NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION, IN ANY REPORT OR ACCOUNT RELATING TO THE PROCEEDINGS, OF THE NAMES, ADDRESSES, OR OCCUPATIONS OF CERTAIN WITNESSES, OR ANY OTHER PARTICULARLS LIKELY TO LEAD TO THE WITNESS' IDENTIFICATION PURSUANT TO S 113 OF THE EVIDENCE ACT 2006.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 61/2023

[2024] NZSC Trans 3

DAMIEN SHANE KURU

Appellant

v

THE KING

Respondent

Hearing: 04 March 2024

Coram: Winkelmann CJ
Glazebrook J
Ellen France J
Williams J
Kós J

Counsel: C W J Stevenson, O H Fredrickson and J H C Waugh for the Appellant
F R J Sinclair and L C Hay for the Respondent

CRIMINAL APPEAL

MR STEVENSON:
Tēnā koutou, e ngā Kaiwhakawā. Stevenson, Fredrickson and Waugh for the appellant, the Court pleases, Mr Kuru.

WINKELMANN CJ:
Tēnā koutou, Mr Stevenson, Mr Fredrickson and Mr Waugh.

MR SINCLAIR:
May it please the Court, Sinclair and Ms Hay for the respondent.

WINKELMANN CJ:
Tēnā kōrua, Mr Sinclair and Ms Hay. One preliminary matter, I think, Mr Sinclair, that there are name suppression orders in place in this matter in respect of witnesses but –

MR SINCLAIR:
Yes, that's right, your Honour, but my understanding is that none of those protected people are referred to in the submissions, in the written submissions.

WINKELMANN CJ:
So there's no real jeopardy that we need to be mindful of?

MR SINCLAIR:
I don't think so, no.

WINKELMANN CJ:
Right, thank you. That's very helpful. Mr Stevenson?

MR STEVENSON:

Thank you, Chief Justice, and if the Court pleases. May I just start by advising –

GLAZEBROOK J:

Can you please just make sure the microphone's pulled around for the record.

MR STEVENSON:

Oh, I beg your pardon, yes.

GLAZEBROOK J:

Thank you.

MR STEVENSON:

Thank you. May I just start by advising your Honours that the appellant is here, Mr Kuru, and he's seated behind me in the public gallery. The questions for leave in this case start chronologically in my submission sensibly with a consideration of the sufficiency of evidence, thereafter with an analysis of the admissibility and use of the evidence of Mr Scott, the police "gang expert" in the case. It's –

KÓS J:

Isn't it more logical, Mr Stevenson, to go in the other direction?

MR STEVENSON:

In –

KÓS J:

Whether or not Scott is in makes a difference perhaps to the *Owen v R* [2007] NZSC analysis.

MR STEVENSON:

It does and it could be decisive, but in my submission it is helpful to analyse the evidence, particularly the evidence absent him, and then consider was it enough. If it wasn't, then of course his evidence is decisive and either way the admissibility will bear on the reasonableness of verdict.

WINKELMANN CJ:

Well, is your point that even with him it's insufficient?

MR STEVENSON:

Yes.

WINKELMANN CJ:

Right.

MR STEVENSON:

Yes.

WINKELMANN CJ:

So that's what your first ground is?

MR STEVENSON:

Yes. Now the –

WINKELMANN CJ:

So that's two things you're addressing?

MR STEVENSON:

Yes.

WINKELMANN CJ:

Right.

MR STEVENSON:

The I suppose overarching question in this case, at least from the appellant's point of view, is was he as asserted by the prosecution in this case with the assistance of Mr Scott the stereotypical gang leader interested in using violence where necessary with full authority over his members and somebody who would be prepared to use violence to remove an opposing gang member from his turf, so to speak, or was it more nuanced than that. Was he not the stereotypical gang president, was he somebody with very real prosocial intentions in the

community who would have disapproved of this sort of activity and for that reason in fact hadn't been told about it, wasn't involved and didn't know.

Now the first question in terms of the reasonableness of the verdict on the facts in this case –

KÓS J:
I suppose it depends on what the activity is.

MR STEVENSON:
I beg your pardon, Sir?

KÓS J:
I suppose it depends on what the activity is.

MR STEVENSON:
Absolutely.

KÓS J:
He might well have approved of intimidation and might well have disapproved of extremely violent intimidation.

MR STEVENSON:
Yes, although the intimidation in this case, at least on the Crown theory by the end of the case because it evolved, and I'll talk about that, the intimidation did involve the use of firearms and as Justice Cull who dissented of course said how was he meant to have known with this rapidly unfolding organic plan on the morning that firearms were involved, but that would elevate it in that sense, even if it was just an intimidation. Was he the president who would have approved of that pretty serious gang conflict with the use of firearms?

WINKELMANN CJ:
Well that might've been their narrative underlying the trial, but I'm not sure if it's the narrative we really need to concern ourselves with.

MR STEVENSON:

No, no, no, but I just observe that that will be the question in effect that's answered in all likelihood now by this Court.

WINKELMANN CJ:

Well I'm not sure about that.

GLAZEBROOK J:

Did I understand you to say that the initial view, Crown view of the purpose changed in the course of trial?

MR STEVENSON:

Yes, it did.

GLAZEBROOK J:

Yes.

MR STEVENSON:

And your Honour can find that, and I'll come to it, in the section 147 judgment of Justice Thomas. Your Honours might recall there were two section 147 applications by Mr Waugh who was trial counsel pre-trial and during trial, and at the time of the section 147 application before Justice Thomas the asserted plan by the Crown at that point was a plan to draw out Mr Ratana and shoot him. So much, much more serious, and I suppose I should say now that it does seem to the appellant that that must have driven the brief of evidence of Mr Scott and his opinion as it were at that time which must have been talking about, as he's understanding it, an allegation of very serious intentional high-level gang violence. I'm not sure how helpful by the end of the case his opinion was because the Crown case was really at the other end of the spectrum, it was right down at a very significantly lower level, not that the intention was to draw him out and shoot him, ie a gang president would have to know about and authorise that, but it was just to go around and make some noise and tell him he's got a week to get out of town.

WINKELMANN CJ:

Because that's the other narrative, which is not the narrative that you've formulated, but it occurred to me the other narrative was that this was significant high-level violence that a president would have to know about or this was just a run of the mill kind of low-level nothing which he would not necessarily know about because it's part of the everyday happenstance.

MR STEVENSON:

Well that is the appellant's case now and I would categorise this, without wanting to sound flippant, as a sort of a skirmish, albeit in the context of gang conflict, but at that sort of a level and that's the intention I think all of the evidence speaks to in terms of what was happening outside Ms Herewini's house on that morning, and a really important point to layer on top of that is that there had been I think at least three prior similar skirmishes also not involving Damien Kuru which tend to support the proposition that what was happening, at least from the Black Power members' point of view as they went down to that property, was in a similar vein. So previously Ms Herewini talked about a carload driving past at night, your Honours might recall that, the gang slogans and so forth. Mr Ratana was with Mr Fraser on the 14th, there's evidence about that and discussion about it by trial counsel, at a nearby street, Kauri Street. They're off to the gym and he talks about being – well Black Power members trying to roll him with batons and he presented a firearm and they've made off. 1010

So that sort of stuff was happening, and I digress slightly but it's probably helpful just to talk about this as these questions arise. It does show two things. One, Damien Kuru wasn't involved in those things, there's no suggestion anywhere he was. Most of these people know each other and Ms Herewini was identifying people outside of her address on the 21st. Mr Ratana I believe is whānau to the appellant, Mr Kuru. So these sorts of things were happening and Mr Kuru was not involved and they speak to this intention of a relatively low-level series of intimidations to get Mr Ratana out of Castlecliff.

So back then, if the Court pleases, to the test –

GLAZEBROOK J:

Can I just, so the – it wasn't during trial that the Crown analysis of the common purpose changed, it was between pre-trial and trial?

MR STEVENSON:

Indeed, your Honour.

GLAZEBROOK J:

Thank you. That's –

MR STEVENSON:

Justice Glazebrook's quite right. In opening, I just checked that myself because I wondered when it had changed, and it's pre-trial but as I say, the importance of that sequentially in my submission is that's allied to the briefing of Mr Scott and what he's being asked to comment about pre-trial before Justice Thomas, it's an intention to draw Mr Ratana out and shoot, opening and closing it's that much lower level proposition, an intention to intimidate and threaten and damage property if necessary, and excuse me I'm just going to have my first water of the day.

Now turning then to appellant's case that the conviction entered by the jury in this case was unreasonable on the facts, I propose to briefly touch upon what the Court of Appeal said in *R v Munro* [2007] NZCA 510. What this Court said in *Owen v R*, mention briefly what the High Court of Australia said in respect of the *Pell v R* [2020] HCA 12 and mention the approach taken by the Court of Appeal in this case.

So *Munro*, *Owen* and *Pell* are mentioned or are incorporated in the appellant's bundle of authorities and that's where I'll be going now if the Court pleases.

Now *Munro* was a case in which the appellant successfully argued the conviction entered by the jury in that case was unreasonable, and your Honour Justice Glazebrook wrote the decision for the Court in that case and it was only

a short time prior to the similar issue coming before the Supreme Court in *Owen*, and Justice Tipping wrote the decision in that case.

There was a close analysis of the statutory right of appeal in *Munro*, the position taken in like jurisdictions and the correctness or otherwise of the so-called *R v Ramage* [1985] 1 NZLR 392 (CA) test in New Zealand and what the correct test is.

Now my submission in that case had been that the Court should consider for itself in its own mind whether or not there was a reasonable doubt about guilt. The High Court of Australia at the time of *Munro* had been close to that position on a few occasions, for example in *Weiss v R* (2005) 224 CLR 300, but ultimately the Court said the correct question is to assess in compliance with the statute whether or not a jury acting reasonably ought to have entertained a reasonable doubt.

The Court also though in *Munro* said or referred to preceding cases in Australia and also said some things that are important in resolving the question in this case in my submission, and speaking of the notorious *Chamberlain v R* (1984) 153 CLR 521 case, and this is – hopefully your Honours now have got the paginated bundle of the appellant's authorities, which is page 10 of the paginated bundle which is – thank you. So at page 10 of that bundle the Court's talking about the *Murphy* dissent, his Honour recognised, and this is at about line 3, inevitably juries will sometimes make mistakes, and further down that paragraph: "In his view, the appellate system must operate as a further safeguard against the mistaken conviction of the innocent," and Justice Deane also dissented at paragraph 20, expressing in fairly memorable terms that: "The principle that no person should be convicted of a serious crime except by a jury acting on the evidence has no corollary requiring that every person who is found guilty by a jury should remain so convicted," and he said: "The cause of the continued acceptance of trial by jury will not be served by treating a jury's verdict of guilty as unchallengeable or unexaminable," and went on to say that to do so would be: "A potential instrument of entrenched injustice."

Now no real controversy about that, but some pretty important points to recall. The appellant respectfully says, and all of this traces back to the so-called Blackstone ratio which we all know about and he expressed in his commentaries in 1760, which is the foundation of the modern appeal statute in section 385(1)(a) and now section 232, better that 10 guilty men go free than one innocent person be wrongly convicted.

Now the position in England and Wales was discussed at paragraph 22 in *Munro*. The English still have the so-called "lurking doubt" jurisdiction that was considered to be in act in New Zealand but the Court in *Munro* did say if an appellate court does sense or have a lurking doubt, that may be an important trigger for a very close scrutiny of the evidence in the particular case.

Just a couple of final further references in *Munro* before coming to the test as stated, which I've already mentioned. Paragraph 32, there's reference to the Australian case of *M v R* (1994) 181 CLR 487, and these cases, *M v R* tracing through to *Pell*, do demonstrate in the appellant's respectful submission the willingness of the Australian High Court when necessary to engage on the facts and to quash verdicts it considers to be irrational or, perhaps put another way, just not sustainable having regard to the high standard of proof. So in *M v R*, the majority said, at paragraph 34: "…in most cases as I've mentioned, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced."

Then at 57 of *Munro*, paragraph 57 if the Court pleases, the Court on that occasion, the Court of Appeal, and it was a full five-judge bench in *Munro*, considered the Crown's contention that "appellate review…system", and your Honour Justice Glazebrook writing on this occasion said that submission can be dealt with shortly. "It cannot be the case that letting unreasonable verdicts stand could enhance public confidence in the jury system. It would, in our view, have exactly the opposite effect… In addition, to take such a position would not accord with the statutory language."

1020

There is a requirement under section 385(1)(a), now section 232, for the Court to "allow an appeal if the verdict is unreasonable or [it] cannot be supported having regard to the evidence", and then importantly at paragraph 58: "As to the concern about the constitutional divide between judge and jury" – as was noted – "this is clearly more of an issue at the trial level than at the appellate level," because Parliament has expressed by statute that a court sitting at an appellate level has no discretion as to whether or not to intervene if it considers a verdict is not supported having regard to the facts. It must intervene. As the High Court of Australia said in *Weiss*, the appellate court must comply with the statute.

ELLEN FRANCE J:

We are now governed, aren't we, by *Owen* and what it says in terms of the parts of *Munro* that this Court has endorsed?

MR STEVENSON:

Yes, and –

ELLEN FRANCE J:

Including what's said about the weight to be given to the jury function, et cetera?

MR STEVENSON:

Yes, and I think that there is essentially a meeting of *Munro* and *Owen* particularly, I'm just about to come to, paragraphs 86 and 87 of *Munro*, the test expressed, and that was endorsed, as far as I can see it, without qualification by Justice Tipping in *Owen*, but I'll just trace through that in a moment, and I think it's an important point because I was criticised in the Court of Appeal in this case for saying that the test is whether or not a jury ought to have entertained a reasonable doubt.

Now, the penultimate point, then, in *Munro* was a response by the Court on that occasion to the submission of the Crown that the jurisdiction should be curtailed to certain categories of evidence and the Crown said the Court should only exercise the jurisdiction to intervene on the facts in cases like expert evidence

or witness identification or such, and that was rejected by the Court of Appeal in *Munro*, but for present purposes, the important point is from paragraph 71 of *Munro.* The Court observed that, speaking to these categories of evidence, the Crown didn't mention specifically documentary evidence and noted that that seemed to be a category of evidence that lent itself readily to potential appellate intervention, and over the page, the Court said that: "The legal method, the time available to undertake the review and the distance from the cut and thrust of the trial may even given an appellate court an advantage in the assessment of such evidence."

So that's documentary evidence, but this is the important next point in my submission as it relates to this case: "The same may apply where the real issue at trial is the inferences which may validly be drawn from established facts. An appellate court may be required to intervene where the facts support two inferences of equal weight and a jury has incorrectly drawn one or the other."

So I'll be coming to the facts shortly, but this is a case, in my submission, that perhaps contrary to an initial view of things in a lengthy trial and I think about five weeks of evidence, it is one that is readily leant to appellate review and intervention because somewhat surprisingly, the baseline facts are not in dispute, really. There are a few disagreements around the extent of a couple of points, but the fundamental baseline facts in this case are not really in dispute, and we can see them, and I'll go to it in due course, the summary of them by Justice Ellis when she was charging the jury and the summary of them by Justice Ellis in her section 147 and also of course the Court of Appeal. There are baseline facts about what was going on, and then the question is, well, what do you make of it all? What are the inferences that can be safely drawn from this evidence? And so in that respect, in my submission, this is a case that does lend itself comfortably to appellate review and trained legal reviewers can, in my submission, see that the evidence in this case did not reach the high so-called *Wanhalla* standard, and if I hark back to the Blackstone ratio, the approach has to be, in dealing with this backend constitutional protection for the citizen, the approach has to be one of careful and critical scrutiny, in my

submission, taking a very careful scrutinising look at whether or not the reasonable possibility of innocence has been safely excluded in a given case.

WINKELMANN CJ:

So you want to take us to paragraph 86 to 89?

MR STEVENSON:

Yes.

WINKELMANN CJ:

Which is all – this is set out, which I think we're probably familiar with.

MR STEVENSON:

Yes. Indeed, yes.

WINKELMANN CJ:

But is the critical thing to move to *Owen* then to say why that's carried forward?

MR STEVENSON:

Still stands, yes, indeed. So if we then move to *Owen* at page 86 of the bundle, the Supreme Court had been reviewing *Munro* and picks up on those very key paragraphs of section – I beg your pardon, at paragraphs 86 and 87, at paragraph 14 of *Munro*. Although they are not numbered, we can see that those are the paragraphs 86 and 87, and at paragraph 15 this Court said: "We agree with the Solicitor-General's submission that the third sentence in para [87] captures the substance of the correct approach," which is, if we go back to it: "A verdict will be deemed unreasonable where it is a verdict that, having regard to all of the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt." The Court said: "We did not understand the appellant, ultimately, to be suggesting any materially different test … [the verdict] is either unreasonable or it is not," best to avoid the use of "deemed". But the Court didn't disagree in my submission with what the Court of Appeal had said in *Munro*, and it may be a matter of semantics, but the question is whether a jury acting reasonably ought to have entertained a reasonable doubt

as to the guilt of the appellant, and the Court of Appeal in *Munro* used the word "ought" thoughtfully because it said at paragraph 86: "We consider the word 'ought' is a better indication of the exercise to be undertaken/conducted than the word 'must'," and drives in my submission, as I've said, this close scrutiny, ought the jury, having regard to all of the evidence, to have entertained a reasonable doubt.

Now that is not supplanting the jury's decision-making, it's conducting a review in the appropriate case which probably will very often not include cases which came down to a contest of credibility to assess whether or not, and I'll come to this, now as the High Court of Australia in *Pell* said there is a reasonable possibility an innocent person has been convicted.

WINKELMANN CJ:

So if you look at those two judgments together, you might say that what is not addressed in *Owen* but it is addressed in *Munro* is what is the trigger for the Court to undertake what is a burdensome task of reviewing in detail all the evidence to see if a doubt is lurking.

MR STEVENSON:

Yes.

WINKELMANN CJ:

So *Munro* adds a filter or an additional – or gives a hurdle that has to be crossed by the appellant before the Court takes on that task?

MR STEVENSON:

That's right, and the appellant respectfully acknowledges that, and it must be so, we're all familiar with the heavy workload of appellate courts and it can't be the case that any appellant can just march in and say this verdict's unreasonable on the facts. The appellant has to be able to point out a basis upon which the review should be undertaken. That sort of filter if you like, as your Honour Chief Justice notes, was identified by the Court of Appeal in *Munro*.

1030

Now before then going to the evidence, I did just want to say something about the recent case of *Pell* from the High Court of Australia. That is in the, sticking with the appellant's bundle of authorities, perhaps picking up at I think it's page 110 of the bundle, page 12 of the appeal itself. Here is just a pithy recounting of the test which really accords with what we've been discussing this morning: "The function of the court…proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable." Of course there were complainants in that case, two of them who claimed to have been sexually abused in the cathedral. "The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt."

Pell is the second occasion that I'm aware of that the High Court of Australia in cases like this, the other one being *M* which I referred to earlier, has intervened on the facts and said, well, despite findings that must have been made by the jury as to credibility, there was other evidence which raised reasonable doubt, and the appellate court, reviewing the record, must intervene if it thinks that it was irrational for the jury to have found the case proved beyond reasonable doubt.

Now, the Court of Appeal, the Victorian Court of Appeal upheld Cardinal Pell's conviction. Dissenting was the Chief Justice of the Victorian Court of Appeal Justice Weinberg…

KÓS J:

He wasn't the chief justice, but it doesn't matter.

MR STEVENSON:

I beg your pardon. No, that's quite right.

KÓS J:

Justice Weinberg.

MR STEVENSON:

Yes, Justice Weinberg. And at page 112 of the *Pell* judgment, the High Court talked about the finding of the complainants by the Court of Appeal as being compelling and said about half way –

KÓS J:

Which paragraph, please?

MR STEVENSON:

Oh, I beg your pardon. It's not up. Page 112 of the bundle. So it's the paragraph, the third one, beginning "When it came to applying". Paragraph 46.

GLAZEBROOK J:

We have just been sent through a paginated version.

WINKELMANN CJ:

It's not in our system.

MR STEVENSON:

Yes, I'm sorry, to my horror, over the weekend I saw that our bundle was not paginated.

WINKELMANN CJ:

Yes, we just have to proceed in our own simple-minded way with this material. So if you just give us the paragraph numbers of the judgments as well when you're citing your page number, that would be helpful.

