and then the question is now we're going to 10, the accused does have a right to a hearing and if he opposes must be heard and of course the threshold for doing so is the exceptional circumstances relating to the trial, including without limitation the length, or expected length, in having regard to the interest of justice that the Court should proceed with fewer than 11 jurors. It may proceed with 10 jurors whether the prosecutor and the accused consent or not and then of course can't go under 10 unless both consent. So in these circumstances the reason for it still has to be seen as purely administrative, i.e, the efficient despatch of justice that the Judge must

Elias CJ Where do you get the efficient despatch of justice from?

Pike Well because it's essentially a continuation of the reasoning I would have thought for the 11, or 12 down to 11. The only purpose of that is the serious trial inconvenience to a whole range of interests. There may be the interests whether the accused likes it or not of a speedy trial – of having the matter determined. There's prosecution witnesses; there's victim impact; there's the cost increasingly a seriously significant fact of repeated trials; the difficulties of bail delay; custodial remands. I mean I don't obviously need to preach to the Court about, especially this one, as to trial inconvenience and repeated trials of the same matter. But the submission is made that is really for amalgam of

purposes that the down to 10 rule was brought in, except plainly there was a recognition of the fact that by now when you're going down to 10 jurors, there's some magic in that that there wasn't apparent in the 11 and that with two jurors having gone the matters have to be weighed in the balance, whereas in 11 they don't.

Tipping J I don't quite understand how this efficient despatch of justice fits in. Clearly the section signals at least to me that going on with 10 is very much the exception not the rule, so Parliament is by no means sort of saying well the efficient despatch of justice demands you go on with 10. There has to be something pretty unusual about the whole set up before you go on with 10.

Pike Well it has to be in exceptional circumstances.

Tipping J Yes, so it's really something that sort of strikes you as being this would be quite wrong not to carry on - that sort of connotation I would have thought.

Pike Yes but as I say

Elias CJ See the prosecution can object yet there may be cases where the defence desperately wants the matter to proceed.

Pike Indeed, it would be unusual but it's

Tipping J Well no, you might feel the wind at your back.

Pike Yes, oh well

Elias CJ Mr Pike have you checked to see whether there's any legislative history of help to us or are you just not able to tell us at the moment?

Pike No we haven't found any

Elias CJ Because it seems inconceivable that there isn't something.

Pike Well the best thing we can do is to try and get the justice file

Elias CJ No, no, I don't think it's necessary to drill down as deeply as that but really all I was inquiring about was is there anything in the introductory speech in Hansard and was it preceded by a Law Commission report or something of that sort?

Pike 1997.

Elias CJ It's a 97 one?

Pike It was the 97 amendment.

Tipping J There must be something in Hansard.

Pike Well Sir we checked it.

Elias CJ You did check did you?

Pike Yes, and I don't think there's anything in the debates. What we possibly need to do and we shall do this because the Court obviously would be assisted is have another check at the Select Committee reports and see if we can get anything, but I'm pretty certain I looked at the 97 debates and couldn't find reference to it, but I

Blanchard J Was the section amended during passage through the House?

Pike No I don't recall I'm sorry.

Blanchard J Because often if you're going to find anything that's where you find it.

Pike There has to be and I'm sure the Ministry of Justice will assist as they are always very helpful, that we can go back to them and get a line on it, so that's

Blanchard J Well I think we've got to be very careful about the admissibility of material that isn't true Parliamentary material. The Select Committee Report would be admissible but the communication between the Ministry of Justice and the Select Committee may not be.

Pike I'm sorry, the Court has received departmental report, well the Court of Appeal has in years gone by and it may still be

Blanchard J But it's very much an open question whether that's permissible.

Pike Yes, but I'm sorry what I was intending to say is that a line of inquiry could start there then if admissible material is then discovered I will get it to the Court. I can undertake to do that and we can do it quite quickly.

Elias CJ Thank you.

Tipping J Well what was exceptional about this Mr Pike, forget the Judge's reasoning, you're are able to articulate sort of one, two, three, or one point or whatever it might be that makes this exception.

Pike Well with respect I haven't got more reasons than of course His Honour, the trial Judge said.

Tipping J Well the problem was His Honour didn't give all the reasons that might have been given.

Pike No he didn't, he didn't, but I would certainly adopt, it was obviously the Crown's submission in the Court of Appeal, and I will repeat it here. The Court accepted that what the section did not entail was a weight type analysis of the reasons given for its exceptionality. I think what the Court of Appeal said was that if any meaning is to be given to subsection 8 which talks about the reviewability of the discretion, I mean what the Court would look to is to say as in truth had there been a proper exercise of a discretion at all in this matter, but it would not go into the reasons that were given

Blanchard J But what do you say is the position on exceptional circumstances? Are you arguing that the Judge's decision about what is exceptional circumstances is a discretion?

Pike It's a matter of judgment I would argue. It has to be something out of the ordinary

Blanchard J So therefore the probative provision doesn't apply to it.

Pike Sorry?

Blanchard J The probative provision only applies to the discretions within the section. If the question of what's an exceptional circumstance is not a discretion, the probative provision simply doesn't apply to it.

Pike Oh sorry, yes that was the point the Court agreed to this morning.

Blanchard J Yes.