MR STEVENSON:

So this is an important point the appellant says that I'm about to recount whereby the High Court of Australia criticised the approach of the Court of Appeal and it's an approach akin to the approach taken by the Court of Appeal, the appellant says, in his case. And of course we're dealing with complainants in *Pell*, but nonetheless, the reasoning, in my submission, is

apposite. "Their Honours" – so that's in the Court of Appeal – "reasoned" – this is at paragraph 46 – "with respect to largely unchallenged evidence that was inconsistent with those allegations" – described by the High Court as "'solid obstacles' to conviction" – "that notwithstanding each obstacle it remained *possible* that [the complainant's complaint] was correct." So in other words, it remained possible, notwithstanding obstacle evidence to conviction that was highly consistent with innocence, it remained possible that the complainants, or you might say in *Kuru* terms, the Crown theory, was correct. But as the High Court said, the analysis failed to engage with whether, and this is the correct way of approaching it in my submission, against this body of evidence. It was reasonably possible that A's account was not correct, or we could say the Crown theory was not correct, such that there was a reasonable doubt as to the appellant's guilt. In concluding, the High Court of –

WILLIAMS J:

How do you prevent that test becoming a merits review?

MR STEVENSON:

Ultimately, Justice Williams, in my submission, that's going to become a merits review because it's the constitutional protection and the expectation of Parliament is that appellate courts will scrutinise the facts because of human imperfection, as the Honourable Michael Kirby puts it –

WILLIAMS J:

Yes, but what's your standard that prevents appeals simply being that's what the jury thought, but it's not what I think? What's your safeguard against that creep?

MR STEVENSON:

Well I mean a lot of cases involve credibility and allegations of interpersonal violence, for example, of some sort and notwithstanding what the courts have said, and indeed your Honour Justice Glazebrook said in *Munro*, an early comment about this and the limitations of assessing demeanour, notwithstanding all of that, there has to be considerable leeway given to juries

in those sorts of cases. So it would be difficult, although the appellant succeeded in *M* and *Pell* in Australia in those sorts of cases, it would be difficult in a run of the mill case for an appellant to come along and say, well, this is unreasonable, should have preferred the defendant's account of what happened.

The differences, as I've said, which the Court of Appeal in *Munro* observed, that where effectively you have foundation facts which are largely undisputed and it's a question of drawing inferences, then an appellate court is in a good position to say, well, was, as put by the High Court of Australia in *Pell*, was there obstacle evidence that couldn't be excluded by the Crown in a given case.

WILLIAMS J:
So that's a rationality test?

MR STEVENSON:
Well it is, and that's what has been said on multiple occasions, that the jury must be acting rationally. It's –

WILLIAMS J:
But that means it's not a merits review? Because the –

MR STEVENSON:
I'm not sure if I'm understanding what your Honour means by a "merits review" then because I mean merits in terms of the factual adequacy –

WILLIAMS J:
Well thinking of it in public law terms, whether a decision is irrational is said by the public law authorities to be fundamentally not a merits review.

MR STEVENSON:
Oh, right. I beg your pardon.

WILLIAMS J:

And residual, if you like. I know that's public law and this is crime, but you wouldn't want too much inconsistency between these concepts.

MR STEVENSON:

Well one way of considering what's the correct approach, in my submission, is to be realistic about what's going on in a criminal trial, that human beings being called to make decisions are not undertaking an arithmetical equation, human beings are imperfect and juries get it wrong sometimes, and the High Court of Australia and the House of Lords in *Chamberlain* and *R v Coutts* [2006] UKHL 39, you know, have discussed the fact that juries will get it wrong and that it's not necessarily a place of undeviating intellectual rigor, which is not to say that juries probably get it right a good amount of the time, it's to recognise the reality that sometimes they'll get it wrong and it should be obvious –

WILLIAMS J:

Yes, I get that.

MR STEVENSON:

Yes.

WILLIAMS J:

At one level that's an unarguable proposition, if that's the right way of putting it. What I'm looking for is your line.

MR STEVENSON:

Yes.

WILLIAMS J:

You said rationality, and if that's the line then that's a reasonably clear line in legal principle, but it doesn't permit merits reviews.

MR STEVENSON:

It's not –

WILLIAMS J:

Unless there's something so fundamental in the evidence it couldn't possibly be right.

GLAZEBROOK J:

But I don't think either *Munro* or *O* operate on that basis. They just say that the evidence isn't there that backs it up. I don't think you have – in this case you certainly don't have to go to *Pell* because there's not much credibility evidence there.

WINKELMANN CJ:

I was going to say the same thing.

GLAZEBROOK J:

And I mean one of the issues with *Pell* possibly is that the juries are entitled to reject evidence –

WINKELMANN CJ:

Even though it's not challenged.

GLAZEBROOK J:

Even though it's not challenged, and I suppose they could hear in terms of some of the explanations, they could say, well, I don't think – I don't believe you were going to see the teacher, for instance not quite why they do that in this case but –

1040

WINKELMANN CJ:

I think the point that Justice Glazebrook's putting to you is that *Pell* is a very high watermark and you don't say your case needs to go that far. You don't need to have us deciding that the jury should've rejected someone's – or seen someone's evidence as not capable of rejection.

MR STEVENSON:

No, no. I suppose the analogy there the appellant saw and to an extent it answers Justice Williams' enquiry which I recognise is a difficult one, where is the line and what sort of cases is the Court going to consider and how does it go about its task, but in *Pell*, there was this very, very troubling, as they put it, obstacle evidence, that the overwhelming picture that Cardinal Pell just when he finished mass went with the congregation to the front of the church every single time and stayed there and was never unrobed without assistance, and that there was, on the basis of his habit evidence over many years, no opportunity, and they described that as obstacle evidence, and so it didn't really matter what –

KÓS J:
And his acolytes gave evidence to that effect.

MR STEVENSON:
Yes.

KÓS J:
But I mean that's a very different case. *Pell* is one where you have totemic obstacle evidence. I don't think you have obstacle evidence of any near that scale in this case. But for you in this case is that the Crown case in *Kuru* is essentially one which is circumstantial and that's a much more attractive invitation to an appellate court to review.

MR STEVENSON:
Yes, indeed, and if I can get to the point that I've been slow to get to in *Kuru*, we say the obstacle evidence was both pre-incident and post-incident, and I'll come to this in a moment, but to summarise it, the very clear evidence that he had a prearranged school interview which is why he would be out of his house.

WINKELMANN CJ:
See, that's not obstacle evidence.

ELLEN FRANCE J:

I was going to say.

WINKELMANN CJ:

I just don't think it helps you to characterise your case in terms of *Pell* because I think that is kind of a – *Pell* is a high water mark case.

MR STEVENSON:

All right, well I'll desist from using that expression.

WINKELMANN CJ:

It's not your –

GLAZEBROOK J:

My concern about rationality is that's too high a standard, because in fact what you're doing is reviewing the evidence and saying ought the jury – on the basis of that, could they have convicted and it's just a pure absolute evidential look at the evidence.

MR STEVENSON:

That's right.

WINKELMANN CJ:

I know you've got your narrative of how – explains what he did et cetera, but what struck me was that you didn't really attach your submissions to what the Crown needed to prove in terms of the common purpose which was as instructed by Justice Ellis that they needed to prove that this common purpose had been formed, that they would – that the group would go to the property, and I can't recall the words, but harass the victim, and that they would be armed with a weapon.

MR STEVENSON:

I understand that.

WINKELMANN CJ:

And they did –

MR STEVENSON:

I suppose that the appellants approached it in a reasonably simplistic way which is, is there evidence that he knew or was involved with a plan.

WINKELMANN CJ:

Yes, exactly.

MR STEVENSON:

Which is section 66(2) foundation. I don't think we need to get to the probable consequences, but I'll deal with that later on. But that's really the issue, did he know.

WINKELMANN CJ:

Yes. It is the issue.

WILLIAMS J:

Isn't the question whether it's possible to have no reasonable doubt that he ordered or sanctioned the attack? I'm just worried that your obstacle evidence is a bit of a distraction from that. You've got to point to the positive evidence –

MR STEVENSON:

Yes, no, I agreed to desist from over-complicating the appellant's case.

WILLIAMS J:

Yes.

GLAZEBROOK J:

And there, I think, possibly the *Pell* thing could get that the right way around is important.

WINKELMANN CJ:

And you say –

MR STEVENSON:

Yes, not to say that it's possible despite the evidence which suggested otherwise and that's really the point I'm trying to make or set from *Pell*.

WINKELMANN CJ:

I think you're coming at this in a very sideways way because your point is all they had was that he's president of the gang, Detective Scott – well, Mr Scott, that he was – that the congregation of people was in the vicinity of his house but not at his house, and that he was on the street somewhere in the vicinity but not at the house and that's all they had, and you say that wasn't enough to dispel any reasonable doubt.

MR STEVENSON:

No, because there was an explanation which we're familiar with as to why he would be out around 9.35, this prearranged interview with the principal.

KÓS J:

Which was at 10 o'clock three minutes away from his house, so that's not a very good explanation.

MR STEVENSON:

Well, I mean, it's also not inconsistent with the way people behave. If you're familiar with people in the street and you're wandering down the street, it's an important meeting, you want to be early. I respectfully don't see a problem with that. But then of course the meeting the next day is also the problem for the Crown because this is the evidence given by Josiah Friesen and the Crown proposition is that Mr Kuru has knowledge because he ordered it, let's say or authorised it. So he knows exactly what's going on, of course he knows who's involved, that's why he's out there, he's part of the group. But the evidence from Josiah Friesen is really, I would say, at the risk again of overstating things, almost insurmountable for a decision maker acting rationally when he's –

WILLIAMS J:

Really? Because the Crown's response was –

MR STEVENSON:

A ruse.

WILLIAMS J:

Sorry?

MR STEVENSON:

I'm sorry, yes.

WILLIAMS J:

Sorry, the Crown's response was, well, if this was an intimidation gone wrong, then telling them off after is perfectly consistent with involvement at the time.

MR STEVENSON:

And that's true, but that's not the evidence of Josiah Friesen because Josiah Friesen said that at the meeting the next day Mr Kuru was asking who was involved and he gives that evidence on a couple of occasions and confirms that.

WILLIAMS J:

I got the impression from his evidence it was who fired the gun.

MR STEVENSON:

It was everything but it was also on two occasions. He wanted to know who was involved, that – who was there, not just who did what.

WINKELMANN CJ:

Wouldn't you say, Mr Stevenson, on the bit about the day of the shooting, Mr Kuru on the street, well there's actually many – there are many explanations, possible explanations for that, and one plausible one was he is going to the meeting, also that he heard something going on and he was trying to find out what it was, but it's not a plausible explanation that he goes to see something that's been planned when the next day he's taking such care to dissociate himself from it, so why would he link himself to it?

MR STEVENSON:

That's right. It's a little bit complicated in the sense Justice Ellis in her sentencing said that she thought he probably only just became aware of it when he got onto Tiki Street and by the fact of his innate authority he was authorising it to happen. So Justice Ellis, who presided over the trial, put it chronologically that late in time. That was her view of things. It was, as she said, the sort of hastily, chaotically formed, "planned". But on top of what your Honour Chief Justice says there's also –

WINKELMANN CJ:

So can I just ask some detail about it? It would be quite nice to have a street plan you can actually see. We've got tiny ones in the submissions and I can't make – I find it very hard myself to read them.

MR STEVENSON:

Right, yes.

WINKELMANN CJ:

But could he be seen from where he is alleged to have – could he see the shooter from where he's alleged to have got to because this formulation requires that the people who are involved there sort of are aware of what – his presence and are encouraged by it.

MR STEVENSON:

Absolutely, absolutely. Well there was no scene visit by the jury which is unfortunate. Justice Ellis thought it would be helpful. It doesn't really matter why there wasn't one but a scene visit is helpful and I've been up there a couple of times to make sense of it. I know it's difficult with the maps. But perhaps if we go to the Court of Appeal exhibits booklet which we'll put it up on the ClickShare. So what page are we there? This is the respondent's submissions, thank you. Thank you Mr Fredrickson. That's a pretty good one.

ELLEN FRANCE J:

Do you know what the exhibit number of that one is Mr Stevenson?

MR STEVENSON:

So the plans start at the exhibits Justice France at around page 13. Let me just bring that up, the exhibits. We've got the overview and a plan format at page 13 of Court of Appeal exhibits.

WINKELMANN CJ:

Just while we're doing this, on Justice Ellis' formulation, how did Mr Kuru come to know about the firearm in that circumstance?

MR STEVENSON:

Well that was a point I was going to make because it seems to me one that's been overlooked and highly problematic. It would have to be that they would take firearms in that sort of situation. It could only be that.

1050

WINKELMANN CJ:

But –

ELLEN FRANCE J:

I was just going to ask you at some stage to talk about what she says, the Judge says in her sentencing remarks at paragraph 18 and 19 because she's saying: "…I doubt that you had any advance notice of what was planned…the jury must have inferred from the arrival of the cars and the congregation of a group…" et cetera "…that you found out pretty quickly what was going on. And the jury by their verdicts must have found that once you had that knowledge, and by dint of your presence and your innate authority, you effectively encouraged the other participants to execute their plan."

MR STEVENSON:

And that's what I had just been referring to when I paraphrased that and in my submission it puts it right down at the lowest possible level of mens rea if you like. Way, way below what the Crown was alleging. That was the trial judge's view of things that he didn't have any involvement in formulating the plan.

KÓS J:

Well the other –

WILLIAMS J:

It's pretty close to “he didn’t stop it”.

MR STEVENSON:

Well –

KÓS J:

Well there's another thing. I mean we’re looking here at joint enterprise liability. We’re always looking at entry and exit from the joint plan, right? The other theory the Judge could have advanced is that the jury concluded that he had approved the idea of intimidation with some degree of violence ahead of what actually happened on the day. So this is simply part of a longstanding plan. As you say, there have been four instances I think of intimidation, now of escalating violence, partly contributed to by Mr Ratana’s own response to it.

MR STEVENSON:

That proposition does depend squarely on the evidence Justice Kós in my submission of Mr Scott because without that there is no safe or rational basis to make that. I would categorise it as an assumption. It's a stereotypical sort of gang assumption that presidents rule with an iron fist. They are all-knowing and across what can sometimes be, as Mr Gilbert said, a group of chaotic and difficult to control –

KÓS J:

Well Mr Keegan, who’s a very capable defence counsel, described Inspector Scott’s evidence as being simply common sensical and it surely is common sensical, almost an overwhelming inference, that Mr Kuru must have known that there was an intimidation process going on with Mr Ratana.

MR STEVENSON:

Previously.

KÓS J:

Previously.

MR STEVENSON:

Yes, it seems likely.

KÓS J:

And presumably approved that because he didn't stop it. So –

MR STEVENSON:

Is that enough for a section 66(2)? He had no –

KÓS J:

Well I don't know but I mean the point is there is arguably a continuous thread running through to this particular day. So it's not just the version the Judge offered as a possibility. He could have pre-dated the rather shambolic events on that day itself.

MR STEVENSON:

Pretty speculative though, isn't it?

WINKELMANN CJ:

And how was it that the Crown made its elements against Mr Kuru as opposed to us speculating? What was the Crown formulation against Mr Kuru at trial?

MR STEVENSON:

Well the Crown in the words of the Court of Appeal ran pretty close to the line in their closing address in terms of the way they utilised Mr Scott's evidence. Your Honours will recall Justice Ellis said it's to be treated with care and due qualification and so forth but the Crown opened their closing address by saying you can resolve this case through the "lens" provided by Mr Scott. He alleviated it, in my submission, inappropriately to a war footing, the parties being on a war footing that Mr Kuru has full control and authority over his members and that his appearance in Tiki Street, which is around the corner and doesn't allow him,

to answer your Honour Chief Justice's earlier question, it doesn't allow him to see what was actually happening on Puriri Street. The Crown said his presence on Tiki Street was evidence that he was connected with what was going on and really you can connect the dots. Of course the president knew what was going on. Mr Scott tells us and the prosecutor used the word "lens" 10 times in his closing address to describe that evidence and how the jury could achieve a guilty verdict.

WILLIAMS J:
One factor that counts against you is that his sergeant-at-arms was there.

MR STEVENSON:
Mr Runga?

WILLIAMS J:
Mr Runga, yes, and that –

MR STEVENSON:
Yes, the acting sergeant-at-arms, because I think Mr Te Tau was the actual sergeant-at-arms, the evidence revealed and he was incarcerated.

WILLIAMS J:
But that does get the activity closer.

MR STEVENSON:
That is part of the Crown case and that's what Mr Wilkinson-Smith also of course said in his closing address. He said it's not realistic to suggest Mr Kuru wouldn't have known what the sergeant-at-arms was up to. So –

WILLIAMS J:
What do you say to that?

MR STEVENSON:
Could I just speak to the map and then come back to that point? Because it's obviously a really important point.

WINKELMANN CJ:

It would be helpful thanks, yes.

MR STEVENSON:

So if your Honours have that up on ClickShare, then we can see 60 Matipo Street and that's Damien Kuru's address and it was described as the gang pad or the headquarters, but you don't necessarily need to look through, but you'll see you might equally say it's a family home. If you have a look at the photos of –

WILLIAMS J:

It did have a flag at the top of its –

MR STEVENSON:

There's gang paraphernalia and I mean –

WILLIAMS J:

Well a big flag with a patch.

WINKELMANN CJ:

Well it is what it is.

MR STEVENSON:

It is what it is. Now by way of interest because it's part of answering the question about why he wouldn't know or why he didn't know, we say, what Mr Runga was up to, the Matipo Gardens, your Honours will have seen reference to that. That was the impressive work, as Justice Ellis described Mr Kuru's involvement in that. He's a trustee of the Matipo Community Trust, had been involved with E Tū Whānau programmes in the community and also the gang action plan and it was all really connected around the Matipo Gardens, which are not shown on that photo, but if you imagine you're at Mr Kuru's address and you come out the driveway, you turn right, you go up Matipo Street, which is a dead end, and it's really just about 100 metres at the end of that. You can see it on some of the maps. The gardens are up there and there is

also a house where the training programmes were happening and, of course, one of the witnesses your Honours might have seen, Mr Oldfield, was a tutor who was on his way to work that morning and he spoke about, in his words, "the wonderful work being done by this Trust in helping disenfranchised, somewhat antisocial, particularly young men in the community". So 60 Matipo Street, then Mr Kuru on the morning would have come out and turned left and if he was heading in the other direction right down to his left so, as we can imagine it, more or less south down Matipo Street, he would have arrived at the kura, the school, which was spoken about and the intended appointment further down Matipo Street.

KÓS J:

That's number 83 I think, or was it 86?

MR STEVENSON:

The school I thought it was a lower number, around 30. We can see it there. Yes, 36.

KÓS J:

36, sorry.

MR STEVENSON:

36 and 33 Matipo Street, for what it's worth just to orientate everyone, is where the lawyer, the locksmith and the bailiff were and Mr O'Neill, who takes the photos, they're doing the eviction, and he sees the aftermath.

KÓS J:

Can you tell us where Mrs Burton's house was in Tiki Street?

MR STEVENSON:

Yes, yes, Mrs Burton, who thought the first shot might just be another dog being put down –

KÓS J:

Yes.

MR STEVENSON:

– in the neighbourhood and was worried about her chickens. We've got the pointer –

KÓS J:

And then her dog.

MR STEVENSON:

That's right. So she's the – just where the cursor is put there, so that's where Mr Damien Kuru of course is on Tiki Street.

KÓS J:

The white driveway?

MR STEVENSON:

Just below it as we come down to Matipo, just where the cursor is.

KÓS J:

Right.

MR STEVENSON:

So the adjoining property. And while we're talking about it of course she says that she comes out, Mr Kuru's there, he's not wearing a bandana, he's not disguising himself, he's not wearing gang paraphernalia, he's not patched up. She says that, and you can take this a couple of different ways I suppose, but she says that he seemed calm, and contrary to what the Crown says in their submissions in this court, he didn't just say one thing, he said two things which were: "Strange, eh?" right and the other thing that he said, which is in the evidence is: "It doesn't sound good, eh?" So a pretty sophisticated conspiracy, if that's what is going on, whereby he says that and then also puts on this big ruse the next day for the meeting in front of Josiah Friesen.