Pike I had with respect and no doubt some difficulty now, had thought that if the opposite was true that it was perhaps not the intention to say that each of the factors should be re-weighed by an appellate Court and only if the appellate Court was satisfied, simply on a re-weighing, that there were exceptional circumstances, then what had been done in the exercise of discretion wasn't reviewable because plainly if the Court accepted there were exceptional circumstances it would be most unlikely to then say ah, but that being so, it was still wrong. It was wrong to continue on the trial. I had rather thought that the Court of Appeal result which was perhaps pragmatic but did reflect the subsection 8, is to say that if the reasons given for exceptionality, individually or severally, couldn't rationally amount to exceptional, i.e., out of the ordinary, if they couldn't rationally amount, no reasonable Judge could have found it, then I would rather have to give way on the proposition that there had been a proper exercise of a discretion at all, so there was a plain error of law. And this is getting back to the early days of administrative law type reasoning, but that would be what is seemingly contemplated by the section. That's what the Court of Appeal thought that it meant and I would submit that it was a reasoned and available meaning of 8 that if it couldn't possibly be said that any of this was out of the ordinary in that meaning of the

word ‘exceptional’ then there has been error of law or plainly wrong, in which case 8 doesn’t really bite and in any event because 385 of the Crimes Act gives a right of appeal on a substantial miscarriage, or for any reason there’s been a substantial miscarriage of justice, if the reasons could never in a rational judicial mind have amounted to exceptional, then there would have been a miscarriage of justice, the question then, was it substantial? But that’s what the Court of Appeal would rather have said. All I can find out about section

Elias CJ Well the question is really whether the statutory grounds exist.

Blanchard J Is there jurisdiction?

Tipping J It’s a question of power isn’t it?

Pike Well with respect I think when we come back to jurisdiction

Tipping J Well I would be inclined if they are going to put it like this in the section, if they want to give a complete immunity for any decision under this section, they should do so plainly.

Pike Well I don’t think they have and we’re not arguing for that.

Tipping J Well therefore surely if we think that there weren’t exceptional circumstances, there were no grounds to exercise the power, the discretionary power.

Pike If the Court came to the view there weren’t exceptional circumstances on a basis that no Court could have found these, not that you disagree with them

Elias CJ Why should there be deference in that sense here? Are you talking about a

Pike If there’s no deference at all then there is no real meaning in subsection 8.

McGrath J You can Mr Pike, because if you look at subsection 4 it seems to me, that’s setting out when the discretion arises, and basically you have a situation in which discretion arises which is always subject to subsection 4(A) and if you then come down to 8, the Court can review the exercise of the discretion but before you’ve got to the discretion you’ve already concluded that subsection 4(A) doesn’t bite and our real issue here is whether subsection 4(A) has ever had any application in this case.

Pike Yes I certainly appreciate that although I don’t accept it’s right with the greatest of respect.

McGrath J You're putting in as the Chief Justice says, you're putting in a judicial review type of test rather than an appellate type of test and I don't see any basis for that.

Pike Well the only basis one can give for it is firstly the wording is unusual in terms of 'review the discretion'. It doesn't say any 'no appeal may lie from the discretion'. It says 'may not review it', and the origin of these words goes right back to the writ of error and the writ that was plaguing the sessions of Oyer and Terminer and the other trial Court

Tipping J Well then let's let it plague today's jurisprudence then.

McGrath J But it may just be drawing a contrast between the exercise of the discretion and reviewing the circumstances which give rise to the existence of a discretion.

Pike Well that's an approach I'll respectively disagree because as I say it's best one can see of the history of it and it's very murky and it needs more work and I just haven't been able to find it tracing through using

McGrath J But there's plenty of scope for the provision to operate though isn't there? I mean you can then say you can't review a decision to discharge the jury, nor can you review a decision to order the trial to continue as long as in fact there was the statutory basis made out for it, exceptional circumstances and so forth.

Pike In substance however if on a simple mutation as it were of opinion or a transference of opinion from one Court to another, the reasons given arise to exceptionality are impeachable, then I still come back to the point subsection 8 have little play at all, because that's what the argument will always be, unless a disgruntled party in this case, it will have to be the accused because the Crown doesn't have a right of appeal on the point unless it reserved a question and it's unlikely that we ever would. So if the accused wants to undermine the exercise of discretion it will always be on the basis that there was never a factual basis for doing this. It won't be anything else. In which case subsection 8 has no effect at all.

Blanchard J Well it may have little effect in relation to this particular subsection, but there are some other discretions within the section generally in respect of which it can operate. I mean Parliament has chosen to right it this way. We have to apply orthodox principles and I think Justice McGrath is quite right that we can't introduce judicial review principles into what is essentially a matter of appeal.

Pike Well as I said I'm bound to respect that in the end. If the argument is unpersuasive that's where it rests.

Tipping J But look at the language, look at the language. If the Court considers that the Court should, that's the discretion. The foundation of the discretion is exceptional circumstances and so on.

Pike Yes, but I can only come back to as I said, the history of it as best it can be gleaned, the writ of error would lay from the Queen's Bench. It was a review writ.

Elias CJ But doesn't that I mean I've just been pondering that point, the word 'review' is apt for the process as well isn't it, and it's not determinative of the exclusion of an appeal?