1100

WILLIAMS J:

Can you tell me how this, the brief discussion with Ms Burton connects to the evidence of the bailiff, the lawyer and the locksmith?

MR STEVENSON:

Certainly. So Ms Burton hears the shots, comes outside, encounters Mr Kuru who says what he says and high-tails it back down towards Matipo Street and by the time he gets back onto Matipo Street –

WILLIAMS J:

They see him.

MR STEVENSON:

They start taking the photos.

WILLIAMS J:

So it's sequential?

MR STEVENSON:

Correct, yes.

WILLIAMS J:

So there's no evidence of Mr Kuru going in the other direction?

MR STEVENSON:

Which direction?

WILLIAMS J:

Well, up Tiki Street?

MR STEVENSON:

Beyond that, no. No, and –

WILLIAMS J:

All we have is the heading away from Tiki Street, or down Tiki Street and on the way back home?

MR STEVENSON:

Yes. That's right.

WILLIAMS J:

Okay, thank you.

MR STEVENSON:

And Waiora Herewini knows him and he wasn't at Puriri Street, and remember there were two incidents, which I'll come to. I think I mentioned earlier outside the address earlier in the morning, there's some threats –

WINKELMANN CJ:

So could I just ask that on this, the assailants would not have been able to see Mr Kuru from where he was?

MR STEVENSON:

No, because Puriri Street, we can see 144 is where Mr Ratana was and he's come out to the front doorstep there and he presents his firearm, according to one witness appears to discharge it, that's by the by for present purposes, but is then shot and killed on his doorstep effectively at 144 Puriri.

KÓS J:

Well we don't quite know when he meets Ms Burton, we don't whether he's come from Puriri Street or from his home, he's simply in Tiki Street.

MR STEVENSON:

And again, this is what you do in a case like this with established facts and how far should you go in drawing inferences, and the Crown case had to be and was, in Mr Wilkinson-Smith's closing address, that he probably was further up Puriri Street and he's coming back down, but we say that's an unsafe inference to draw.

WILLIAMS J:

What do we make of Mr Edwards' evidence?

MR STEVENSON:

Mr Remus Edwards?

WILLIAMS J:

Remus Edwards, that he was at Puriri Street. What happened there?

MR STEVENSON:

Well as Mr King used to say to me, you get one of these witnesses in every trial. I think by the end of it he was in – appears to have been embarrassed and apologised for making the mistake and there was some very careful cross-examination by Mr Keegan.

WILLIAMS J:

I was trying to find that.

MR STEVENSON:

It's the cross-examination.

ELLEN FRANCE J:

It's at a later – it comes at a later point. He comes back.

WILLIAMS J:

All right. Thank you.

MR STEVENSON:

I get the sense trial counsel got something of a shock at that evidence. Everyone did. It wasn't briefed and needed time just to come to terms with that and deal with it because it wasn't an expected issue. But of course we know from Josiah Friesen as well, and Ms Herewini, that Mr Kuru is not at 144 Puriri Street. So Josiah Friesen is there, he's a patched member who turned Queen's evidence and he's – there's just no dispute I don't think that – you know.

WILLIAMS J:

Okay, good.

WINKELMANN CJ:

So an essential element of section 66(2) is that the defendant has formed a common understanding with at least one member of the common venture to do this. So I'm just wondering where this on the Crown case, unless it's at Justice Kós' pitch of the long-term plan, I'm just wondering where this is, as it's formulated by Justice Ellis, that he ever forms a common purpose with anyone in this group to do this.

MR STEVENSON:

That's the key.

WILLIAMS J:

Well that's the point in my question about the sergeant-at-arms, which you didn't respond to.

MR STEVENSON:

Yes. Well you had to – you could only get there, in my submission, with Mr Scott's evidence and he said that it would be likely that a gang president would have to know and indeed be involved in something of this nature.

KÓS J:

The burden of Mr Wilkinson-Smith's closing to the jury was events on the day, there's some reference to prior skirmishes, but he doesn't set it in the way I offered as an alternative approach.

MR STEVENSON:

No. No. The fact it seems to me to have been overlooked and it's understandable, there was a lot to deal with in this case, but at least reading it afresh and not having been trial counsel, the fact it seems to have garnered inadequate attention from the defence point of view is the fact that not only was Mr Kuru not involved in the prior incidents, but he wasn't involved in the build-up

on the morning of this incident. Had it not been for a bus at Puriri Street when the carloads went there the first time, then presumably Mr Damien Kuru wouldn't have featured at all and if I can just narrow in on that. Ms Herewini is at home with her partner, Kevin Ratana. They'd met on Facebook apparently four weeks earlier. At the house also is her friend Tegan, his partner Quaid, the chap who goes out behind Mr Ratana and Tegan, some five to 15 minutes before the fatal incident, comes flying back to the others in the house and said: "There's a carload of gangsters out there, BPs, bandanas, patched up" and so forth. So that is the others. That is Gordon Runga, Sheldon Rogerson, their two cars, or at least one of those cars, and those members. Now she says a bus pulls up at that point and then the car departs. So presumably the intention was that that was going to be the intimidation and the banging on the car, and get out of town, and so forth. What's important about that is that had its foundation at Gordon Runga's house at 58 Rimu Street. Your Honours might recall the evidence about that. That the neighbour says: "Black Power guys are getting together at Gordon Runga's house." And it's not the Crown case at all that Mr Damien Kuru had anything to do with this. So all of that build up then, presumably had it gone to plan and there being no bus, would have played out with Mr Damien Kuru being home, on the appellant's case, at that point in time because he wouldn't be out of his door by that point.

KÓS J:

And with the BPs not in Matipo Street at all –

MR STEVENSON:

That's right.

KÓS J:

– but staying outside the house in Puriri.

MR STEVENSON:

Now Josiah Friesen is not at that first failed intimidation. He is told something's going to go down. Your Honours may recall another problematic piece of evidence for the Crown that Gordon Runga turns up to his place at 73 Matipo

in the morning and says: “Hey, the bro’s there again, he’s been sighted” because he wasn’t staying there full-time, Mr Ratana, at Matipo Street, so he’s obviously been sighted and the evidence is “shall we go round there” or something and so it was a question “shall we go and give it a crack” and that’s when Mr Friesen said: “Hey he's got a piece” and Mr Runga shows him his and says “it's all good.” But he’s asking “shall we go round there.” He's not saying: “We've got a plan, you know, it's in train, we’re gonna go and hit the bro and you're to join us.” That sort of conversation would be consistent with something that the president had been involved in but it does respectively sound like a very fast moving idea formulated and playing out on that morning. Now the final point –

WINKELMANN CJ:

So then just about that, so that’s exactly how Justice Ellis put it and on her assessment of the evidence Mr Kuru did not join until he walked up the road which has got some legal issues but what are we to make of that. That’s a trial Judge who sat there and watched it so she’s saying this is how you could put a party liability together, which might be section 66(1) liability on her analysis but…

MR STEVENSON:

Well, of course, though the Court’s not bound by it because, as I've stressed earlier, the Court has to rigorously scrutinise the facts and come to its own view and then say well –

WILLIAMS J:

Well that was the Judge working within verdicts.

MR STEVENSON:

Yes, but this –

WILLIAMS J:

Whether she actually thought that is another question.

MR STEVENSON:

Well this is –

WINKELMANN CJ:

Well I don't know about that.

GLAZEBROOK J:

Maybe it's helpful for you –

WINKELMANN CJ:

It seems to me it was helpful.

GLAZEBROOK J:

– because it was the only explanation she could come up with.

WINKELMANN CJ:

I raise it with you because it seems helpful for you.

MR STEVENSON:

Absolutely, and so having made that concession about what I said earlier the point is this is a trial judge who just sat through the whole thing and was presiding over the pre-trials and had an intimate understanding, saw and heard all of the witnesses, and in my submission her Honour's conclusion is very, very difficult to shake. At most he's become aware of something on Tiki Street.

1110

ELLEN FRANCE J:

If you look at the summing up and the description there the Judge gives in terms of the planks of the Crown case at page 440, paragraph 169, the reference is to firstly the evidence that he was the president, secondly Detective Scott's evidence about what that means. "Thirdly, the evidence about what happened at Puriri Street, which the Crown characterises as a planned and coordinated attack… and also the consequences such an attack would likely have," et cetera. Fourthly, the launch evidence, which you are critical of. Then: "Fifthly,

where he accepts that he was on Tiki Street and outside his home at around the relevant times." So on the Judge's later approach, you take out the planned and co-ordinated aspect?

MR STEVENSON:

Yes, and at one 171 I've marked up his, you know, for the appellant an important point where –

ELLEN FRANCE J:

Yes, yes.

MR STEVENSON:

And Justice Cull of course…

ELLEN FRANCE J:

Picks up on that.

MR STEVENSON:

Really picked up on this and said, well, look, the trial Judge didn't appear to think any of that was enough. At 171 you might think that those established facts alone, even when woven together, would not be enough to make you sure he knew about the plan, and of course that then left the question of Mr Scott's evidence.

I wanted to make one point when I mentioned earlier Josiah Friesen catching up with the others because he had to do the school pickup near immunity witness. He says that when he arrived, the members in the two cars, the green Nissan Primera, that's Runga, Mr Runga, and the blue Commodore, Mr Sheldon Rogerson who fires the cover shot later, and somewhat oddly it has to be said pleaded guilty to murder, but putting that to one side, he says those two cars are on the corner of Tiki and Matipo. So the proposition, we've gone through this in our submissions and given your Honours multiple references, but the proposition that there was a launch, as the Crown said earlier at one

point, from the gang pad from Mr Damien Kuru's house, that's just not the evidence at all.

WINKELMANN CJ:

Can we have that – was it Puriri and Matipo or Tiki and Matipo? Tiki and Matipo, wasn't it?

MR STEVENSON:

Well, no, Matipo and Tiki.

WINKELMANN CJ:

Yes, yes.

MR STEVENSON:

So when Mr Friesen turns up he says the cars are there. So they must've come back from the interruption by the bus and reconvened there and then it happens.

WINKELMANN CJ:

So they're withdrawing and regrouping?

MR STEVENSON:

Yes. But had things gone according to, dare I say it, plan, it wasn't on that evidence involving Mr Damien Kuru at all.

WILLIAMS J:

On the Crown case that wouldn't have been necessary though, would it, because –

MR STEVENSON:

Not if you have Mr Scott's evidence.

WILLIAMS J:

No.

MR STEVENSON:

No, and Mr Scott purports to look inside –

WINKELMANN CJ:

You've got the – the microphone's drifted away from your mouth again.

MR STEVENSON:

I beg your pardon. Mr Scott purports to look inside, effectively, the mind of Damien Kuru and answer the Crown case. I mean the mens rea.

GLAZEBROOK J:

Well that's – the Crown case that it's higher, isn't it that – I guess is that he would've known, so even though there isn't evidence of him ordering this particular thing, it was in accordance with instructions that were either given by the sergeant-in-arms or to someone else, which there's no evidence of.

MR STEVENSON:

But why would he have known? I mean isn't it reasonably also the case that indigenous gangs are by their nature groupings of young often chaotically-behaving young men who are difficult to control and sometimes this stuff happens with the president's authority and knowledge and sometimes it doesn't. Isn't that a fairer proposition? And why would you rationally say he had to know?

KÓS J:

Well –

GLAZEBROOK J:

Well I think your point about it, you might well say if they were going to go around and shoot him then it's very likely that that wouldn't be done.

MR STEVENSON:

That's right, yes.

WINKELMANN CJ:

You might also say –

GLAZEBROOK J:

Although it could be because it could be done as a, you know, look what I've done, I've actually gone off and done this to impress you.

WINKELMANN CJ:

You might also say though that if the only – that that would really be introducing a new principle of criminal law.

MR STEVENSON:

Mmm.

KÓS J:

What perhaps spoils your beautiful theory is Mr Runga –

MR STEVENSON:

I beg your pardon, Sir?

KÓS J:

Mr Runga somewhat spoils that theory because –

WINKELMANN CJ:

Runga.

KÓS J:

Runga.

MR STEVENSON:

Runga, yes.

KÓS J:

Runga, sorry. Because he is the sergeant-at-arms acting you say, but he is the point of connection that suggests great authority. This is not a completely chaotic event.

MR STEVENSON:

It's a relevant piece of circumstantial evidence in terms of the process of drawing inferences, but it's not the full answer in my submission, going –

WILLIAMS J:

It's not enough, you would say?

MR STEVENSON:

No. No.

WINKELMANN CJ:

Well in fact it's simply just a further detail on the presumption – on what seems to be operating as a rule of evidence that if it occurs within a gang it's authorised by the president through the hierarchy of the sergeant at arms.

MR STEVENSON:

That's right and I'll come to this shortly but it's probably worth noting now there does seem to be a line in the authorities in terms of what these sorts of experts can say. They can give educative evidence about not quite counterintuitive material but material alien to jurors, typically how they work, structures, paraphernalia, language and so forth but not state of mind evidence, and it seems to me that's the line that's been drawn particularly by the two Canadian cases and said: "No, that's just going too far, there are problems with reliability and the underlying hearsay" and so forth. There are concerns about methodology and also it's just getting too close to usurping the function of the jury and I'll come to that in more detail shortly.

Could I finally come back to Justice Williams' question about why I think in terms of the suggestion that Mr Damien Kuru just wouldn't have been involved in this, what else is there to speak to that point, and without going to the evidence, unless your Honours want me to, it was adduced under cross-examination by the defence of the school principal who gave evidence at trial, Tuhi Smith, that yes there was the meeting planned at 10 and that Mr Damien Kuru had been liaising or engaging with the school about trying to set up E Tū Whānau

meetings at the school, were using school's facilities and engaging with the community in that way. Now E Tū Whānau, and this is publicly available information that can't be controversial, is a grassroots Māori organisation instituted around a decade ago to try and deal with violence in Māori communities. So that's what he was engaging in at that time. There's also more that speak to Mr Damien Kuru's attitude and prosocial outlook at the time –

WILLIAMS J:

Sorry, can you just help me with that? Are you suggesting he was going to school to talk about E Tū Whānau and not about his son?

MR STEVENSON:

It was to speak about his son but the principal also confirmed that he'd been engaging with –

WILLIAMS J:

I see, there was a – I see, right.

MR STEVENSON:

– the school about running E Tū Whānau programmes or seminars or something like that at the school.

WILLIAMS J:

Good.

MR STEVENSON:

But if we look at the exhibits schedule we can see a printout of a diary of Damien Kuru that was obtained when police searched his house and this is, if my notes are correct, at page 267 of the exhibit schedule. I wonder if we could bring that up on ClickShare. Now this is a page that was uplifted during the search of Damien Kuru's house and although a little earlier in time, Monday 6 August, it really reinforces what Justice Ellis said about seeing as impressive and genuine things Damien Kuru was doing in the community.

So it's a diary for the day from what we can see, “9 am Braxton” it's one of his kids, “11 am UCol” so programmes for other gang members, Gordy, Josiah, Hikitia, Damien. Those are the other men who were convicted; Gordon Runga, Josiah Friesen, Hikitia Box, Damien Fantham-Baker. Damien Fantham-Baker by the way lives at 55 Matipo Street which is the other reason that these chaps would be congregating around the bottom of Matipo Street, not necessarily anything to do with Anthony, I beg your pardon, Damien Kuru. Then we see Te Kura O Kokohuia – community service, raised beds, a hui. The Whanganui Garden Centre, asking whether or not others would like to be involved, gardens in schools. Design garden project further down, get kids involved, fundraising. Building a team, Dennis O’Reilly, who is the chap Mr Damien Kuru texts at 2.03 pm on the 21st of August where it's texted by, and I'll come back to that in second, reference to the charitable trust and then something that’s maybe to do with gang paraphernalia, I'm not sure, but black lettering at the bottom, “black leather” I should say.

1120

So Josiah Friesen, the immunity witness, spoke about Damien Kuru in similar terms. He said in evidence that Damien Kuru was never involved, that even after he’d been given immunity the police asked, and this was another statement adduced in cross-examination, he was asked again by police whether or not Damien Kuru was involved and he said “no.” He confirmed that he had been patched for 10 years. Damien Kuru had never asked him to do a crime. He had tried to help him get into training courses, had been like a father figure to him and was very anti-methamphetamine.

So E Tū Whānau programmes at the school, a 10 am appointment, what is, the appellant says, what is the likelihood that on that very morning with a 10 am scheduled appointment with the school Damien Kuru would be getting involved in a gang hit with weapons around the corner. It's not a full answer of course but it's a valid question, the appellant says, and it militates strongly against the Crown proposition that a fact-finder could be convinced, sure, morally certain, as the Americans put it, that he was guilty.

Now the next part of this is also sticking with the exhibits schedule which is at 875 and this is text messages intercepted and obtained by the police. I'll bring that up if we could too please on the ClickShare. Thanks Mr Fredrickson. So on the 21st of the 8th at 1.27 pm we see a text to Damien Kuru because, of course, news is going around by now about what's happened. At around 9.40 am: "You all good yo?" And another question from the same number: "Bro one of ours?" ie, Black Power, and we see the answer is over. Now to interpolate, by this point the evidence was Mr Damien Kuru had been through a checkpoint and spoken with police and he said he was trying to get his family to safety. Again the defence said totally inconsistent with him having known something like this was going down but his answer is: "No. Apparently it was 1 of theirs. The cops jzt told me." So that's all part of the narrative, the appellant says, which is very consistent with Damien Kuru having not been involved and was it rational for the jury, having regard to the evidence about what he was planning to do that day and his post-incident conduct, these text messages and the meeting where he's demanding to know who was involved, was it rational for the jury to say we exclude that, it doesn't raise a reasonable possibility as to –

WINKELMANN CJ:

So you're saying there's a paucity of evidence and more than that there's inconsistent evidence which was made –

MR STEVENSON:

Yes.

WINKELMANN CJ:

So it's really two grounds, paucity of evidence –

MR STEVENSON:

Yes.

WINKELMANN CJ:

– and then, furthermore, there's evidence which you would find hard to describe as an immovable obstacle but might be enough to raise reasonable doubt.

MR STEVENSON:

I take that point, yes. Now I think I've covered a good deal of the key points and the Court obviously has a pretty close summary of the facts and the respective submissions but we should look at what the Court of Appeal said about the correctness of the jury verdict and that's in the Supreme Court case on appeal booklet –

WINKELMANN CJ:

Is this addressing the test that they applied?

MR STEVENSON:

Test and their findings, endorsing the jury's guilty verdict. So that's at pages 11 to 45 of the case on appeal. I just want to point out two errors as to the facts from the appellant's point of view. So at paragraph 14, and this is under the heading "The shooting of Mr Ratana", the Court of Appeal said: "A group of Black Power members, including… Box, Fantham-Baker and Anthony Kuru" – no relation I should say – "walked from 60 Matipo Street to 144 Puriri…" That, in the appellant submission, is a mistake, excuse me, and potentially quite a telling one because that's just not right at all, and Mr Keegan, your Honours might recall, in his closing address said anywhere but 60 Matipo, the grouping happened at Rogerson's, Harper Street, Runga's, Matipo Street, corner of Tiki and Matipo, anywhere but 60.

The second error, so far as the appellant is concerned, is discussing the summary of the trial Judge at paragraph 38(iv). So this is evidence the Court of Appeal's talking about that Justice Ellis summarised as relied upon by the Crown. So at subparagraph (iv): "The undisputed evidence… Mr Kuru then watched from at his gate on Matipo Street as the men returned (there is a photograph of him by his gate at this time)," and it's probably a convenient moment to bring up the photos, just before we break, taken by the bailiff,

Mr Oldfield. Mr O'Neill, I beg your pardon, and I'm just thinking they're in the exhibits but they're also in the Crown submissions, it might be easier.

The short point is the appellant says there's no evidence he is watching, that's Mr Damien Kuru, from this address at all. That could be a submission by the Crown but the idea that he's watching them is contested by the appellant and he says that what can be seen here is the men returning. Mr Damien Kuru is on the far right, obviously we've got an arrow pointing to him, and that's at around his address, but according to the photographer, as he's watching the scene Mr Damien Kuru just disappears, and go to the next photos, they follow that one, and we can see that his back, and this is a point made by Mr Keegan in closing, Damien Kuru is with his back to the others and the next photo, I think there's another one, yes. All right.