Pike No, we've got an inconsistency in the Act. The difficulty is that the two sections, 385 and the 375 for 8 do not gel.

Elias CJ But the sort of thing that this would prevent surely is somebody rushing off to review the exercise of the discretion and stop the trial, that sort of thing. Would that

Pike Well that was once possible. That's what was happening as I think I've made reference to it; I have in our case sorry. The slight belief that we've got does indicate that there was the writ of error issued out of Queen's Bench removed the trial from the weigh-in terminal and the Sheriff's Court

Anderson J Technically you could do it in relation to a District Court jury trial

Pike Now, here and now.

Anderson J They seem to have quite a lot of prerogative writs.

Pike Yes well we could remove the decision, but in this case the whole trial got removed. I mean the history of it or one's gleanings of it you can see that the legislators no doubt emboldened by the Court of Queen's Bench at the time got fed up with the number of trials people were trying to get themselves, what they saw as a better class of trial by being tried by Queen's Bench – at the Bar of Queen's Bench rather than in the Sheriffs Courts with juries, and there were at least three or four Courts under Queen's Bench that sat with juries, as did Queen's Bench, and so what happened was that the trial got removed on the writ – the whole thing, to a Queen's Bench jury. And so it was, it was essentially a judicial and that's why I stubbornly come back to the fact that the words do have their anchors at least in that and what we make of them now is a matter of extreme puzzlement but that was why I would sought to validate an argument that this Court, or the Court of Appeal, was right to say if we simply disagree with the reasoning, that's not sufficient to raise it to an appeal that falls into the non-reviewability and we can't go there. If we look at the reasons and say look no Judge reasonably could have come to these conclusions, or

there was no proper hearing at all of this, therefore has been a trial process

Tipping J That's a sort of half-way house. If it's a bad enough however you can review it.

Pike Plainly wrong, well I mean certainly I'm stuck with the proposition wrong in law, wrong in principle, plainly wrong.

Anderson J What about for example in relation to subsection 1, the Judge says well I thought this jury would be back before now and I have to go on circuit so I'm going to discharge the jury, a case similar to the one that happened in England at some stage, and could a reviewing Court say well look there wasn't an emergency; there wasn't a casualty and therefore the ability to discharge just never arose.

Pike Well I agree with this and I'm driven by the logic of my own case to agree that there comes a point where the words are not capable of giving rise an ordinary English meaning or as interpreted by a Court, of being exceptional or an emergency for that matter. I accept that, or I can say in response to the Court 's questions is that if they are capable of being seen as something that's out of the ordinary in the witnesses in Australia; the balance of a trial; or inconvenience; the inability to get a trial on again if the Judge knew that it was 18 months in Auckland to get another trial together

Elias CJ Well if you prove this, if we approve this course though, what bothers me does that mean in any case where a trial is underway and therefore there will be some administrative inconvenience, some cost, all of that, is that always going to entitle a Judge to proceed with 10?

Pike No I hope that my submission isn't understood that way.

Elias CJ So it's the additional element of the witness from Australia. Is that it?

Pike Well that's essentially one of the features that was predominant in His Honour's mind, but I don't

Elias CJ Well it may not be, but I'm just groping for what other reasons you say in this case made it exceptional, because most cases these days go for a couple of weeks it seems

Pike At least, yes.

Elias CJ And this was just at the end of the first week was it?

Pike Just before it.

Anderson J The morning of the seventh day.

Elias CJ Yes. This sort of case must crop up a lot.

Pike It does.

Elias CJ And absent the additional element about the witness from Australia which you can come back to, could you say that that is exceptional?

Pike Well as taking one step at a time, as the Court observes, a two week length of trial for a murder trial is exceptional only its brevity.

Elias CJ Yes.

Anderson J But you're not going to lose two weeks here, you're going to lose the time that is already taken, which is actually six days

Pike Yes.

Anderson J There may have been 37 witnesses but only six days would be lost on re-scheduling the trial.

Pike Yes six days are lost and another two weeks has to be found, and another jury and there are

Elias CJ Yes, but potentially you have an accused who if convicted is going to be getting a sentence of life imprisonment with a substantial non-parole period, so you know there's an overall consideration of justice.

Pike Yes certainly, that's where the struggle begins because in a sense the question is was there a right essentially – there's a statutory right to have 11 jurors unless there's exceptional circumstances

Elias CJ Yes, exactly.

Pike There's no say Bill of Rights dimension to have 11 rather than 10 jurors, it's really a statutory right. We have to accept that the legislature said you just don't do this with a wave of a wand and say well we're carrying on irrespective. There has to be something which is unusual.

Elias CJ Yes.

Pike What I do submit though is that because there is no perhaps really fundamental over-arching right engaged, and that might be brought to bear, the question still comes back to whether the deference, oh wait that word's not particularly light in some circumstances, we say the marginal appreciation or whatever to a discretion runs wider than would ordinarily be imagined, that is the Judge might well have had rather too few reasons that didn't quite get to exceptional circumstances, but be that as it may it's not reviewable unless you can come and point to a miscarriage of justice by some other means.

Blanchard J But the question of whether there are exceptional circumstances it seems to me is not a matter of discretion.

Pike Well it's a matter of judgment

Blanchard J Yes.

Pike And judgments are just that, matter of judgment.

Blanchard J You get them right or you get them wrong.

Pike Yes.

Elias CJ That's basic administrative law as you've said. I mean those battles have been well fought.

Pike Well I do come back to that exactly, that there may be cases where the Court is sitting notionally as a reviewing Court have, well we wouldn't have done that, or as a trial Judge certainly it wouldn't have been enough for me. The question is however was this just plainly wrong or just wholly untenable, and if it's wholly untenable there's a miscarriage.

Tipping J I just don't understand that.

Blanchard J That is judicial review.

Pike Sorry.

Tipping J But Mr Pike surely either the Court can get into the question of exceptional circumstances or it can't.

Pike No. 1 it can; I can't possibly say it can't.

Tipping J Right.

Elias CJ Right.

Tipping J Then you impose a rider on that that instead of ordinary appellate principles you get into it on judicial review principles to borrow my brother McGrath's

McGrath J Or the view of discretion

Tipping J Well what's the logic of that?

Pike Well they're much the same. I mean again the Court won't interfere ordinarily in the exercise of judgment or discretion unless the appellate formula of wrong in law clearly wrong

McGrath J But we can only get into this if it's not a matter of discretion.

Tipping J And once we get into it, if it's wrong, we act accordingly. If it's right, ditto.

Pike Indeed, but the only difference seems to be the threshold at which intervention comes.

Tipping J But you're introducing that threshold.

Pike I am, yes.

Elias CJ But I, and of course I can't remember the names of the cases, but this is *Aldridge* and all of that isn't it? If you have to make a conclusion before you can exercise a power, then that's an objectively weighed matter, and the Courts don't defer – it's *Liversidge v Anderson* it's all of that. You don't say well just because the Judge thought that there were exceptional circumstances that's the end of the matter.

Pike No, one has to find a principled basis for saying the Judge was wrong rather than simply had a difference of opinion

Elias CJ No you can just say that the Judge was wrong. It's fundamental to the rule of law.

Pike In my case that therefore already sidelines subsection 8 to what it may possibly be, historic oddity, but it still

Elias CJ No, because if the Judge says there are exceptional circumstances here and let me think, shall I or shan't I, the shall I or shan't I can't be reviewed.

Tipping J If he says there are exceptional circumstances and I think it's in the interest of justice to go on, that's the end of it.

Elias CJ Yes.

Tipping J End of converse.

Elias CJ Yes.

Blanchard J Provided there are exceptional circumstances.

Tipping J Yes.

Blanchard J In reality the Judge would almost always decide to go on if there were exceptional circumstances, but possible a Judge might decide not to.

Tipping J And it might be exceptional circumstances but in the end interest of justice is a counter-veiling point which persuades them not to go on. I mean there are all sorts of permutations possible here.

Elias CJ Mr Pike I'm not sure either about your argument that there's no fundamental right here, because after all we've got Magna Carta; we've got the Bill of Rights Entitlement to Trial by Jury, and that has the meaning long-established of trial by 12 of your peers. Now statutes have chipped away at that and they may be reasonable limitations on the right or whatever, but you're in that area of be careful because there are fundamental rights in issue. It's the safe system that has been devised by our legal system for ascertaining criminal culpability.

Pike Well we're certainly stuck with it.

Elias CJ Yes.

Tipping J Dare I mention s.6.

Pike And it goes back to a thousand years to 12 good men and true, but

Elias CJ Section 6, yes indeed.

Blanchard J Yes but is that fact utilitarian or rule utilitarian.

Elias CJ I don't know.

Tipping J You don't know. Sorry, a bit of an in-joke Mr Pike.

Pike Yes Sir and I don't want to distract the Court however from the purpose of the argument that appears to be unacceptable and that's where we end it, is that there is an area in terms of the exceptionality where the Court might simply disagree they're exceptional but would not by dint of subsection8 interfere unless, and I say, unless the degree by which these facts fall short of exception is marked or obvious. It's not to substitute one set of opinions for another. That's I think as far as one can say about subsection 8. Once we go beyond there and we're into the issue of if the Judge was reviewably wrong then we come back to s.385 of the Crimes Act. We now have to say that there has been an error or law perhaps under 385, or generally for any other reasoning, miscarriage of justice, then of course we come to the proviso

Anderson J Well if you get to that stage you've got a miscarriage of justice in that a person has been convicted without having had a trial, a lawful trial. It's hardly a proviso that.

Pike Well I suspect you can. I mean as was said in *Loumoli v Brooks* we indicated that there was in a sense it while what was done there was lawful because the jury hadn't, it was held, wasn't functus officio

Anderson J It's more a sense of sentence first, trial afterwards isn't it?

Pike But I know the Court of Appeal is against me on this because it blows, but I would submit it's wrong with great respect because the whole point of the proviso, to (d) in the proviso, is that any trials that are a nullity will almost inherently be unlawful, found they have to be. It's hard to perceive a nullity that's not also unlawful, but it is nevertheless subject to the proviso and there's no indication that it has to be read down by

Tipping J Are you formally asking us to invoke the proviso if we're against you on this point?

Pike Yes.

Elias CJ You will come back though won't you to the factors that are exceptional in this case before you get to the proviso?

Pike Well unfortunately I haven't got any more than the Judge had. If I had I would let you have them.

Anderson J But you don't have to

Tipping J Well you've got less though in fact because the duration of the trial is not one you're comfortable about relying on.