So the idea that Mr Damien Kuru watched the others return, I think the Crown put it "welcoming his troops home", which was more of the war sort of terminology adopted by the Crown, in my submission, it's a little bit unfortunate to pitch it like that, but in any event the idea that he's welcoming the troops home, as the Crown put it, in my submission, well, you can make the argument but it's not undisputed evidence.

ELLEN FRANCE J:

Mr Stevenson, there's reference to a timeline that Detective Bennett prepared.

MR STEVENSON:

Bennett. It's in the exhibit schedule.

ELLEN FRANCE J:

At some point, could you just let me know where to find that?

MR STEVENSON:

Yes, it's – I think it's exhibit 40 or 73. I made a note and somehow it's dropped off.

ELLEN FRANCE J:
Because it didn't seem to – the numbers didn't seem to match that one.

WILLIAMS J:
No.

MR STEVENSON:
No, and –

ELLEN FRANCE J:
Because that would –

MR STEVENSON:
It's got the timestamp of the bus and so forth because it was a GPS and it's quite helpful.

ELLEN FRANCE J:
Yes, yes.

MR STEVENSON:
We'll find it.

WINKELMANN CJ:
Right, well we'll take –
1130

WILLIAMS J:
So just before we go on that, so we've got the picture of Mr Kuru by the car looking away from the photographer, Mr O'Neill, isn't it, are you saying that on Mr O'Neill's evidence he's walking at that point?

MR STEVENSON:
Yes, and disappears.

WILLIAMS J:

So is it possible to work out where he is in relation to 60 at that point?

MR STEVENSON:

Well –

WILLIAMS J:

Perhaps you can come back to that.

MR STEVENSON:

Well he's almost at his driveway. What Mr O'Neill also says, it's a little bit unclear, but everyone agrees the time gap between Mr Damien Kuru and the others is at least 15 to 20 seconds.

WILLIAMS J:

Yes. I thought it was 20 to 25?

MR STEVENSON:

Well, yes, but when broken down under cross-examination Mr O'Neill seems to be saying, actually, 35 to 40 seconds.

WILLIAMS J:

Right.

MR STEVENSON:

But all witnesses say no discussion, no connection, no interaction between these men.

WILLIAMS J:

Right, okay. Thank you.

WINKELMANN CJ:

All right, we'll take the adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Now you better get a wriggle on I think Mr Stevenson.

MR STEVENSON:

Yes, yes, and I'm mindful that all things being equal I should give the Crown an opportunity to make a start before lunch. I think I ventilated the points for the appellant in respect of what we say was an unreasonable guilty verdict.

Could I just finish off with two points. One is to remind your Honours about the analysis of Justice Cull, her dissent, and perhaps we bring this up for ease of reference, Supreme Court Casebook from page 36. So her Honour at 93 agreed with the Judge's, that is the trial Judge's assessment, and then we've discussed that earlier whether or not the foundation facts absent Mr Scott would be enough. Her Honour said that those four "factual" circumstances at best creates suspicion or possibility or probability of knowledge. Her Honour at 94 departed from the majority and said half way down 94: "…there is no evidence that Mr Kuru was involved in that incident," earlier incident, "or that he co-ordinated the previous attack on Mr Ratana; his presence in Tiki Street could not have 'knowingly encouraged' the others as there is no evidence he was seen by them," that's something that's been discussed earlier, "and the others did not assemble outside his house but nearby." The appellant has made that point already. "The jury would have had to engage in speculative reasoning, with respect, that Mr Kuru '*would have been likely* to have been seen'…and that he '*would have also anticipated*' [they] were carrying weapons." A question raised by the Chief Justice earlier as to when it is he's meant to have gained knowledge of weapons and in summary her Honour Justice Cull, in what we say is a punchy and persuasive dissent, says" "Mr Kuru was not present…the defendants did not collect outside *his* house" but nearby and "the plan was hastily formulated on the morning." Concluding final sentence in 95: "The evidence falls well short of proving that Mr Kuru knew of the plan, foresaw that an unlawful shooting was a probable consequence, and sanctioned the plan."

GLAZEBROOK J:

I guess it wouldn't be speculation if you could say from where he was you must have seen it or they must have seen him but you say if you look at the maps that's just not available unless he had actually gone further up and –

MR STEVENSON:

That's right.

GLAZEBROOK J:

Further up Tiki Street, that is.

MR STEVENSON:

And is it legitimate to make that assumption. The final point in all of this, of course, is it's not irrelevant that Mr Kuru is seen out near the incident. Of course that's relevant. But it depends, doesn't it? It's acutely contextual. If this incident had been occurring on the other side of Whanganui and he was nearby, then rightly, there would be criticism of an assertion that he had nothing to do with it. But here, he's barely across the road from his house. So the reasoning that his visibility nearby must be consistent with involvement really falls away given how close in proximity this was to his house, and of course, the evidence that he had to be going down Matipo past Tiki Street on his way to the school interview, albeit punctually.

WINKELMANN CJ:

Or he heard something going on and wanted to know what it was.

MR STEVENSON:

Oh, that's right, and that sequentially must be right, because Waiora Herewini's evidence and the evidence of others that hear her and the men who have arrived at the address is there was an almighty commotion and lots of screaming and so forth before firearms were discharged, and banging, of course, on vehicles. So a lot of noise heard by others who are living at a distance beyond that of Mr Damien Kuru.

Before turning then to the Scott evidence dealing with section 66(2), I'm very aware that I think, if I'm correct, this Court still has reserved I think it's the *Burke v R* Supreme Court 75/2022 decision –

WINKELMANN CJ:

Burke. That's right.

MR STEVENSON:

So I don't think I'm going to be thanked for going through the points made in respect of that. I mean, the appellant joins what I understood was said in *Burke* for that appellant that manslaughter does require foresight of that offence being death in the context of manslaughter, and from memory I think Justice Mallon dissented along those lines in the earlier Court of Appeal decision. Here, it was pitched by the trial judge there had to be knowledge of a shooting. The Crown says that was favourable to the appellant, but we say for manslaughter, in terms of what the appellant in *Burke* said, the foresight had to be pitched higher.

But the main thing I wanted to say about section 66(2) is what the trial judge said and what I understand is also a live issue in *Burke*, and that is the definition of "probable consequences". So under the statute of course, section 66(2), a defendant facing an accusation framed in those terms has to know that involvement in the plan is going to result in a probable consequence of the end offence. Now, "probable" has been read down to "could well happen" and although not suggesting this is your Honours' final position and oral argument having watched some of the livestream, I think your Honour the Chief Justice said to the Crown, well, the appellant's really saying that's a bit lukewarm, and that's the way the appellant would respectfully put it. It's just not stringent enough to read down "probable consequences", taking the natural meaning of "probable" down to "something that could well happen". That's just far too soft and allows convictions under section 66(2) that don't align with what must be the statutory purpose which is a much higher level of understanding or foresight. If you ask the layman what "probable" means, of course this is not necessarily the North Star here, but they're going to say "likely". That's the natural understanding of that term and the appellant says the one expected by

Parliament to be the expression or type of expression used when explaining it to a jury, and it's inappropriate to read "probable" down to "something that could well happen".

1200

Now, it was worse in this case, in my submission, because it was further diluted, and we can find this in the casebook, perhaps if we bring this up Mr Fredrickson, this is Court of Appeal casebook at page 437 when the Judge is directing the jury regarding section 66(2). At this point she's talking about Mr Runga but then says this applies equally to Mr Kuru. So perhaps we go back 435, we'll see this is the summing up to the jury and her Honour introduces section 66(2) and goes on to explain that and the language used in 437 is not could well happen but repeatedly something that might well happen.

WINKELMANN CJ:

What paragraph?

MR STEVENSON:

So paragraph 158: "That is about whether Mr Runga would have foreseen that Mr Ratana might well be shot as a result of the shared plan..." At 159 –

WILLIAMS J:

What makes you think might well – are you suggesting "might well" is not as strong as "could well"?

MR STEVENSON:

It does feel it might –

WILLIAMS J:

Does it because I would have said the opposite myself but that's probably about the English language.

WINKELMANN CJ:

"Might" is possible.

MR STEVENSON:

Yes, well “might” is possible.

WILLIAMS J:

Yes, but “might well”, it seems to me “might well” is a little – that “might well” happen. It seems to me a bit more than “could well” happen.

MR STEVENSON:

That's not fair the appellant says to the accused person.

WILLIAMS J:

Well –

MR STEVENSON:

In terms of a faithful interpretation of the statutory test, it is what it is. It's probabilities and multiple appellants have tried to have a crack at this previously, thus far without success, but there's no doubt these sorts of cases have caused consternation in the idea that the threshold for liability is unreasonably read down in the memorable recent language of the UK Supreme Court describing the common law having taken a wrong turn in respect of the formulation of common intention, back in the 1980s I think it was. Well we don’t need to delve too far into that but the point is in my submission the Judge went on again at paragraph 159, fourth line: “So, ask yourself, what would anyone think might happen in that scenario?” At 160: “But if you decide that shooting Mr Ratana *was* something that might well happen” and that’s all I can really say about that but we say respectfully that is problematic and unreasonably diluted the test.

GLAZEBROOK J:

One of the issues always with firearms though is that even if the people think they're only going to be used as a threat, if you have a loaded firearm there are real issues about it going – being used and that's really all that’s being said here isn't it. So if somebody takes a loaded firearm to something, normally one would

expect someone to consider there'd be situations in which it would be used. So it's not more probable than not has been held.

WINKELMANN CJ:

So probable outcome.

GLAZEBROOK J:

So what – where do you say –

MR STEVENSON:

I think the intervener –

GLAZEBROOK J:

– because you go along with a firearm, it's going to be a very tense situation.

MR STEVENSON:

Well the statutory word is "probable" and Te Matakahi, Defence Lawyers Association, has intervened and said that that should be expressed as something that is likely to occur –

GLAZEBROOK J:

Okay.

MR STEVENSON:

– and the Courts may well think that that is too low a threshold in terms of risks with loaded firearms and so forth but at the moment that's the way the provision is framed.

WINKELMANN CJ:

So your simple point is to say that if I said to someone "you might get shot" that is a quite a different thing to saying to them "you'll probably get shot"?

MR STEVENSON:

And how do you not get convicted in these circumstances as a gang member with all of the prejudice that follows you in these sorts of cases when the

instruction to the jury is all you need to be satisfied is that he knew this might happen.

GLAZEBROOK J:

And do you make the same point, I know here the Judge just said "might well happen" but if you look at the question trails that are there, they usually say a real and appreciable risk or might well – or could well happen, isn't it?

MR STEVENSON:

Mmm.

GLAZEBROOK J:

What do you say, even the real and appreciable risk is too low?

MR STEVENSON:

It's too low. I mean "risk" from memory under the definition in the *Oxford Dictionary* is "chance". The whole thing is just unfaithful to the statutory language and so often these sorts of cases, as here, these sort of fact scenarios with gang members who will face prejudice, and it was very high here because of the kind of propensity element of Mr Scott's evidence I'll come to in a moment, but so often there is the danger that a rational assessment of the facts will be derailed by reasoning, prejudice for gang members on trial, and when you're told or a jury's told, look, you just have to know that he knew this might happen, it's difficult to see how many people are going to avoid liability in those circumstances, and it runs the very real risk that the criminal law is just sweeping up too many people in the section 66(2) net.

WINKELMANN CJ:

So your submission there is "real and appreciable risk could very well happen", these are vague words and they give space for prejudicial reasoning?

MR STEVENSON:

Yes.

WILLIAMS J:

The flipside of that though is that, on your argument, unless there was a clear intention to use the gun in those circumstances, taking a gun to a fistfight will never result if the gun is used in a section 66(2) conviction for the result.

MR STEVENSON:

Well, mmm. I mean –

WILLIAMS J:

Really?

MR STEVENSON:

Well –

WILLIAMS J:

Because but even on those facts, if, contingent though it may be, as it happened here of course with Mr Ratana popping up with a gun of his own, in certain circumstances it would be probable.

MR STEVENSON:

In certain circumstances, it would be.

WILLIAMS J:

But doesn't that, isn't that the point? You take a gun to a fist fight and in some circumstances the use of it will be probable.

MR STEVENSON:

Sure, I mean but if the appropriate policy response is if you take a firearm to confrontation in these sorts of circumstances, then you only need to know that it might be used. That's a policy call, and it's the policy call which informs the statute and at the moment –

WINKELMANN CJ:

Your point is – yes. Are you making a point beyond the wording of the statute?

MR STEVENSON:

Well that at the moment the statute's framed the way it is and we just have to be faithful to it, and if it's suggested that's unreasonably favourable, as I think in certain circumstances it's being suggested it is, well that's just the way it is, the way the statute's framed.

WILLIAMS J:

But it depends on what – the point is it depends on what level you apply your probability test.

MR STEVENSON:

Of course it does, but –

WILLIAMS J:

And I wonder whether in the end that'd help you. That's my point.

MR STEVENSON:

Well it would've helped Mr Kuru if the jury were told he has to know that it's likely a firearm's going to be used in these circumstances, or it's probable, and not say that –

WILLIAMS J:

Well in the circumstances of a rival member coming up with a sawn-off shotgun, it seems to me "probable" is precisely the right word.

MR STEVENSON:

But of course that's an intervening fact that couldn't have been known and so contemplated, yes.

WILLIAMS J:

But it could've been, in context, could well have been understood as sufficiently possible to produce the probable.

MR STEVENSON:

Sure, and if the facts supported that this was a likely scenario or probable find, but not something that "might well" happen.

WINKELMANN CJ:

So we're mixing up here, too, what the test is and what the application is.

MR STEVENSON:

Yes.

WINKELMANN CJ:

Right. So and really I think your argument, as I remember, it was incorrectly – the jury was incorrectly addressed?

MR STEVENSON:

Yes.

WINKELMANN CJ:

Because you're going to have difficulty getting home on the unreasonable verdict on what he foresaw but the point is, quite apart from – that's putting to one side all the other arguments, but that's – your focus is on the legal test?

MR STEVENSON:

Yes. I don't really think I can helpfully say much more about that and probably –

WINKELMANN CJ:

No. So what we're really interested to hear from you about is –

MR STEVENSON:

Is Mr Scott.

WINKELMANN CJ:

– Mr Scott's evidence.

MR STEVENSON:

Yes. I'll just get a glass of water.

1210

So, as always, it's probably helpful to go to the evidence which is in the notes of evidence at page 1553. Now, I mentioned this earlier but I think I should also just point out what the Crown case was, as I say, presumably at the time Mr Scott was briefed, and that is in the section 147 judgment of Justice Thomas.

WINKELMANN CJ:

Can I just ask the question, staying with your opening proposition on this so it's taking me back one moment, which is that while you were junior prior to Justice Thomas' judgment, the line you say needs to be drawn is that experts may be able to give evidence about concrete facts such as wearing of insignia but may not go so far as to give evidence of state of mind. Do you extend that beyond the police experts to sociological experts because of course there's a prior question here as to whether this expert was properly qualified, but…

MR STEVENSON:

Well, I mean, when the issue at trial is essentially state of mind in a mens rea sense, there are always going to be concerns about any expert giving evidence that purports to answer it, I suppose, is the short point. It does seem to me having reviewed the cases, and there are a lot of them, although a lot of them are really saying the same thing in terms of how experts have been treated particularly in Canada but also England and New Zealand, that, and the appellant accepts this, gang expert evidence will be admissible and will be substantially helpful in some circumstances, as I've said earlier, to explain things that may be relevant in the particular case, and oftentimes that's just about what gangs are and how they work and how they're structured internally, the words they use, opposing gangs, the signals, what their paraphernalia means, and sometimes, who they're feuding with, and that's –

WINKELMANN CJ:

So it might be admissible, for instance, for the witness to say they're a strictly hierarchical organisation and the president is in charge and then gives orders down and they're carried into effect by the sergeant-at-arms, et cetera, et

cetera, but it would not be permissible for them to say, and it follows from this that the president knows of any significant activity that's going on.

MR STEVENSON:

No, and also as the Privy Council said, and I'll come to this, in *Myers v R* [2015] UKPC 40 which says in a trilogy of cases from Bermuda, the police expert can give evidence that's relevant to motive, but the Privy Council says the expert also needs to state qualifications, which although it didn't make it into evidence was the point made by Mr Gilbert in the brief put before Justice Thomas at a pre-trial, the section 147 stage, in which he said, well, yes often that's the way.

So to pick up your Honour Chief Justice's example, the expert can say gangs are hierarchical, orders are passed down, but not always, and care needs to be taken as Mr Gilbert, or I think he's Professor Gilbert, said to look at the facts of the case and primarily make a judgement based on those.

GLAZEBROOK J:

Isn't this evidence just absolutely so common sense that it would be within the knowledge of any juror anyway? It's a bit like saying you can give expert evidence that a boss of a company would be giving out orders in respect of, you know, going after a new client or something. I mean, it's…

MR STEVENSON:

I mean, yes, and I was looking for analogies along those lines in a commercial setting, that we attribute knowledge along those lines to directives and –

GLAZEBROOK J:

Do you need expert evidence to attribute it? I mean, you may make the submission.

MR STEVENSON:

Is it substantially helpful – yes, well, there are two parts to it. The idea that it's common sense, of course, includes the proposition that it's correct and we say that's just not necessarily so, that the president in a gang would likely know the

sort of thing that's happening. I mean, that may have a superficial common sense feel to it, but that's just not necessarily true.

GLAZEBROOK J:

No, but it'd be something that a jury would weigh, whether in these particular –

MR STEVENSON:

Yes.

GLAZEBROOK J:

What they have to weigh is whether in these particular circumstances, that sort of corporate analogy about a boss giving orders works or not.

MR STEVENSON:

It's inevitably part of the reasoning process. I absolutely agree.

WINKELMANN CJ:

Can I just say when I look at this it seems to me that expert evidence is always known to require certain things, and leaving to one side whether or not it's scientific or other, it requires that the person be adequately qualified, that they are impartial and they are there to assist the Court, which in this case it includes the jury, that they state that they base their evidence on proved facts or a body of study, experience – a body of study or experience which is falsifiable in the sense of it's available for –

MR STEVENSON:

Assessment.

WINKELMANN CJ:

– opposing party to challenge, that they admit that they state explicitly any limitations upon their ability to give evidence in this area, that they identify a contradictory material and they acknowledge limitations on their evidence. Do you add anything to that?

MR STEVENSON:

No, I think, I think that's consistent with the case law for example, the *Daubert v. Merrell Dow Pharm*., 509 U.S. 579 (1993) criteria and what has been said in a number of the cases. The point for the appellant, of course, is that this evidence failed at a number of junctures in terms of the criterion or criteria that your Honour has just outlined. And just to jump straight into them, first of all the qualifications, I've been looking for a CV but apparently there wasn't one, the qualification just comes in the original brief of evidence which is then read out at trial which seems to involve attendance at police courses and being involved in police gang investigations and debriefing informants and witnesses, presumably like Josiah Friesen who end up giving evidence for the prosecution. But how is an appellant to interrogate that when really you get a series of conclusory statements. I've spoken to a whole bunch of ex-gang members and attended some courses and as a result of that I can state the presidents likely know about the sort of business as occurred in this case.

ELLEN FRANCE J:

How different is that from Rollin, who I think is the expert in *Myers*, who says well you know I've been working on a daily basis with these group, these people?

MR STEVENSON:

Well it's –

ELLEN FRANCE J:

I mean there are also difficulties there, aren't there, in interrogating that?

MR STEVENSON:

There are and I'll come to *Myers* in a second. I suppose the controversy in *Myers* was less pronounced because whilst the Board said they shared concerns of the Court below about gang police expert evidence really it was just being adduced in that case to show motive. In the three cases –

ELLEN FRANCE J:

Well not – well membership motive.

MR STEVENSON:

That's right. So to make explicable why this person would shoot that person in *Myers*, *Cox* and *Brangman*, they're gang members, they're feuding, and this is how you can know they're a member of that part of gangs, well a gang. So that's just by its nature a less controversial understanding from a police expert how we identify who's a member of a gang and what that means but here of course it went so much further and –

ELLEN FRANCE J:

Well for my part I'm not sure that the ability to interrogate is necessarily the strongest point –

MR STEVENSON:

No, no.

ELLEN FRANCE J:

– as opposed to a qualification per se but…

MR STEVENSON:

Yes, I agree with that Justice France and I don't think it's going to be of great utility in this case to spend too much time on that but it is a concern when the evidence underlying a proposition such as the one in this case which is so central to the outcome. I mean if you accept what Mr Scott says you're really there in terms of the verdict sought by the Crown. And what do we know about – well I mean how many former gang members have been debriefed and is it really the situation that none of them talk about violence that erupts without a president's knowledge and is it right in an intuitive sense that there's no qualification at all along those lines as –

1220

WINKELMANN CJ:

What interests me because I think Justice France must be right that, if it's going to be very concrete evidence, you might say that experience is enough. For instance, the evidence we get in methamphetamine trials about this is the

gang, this is the price that you get for methamphetamine in the marketplace but that might go to that inability to get – say so Dr Gilbert could produce his, could call upon sociological studies and he could cite et cetera and you could have a look at those, but the inability to have any kind of empirical concrete basis or even any kind of, to interrogate the basis of this experiential knowledge might go to how permissive the Court is in terms of the scope and opinions that the witnesses are allowed to express.

MR STEVENSON:

Yes, and one of the Canadian cases involves the Court of Appeal reversing the decision at trial level to exclude the proposed gang evidence of a sociologist who had spent decades studying gangs and explained that as a sociologist his methodology was very rigorous in terms of the interviews, how he interviewed the former gang members, the collection of data, the avoidance of bias, statement of qualifications and so forth and that's just problematically all absent in this case. And one of the difficulties, as I see it, is it would have been helpful to have an evidential hearing and some of this teased out in cross-examination with the expert. Well, you know, let's really get into what you're saying. What are the underlying facts you're relying upon? How many people have you debriefed? I mean how many people have you debriefed who actually talk about the topic in this case which is the proposition gang presidents know about serious violence.

So the Privy Council in *Myers* does say some things about these issues and perhaps if we could bring this up and go at the appellant's bundle, beginning at 167 is the *Myers* decision. So at paragraph 56 really repeating a point made by one of your Honours just moments earlier, paragraph 56, ambit of gang evidence: "It follows from the principles set out above that the ambit of gang evidence will depend, in any particular case, on what legitimate role it may have in helping the jury to resolve one or more issues in the case. It is not possible to lay down general rules for gang evidence beyond that. However, it follows also that the measure of admissibility is the extent to which the evidence justifies departure from the starting point of *Makin*." That was a discussion

about the inherent nature of hearsay evidence in these sorts of witnesses talking about he said/she said previously.

Over the page at paragraph 57 beginning "In such a case" the Board talked about the sorts of cases in which an expert can give evidence which I've mentioned. "An example is evidence of the customary practices of drug users…" further down: "…practices, mores and associations of gangs…". That's all fine. Concluding that paragraph: "…providing that the ordinary threshold requirements for expertise are established, and providing that the ordinary rules… are observed." But provisos are expressed at paragraph 58 and they're of some importance. About half way down paragraph 58 we see the sentence beginning: "But the officer must have made a sufficient study…properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact." And further in that regard, the bottom third of that page, paragraph 58: "But care must be taken that simple, and not necessarily balanced, anecdotal experience [*sic*] is not permitted to assume the robe of expertise." And I'm about to come to *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272 which is in the respondent's authorities, that's what I'd classify as a state of mind case, but the board gives the example of that case. It's "not a balanced, tested, or researched proposition… It was not admissible and indeed proved nothing about the particular defendant on trial." So your Honours will recall that's the evidence that all drug couriers know there are drugs in their vehicles or whatever.

Then at paragraph 59, traversing points just succinctly summarised by the Chief Justice, the generally acknowledged requirements. Subsection (3): "An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions," and we say it's inescapable there was a failure here in this regard. There should have been some qualification rather than the way in which the expert pitched his evidence as close to an immutable truth that presidents are in charge of business and, as we know, the expression "likely know" that this sort of thing is happening.

Importantly, at paragraph 60, interpolating that we accept police officers can give evidence and can be impartial, but again, we have to be realistic, the appellant says. This is an unusual situation, a police officer being called to give evidence to support the police case, and so the board said at paragraph 60: "Compliance with these exacting standards can be difficult for a police officer who is effectively combining the duties of active investigator… with those of independent expert," and goes on, bottom four lines: "In particular, a police expert needs to be especially conscious of the duty to state fully any material which weighs against any proposition… he is advancing…".

So I can go then to the two Canadian cases briefly, *Sekhon* and *R v Sandham* [2009] OJ No 4602, and they from memory are in the respondent's bundle of authorities. Now I'm not – well I think I will ask to bring it up briefly. Let's go to tab 18 of the respondent's authorities. This is the English Queen's counsel article about police evidence. This is page 513 of the respondent's bundle.

So like *Myers*, the author in this article describes the position taken by the Canadian Supreme Court, I think it was, in *Sekhon* as a warning, and of course this is just the author's summary and opinion, but helpful: "…the Supreme Court in Canada in *Sekhon* has sounded an important warning note about such evidence," police gang expert evidence. "Its admissibility is likely to be strictly determined because of its risk of prejudice," recounts the facts, and at the bottom of that *Sekhon* warning note portion of the article he concludes: "…the guilt or innocence of accused persons…the police officer had encountered in the past was not legally relevant to Sekhon's guilt or innocence. In other words, the officer's testimony was of no probative value in determining whether Sekhon knew about the cocaine and its lack of relevance is sufficient to justify its exclusion." So Sekhon himself then is at the respondent's –

1230

WINKELMANN CJ:

Could I just ask what tab that article is of yours?

MR STEVENSON:

Respondent's tab 18.

GLAZEBROOK J:

Tab 18. Tab 18.

WINKELMANN CJ:

Oh, it's respondent's so I couldn't find it, and it's tab 5 of respondent's, is it?

MR STEVENSON:

Yes. Tab 18 of the respondent's.

WINKELMANN CJ:

Got that completely wrong then. Oh, it's Ian Freckleton one, yes.

MR STEVENSON:

It's probably me who put your Honour wrong.

WINKELMANN CJ:

No, it's all right. I knew I recognised it and it's Ian Freckleton.

MR STEVENSON:

So, conscious of time, if I can just thumbnail sketch, at *Sekhon* the expert gave evidence that was acceptable except the bit where he said, to paraphrase it, all couriers know that there are drugs and there are no blind couriers.

At page 236 of the respondent's bundle…

WILLIAMS J:

Give me the number, page again please?

MR STEVENSON:

Page 236 of the respondent's bundle. Hopefully we can bring this up. At paragraph 41 the Supreme Court noted the majority of the Court of Appeal had no difficulty, Justice Newbury in dissent did have a problem and the statement is a helpful one, the appellant says, which is the penultimate

paragraph beginning: “Anecdotal evidence of this kind…” and of course we’re applying this, we say, to what was happening with Mr Scott and gang president operation in New Zealand and in the instant case. “Anecdotal evidence of this kind is just that — anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very in the Crown’s favour, and of coming from the mouth of an ‘expert’. If it can be said to be relevant to the case of a particular accused, it is also highly prejudicial.”

Then at page 239, the summary of the Supreme Court in *Sekhon*: “…the trial judge erred in relying upon the Impugned Testimony,” the knowledge or state of mind testimony which was the issue at trial. “The Impugned Testimony,” half way down paragraph 49, “though perhaps logically relevant, was not legally relevant because the guilt or innocence of the accused persons that Sgt. Arsenault had encountered in the past is legally irrelevant to the guilt or innocence of Mr Sekhon,” and goes on to say: “It is trite to say that a fundamental tenet of our criminal justice system is that the guilt of an accused cannot be determined by reference to the guilt of other, unrelated…persons.”

Now the majority said that evidence was inadmissible but it didn’t matter, there was enough evidence otherwise to convict the accused, Chief Justice McLachlin and LeBel dissented and in their judgment at page 248, paragraph 75: “At the same time, this Court has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact. The trier of fact, whether a judge or a jury, is responsible for deciding the questions in issue at trial. Judges must be especially cautious where the testimony of police experts is concerned, as such evidence can amount to nothing more than the Crown’s theory of the case cloaked with an aura of expertise.” We say that’s precisely the problem here. “The courts have clearly recognised that the risk that expert evidence could usurp the role of the trier of fact in the assessment of credibility…I see no reason to believe that this danger is less real where the evidence is given by a state agent like a police officer…”

KÓS J:

Can I test something that you've been getting at here? The Judge had ruled that the original form of the brief that was provided by Detective Inspector Scott had to be altered. It had to be less decisive and firm, it had to be more qualified. So he qualified it. He changed the word "only" to "likely" with one or two other changes, but that was the key change. So there was therefore an implicit qualification given in his evidence. Surely it was for the Crown to lead evidence as to what those qualifications were rather than put the onus on the defence to explore those qualifications, and Mr Keegan here wisely chose not to. But isn't your argument, and I think I see some force in this, that if you insert a qualification, you've actually got in your evidence, expert evidence, you've got to then explain that qualification further? And this he did not do.

MR STEVENSON:

Yes, absolutely, and that's what the case has, as I've been referring to earlier, made very clear, that it's for the trier of fact to make the assessment but they can't do that if all of the information is not provided to them, and so the qualification needs to be explained, because of course again a case like this is set against this prejudice for a gang member where there will be stereotypes about them and what they do, where there is very severe bad character prejudice bound up in the expert brief by talking about intergang violence and how they deal with each other and the fact of past violence between the gangs which is not accurate in respect of Damien Kuru but appears presumably to the jury to be relevant to him, so you have that problem of bad character propensity and then a failure by the expert to specifically identify, in a meaning and material way, the qualification.

Now, I won't go to it, but it's also worthwhile noting that Justice Ellis in her decision also expressed concern that this was getting, this proposed evidence was getting perilously close to the ultimate issue, recognised that's not in and of itself a reason to exclude evidence. The law as we all know has changed in that regard and a witness can give evidence, but caution needs to be exercised.

Again, I'm not going to go to them, but we've given the Court a plethora of information and articles and so forth about the aura of expertise, the preferential

treatment given to police witnesses and the dangers inherent in all of this and therefore the importance of very close scrutiny in the way it's treated and admitted before a jury.

Now, my learned colleagues tell me that this is not necessarily our strongest point, but I don't think I can depart Justice Ellis' pre-trial admissibility decision without observing –

WINKELMANN CJ:
So which learned – you mean the Crown tells you it's not your strong –

MR STEVENSON:
No, no, my colleagues, so the appellant.

WINKELMANN CJ:
That's very candid of you, I must say.

KÓS J:
They're looking worried.

MR STEVENSON:
Well, her Honour said that Mr Scott was to express himself in a much more generalised way and specifically he was only permitted to say it is unlikely such a thing would happen without the knowledge of the expert. By the time of trial, of course, that had been put in a much more positive way by Mr Scott who came out and said not that, but it is likely this sort of thing happens with the gang president's authority and knowledge, and perhaps that's just semantics, but it does seem to me those things have a different emphasis.

GLAZEBROOK J:
Again, I think the first is probably worse than the second bit, but as you say, nothing really turns on that.

WINKELMANN CJ:

Well, hang on, can I just – it was likely that it would happen – if it would happen with the gang president's –

MR STEVENSON:

She said he could say it's unlikely this –

WINKELMANN CJ:

No, no. Can you just take us to the evidence? Because what does he say? It's likely it would happen with his…

MR STEVENSON:

Yes.

WILLIAMS J:

He said "likely".

GLAZEBROOK J:

He said "likely".

WINKELMANN CJ:

I know, but what would happen? What? I'm just interested in the thing that's –

GLAZEBROOK J:

No –

1240

MR STEVENSON:

So at page 1556, Mr Scott read out his brief, this is the Court of Appeal evidence folder, and if we can bring this up, but let's just go back to page 1555, bottom three lines. So this is Mr Scott talking about the president. "The President is the figurehead of the gang or chapter…chairman at meetings." Can be referred to as "Prez" or "Captain". "He is a senior member" – I mean this is problematic as well as it goes on – "who has developed into the recognised leader usually through a combination of personal strength, leadership skills and personality."

We know for Mr Damien Kuru that this is an example of lacking nuance and knowledge of the Whanganui Black Power. Of course, Mr Scott was from Gisborne and his experience was with the gangs up there. Mr Damien Kuru became president as the result of familial connections, his father had been the president and murdered, his uncle and mentor, Craig Rippon, had been the president and murdered and he was, as Justice Ellis said, as far as she could see it, reluctantly put into the position of president. So that's an example of a lack nuance, but he goes on to say: "In my experience a (serious) organised gang crime against another gang would likely occur with the sanction of the president."

KÓS J:

Which is entirely commonsensical, as Mr Keegan said, but the emphasis there is on "organised", and the thrust of the defence was that this was a disorganised affray?

MR STEVENSON:

That's right. That's right, and serious, and serious.

KÓS J:

Yes. Well why is "serious" in brackets in the transcript?

MR STEVENSON:

I'm not sure. That's – I beg your pardon. That's in his brief. I wonder how the transcriber knew that.

KÓS J:

That's what I'm wondering about.

MR STEVENSON:

He must have said: "Bracket, close bracket."

KÓS J:

Right.

WINKELMANN CJ:

Yes, the transcriber may in fact have had the brief.

MR STEVENSON:

Yes.

WINKELMANN CJ:

I think it's unlikely he said: "Bracket, close bracket," but I don't exclude the possibility.

GLAZEBROOK J:

I just think it's probably worth – if it did say "would be unlikely to occur without the sanction of the president", actually it seems slightly stronger than "likely" in fact.

MR STEVENSON:

All right. I should have listened to my colleagues.

WILLIAMS J:

If you were going to be working on the brief of DI Scott, how would you qualify the statement?

MR STEVENSON:

Can we bring up Mr Gilbert's brief, I think that's in the supplementary materials, because this is the way it should be qualified, in my submission. Can we just find the portion where he expresses qualification, please?

WINKELMANN CJ:

Well I mean he says at paragraph 4.2: "While I accept the usefulness of this view in understanding gang behaviour, I would strongly caution against an overreliance on it when examining specific incidents," et cetera, et cetera, et cetera.

MR STEVENSON:

Yes. Yes, yes, and I'll go back please, so the qualification which we say Mr Scott should have stated –

GLAZEBROOK J:

You now are really not speaking into it.

MR STEVENSON:

Sorry.

GLAZEBROOK J:

Thank you.

MR STEVENSON:

And the qualification which we say Mr Scott should have expressed, particularly when we're in ultimate issue territory, is the sort of qualification expressed in paragraph 4.3: "Gangs…tend to have different internal cultures and ways of operating. Some presidents will lead with an 'iron fist' or be so hugely charismatic…they take a lead on most if not all important matters and members really operate without…knowledge." Paragraph 4.4: "Other presidents will seek a far greater consensus and significant issues will be put to a vote… In some circumstances…politics of the gang may break down…" Paragraph 4.6: "Events may occur quickly" – well that has the ring of truth here – "…little or no planning and therefore…no knowledge of the president. Or the event may be seen as outside the scope of the gang…"

WINKELMANN CJ:

It goes all the way through right to the end.

MR STEVENSON:

Yes.

ELLEN FRANCE J:

Yes, yes.

WINKELMANN CJ:

Which ends with: “In the multitude of instances that may stem from these types of examples, then, it is clear there will be numerous times when our traditional understandings may be confounding rather than illuminating. Often during my fieldwork I would speak to gang presidents who were angry, stressed or disappointed by the activities of the one of their boys. The gangs certainly have a level of discipline and structure but ultimately they are made up of rebellious and difficult-to-control men.” Therefore this is just a generality blah, blah, blah.

MR STEVENSON:

Yes, and that’s we say intuitively correct that –

WILLIAMS J:

It might be difficult for DI Scott to say.

MR STEVENSON:

Why didn’t he tell the jury look you need also to be careful –

WILLIAMS J:

Look I understand but –

MR STEVENSON:

Yes, I mean it may be absolutely.

WILLIAMS J:

The other thing is that he of course suggests that prosocial behaviour is a cover.

MR STEVENSON:

Yes and –

WILLIAMS J:

And almost certainly should have said the prosocial behaviour may sometimes be a cover but it's not always the case.

MR STEVENSON:

That's right and that did seem incredibly gratuitous and in fact –

WILLIAMS J:

It did. I'm surprised it got in.

MR STEVENSON:

I was too and of course again lacks nuance, lacks specific knowledge of these facts. As far as I'm aware he didn't know Damien Kuru himself and he'd done no investigation into the local politics and background and so forth and so that really undermined what the defence was trying to do with Mr Kuru at trial saying it was exceedingly unlikely in fact because of who he was and where he was at his stage of life that he would be involved in this sort of carry on.

The final case I wanted to just mention is that other Canadian case I mentioned which is *R v Sandham* and this is at page 210 of the respondent's authorities and it's really a case about the Bandidos and de-patching and somebody killed in the process of the de-patching and 211 at the top of the judgment on page 211 there's a reference: "…to give evidence relating to outlaw motorcycle gangs… terminology, culture, procedures, structure and characteristics." The sort of nuts and bolts stuff that I've said previously is probably educative, substantially helpful and not problematic.

At page 213 in paragraph 15 the Court dealt with a more problematic part of the proposed evidence: "The theory of the Crown is that the deceased were murdered precisely because they were Bandidos, who were unwilling to hand in their patches…" and the expert evidence was that a de-patching would be associated with violence. At page 214, paragraph 23 the Court was concerned about that, describing the problem at paragraph 23, line 3: "The problem is compounded in that he is drawing that inference, at least in part, from untendered and inadmissible evidence. (Appellant counsel) Ms Wells make a valid point when she characterises this as little more than the theory of the Crown, being expounded through their expert witness."

Over to paragraph 28 please, this is an explanation of the contention of the proposed expert about the "patch pulling" and that it would involve an expectation of violence which was really a state of mind issue in that case.

At paragraph 35 the Court said that this sort of evidence is: "…highly prejudicial to the accused. To state to the jury that there was an expectation of violence at this patch pulling is to state something highly significant" and explains why that would be so and I won't read through that. At paragraph 36: "The jury would be drawing this inference in the complete absence of any evidence that the accused were aware of this nexus between patch pulling and violence" which is the problem in the instant case, the *Kuru* case. At paragraph 37 you can ask the jury to impute certain knowledge but at paragraph 38 the expert was precluded from providing that evidence linking de-patching and expectations of violence if they want to prove that they need to do that through evidence.

1250

So it's a little more obtuse, but it's the same sort of concern, in my submission, about trying to prove that the essential fact in issue and intention and knowledge and understandings through an expert who comes along and really just gives the prosecution case.

Justice Cull, two final points on this, Justice Cull and a brief mention of *Thacker v R* [2019] NZCA 182, the New Zealand Court of Appeal decision. Supreme Court casebook just in front of me. Your Honours will be familiar with Justice Cull's problem with this evidence as well, but it begins at let's say paragraph 104 which is really an expression of concern, I would paraphrase this about the language used by the prosecutor. "Phrases used by the prosecutor to describe Mr Kuru's role in the plan…front of his mind…war footing…a declaration of war…colourful but in the absence of any evidence Mr Kuru knew about [it]…"

At paragraph 106, her Honour –

GLAZEBROOK J:

Well it's probably also unusual in a war to have a plan that you go around just to make a nuisance of yourself and threaten somebody, as against actual violence, isn't it? So "war" would assume that the plan was actual violence.

MR STEVENSON:

That's right.

GLAZEBROOK J:

Whereas in fact the plan was put at intimidation backed up by weapons and property damage.

MR STEVENSON:

Yes, that's right. I mean, war footing language would have been arguably acceptable if the Crown had been continuing its position as identified before Justice Thomas that the plan was to draw him out and shoot him, but it just didn't sit easily with the case as it was for the jury to resolve. So at paragraph 106, Justice Cull in her dissent said, we say correctly: "…the evidence given by Detective Inspector Scott and the way in which the Crown used it led the jury into impermissible deductive reasoning, namely: Presidents of gangs know about and sanction gang attacks; this was a rival gang attack by Black Power on the Mongrel Mob; Mr Kuru is a gang President; and therefore, he must have known and sanctioned this rival gang attack. With the combined circumstantial strands not being enough to convict Mr Kuru of manslaughter" – yes, this is at paragraph 107: "…expert evidence that [he] *would likely have known and sanctioned*…[the] attack…assumed critical importance. It provided a basis for the proposition that he *must have been involved*…which the jury were entitled [*sic*] to accept."