Pike Well as I said I can certainly say that a two-weeks trial is not something that is unusual, that's true, I can't.

Blanchard J Was the number of witnesses unusual?

Pike In a murder trial, no.

Blanchard J So really it's the Aussie?

Pike It's the Australian dimension.

Tipping J And is it the lack of compellability of that Australian witness?

Pike I don't know, I can't answer that. It could well have been an issue.

Blanchard J No, no, no Mr Pike, we're looking at whether there are exceptional circumstances, not what the Judge thought.

Pike Yes, well certainly that person is not compellable obviously. There was no process for bringing a witness to New Zealand under any compulsory order at all.

Anderson J And the witness favourable, or a friend of the accused and providently said something which didn't fit well with the defence as it transpired.

Pike Yes, yes, that I think is the nub of it. If picked off one by one, that's the only one which resonates.

Anderson J Then it's a matter of degree isn't it?

Pike Yes it is a matter of degree, but I mean however forlorn the reference to the proviso might be in this day and age, the point is made with respect that it was intended to cover nullities so it is not now necessary ordinarily to decide whether this was a jurisdictional error, which I submit it wasn't, because the High Court has, or any Court has jurisdiction in a proper case, in any case to hear a jury of 10. A case with a jury of 10. If it makes a mistake about that in a particular case, it doesn't mean that it has lost its jurisdiction, it means that it's made a mistake within jurisdiction. It's not a nullity, the trial is not a nullity, it simply is reversible, saved by the proviso, or maybe saved by

Tipping J What I would put to you is never mind nullity, is it a fair trial when unlawfully you're below the number?

Pike Well that's a difficult question. In terms of fair trial I would certainly adopt what was said by Lord Steyn, and this has been a bug-bearer this jurisprudence for a long time, but a fair trial is one which is a weighty conclusion to reach. I'm sorry, that a trial has been unfair Lord Steyn said in *Brown v Stott* is a significant and weighty conclusion to reach. It will be reached where in truth the process of justice has entirely miscarried. So Lord Steyn for reasons having to do with the proviso in a strange sort of way would say well of course you can't proviso an unfair trial. I mean this is what we had with my friend and I remember only too vividly with Lord Roger in *Howse,* where Lord Roger had disagreed with Lord Steyn's view, and I had the singular misfortune to argue this before Lord Roger.

Elias CJ If you are in fair trial territory, how does the proviso stack up with the Bill of Rights Act?

Pike Well we did not immediately accept that if we take Lord Steyn's approach to what is meant by unfair trial, it's a term that is used in rather different nuances and very many different ways, but if a trial is as Lord Steyn described it as one which fundamentally I think the administration of justice has wholly failed, that I think was his words in *Brown v Stott*. In those circumstances the proviso now days couldn't apply. You could hardly have the two together. That's why of course we had this debate vigorous as it was in *Howse,* as to whether it was an unfair trial.

Blanchard J I have difficulty seeing this as a question of fairness or unfairness. How can it be fair if the trial was say three months long and you lose the jurors right at the end of that as compared with what has happened here where it is a much shorter trial. The question of the jury

deliberation is not one of fairness. You can't differentiate between those two situations. The jury deliberates with less than the normal number.

Elias CJ No well I wasn't suggesting it was fair, I was picking up on the discussion about fairness and just raising that in the context of the proviso we will need to at some stage, New Zealand Courts will need to look at whether the proviso can be applied, so it's interesting to hear that you say that your impression is that won't be able to be applied if there's an issue

Pike Well the difficulty was, and I mean I don't want to keep talking out of Court about what happened in another Court, but certainly Lord Rogers' view seemed to be quite clear was that something lesser levels and what Lord Steyn would see as a trial unfairness, would amount to trial unfairness and indeed is as notorious well certainly in debate in *Bain,* Lord Roger again made it very clear that simply the cross-examination issue on the *Bain's* glasses went to trial fairness, and he said this therefore leads to an unfair trial because of that. So the difference between them is light and day. Certainly I would accept, and you couldn't accept otherwise, that Lord Steyn's test for an unfair trial, you don't apply the proviso, how could you.

McGrath J Are you suggesting that we can look at this in a different way and you've been introducing some administrative law concepts into the debate, but it seems to me that we might come back to the type of notion that Lord Hailsham was expressing in the *Aberdeen Estates* case, but that you shouldn't be looking at errors in absolute terms, you just look at the nature of the error and what the appropriate consequence is in deciding whether or not you invalidate the particular process, and it seems to me that if you're looking at an error whereby there is no statutory justification for a person being tried by 10 people rather than 12, with all of the constitutional principle that underlies that the Chief Justice referred to, you're into the area of an important era, and invalidation would be an appropriate measure of response by a Court. Now that keeps you out of the fair trial debate as far as I can see and it would put you fair and square in the sort of territory that we got into at the other of the spectrum with *Burr v The Blenheim Borough Council* where a minor defect in an advertisement didn't invalidate the particular process.

Pike No indeed, well as I said I have accepted, not because I'm driven to or did from the beginning except that the grounds were reviewable, the actual factors, there's no question about that. The only cautionary tale in it all is that how deeply into them do you go? That the only question

McGrath J It is quite a significant error isn't it to try someone with 10 people if in fact there was no statutory power to do that?