WINKELMANN CJ:

So can I ask you a question about this? I know that you say that no judicial summation could save this because it was, the evidence should never have come in, but in other circumstances where the evidence does come in about standards, say, insignia practices in relation to – insignia and much more concrete stuff, is there a direction that you think should be given, associated with that?

MR STEVENSON:

Well it would have to be an expanded expert evidence and propensity prejudice direction. An amalgam of all of those things to say that this sort of evidence requires great care, it can suggest that the accused or the defendant is a bad person talking about prior incidents, and that's a generalised statement, you need to understand it's not necessarily relevant to him, you need to also be very careful because you're dealing with allegations arising out of gang conflict that you don't allow feelings of antipathy and so forth to cloud your judgement and you must take –

WINKELMANN CJ:

Well presumably in a gang context that would already have been given, but –

MR STEVENSON:

Yes. Well it's probably good to give it all at the same time, in my submission, when talking about this sort of evidence, and in terms of the expert evidence, the jury should be instructed, you need to understand that this is evidence that –

WINKELMANN CJ:

Drawn from a general experience?

MR STEVENSON:

It's not central evidence, it's – that's right. It's thought it may help you, but you should focus on the established facts of the case, primarily or principally to resolve your decision. I mean that wouldn't, we say of course, have, say, for the –

WINKELMANN CJ:

So the critical aspect that would be that this is evidence which addresses the general run of cases, it does not purport to be evidence about what the situation, circumstance was in this case?

MR STEVENSON:

Specifically for the accused, that's right.

ELLEN FRANCE J:

Justice Ellis does make the point in summing up that it is generalised evidence and she does make the point that the detective is talking about other parts of New Zealand and not talking about this group, and she does say: "His evidence was not based on or specifically related to the facts of this case. You are the ones who know about those. So, *despite* Detective Scott's general expertise, you need to think about what weight his evidence can carry…" So what more –

MR STEVENSON:

Well I suppose that's the point, what more can be said? And the real issue is was it properly admitted and in the background of all of this is a very senior professional witness coming along, an expert police witness who's given this evidence multiple times previously, and has an aura, one would think, of credibility saying something perilously close to answering in an affirmative way the question for the jury, it's –

WINKELMANN CJ:

They haven't –

ELLEN FRANCE J:

Well that's presumably though why the Judge goes on to say don't be blinded by his expertise, so…

MR STEVENSON:

I know. Yes, indeed, indeed, but to sum up and circle back, in my submission, the evidence was no longer substantially helpful by this point of trial which placed the trial judge in a really difficult situation because, in my submission, it would've been open to the trial judge to be saying to the Crown by the end of evidence, look, before Justice Thomas you said that the plan was to draw him out and shoot him, the expert was presumably briefed on that basis, we can understand the relevance and the cogency of that opinion in those circumstances, but how is this substantially helpful now to the facts as the Crown concedes them to be something quite different, a low-level, not serious piece of gang violence at all, but a low-level, scrambled act of intimidation that

went wrong, and well what happens then is something we've discussed amongst ourselves, would have been either a mistrial or an attempt to tell the jury, look, things have changed, that's no longer relevant that evidence, just put it out of your mind. A little unrealistic.

Final points, if the Court pleases, is the *R v Thacker* which is a Court of Appeal decision and a – your Honours will have seen that we say that's very distinguishable in the sense in *Thacker* the Court of Appeal was dealing with facts as recounted by a complainant, she says that she was offended against by three young men, they were gang members, and that two of them offended against her because the older patched member told them what to do, and expert evidence was prospects obey orders from presidents. So that was really evidence tendered presumably to counter the natural reaction why on earth would anyone agree with that sort of order, this all seems a bit unlikely, and it was educative and it was to help the jury understand those sorts of dynamics, but it's nothing in my submission like the evidence in this case which was problematic for all of the reasons we've endeavoured to identify. So those –

WINKELMANN CJ:
It was counterintuitive evidence effectively.

MR STEVENSON:
Yes. Kind of. Yes, indeed. Unless the Court has any questions, those are the key points we wanted to emphasise.

WINKELMANN CJ:
No, thank you, Mr Stevenson. Now, Mr Sinclair, we've run you out of time a little bit. I mean how long do you think you'll take? Do you need us to come back at 2 o'clock?

MR SINCLAIR:
I was hoping for about 40 minutes or so, your Honour. It's subject of course to where the discussion goes.

WINKELMANN CJ:

Well we should be okay then.

WILLIAMS J:

You mean come back in 40 minutes?

WINKELMANN CJ:

No, he needs 40 minutes.

MR SINCLAIR:

Forty minutes' speaking time.

KÓS J:

You'd need rather more than that I think, Mr Sinclair.

WINKELMANN CJ:

Well we've got an hour and 45 minutes so I think that we should be okay coming back at 2.15. Thank you.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

MR SINCLAIR:

May it please your Honours. It seems important in this case briefly to set the facts before us and that will give the Court the contrast between the two cases and there comes a point where we have to look at this I think frame-by-frame just to appreciate what the arguments really are. Then if it's helpful to do so I'll address the gang structure evidence, then the manslaughter directions under section 66(2) and then I think it makes sense to look at unreasonable verdict in light of – well after considering the evidence and the legal test so I'll deal with that last.

WINKELMANN CJ:

So you'll deal with the legal test on unreasonable verdict last?

MR SINCLAIR:

The *Owen* issue yes. We'll come to that at the end. As I think we've already seen there were at least several weeks of leadup to the shooting on the 21st of August. There was the low-level intimidation from the start of the month, the drive-bys and so forth. On the 14th of August the incident in which Mr Ratana scares away two Black Power members trying to threaten him with batons and from then it's common knowledge that he wears his patch in Black Power territory. He carries a gun. He's a formidable man. So the gravity of this is on the rise and that incident on the 14th is an important development.

A few days later Josiah Freeman, sorry Josiah Friesen, and several other members were chilling outside number 60 Matipo Street so outside Mr Kuru's house and Gordon Runga refers to the Mongrel Mob presence and shows the gun that he carries in his car. A few days further on, this is the morning of the 21st of August Mr –

WINKELMANN CJ:

No suggestion that Mr Kuru was there?

MR SINCLAIR:

No, but it's right outside his house. I think that shows the ease with which communication between say Mr Runga and Mr Kuru could take place.

WINKELMANN CJ:

So, sorry, what was right outside his house?

KÓS J:

The chilling.

WINKELMANN CJ:

They're chilling, they were chilling.

MR SINCLAIR:

Yes, it's just that, they're hanging round, yes.

WINKELMANN CJ:

They were chilling outside his house?

MR SINCLAIR:

Yes.

WINKELMANN CJ:

In what sense, like on his front deck or out on the street?

MR SINCLAIR:

Out on the street I think is the evidence. We come to the day of the killing and we see that Mr Runga has organised a group of six other members. Mr Friesen was pulled in. He didn't know there was to be a rumble that morning but the older members were something of a clique. He was younger, wouldn't expect to be consulted about the attack, wouldn't know what Mr Kuru would know or didn't know about any of this and he does what he's told. My friend suggested it was posed –

1420

GLAZEBROOK J:

When you are making these assertions is this based on the evidence? I'm just looking at that last decision.

MR SINCLAIR:

About the – he talks about the group not being a, or the gang not being a solid group and describes how the older members are one part of it and the younger members another and there's not – well the impression given by the evidence is that there's a bit of a division between the age groups within the gang.

WINKELMANN CJ:

And which part of that young/older part does Mr Kuru sit?

MR SINCLAIR:

In the older part. Then there's that discussion about what's going to happen. My friend says oh well that was posed as a question, “shall we suss him out” I think was the phrase but I think it's clear in context that that was really an intimation of what was expected from him. The carload in the Primera, that’s Mr Runga’s group, deliver some abuse outside 144 Puriri Street. The bus arrives and then we see the assembly of three cars round the corner in the Matipo cul-de-sac where the president lives. In those three cars; Mr Rogerson in the blue Commodore, Mr Runga in the dark Primera and Josiah Friesen just makes it in time in his car. The men on foot have already gone off towards Puriri Street by the time Mr Friesen turns up. The cars immediately go round to Puriri Street and Mr Kuru was either with the pedestrians or followed them so, in the Crown case, knew that something was afoot and was not attracted by the shots. He was already on the street when the shots occurred.

KÓS J:

Well hang on. We need to be precise about the chronology here. There is a lot noise occurring about five or six houses away from Mr Kuru’s house in Matipo Street and the shots are sometime after that. Have you got a timeline?

WINKELMANN CJ:

Yes, that’s Detective Bennett’s timeline I think is it?

KÓS J:

Yes.

WINKELMANN CJ:

Have you got that timeline?

MR SINCLAIR:

Would be the best guide. Yes, so the issue is Mr Kuru’s explanation for being on the street is “I heard the shots.” Implicitly that he was going to investigate what that was about.

KÓS J:

The shots, I mean the shots occur very soon before he sees Mrs Burton and he's already on the street at that point.

MR SINCLAIR:

That's the point, yes, your Honour, yes. So he's coming back. He's retreating from Tiki Street, if I can put it that way, after the shots, not going –

GLAZEBROOK J:

Well that's an assertion. What is the evidence of that?

WINKELMANN CJ:

Because you've heard that Mr Stevenson disputes that assertion. He says you've got no evidential basis for a notion of a retreat.

MR SINCLAIR:

Well there's the evidence of Ms Burton who has heard the shots and then encounters Mr Kuru coming back.

GLAZEBROOK J:

Well is that what she – well do you want to take us to exactly what she said if that's what you say the evidence says? There's no point just making these assertions without referring to the evidence.

MR SINCLAIR:

I'm sorry your Honour. I'm just, I'm really just trying to set the scene. I've referred –

GLAZEBROOK J:

Well I'm not very interested in setting the scene without you referring to the evidence that allows you to make these assertions.

MR SINCLAIR:

Yes. Very well, yes. I'll find it in my written submissions. If I can just take a moment to do that.

WILLIAMS J:

Well it's no doubt that by the time he's talking to Mrs Burton the shots have been fired because he refers to them. At that point he's walking towards Matipo Street so the sequence must be accurate.

MR SINCLAIR:

Of course, of course, yes. The reference is your Honour at paragraph 29 of our submissions: "…heard the shots… After the third shot she went out to retrieve her dog..." and saw the man outside.

KÓS J:

Yes, but how do we know which way he's going?

MR SINCLAIR:

Well if we look at this in sequence, Mr Edwards sees him from the top of the street heading off, then Ms Burton and then he's around the corner and in view of the eviction party.

WINKELMANN CJ:

Okay, so in terms of eyewitness evidence, how far, how close to the scene of the events is he placed by an eyewitness?

MR SINCLAIR:

We can't say that he reached the intersection and it's somewhat beside the point in my submission whether he actually gets to the point where he can see what's going on or not, the point is –

WINKELMANN CJ:

Well you're making something of him moving towards the event as if he's supporting them and involved in them?

MR SINCLAIR:

He must be close behind because all of this is happening in a very short space of time so there's, again the timeline will assist with this, but between the arrival

of the bus, which gives us a time and then the departure of Mr Rogerson's car, Mr Friesen's car, only a few minutes later, and then we have the timestamp for the photographs taken by the eviction party, give or take a minute or so, there's only about five minutes in this.

ELLEN FRANCE J:

So are you saying he had to have been in place by the time Ms Burton sees him?

MR SINCLAIR:

Yes, he's already going back towards his own home after the shots rather than, as his statement to police would imply, he's coming up the street to find out what was that all about.

WINKELMANN CJ:

Where do you get that from though in the eyewitness accounts? Is that from the bailiff and the screenshots?

MR SINCLAIR:

Well it's the direction of his travel, as Justice Kós was just exploring, his direction is seen by Remus Edwards and Ms Burton as back towards Matipo Street, not coming up from that direction in the direction of the shots, is simply the point.

WINKELMANN CJ:

Yes, but they don't tell you, that's seeing him going back towards, it doesn't tell you anything about how far he went though, does it?

MR SINCLAIR:

No, well it's not a big block and perhaps I should have started with that, that initial map but –

WINKELMANN CJ:

Yes, well we've probably clear images but how far – but I go back to my question which I think might assist, how far do eyewitnesses place him up Tiki Street or into the other street, its name is escaping –

WILLIAMS J:

Puriri.

WINKELMANN CJ:

Puriri Street.

MR SINCLAIR:

Yes. All we can say I think with safety is that Mr Edwards, who's looking essentially down the street back towards Matipo Street –

GLAZEBROOK J:

Down the street, down Tiki Street to –

WINKELMANN CJ:

No, it's Matipo, is it?

GLAZEBROOK J:

Towards Matipo.

MR SINCLAIR:

Yes. He sees him walking casually at that stage, not a care in the world, I think is the way he puts it. We then see him, Ms Burton sees him outside her house, that's after hearing three shots and he's heading back home.

KÓS J:

So Mr Edwards, can you show us on the map where Mr Edwards observed from? Was that from his house? And that's 152 Puriri?

MR SINCLAIR:

Yes, it's sort of at the – if one looks straight up Tiki Street I think his house is next to the, I think that's the church, isn't it, on the corner…

KÓS J:

So he looks straight –

WINKELMANN CJ:

So opposite Tiki Street? Is it opposite Tiki Street or is it further to the right?

MR SINCLAIR:

He's on Puriri Street.

WINKELMANN CJ:

What colour roof is it?

ELLEN FRANCE J:

He's 152 Puriri.

WINKELMANN CJ:

Yes, what colour roof is it?

WILLIAMS J:

Brown.

WINKELMANN CJ:

Is it brown or red?

ELLEN FRANCE J:

Orange I think, isn't it?

WILLIAMS J:

Orange, yes.

WINKELMANN CJ:

Well I didn't see an orange roof there.

ELLEN FRANCE J:

No, no, no. I mean I'm just looking at his evidence.

WINKELMANN CJ:

So it's directly opposite so he's looking at – he could just be looking at him in Tiki Street?

MR SINCLAIR:

Yes, that's the issue my friend was alluding to that he – that his evidence spoke about seeing Mr Kuru part of the attack party.

WINKELMANN CJ:

But then he resiles from that, doesn't he?

MR SINCLAIR:

He resiles – yes he accepts that he must have been mistaken about that. There's no – I don't think there's any real challenge to his evidence that he saw Mr Kuru going back down Tiki Street.

WILLIAMS J:

When you say going back down Tiki Street –

MR SINCLAIR:

Yes.

WILLIAMS J:

– heading in which direction?

MR SINCLAIR:

Towards his home. Towards Matipo Street.

1430

WILLIAMS J:

And do we get a sense of where he is on the street?

MR SINCLAIR:

From Mr Edwards?

WILLIAMS J:

From Mr Edwards.

MR SINCLAIR:

Not exactly, but as your Honour will see, there are, say, three dwellings along that block, it's not a great distance.

WINKELMANN CJ:

No, but the point is, Mr Sinclair, we're trying to get from you where do you say eyewitnesses placed to – it sounds eyewitnesses, you can't – there's nothing to indicate that he ever left Tiki Street. So he's not gone around the corner –

MR SINCLAIR:

Not suggesting he did.

WINKELMANN CJ:

– as if he knew where things were happening. He may have been attracted by noise, we don't know what, but there's not evidence placing him in the party moving to the event.

MR SINCLAIR:

Well what he says is that he heard the shots and that's what drew him up Tiki Street and the Crown case is that can't be right, you're already on Tiki Street after the shots have taken place. You're on your way out of it. Now around at Mr Ratana's place, the ultimatum was delivered, one week to get out or you're dead, it's the fatal shot, the covering fire by Mr Rogerson, and this takes place within a very short space of time, as I say, just –

WILLIAMS J:

Just before we get into what happens at Puriri Street, do we know the sequencing between Mr Edwards' view and Ms Burton's conversation?

MR SINCLAIR:

Is there anything to indicate that he's seen him higher up the street, do you mean?

WILLIAMS J:

Was there anything – do we know what order those two things occur in?

MR SINCLAIR:

I think I can only say that Mr Edwards heard the shots, looked out, sees Mr Kuru on his way back.

WILLIAMS J:

So it's possible that this occurs outside Ms Burton's house, is it not?

MR SINCLAIR:

Well, yes, it –

WILLIAMS J:

We can't be –

MR SINCLAIR:

Very, very short distances that we're talking about, but yes.

WILLIAMS J:

Yes, and it could've been that she's – I'm just testing the possibilities here, that in fact Edwards sees him after he's exchanged a few words with Ms Burton and he's walking back from that house?

MR SINCLAIR:

It's possible, certainly both see him in casual mode, if I can put it that way.

WILLIAMS J:

Yes, exactly. They both describe him walking that way which at least makes it again possible on the evidence, I'm not even sure whether that's the right word, but it is consistent with the evidence that his intrusion into Tiki Street is very limited indeed and that he, when he hears a shot, he turns, expresses his view to Ms Burton, keeps walking, Edwards sees him. He's gotten almost nowhere up Tiki Street.

MR SINCLAIR:

Yes, but –

WINKELMANN CJ:

Past Ms Burton's.

MR SINCLAIR:

– he's not there trying to find out what those shots are about. He is already on the retreat, getting back to his place.

WILLIAMS J:

Well, yes, but "retreat" is such a loaded word, Mr Sinclair, that's the point.

MR SINCLAIR:

Well, sorry, I'm just trying to establish direction if –

WILLIAMS J:

Yes, he's moving to Matipo Street but we don't know how far up Tiki Street he's gone and what – because the inference that your case hangs on is that travel up Matipo Street is an indication that he is involved.

MR SINCLAIR:

He knows what's – he knows that something has started and he's following it.

WILLIAMS J:

Well, no, you say he's involved.

MR SINCLAIR:

We'll come to that, we'll come –

WILLIAMS J:

Knowing is not enough.

MR SINCLAIR:

We'll come to that, your Honour.

KÓS J:

Can you give me the reference please to his statement, police statement? I just want to check whether it was "shots" or "noise" that attracted him up Tiki Street.

MR SINCLAIR:

Yes, Ms Hay was just directing me to case on appeal, page 79, and it's "shots", isn't it?

WILLIAMS J:

Page 79?

MR SINCLAIR:

Of the case on appeal.

WILLIAMS J:

This is the Court of Appeal's case on appeal? Yes.

ELLEN FRANCE J:

Sorry, Mr Sinclair, so Mr Edwards talks about –

GLAZEBROOK J:

Is somebody going to get that up for us if it's important? But, yes, great, thank you very much.

ELLEN FRANCE J:

Mr Edwards talks about him moving towards Tiki Street.

MR SINCLAIR:

Does he? I'm sorry, I missed that.

ELLEN FRANCE J:

Sorry, so it wouldn't – Mr Edwards sees him, he says he's moving towards Tiki Street.

WINKELMANN CJ:

So he's in Matipo.

WILLIAMS J:

What –

MR SINCLAIR:

I see. Yes, no, I hadn't twigged to that, your Honour.

WILLIAMS J:

What page is that of the evidence?

ELLEN FRANCE J:

Is there a map that gives us the numbers in that street because I've found it quite hard to work out exactly what Mr Edwards is referring to.

MR SINCLAIR:

Again, I'm not sure. I think 2 is the corner property, 6 is in the middle. Sorry. Sorry, your Honours.

KÓS J:

I can't find this reference to "shots" so perhaps someone could give me the page reference. It's quite a long statement.

WINKELMANN CJ:

I mean, I must say, Ms Sinclair, it all builds a lot on his movements which were over very short distances and which are capable of several constructions.

MR SINCLAIR:

Yes, this is, this part of the picture, perhaps while my friend is just hunting, if it's acceptable to the Court we'll just find that reference to Mr Kuru's statement, but I'll try to keep moving on if I can. So, as I've said, we see him through those two witnesses in casual mode, he then becomes, we would say – oh, I see, sorry. Just – shall we pause there and look at the notes of evidence half way down.

KÓS J:

So who was this witness?

WINKELMANN CJ:

Police witness.

MR SINCLAIR:

This is – yes, no, the witness adducing this is Detective Sergeant Bennett, isn't it? I think it's Mr Bennett.

KÓS J:

Thank you.

MR SINCLAIR:

On his way to meeting with the teacher "when I heard the gun-shots".

1440

WINKELMANN CJ:

So if he's on his way to meeting the teacher, he's walking down towards Tiki Street, he hears it, it takes him 10 seconds to walk that one frontage towards Ms Burton's property, she says probably 20 seconds, she's out – it's such short, small distances, it's –

MR SINCLAIR:

Firstly, there's a problem with him being on his way to the appointment that early, but what that statement implies is that he hears shots, he doesn't actually

acknowledge that he's on Tiki Street at this stage, and of course when he makes that statement he doesn't know whether witnesses will place him there or not, but if it's intended to imply that it's the gun-shots that have led him off course, that doesn't work with the observed behaviour which is he's already on the street when the shots have been fired and he's on his way off it.

WINKELMANN CJ:

Well the observed behaviour from her is, from Ms Burton is that he's got – when he's talking to her he's got his back to Puriri Street.

MR SINCLAIR:

That would be right, yes. On his way back out of it and heading towards Matipo Street.

WINKELMANN CJ:

Or – maybe, but –

MR SINCLAIR:

Well it marries, it then marries with what the eviction parties see. It all fits quite nicely.

WINKELMANN CJ:

Well they're seeing him from Matipo Street.

MR SINCLAIR:

Yes, once he's turned the corner and heading back.

WINKELMANN CJ:

All right. I think, well, we've got his movements bolted down probably.

MR SINCLAIR:

Yes. So calm and then becomes anxious about being caught up by the others and so breaks into a trot to –

WINKELMANN CJ:

Well that's, again, editorialising.

MR SINCLAIR:

Yes, but these are reasonable inferences, these are reasonable ways in which the jury –

WINKELMANN CJ:

Okay, you can say – you'd invite us to draw that inference, the jury was able to look to, infer from his accelerated pace that he was concerned to get back before the party came back?

MR SINCLAIR:

Yes, I'm sorry, that's the picture I'm trying to paint, yes. So one of the witnesses says he looked behind one of the eviction party witnesses, Mr O'Neill, another says while he was hastening, had to hold his trousers up, so he's suddenly picked up the pace, gets to his house and then composure's regained, and in the fifth photograph at the back of our submissions we see him at the front of his property looking away from the members not far behind him. So that's a part of a series of I think five photographs in which we can see he maintains the same position, so he's static at that stage. The other gang members, if you follow the sequence through, coming around the corner and having hastened away from them he is curiously looking away from where the action obviously has occurred, and we see in that photograph the Primera just in front of him and there is this issue of whether Mr Runga had just driven it there away from the shooting in Puriri Street as Friesen evidence suggests, or whether it had already been parked in the cul-de-sac, that Mr Runga is either sitting in it waiting at this stage or he's one of the pedestrians about to get in it. The point is, either way the sergeant-at-arms and the president end up just a few metres apart and there's no need for explanations, there's no interaction between the president and the returning members. There's this air of nonchalance that Mr Kuru assumes. So he shows no surprise that his members have been on the attack, that his sergeant-at-arms is involved, that shots have been fired, that the members started out near his house and came back there to regroup.

There's no enquiry or appearance of consternation at this stage. It was the meeting the next day, Mr Kuru was angry, it's all gone wrong because Mr Ratana has been killed. He wants to know the killer. He's apparently not angry because seven members went round to give Mr Ratana a real fright, that reasonable inference we say, that's what he expected and he knew who they were anyway. So no suggestion that Mr Runga rounding up a party for this rumble is rogue behaviour, that he's taken this serious step without his president's knowledge or approval. Up to the point when the photographs were taken, what's unfolded accords with Mr Kuru's expectations, was a prior understanding and agreement that this further intimidation will take place.

WINKELMANN CJ:
Yes, these are all –

WILLIAMS J:
What would you expect?

MR SINCLAIR:
I beg your pardon?

WILLIAMS J:
Sorry, what would you have expected, photos of the two remonstrating with each other in public?

MR SINCLAIR:
There was absolutely no inquiry into what has happened. If he had no full knowledge you would expect him to be interrogating someone in particular his sergeant-at-arms just right in front of him and saying: "What was all that about? I've heard shots. Was anybody hurt?" There's nothing of that kind.

WINKELMANN CJ:
I mean part of your problem with that, of course, is that the case doesn't suggest that they actually make any kind of engagement at all. So he's, on your case, rushing back because he wants to dissociate himself from something he knows

about so – and this photo suggests he goes inside, continues on his way and goes inside and you're asking – you're saying the jury could speculate or could infer that actually there was, he did know exactly where these people were and he knew who they were and he elected not to remonstrate with them or engage – he elected not to engage with them because he knew what they'd been up to and that it must have gone wrong.

MR SINCLAIR:

Yes, there's a series of logical inferences and one has to look at this bearing in mind the leadup to it and the seriousness of what's starting to happen and the great –

WINKELMANN CJ:

Isn't there a major problem with the logic of it though because he doesn't, even on your case, he doesn't know who's been shot, so on your case wouldn't he be saying to his people, wouldn't he be expressing concern to find out if one of his people has been shot?

MR SINCLAIR:

Exactly, your Honour, that's why it is so significant that he, that he doesn't want to inquire as to what's happened. He wants to maintain separation from the people who know.

WILLIAMS J:

Well he hasn't done a very good job of it. Isn't the more likely inference that any remonstration would occur in private, not on a public street?

MR SINCLAIR:

Well there's no indication in any of the follow-up messages for example that there's any concern or any contact with Mr Runga.

WILLIAMS J:

Well there's Friesen's evidence about a meeting the next day. We don't –

MR SINCLAIR:

That's the next day, yes, but –

WILLIAMS J:

Yes, we don't know what sort of conversation took place between Runga and Kuru in private after these events. All we've got is still photographs of the two not talking.

KÓS J:

Well, and that's what worries me because we don't know what happened in public between them. I mean these photographs are not, are not a constant clipping. It's not a news photographer taking, you know, multiple snaps. It's Mr O'Neill snapping here and there and I think he said in his evidence there was a gap. So how do we know that Mr Runga hasn't said something to Mr Kuru?

MR SINCLAIR:

Well both parties approached the case on the basis that there had been no interaction. No witness saw any interaction. They were asked about this. We then –

KÓS J:

I'm not sure I understand that answer. It's not a civil case where it's a question of what is proven by the Crown.

MR SINCLAIR:

Yes. Well the only evidence we have shows an absence of interaction so –

KÓS J:

Which is still photographs which are incomplete.

MR SINCLAIR:

Yes.

KÓS J:

Well…

ELLEN FRANCE J:

On the timeline there would have been very limited time for any interaction, is that correct, isn't –

MR SINCLAIR:

Yes, the – well the photo –

ELLEN FRANCE J:

They're talking about a minute or something?

MR SINCLAIR:

Yes, the photographs, the sequence of photographs is consistent with that, yes. And then there will be the movements of Mr Runga's car. There's evidence of him interacting with other people subsequently. There's no – there's nothing to give us a basis for thinking communication with Mr Kuru at that stage in the aftermath of the shooting.

1450

GLAZEBROOK J:

So you don't accept the sentencing judge's analysis?

MR SINCLAIR:

In what respect, your Honour? The –

GLAZEBROOK J:

Well that this plan suddenly came to some sort of fruition at the last minute, you're saying it was planned right along?

MR SINCLAIR:

The –

GLAZEBROOK J:

That Mr Kuru ordered this?

MR SINCLAIR:

Yes. Well –

GLAZEBROOK J:

Is that effectively what you're saying?

MR SINCLAIR:

The key relationship is between the sergeant-at-arms and the president and it's quite possible, as I think Justice Kós suggested, that the green light, if you like, has been given, not that day, or could've been earlier in the morning, but not as I think the trial judge suggested, it all comes to Mr Kuru's attention on the very moment of the attack almost. It's a reasonable inference that there has been an understanding that Mr Runga will round up some of the members and deliver a very forceful message accompanied by the threat of violence.

WINKELMANN CJ:

So do you put it higher than that there was – that you don't – you're not just limiting it to the notion that the president had given his go-ahead to a campaign of intimidation, you're saying that he knew about this particular occasion of intimidation?

MR SINCLAIR:

I actually don't think that he needs to know precisely how –

WINKELMANN CJ:

Well, I mean, the Crown has to say what its case is though, doesn't it?

MR SINCLAIR:

Pardon me?

WINKELMANN CJ:

The Crown has to say what its case is I think.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

That's what I'm trying to get from you.

GLAZEBROOK J:

That's really what I was asking you.

MR SINCLAIR:

Yes. Well the evidence supports, and perhaps we'll look more closely at this, but the evidence is consistent with Mr Runga and Mr Kuru having a very clear idea that this –

GLAZEBROOK J:

Mr Runga and Mr Kuru?

MR SINCLAIR:

Mr Kuru, have set this in motion, and so it is no surprise that on this morning Mr Runga's rounded up the members, three cars have appeared, they've left from this street and they returned to it, not even surprised by the firing of shots that were – you could infer that from what Ms Burton says. That's all consistent with this being –

WINKELMANN CJ:

Who's not even surprised by the firing of shots?

MR SINCLAIR:

Mr Kuru.

WINKELMANN CJ:

Well it'd be hard to infer that from what she said because he expresses –

MR SINCLAIR:

Well she said he's very calm. She didn't even associate him with the incident because he just seemed to be so relaxed about the whole thing.

WINKELMANN CJ:

Well, yes, okay.

ELLEN FRANCE J:

So what is the evidence that you say means it's clear the two of them have set it in motion?

MR SINCLAIR:

Well this is partly where the expert evidence has some bearing, and I'll come to that right now, that it's the –

WINKELMANN CJ:

Well just before you do –

GLAZEBROOK J:

Well I'd prefer you dealt with it without that to start with.

WINKELMANN CJ:

Yes. Just before you do, can you deal with the evidence which isn't the expert evidence which shows Mr Kuru's involvement in this intimidation?

MR SINCLAIR:

Yes. Well in some ways the key question is –

WINKELMANN CJ:

If there is no evidence, it'd be good if you just said that, Mr Sinclair.

MR SINCLAIR:

– for the jury was, was this rogue behaviour by Mr Runga or not?

WINKELMANN CJ:

Well can you just answer the question, it just helps, just helps me. Is there any evidence of Mr Kuru's involvement in this?

MR SINCLAIR:

Yes, there's a logical inference based on his –

GLAZEBROOK J:

From what?

MR SINCLAIR:

Based on his observed behaviour. So his –

WINKELMANN CJ:

So is it the movement? No, but we just – yes, but we've gone through the movement of him on the day.

MR SINCLAIR:

Yes, yes.

WINKELMANN CJ:

We've got Mr Scott's evidence, and we're putting that to one side, but apart from that does anyone say that Mr Kuru said, yes, go out and do this, or we've got to drive that man out, or anything more?

MR SINCLAIR:

There's no entry in the minutes of the gang or anything of that nature, it's a –

WINKELMANN CJ:

No, but there's no need for sarcasm either. You know the kind of evidence, you know the kind of evidence I'm talking about.

MR SINCLAIR:

No, sorry, I wasn't – it wasn't intended in that way, your Honour, but in reference to Justice Cull's observation that, you know, there was no text message, there

was no evidence of a planning meeting, I'm sorry, I meant the reference to the minutes in that vein. There's nothing that tangible, but there is very clear evidence that Mr Kuru is right on the fringes of this, he has to be because the time span is so limited, he's –

WINKELMANN CJ:

He's on the fringes of it because of the fact his house is on the road where people are moving and because he's out on the road and moves some distance to Tiki Street. He's more – he's placed at the centre of it because of the evidence that he was a president and Mr Scott's evidence. Is there anything else?

MR SINCLAIR:

There's – well you can look at his explanation for being there, you can reject that and say, well, that's – and say that's inconsistent with the other evidence. You can say that he's not –

GLAZEBROOK J:

So what – so his explanation for being there, you say, is inconsistent because the shots were fired while he was on Tiki Street, is that – as I've understood it.

MR SINCLAIR:

Well partly, but also it's way too early for him to be heading off to that interview, certainly Tiki Street is not the direction he would naturally go in and it can't be the case that he's going up there to investigate shots because he's doing anything – he's already there, he's on his way back instead of going up to investigate. He doesn't seek information from anyone in this sequence that we can see, and I think that justifies the inference it's not surprising, he fully expects something of this nature.

GLAZEBROOK J:

Well in fact on the Crown case of what they were intending to do, he doesn't necessarily fully expect it, does he? I mean he did on the initial Crown – if the common purpose was to go up and shoot this man or shoot at him.

MR SINCLAIR:

Yes.

GLAZEBROOK J:

But now at trial the common purpose was to go and threaten him and destroy some property.

MR SINCLAIR:

Well that's the, I suppose you could describe it as the base common purpose. The Crown – there are two things obviously going on, so the Crown is trying to build a murder case on top of that, but for manslaughter, and we'll come to that shortly, it's not sufficient – sorry, it's not essential for him to have foreseen issues or anything like that.

GLAZEBROOK J:

No, but you say he wasn't surprised at it?

MR SINCLAIR:

No, well, no, the –

GLAZEBROOK J:

Well then presumably you're saying therefore it must have been part of the plan or he's not surprised that something went wrong, or what are you saying?

MR SINCLAIR:

Well the delivery of this ultimatum by superior weight of numbers, if I can put it that way, in which I think fair to say that the carriage of weapons is almost a given, that is the expected course for Mr Kuru.

WINKELMANN CJ:

You could say Ms Burton didn't seem very surprised of it either because she seemed to think she'd heard gun-shots before, obviously. I mean, her evidence about him is really of two people in a neighbourhood expressing surprise,

I mean it is surprise or concern or consternation, about shots in the area, isn't it?

MR SINCLAIR:

But it's different for Mr Kuru because the members have gathered in his cul-de-sac, he clearly –

GLAZEBROOK J:

Well what's the evidence he saw them there? He certainly wasn't part of that group, there's no evidence putting him as part of that group, is there?

MR SINCLAIR:

No, there isn't. That's right, your Honour, but the key evidence for the Crown is that he must have been on the move close behind them in order for all this to fit into sequence. So he knows his men are involved, he would associate those shots with his men. He's conscious of their presence, that's why he's starting to scuttle when he gets around the corner, he knows as gang president he shouldn't be right in the thick of things, gets to his house and nobody is explaining to him what's happened and he sees no need to seek any explanation from his own members, and that is a logical inference that that is because this incident has been planned.

WINKELMANN CJ:

The shooting?

1500

MR SINCLAIR:

Not necessarily the shooting for the purposes of manslaughter and I'll come to that, if that's acceptable. Your Honour, shall I turn to the issue of the police expert witness and I'll try to deal quickly with that but there's nothing objectionable in itself about expert evidence on gang structure, roles in hierarchy given by police officers with relevant training and experience and I hope the written submissions show that. The grant of leave asks us to focus

on what was said here and there are two statements particularly relevant to the jury's interpretation of these events.

So, first, Detective Inspector Scott has said in his experience serious organised gang crime against another gang would likely occur with the sanction of the president and it's important that that's coupled with an explanation of why this was so. So such an act invites serious retaliation by the other gang, invites intense police scrutiny. You don't want members being locked up and taken out of circulation. So, he's given the statement of likelihood. It's coupled with an explanation for that where he's saying: "This is why I say that." But I suppose the extension of what he said, although I don't think he said this, is that members who take it upon themselves to orchestrate such conflict could expect trouble from their own hierarchy. So, we have that statement of behavioural pattern, which is based on decades of collective police experience and the inspector's personal experience of the two gangs in other parts of the country, and it's a proposition helpful to the defence in resisting the murder charge so Mr Kuru was unprepared for the fallout of a killing which signalled that he hadn't foreseen death.

The trial Judge in our respectful submission correctly directed on the use of the evidence. So the inspector said nothing about Black Power in Whanganui, nothing about the defendants. The jury were told they must think carefully about whether the generalised statements helped them draw any specific conclusion about the individuals in this case. The witness said that an attack would likely occur with the president's sanction which naturally means not always would this be so. Here, in our submission, the president was already strongly associated with the action on the 21st of August for the reasons that we've just been discussing.

One can read the facts as being consistent with the general pattern and in our submission there isn't a yawning gap such that the generalised expert evidence becomes the substitute for factual evidence sufficient to prove the elements.

GLAZEBROOK J:

What does the generalised evidence prove then?

MR SINCLAIR:

It gives – well it gives the jury –

GLAZEBROOK J:

If there's no gap, then it doesn't prove anything, does it, which is the point of the Canadian cases, isn't it, the fact that in other cases something happens, even if it happens on some sort of percentage basis which he doesn't say. What does that prove because we don't go on the – I mean we don't have the Bayesian theory of evidence do we?

MR SINCLAIR:

What does it prove? Well it gives the jury the ability to interpret what's happening, the facts that they have to consider. It enables them to consider them in the light of a general pattern and –

GLAZEBROOK J:

Well a general pattern which has exceptions?

MR SINCLAIR:

Which has exceptions, yes.

ELLEN FRANCE J:

So you don't consider that it was incumbent on the witness to explain what the nature of the possible exceptions, just thinking about Professor Gilbert's brief for example?

MR SINCLAIR:

Yes, I was going to say something about that your Honour. It's covered in our submissions but this unfolds with the, and I must say, I don't think the brief was at all calibrated to a particular Crown theory about murder or something less. But there is the – Justice Ellis' section 147 decision indicating the way the

evidence would have to be reshaped for it to be admissible. There is then an in-trial chambers hearing at which the content of the evidence is thrashed out line-by-line and if – I was thinking about this in light of Justice Kós' question – that if there was – I'm sorry to take a step further back – as I've mentioned it suited the defence to have that statement in. There was some benefit to them in the reasons given for presidential sanction. But several – if there had been concern about the statement of likelihood, then several things could have happened.

GLAZEBROOK J:

So are you saying they used it, used the statement?

MR SINCLAIR:

The defence did, yes.

WINKELMANN CJ:

But that's I mean –

GLAZEBROOK J:

You always do.

WINKELMANN CJ:

– it's hardly advantageous. They had to make the best of a bad job, didn't they? If there's a statement saying in there the president would only say – well the president would only sanction, would have to sanction serious violence so what were they making of that, that therefore it was not sanctioned?

MR SINCLAIR:

Defence counsel were content to run this on the basis that the inspector had said a serious attack and so forth was likely to have required the president's sanction on –

KÓS J:

Serious organised violence?

MR SINCLAIR:

Yes, yes.

KÓS J:

And it's both the serious and the organised bit they attacked.

WINKELMANN CJ:

And they said –

MR SINCLAIR:

Yes, and –

WINKELMANN CJ:

How does that help them?

MR SINCLAIR:

– on the basis that, yes, that may be true as a generalisation but it doesn't mean it happened here. And so the case was fought over the –

WINKELMANN CJ:

No, Mr Sinclair, I'm just saying I don't understand how it was helpful to the defence to have that evidence in.

MR SINCLAIR:

Because of reasons, the reasons for the general statement about likelihood were accompanied by that explanation of it's a serious matter because it has these consequences for the gang and the point for defence was Mr Kuru was unprepared for those consequences and that tells you that his state of mind was not foresight of death.

WINKELMANN CJ:

So it tells you that he didn't condone it and didn't authorise it, right?

MR SINCLAIR:

It shows you that he didn't anticipate a senior rival gang member being killed as a result of this.

WINKELMANN CJ:

Well but I think, which is an obvious way of seeing Mr Scott's evidence, that actually it is pro-defence because in fact it's consistent with Mr Kuru's actions afterwards, which is that he was surprised and outraged that they'd done this and wanted to know who was it, who was in the group.

MR SINCLAIR:

Well that's…

WINKELMANN CJ:

That's the defence position at trial.

MR SINCLAIR:

Yes, that was a proposition put in a compound question to Mr Friesen with which he agreed but his evidence was that Mr Kuru wanted to know who had done that shit. It appeared to be an inquiry. He's not concerned that there'd been a rumble. He was concerned that a Mongrel Mob, senior Mongrel Mob member had been killed. Unprepared for all the consequences that flowed from that.

But I'm sorry I've strayed somewhat from the point that I was trying to make which was that for defence at the point that that evidence has settled there are, I suppose, several avenues. If there'd been – I think Your Honour 's proposition was that there should have been more said about the possible exceptions to this pattern that –

WINKELMANN CJ:

Well the limitations of the evidence itself.

MR SINCLAIR:

Yes, on the fleshing out the pattern there was the option to call Dr Gilbert, the detective inspector –

KÓS J:

No, but I mean the defence doesn't have to set out the limitations in the Crown expert's evidence. It's for the Crown expert to set those limitations out.