Pike Well there is a statutory power but it was misapplied in the case. This is the difference between nullity and

McGrath J There's a statutory power if you've reached the point that we've concluded if we get this far we concluded that statutory power doesn't apply.

Pike Well indeed. Well I don't know, it's debatable how serious it is because the question was there after all a substantial miscarriage of justice must still be alive that's all one can say.

Tipping J Well that is the ultimate point.

Pike That is the ultimate, exactly.

Blanchard J It seems to me it's exactly the same as if you started out with less than the appropriate number of jurors, or you had a trial that on the fact of it was perfectly alright. You had the number of jurors; you had a competent Judge. Nothing went wrong, but it was in the wrong Court. And I've seen a situation where a Judge who had power to do jury trials in a very very similar type of charge, because of an error in the introduction of a new slightly lesser charge under the same statute, and a failure to update the schedule, it was discovered later on that there was no power to try that whereas he could have tried the more serious charge which was nullity, and a bit difficult to see that you could provide the proviso there.

Pike Well I would have thought with respect you would. Of course the Court of Appeal in *Blow* said you couldn't, but that is to read down the proviso because what possible adverse consequence in the administration of justice could there be for *Blow* being tried in the District Court before a jury of 12 people by a District Court Judge on the charge of rape which could have been referred but wasn't middle-banded. It just went straight to that Court instead of going where it would have undoubtedly done, middle-band, and with respect it's very difficult to see why that should be said, well look there is a distinction between you're entitled to a superior Court Judge, therefore the whole process

Blanchard J Well how do you make the distinction, how do you decide when there's a miscarriage and when there isn't? What if the trial starts out with only 11 jurors when there should have been 12, because somebody can't come and proceeds in an otherwise orthodox way through to its conclusion, how do you distinguish that from a situation here where there are no exceptional circumstances and assuming that is the case and there's an unlawful reduction in the number of jurors?

Pike I take Your Honour's point there. There are cases but in the one where you start off with 11, because somebody miscounts or whatever, the fact is that there was never by any judicial act or exercise any statutory

power at all. There was not a proper Court. It was not a properly constituted Court but this was a properly constituted Court and then purported exercise of statutory power it had fewer members on the jury ultimately than the 12, it had 10.

Blanchard J Well in my other example of the wrong Court, there was no properly constituted Court.

Pike No indeed, well the Court had no jurisdiction there in any case.

Blanchard J The point I'm trying to get at is it's going to be a very difficult decision to decide when you could apply the proviso. I wonder whether it isn't a situation where despite the way in which the section which is an unfortunate section in many respects is laid out, the proviso just can't be applied in a case of nullity. I just throw that out as a question.

Pike Well I submit with respect that there was actually a deliberate amendment in 1961 to bring in nullity within the realm of the proviso for that very reason that one looked at the substance of what had gone wrong and essentially one would have to say that there was such an appearance of mis-trial because of the emphasis on the right to 11 people, that's the best point we can make.

Blanchard J Is there any statutory history that's helpful on that latest sort of change in 1961?

Pike The nullity one?

Blanchard J Yes.

Pike No there isn't and I know that without exception.

Tipping J Does that presume that there are nullities and nullities?

Pike Yes, the Courts have said that in *Kestle* I think the Court of Appeal accepted there are always degrees of nullity. It sounds odd to say that a nullity which is a nothing that ever happened might have happened a little bit but not all that much, but in fact the Court has accepted that

Elias CJ A little bit of nullity

Tipping J A little bit of nullity is not a bad thing.

Pike No it goes the wrong way. But the Court has essentially said that and there will be nullities that are so grave that you are willing to apply that because their provisos after all are discretionary and the appearance of justice is such, and this is what the best argument is I would think with respect for the 11 to 10 jurors that the Court is right to say that 11 jurors are not to be departed from without substantial reason. If there is not substantial reason then the appearances of what has happened of

the trial get you into a position where you cannot save it by the proviso simply because of public confidence in the administration of justice on those grounds. You don't go into whether they lost a particular juror who was favourable or unfavourable, or speculate, you have to leave it at that to bring an abstraction in principle. But I can't really go beyond that. I suspect that I can't really add anything, if I've got anything to add anything to that is.

Tipping J Don't be so dejected Mr Pike.

Elias CJ Thank you Mr Pike. Yes Mr King.

King Yes I'll be brief Your Honours. Very quickly Your Honour in respect of the learned Chief Justice's question, the reference to the

Elias CJ Oh yes, I've found it.

King Oh yes.

Elias CJ Yes, thank you.

King As far as the 10 juror point is concerned, in my submission one needs to carefully consider the evidence of Mr Handley. It was clearly not a factor that the learned Judge at the time considered to be exceptional circumstances because he doesn't refer to it in his para.14 when he sets out the basis for his decision, but when one carefully looks at his evidence it's contained in some nine pages

Elias CJ How many?

King Nine.

Elias CJ Oh sorry Mr King.

King So it wasn't lengthy. It's contained at pages 101 to 110, which is tab 6, volume 3. There is absolutely no indication of any reluctance from him. There is no hostility indicated; no indication that he would not willingly return, if so required, and of course it's not a case where it was stood down for inquiry to be made or anything of that nature and certainly in counsel's experience witnesses are quite happy to come back for another free trip, back to new Zealand to see family and friends at the taxpayers' expense, so in the absence of any indication at all, he's only a four-hour flight away, or three hours I think now-days, so in my submission the Court should be urged against trying to build into the fact that he is in Sydney and it should not be seen to assume undue importance.

Tipping J It's the question not of the distance per se but the question of compellability Mr King, that would be the only thing I would wish to

King Indeed, and that's why I emphasise Sir that there was absolutely no indication that he was in any way reluctant or hostile; that he didn't happily give his evidence. The important evidence I suppose was that it assumed significance was about the accused saying to him about the Pakistani man; that he'd read a statement from the Pakistani man whilst in the prison. Now that was actually unbriefed. He wasn't briefed to even say that but he recited it. There was no difficulty; there was absolutely no reluctance apparent.

Anderson J He didn't understand the significance of it before he left did he?

King Well who knows, who knows. Certainly no one did.

Anderson J But no one knew until the defence opened.

King No one did, and it was slightly ambiguous in any event because all it says was that Mr Rajamani had read the statement of the Pakistani man and the impression he got was when he learned about it, but it didn't go any further than that.

Anderson J Well it may be equivocal in some respects.

King But it should be looked at in my submission before anything is built into that. As far as the significance of the error is concerned, in the *Howse* case in the Privy Council, the Law Lords were unanimous in adopting a two-stage approach to the proviso. The first one really relates to trial fairness and whether what happened could have in any way influenced the outcome of the trial. But the second test, it was the fundamental error test, and that's where in my submission nullity comes into play. It's long-established under s.385 that the proviso simply rationally cannot be applied to for example a 385(1)(a) case where the verdict is unreasonable and cannot be supported having regard to the evidence. Impossible in my submission that the Court could ever reach a conclusion that there was just no evidence, but it's appropriate to apply the proviso. The same would apply in my submission to whether it's (d), I think it's (d) the trial was a nullity, or whichever, I haven't got it in front from me, but whichever provision it is. So there is that wonderful quote and it's age-old, I think it's in the house judgment that a trial is a trial according to law. Now if one envisaged a situation where, to take a hypothetical, only nine people turn up for a trial but witnesses are from overseas and there's all sorts of logistical reasons and the Judge is going on sabbatical and there's not enough time to hear it and so the Judge decides right okay we're going to proceed with this trial with nine, eight or seven Judges, and in my submission this Court would have no hesitation whatsoever in saying that was a nullity, it was a fundamental error, it's not something to which the proviso could ever appropriately be applied; there was just no jurisdiction, and if the Court gets to the situation of saying that this learned Judge was incorrect in deciding that there were exceptional circumstances when it fact there were not, then what's the difference

between a trial with six Judges. And the final point I wish to make on that is that if it becomes a proviso point then what a practical effect will be, is that no appellant will ever be able to show that because there were six jurors or seven jurors or five or ten that that occasioned to a substantial miscarriage of justice. For a start the Courts in New Zealand have always been, and rightly so, reluctant to make inquiries into what actually happens inside the jury room, so in *The Queen v Tuia***,** the authority for that is ageless, so right at the start it's an impossible

Tipping J I'm not sure if I accept that proposition Mr King.

King I'm sorry Sir, I didn't mean that, because it was your judgment yes. I didn't mean it. It follows on. But the prohibition against the jury room is what I meant to say different Sir, so it's an impossible hurdle to say well okay you shouldn't have gone down to 10 jurors, there was no jurisdiction in this case, or you shouldn't have gone to nine, six or eight, but the appellant then has to establish that that's occasion to, well has to show that it hasn't occasion to substantial miscarriage – I can't remember the onuses but it's an impossible standard because in every case they can say well the appellant hasn't been able to point to anything to show that in fact had a profound effect.

Anderson J It has to be assumed doesn't it that if the trial has been conducted without the lawful number of jurors, *ipso facto* there's been a substantial miscarriage of justice, so as to exclude the proviso.

King Yes, and that's what *Howse* was all about with respect. It was about establishing the fundamental error test and that was adopted by all the Law Lords, the application of that test, that two-stage proviso test to the facts of the case is the only area where there was the dissention, so that's all I really seek to say about that issue. As far as the provocation directions are concerned, I pick up on Your Honour Justice Blanchard's point. Firstly there is the additional reference Sir at para.102 as not confined to 95 as being I think Your Honour said that that was the last reference to deliberateness was 95, in fact it's repeated at 102. Now the point that I seek to make is that every single one or the challenged comments that His Honour made to the jury in respect of provocation on those three grounds, the deliberate versus intentionalness; the state of loss of self-control, and finally the *Timoti* point react as this accused did, every single one of those points from the summing up was repeated verbatim in the answer to the jury's questions.

Tipping J Did he also repeat, I rather think he did, the point about angry.

Blanchard J Motivated by anger.

Tipping J Motivated by anger.

King Yes, yes absolutely and I've got the references here, so for example the paragraphs we focused on in debate from this morning from the summing up are paragraphs 55, 60 and 62. Those are really dealing with the states of loss of self-control and the deliberateness point. Paragraph 55 of the summing up is repeated verbatim in para.94 and 95. It's in fact broken up for some reason in the question but it's their verbatim. Paragraph 60 is repeated verbatim and paragraph 101, the second part of that paragraph in respect of the jury question, that's at the top of page 330. And paragraph 62 is repeated verbatim in the jury question answer at paragraph 102. So every single one of those challenged directions from the summing up is repeated verbatim in respect of the jury's question. Now my friend raised an issue which to be perfectly honest in all the time I've spent thinking about provocation, it's not something that's ever occurred to me, and that is to draw a distinction between an accused who has actually lost the power of self-control and whether or not the accused had lost the power of self-control, effectively an incapacity argument. Now in my submission that would simply be adding a whole breadth of complexity into an already fairly tricky concept to explain to a jury.

Tipping J You mean the difference between loss of self-control and loss of the power of self-control.

King Correct. In my submission Sir if an accused person has actually lost self control, then the test of whether they have been deprived of the power of self-control is met, and can I say that I've had almost identical arguments to this yesterday in the Court of Appeal in Auckland in the *Anthony Dixon* case in the context of insanity, and there is uses the words 'the accused by disease of the mind has to be rendered incapable of knowing right and wrong, and the issue was if an accused in fact did not know that it was wrong then does it 'rendered incapable' mean anything different, and the Judge had directed the jury in that case that in fact there was a distinction and that the issue was not whether he did know it was wrong but whether he was rendered incapable of knowing what was wrong, and the case which is directly on point in that context is *Queen v McMillan* which says the words 'rendered incapable' doesn't add anything and that the test is satisfied if in fact the person did not know the Act was wrong.

Anderson J What if they don't know but it's not because they're suffering from disease of the mind?

King Well it has to be because of disease of the mind, although in the *Dixon* case

Anderson J Well that's to indicate the necessity for a causal link.

King That's right, so my point is simply that to be deprived of the power of self-control is met if the accused by virtue of the provocation actually was deprived of the power of self-control.

Anderson J It must have, it must have.

Tipping J It's a bit like you don't direct they had no capacity to form the intent, the sole issue was whether they did form the intent. It's the same point.

King Absolutely right.

Tipping J All over the place.

King It's just my friend put stock on the fact that it's the power of self-control rather than the actual loss of self-control, although of course as is frequently directed, the first inquiry despite the fact it's second in the legislation, is did this accused actually lose their power of self-control because of provocation. That's all I say about that. Finally the hearsay point. It's not a case and I think Your Honour Justice Tipping picked up, it's not a case where there was no proper use direction, this was a case where there was a clear improper use direction. It cannot be excused in my submission as a slip of the tongue. The context and reference to the deceased's state of mind shows that he was in fact consciously referring to the accused's state of mind when he said that again the context of para.24 of the summing up where he talks about the effect, you can't say just because he said it that he must be guilty of murder, it's just one of the mix, so again he reinforces the error. That in my submission, that direction has to be viewed in the context of the actual evidence which came from two witnesses, Ms Barnes, that's at pages 111 to 117 and Mr Roger Long, which is at 194 to 197 and in the course of his evidence, and this is at page 196 of the trial transcript, Mr Long actually reads out to the jury a note that he had apparently contemporaneously made, and there's admissibility issues about that in itself, so he apparently in one phone call with the deceased had made a note. He then relayed the contents of the conversation to Ms Barnes. Ms Barnes gives evidence about her own conversations with the deceased. Mr Long then comes along and actually reads out to the jury the note that he had made at the time. So this was evidence which assumed importance and so any direction by the Judge that this was relevant to his state of mind, that is the accused, that it was relevant to the defence of provocation, despite the fact it's only said once and is not repeated, it needs to be viewed in the context that this was two witnesses giving this evidence and it had assumed importance. And just very finally, the Crown seeked to distinguish or to effectively minimise the provocation directions on deliberateness by saying that in fact what His Honour was meaning was premeditation and that the repeated emphasis can't be deliberate, meant it can't have been premeditated. Well in my submission that's one issue of course that appellant's position is that in fact the jury would have thought that went to intent, but the repeated emphasis by the Judge of a concept of premeditation as rebutting provocation simply emphasises the graven of this hearsay evidence, because the effect of this hearsay evidence,

i.e., that the accused had been saying to the deceased for days before her death that he was going to kill her, the graven of that is that his actions on the date of the homicide were premeditated. So even if one accepts the Crown argument that the jury would have understood that His Honour when talking about if you act deliberately provocation doesn't apply, even if they would have differentiated that from the murderous intent issue, all it does is elevate the importance and demonstrate that that hearsay evidence and that direction that they could take it into account was central in this case.

Tipping J Well anything to show that he had been planning.

King Yes.

Tipping J To kill her would be fairly strong.

King Absolutely, and we know that she has been saying for days beforehand that he has been threatening to kill her tends to show it was planned, premeditated or deliberate, as opposed to the spontaneous loss of the power of self-control, so they can't with respect have it both ways. They can't say well you can excuse the provocation directions because when he meant deliberate he really meant premeditated, and then say that the best evidence they had of premeditation, the inadmissible hearsay, didn't amount to anything. Unless the Court has any questions those are the submissions on behalf of Mr Rajamani.

Elias CJ Thank you. Well we'll take time to consider our decision and thank you to all counsel for your considerable assistance.

3.54pm Court Adjourned