MR SINCLAIR:

Well I thought he had, with respect, he had gone far enough in saying it's likely –

KÓS J:

Well changing the word from "only" to "limited"?

MR SINCLAIR:

"Likely", not "inevitable". Here's why I say it's "likely".

1510

WILLIAMS J:

You really should have said: "Here's why it may not have occurred that way."

MR SINCLAIR:

Well, you could have – I mean it all –

WILLIAMS J:

Because he was a policeman.

MR SINCLAIR:

How hard would it have been for defence counsel to say: "Well, you'd agree with this proposition that there is a difference in the character of authority relationships in gangs, you'd agree with that, wouldn't you"?

WILLIAMS J:

Yes, but it's rather –

WINKELMANN CJ:

Shouldn't he also have said: "This is evidence which is based on – I'm drawing on my own experience with gangs in this area, I'm also drawing on general discussion amongst police at educational seminars. My evidence does not pertain to the dynamics of this gang. I cannot speak to how they operate"?

MR SINCLAIR:

He certainly covered at some length the first part of what your Honour's just sketched out.

WINKELMANN CJ:

But not the necessary next part?

MR SINCLAIR:

But that was manifested to the jury in particular. They were clearly directed on that.

WINKELMANN CJ:

Well, I mean, the Judge did say –

MR SINCLAIR:

And submissions made.

WINKELMANN CJ:

– speaking in generalities, but what does a jury understand from that? I think the spelling out of it in the evidence itself is extremely important, from my perspective, because that's what you normally expect of an expert witness, to be very particular about the scope of their evidence.

GLAZEBROOK J:

And don't you also have to say why, when you know nothing about this gang, that it's going to be operating in exactly the same way that you say other gangs operate? I mean, again, I just have real difficulty seeing this as even getting

across the threshold of even vaguely helpful, let alone substantially helpful and let alone relevant.

MR SINCLAIR:

Well, yes. The interactions of Black Power and Mongrel Mob, you could describe as a social phenomenon and people with –

GLAZEBROOK J:

No, I'm not worried about that. I'm not worried about that. I'm worried about the specific evidence that we're talking about here which, as soon as you say the president of a gang – I mean, it's like saying, as I said, you know, that the boss of a telecommunications company might well know any major decisions that are made by people down below. Well, that's within the common knowledge of everybody. Why do you need expert witness to say that?

MR SINCLAIR:

Oh, I see. I'm sorry, I missed your Honour's point. Yes, I remember the discussion from this morning about it being common sense. That's a –

GLAZEBROOK J:

I mean, if anything, you'd want the counterintuitive evidence to say, and in some case in these type of situations, that mightn't be the case.

MR SINCLAIR:

Yes. I think the – well the pattern around the world in cases such as *Thacker* is Courts have considered that this is – or you can't assume that it's within the ordinary knowledge of jurors and there should be a basis –

GLAZEBROOK J:

Things like gang prospects, matters of that kind, I can understand that, where you wear and don't wear gang patches, but the pure indication that if you have a hierarchical association of any kind, then one would expect with something very serious which of course by the time you get down to trial is not particularly serious common purpose, that they'd know about it.

MR SINCLAIR:

Yes. What –

GLAZEBROOK J:

You're not going to have a jury go: "Oh, wow, I didn't actually think that was the case, that the boss might've known about anything serious. That's a surprise."

MR SINCLAIR:

I don't know that it just can be treated as assumed knowledge such that counsel can then make a submission on that basis.

WINKELMANN CJ:

I mean, well, one natural line with the evidence might've been that gangs operate at a hierarchical structure and normally serious matters are directed on or something like that from the president, but that might be the line, as opposed to "likely would have" – what's the language that was used here? "Likely would have known about it," which actually goes, as Mr Stevenson said, goes to, does actually directly address the ultimate issue as to whether he knew of the particulars of this event and was joining in.

MR SINCLAIR:

Yes. It's really no different in that respect from the evidence that was given in *Sekhon* and was treated as acceptable both by the Supreme Court of Canada and the Privy Council in *Myers*, but the evidence on the right side of the line had been, had included such things as drug importers typically don't entrust large quantities of cocaine to a first time courier, secret compartments, the fact that the driver had a key that gave access to the drug. Now those matters which are on the right side of the line strongly suggest that the defendant in that case was a knowing courier. That was fine, it's when the evidence is led from that witness to the effect that he'd never known in a thousand cases, never come across an instance of an innocent courier, that was unacceptable.

WINKELMANN CJ:

Can I also ask, Justice Kós was effectively testing you on this. You accept that it shouldn't stray too far into knowledge and you probably, you'd say this hasn't strayed too far but you've heard some contrary points put by Mr Stevenson today. The second point which you've been tested on is whether the witness should be more explicit as to the limitations of their evidence and you've said, well, defence can call evidence, but that's not how it really should operate, is it, with expert evidence, experts should do the proper job first rather than placing an onus upon the defendants to correctly circumscribe the expert's evidence.

MR SINCLAIR:

Well, yes, with respect, I don't see a problem with what the witness said, which was in my experience this is a pattern you see, this is, it's likely that in this situation the president will be behind it.

WINKELMANN CJ:

Yes, the problem with it is that he didn't explicitly state the limitations on that evidence.

KÓS J:

And there are two limitations. The first is the set of paragraphs from Dr Gilbert's evidence, which really should have featured in Detective Inspector Scott's evidence, and the second is that he says nothing about his knowledge of this particular gang, and this particular defendant. He's unable to say, for instance, whether Mr Kuru is an iron-fisted leader, or a very relaxed one who, as Mr Wilkinson-Smith said in his closing address, comes along and gives the annual prizegiving speech.

MR SINCLAIR:

I think it would have been wrong of him to, even if he had that knowledge, to have got into it and said, well, Mr Kuru is a man of this sort of nature, and Mr Runga like that. It's very clear –

KÓS J:

Well he would've been able to say that about the Gisborne gang leaders he dealt with.

MR SINCLAIR:

Yes, but I think the point of this evidence is not to analyse particular personalities or anything of that kind. It is to give you a general picture of gang structures, their mode of operation, the chains of hierarchy, the way they interact with other gangs, and so forth. That's the pattern, the picture, for anyone who's not acquainted with those sorts of things. He's given that, and very correctly he's not purported to talk about the individuals in this case. I think that's the –

WINKELMANN CJ:

No, and that's what he should be making clear, that he's not talking about, he cannot speak to the individuals this case, and there are these limitations in his evidence.

MR SINCLAIR:

Well if it was an omission from his evidence it's an omission that's caused no prejudice to the trial because it was made very clear in counsel submissions, and in the directions, that he wasn't talking about this gang.

GLAZEBROOK J:

I just have difficulty seeing how then it's relevant if you're not talking about the particular gang, what is this general evidence relevant to?

MR SINCLAIR:

But is it not comparable to what we saw in *Sekhon*, where the witness is able to say, these are the characteristics of drug importations over the Canadian border. These are features that you associate with a knowing courier, and the jury can see, ah, we see them here. what –

WINKELMANN CJ:

Don't assume that *Sekhon* is something that everybody here would think should be admitted, because there is a level of –

GLAZEBROOK J:

Well in any event it is slightly different because they're looking at the particular, aspects that normal jurors may not understand because they don't understand, well I would hope they don't usually have experience of how drug courier works.

WINKELMANN CJ:

It is actually a different category of case, isn't it, it's a harder case to get evidence in, it seems to me, the drug courier case, because it's propensity evidence clearly, whereas what you're saying is that there is some aspects in relation to gang culture et cetera that basically the sociological level you can say they're observable things. So there's the wearing of the insignia, et cetera, et cetera, that might be useful to a jury to hear, but it has to be done in a way where the police officer is not given this patina of invisibility and a person that's giving them the inside information which is, you know, it has to be very – they have to somehow put on themselves a cloak of impartiality and balance.

1520

MR SINCLAIR:

Yes, and there's a distinction between independence and impartiality, which I've noted in the footnotes has been the subject of appellant –

WILLIAMS J:

I think the context –

MR SINCLAIR:

– appellate commentary in this country. Sorry, Sir?

WILLIAMS J:

The context is I think really important to understand that this is a police officer giving expert evidence, already a law enforcer with strong social capital and

whom, generally speaking, members of the community, including jurors, will repose considerable confidence, and in those circumstances, when you are the enforcer as well as the expert, there is an extra burden to be very careful because the risk is if your evidence is overvalued or if it closes the gap that it shouldn't really close, the unfair prejudice created by this kind of expert as against the DNA expert or a fingerprint expert is kind of obvious. That's what we – the system has to guard carefully against that and officers that give this kind of evidence, it seems to me, really need to underscore the limitations of what they have to say in very clear terms in a way that you probably wouldn't expect of a DNA witness or someone who doesn't come from within one of the parties, effectively, and in whom there isn't such community confidence and the risk of overvaluing.

MR SINCLAIR:

I fully accept the force of what your Honour's putting to me. It can't be the case of course that police, very experienced policemen can't give evidence of this kind because we see it all around the world.

WILLIAMS J:

Yes, I don't – oh, I'm certainly not saying that.

MR SINCLAIR:

No.

WILLIAMS J:

But it does mean that the sort of thing that Dr Gilbert would say is the sort of thing you'd want an expert cop to say too, for no other reason than to demonstrate their independence.

MR SINCLAIR:

Yes.

WILLIAMS J:

He specifically didn't say that. In fact, he said, you know, these gangs, they – these leaders can be prosocial but they are engaged in criminal activities while being prosocial.

MR SINCLAIR:

Well there's a duality in their lives, clearly. I mean, the –

WILLIAMS J:

Yes, but there are gang leaders who are not like that and he'll know that.

MR SINCLAIR:

Yes. Yes.

WILLIAMS J:

He will have worked with them, but he doesn't say so. It does seem to be a bit of a one-way street for Detective Inspector Scott, and that's not very helpful in terms of the administration of justice, it seems to me.

MR SINCLAIR:

Yes. It's certainly not a situation where Mr Kuru has been convicted because of his office. You know, Mr –

WILLIAMS J:

Really?

MR SINCLAIR:

Well –

WILLIAMS J:

That's what we're worried about.

MR SINCLAIR:

Mr –

WILLIAMS J:

Because that's the essential effect of DI Scott's evidence.

MR SINCLAIR:

He's in jeopardy because he is thickly involved in this episode. If we contrast him with Carlos –

WINKELMANN CJ:

So the "thickly involved" is that people meet in the vicinity of his house and he moves in the street opposite his house, so that's the only other material you've got?

MR SINCLAIR:

Yes, I think looking at the way this has unfolded over several weeks, coupled with the matters we've been over, I won't burden your Honours with it again, but –

WINKELMANN CJ:

All right, but that's all to do with his office? The unfolding over several weeks, as you accepted, there's no direct evidence of his involvement, it's to do with his office?

MR SINCLAIR:

The contrast –

WINKELMANN CJ:

And he's in the gang. Perhaps it's beyond that, perhaps it's also that he's in the gang and he'd know what's going on in the gang, there'd be chat, et cetera.

MR SINCLAIR:

Yes. You could draw the contrast with the vice president, Mr Rippon, who's just invisible in this by and large. There's no suggestion that he is roped into the common purpose. The proof of the common involvement and the common

purpose, in our submission, is rooted in what you can see happening unfolding in these events, the –

WILLIAMS J:
Do you know where Mr Rippon lives?

MR SINCLAIR:
Not off hand.

WILLIAMS J:
Well he may not live on Matipo Street, is he?

MR SINCLAIR:
Yes, and he's not right behind the people committing this attack on Mr Ratana either.

WILLIAMS J:
No, but that may be because he doesn't live on Matipo Street.

MR SINCLAIR:
Well he was alibied out in any way but the – in my submission all we are dealing with here is a strong set of circumstances linking Mr Kuru to the rumble and you can look across to the expert evidence and see a statement of generally, you know, if you categorise this as a serious attack on a rival gang, generally the president will be involved or the jury's going to look at that and say: "Yes, we see him involved. Is anything inherently dangerous about that?"

The second potentially influential statement from the expert was that the sergeant-at-arms enforces the president's orders. There was no controversy about the validity of that assertion. And, again, it's played out in the facts here. So, as I started out by saying, a few days before the attack Gordon Runga spoke about sorting out the victim, showed his gun to Mr Friesen and the others just outside the president's house. There's nothing clandestine about his intentions and what he did on the 21st was done in front of his president.

The attack kicked off in that cul-de-sac. I think it's more important that Mr Kuru knows about this, an inference from his conduct in following up Tiki Street. Mr –

WINKELMANN CJ:

But is it enough that he knows about it? Don't you have to show that he joins in it?

MR SINCLAIR:

Well this is…

WINKELMANN CJ:

Common purpose?

WILLIAMS J:

And agrees to assist.

MR SINCLAIR:

It's sufficient. He doesn't have to do anything himself. It's sufficient that he enters the agreement, yes.

WINKELMANN CJ:

Yes, well how – and your evidence that he entered the agreement is?

WILLIAMS J:

Well it's not sufficient that he enters the agreement. He must enter the agreement and agree to assist.

MR SINCLAIR:

Yes, both parts, yes, yes.

WILLIAMS J:

Knowledge is not going to be enough unless you say that his agreement is that he's under some burden to stop the events that he may know about but not have joined in.

WINKELMANN CJ:

So where's the evidence that he joined in that attack?

MR SINCLAIR:

Would your Honour allow me to deal with that in the section 66(2) part –

WINKELMANN CJ:

Okay, fair enough. It does seem to sit there.

MR SINCLAIR:

– because I'm concerned that I'm taking longer than I had hoped to and it might be quicker if I just deal with this issue of Mr Runga. I made the point neither of them saw any need to seek or make an explanation because it's a reasonable inference, we say, there was an understanding that this further intimation would take place. No anger directed at Mr Runga the next day. Of course there'd been a rumble but who had gone overboard and killed the target. That's what Mr Kuru was really concerned about. There's nothing to suggest that Mr Runga had turned the tables usurping the president's authority by launching a major attack on the Mongrel Mob on his own initiative. He behaved as if he'd done what he was meant to do, putting aside the shooting, and that's reflected we say in the observed behaviour of Mr Kuru as well.

Ground 3, I'm sorry, your Honour, that's now coming to the issue you raised, the manslaughter directions demanding as to mens rea. So to be liable under section 66(2) the jury was told had to find that Mr Kuru authorised a plan to go to Puriri Street, take guns, threaten Mr Ratana and damage his property and that he foresaw an unlawful shooting. That's in line with a view that party liability for manslaughter requires knowledge of the weapon used to cause death or foresight of the kind of violence which causes death. When gangs and guns are known to be involved, it's a small step from saying that you must know of the weapon, must know of the kind of violence, to say more than that you must foresee death but, in our submission, that really would dissolve the distinction between manslaughter and reckless murder.

1530

In our submission the correct formulation conforms with the mens rea for manslaughter itself, and I appreciate that's a somewhat academic question given the direction and verdict here, but it would be sufficient if there was a common purpose of intimidating the victim. Unlawful because of say the threatened use of force under the section 2 definition of "assault". Those who join the common purpose become liable for any offence they know could well happen. For manslaughter, it must involve the infliction of some more than trivial transitory harm, and that offence is the operative cause of death. I won't go into this issue of the meaning of "probable" but there's been decades of judicial interpretation of probable meaning could well happen and so forth, without the legislature seeing the need to intervene, so that's possibly an aspect to consider in this as well.

The jury was asked to find, and so must have found, that Mr Kuru ordered or sanctioned the attack and you can infer an intention to assist from that –

WINKELMANN CJ:

So that was how it was put to the jury, that he ordered or sanctioned the attack?

MR SINCLAIR:

Yes. They were required to find that.

KÓS J:

Authorised, sanctioned or ordered.

MR SINCLAIR:

Yes, and Mr Kuru's assistance could take the form of allowing it to proceed if, for instance, Mr Runga had proposed this course, Mr Kuru went along with it, and of course his consent could be seen as a precondition for it going ahead, and that's assistance in itself.

WINKELMANN CJ:

So the evidence of that authorisation, sanction or ordering is either that he followed them on or after them, and there's no evidence they saw him, since there's no evidence that he got around the corner, or else it is his presidency.

MR SINCLAIR:

Well yes there's more to it than that, and I was going to mention, or some focus this morning on the five-strand summary of the Crown case, which with respect I think is somewhat incomplete, likewise some of the remarks made at sentencing, but in the somewhat deferred section 147 decision the trial judge there refers to the importance of the relationship between Mr Runga, as sergeant-at-arms, and this is where it is important to understand what that role means in the context of a Black Power or Mongrel Mob gang, there to enforce the president's orders. No contest that that's a truism and if you take that fact and line it up with what you saw unfolding –

WINKELMANN CJ:

So that is a five-strand summary of the Crown case plus the relationship between Mr Runga –

MR SINCLAIR:

Yes and assistance also from presence, if it's –

GLAZEBROOK J:

Sorry, from what sorry?

MR SINCLAIR:

From his presence on that day, going with the foot party. You can infer an aspect of spine-stiffening, I suppose, for want of a better phrase, bearing in mind the incident on the 14th where some of the members had run off at the sight of a gun, well you now have the president on the street. If you're going to run away you're going to run into the president. So assistance can be inferred from that.

Unreasonable verdict, finally your Honours. I know we've covered a lot of this before and I'm just wondering if it's helpful for me to headline it just so that you have a summary statement of why we say this was not an unreasonable verdict.

WINKELMANN CJ:

Well I would be assisted by your addressing what Mr Stevenson said about the law. Do you take any issue with what he says, which is there is this kind of the *Mason* approach which is that you have a – *Mason*, *Munro* [2007] NZCA 510?

ELLEN FRANCE J:

Munro.

WINKELMANN CJ:

Munro approach which is that you have a kind of a threshold that you have to get over before the Court assumes this obligation to do this deep consideration of evidence.

MR SINCLAIR:

I'm afraid my approach to this has been possibly simplistic, but I thought we were not to relitigate *Owen*. The very clear message from *Owen* is that the test is whether there was no reasonable pathway to a verdict of guilty and it's our case that we're a long way from that threshold here. As I've said before, it's a given that guns would be carried on this occasion and very –

WINKELMANN CJ:

Wasn't there evidence of a previous – in this campaign of intimidation, isn't there evidence of one occasion which guns weren't carried when they were chased by the – they were carrying poles?

MR SINCLAIR:

Yes, well they were out-gunned on that occasion and that's the important point is that that won't happen a second time and they won't be outnumbered. So there's a show of force, a much larger number of members recruited, two guns are there, that's no surprise, and the nature of these things are such that

it's highly probable really that the intimidation would lead to some form of violence and during that it could well happen that a gun will be fired.

So the real issue is whether the jury could rationally find that Mr Kuru was part of the common purpose of intimidation, and briefly to recite what I know we've covered, but this is the long lead-up, the low-level intimidation hasn't worked, and Mr Ratana carrying his gun, he's a defiant man, it's all common knowledge among the Black Powers, the whole situation's a front for the gang as a whole, the next phase is going to involve a greater show of force, guns to meet guns, trying to catch Mr Ratana on the fly hasn't worked so his house is the next target, it's just around the corner from the president, the Crown's submission that it was top of the agenda for the gang, in my submission, was eminently reasonable. Of course the president is aware of this developing situation. The sergeant who enforces the president's orders is the man who organises the group on the 21st, leaving from the cul-de-sac, returning there afterwards, Mr Kuru on the fringes, his –

WINKELMANN CJ:

Well it's an overstatement to say "leaving from the cul-de-sac", that makes it sound like it's the meeting point but actually it wasn't the meeting point, was it?

MR SINCLAIR:

It was the final launch point.

WINKELMANN CJ:

Final launch point but they'd actually met outside the house beforehand.

MR SINCLAIR:

I'm sorry, your Honour, the house?

WINKELMANN CJ:

So wasn't there a – did they go to Matipo Street first? I may have lost the – I thought –

MR SINCLAIR:

They did, they – well –

WINKELMANN CJ:

– they went outside Puriri Street first and then move around to Matipo?

MR SINCLAIR:

We know that the Primera was there.

WINKELMANN CJ:

Yes.

MR SINCLAIR:

But that's only part of the party. We know that Mr Friesen was told to get himself to Matipo Street, so that tells you that that is – that's where it's going to proceed from.

WILLIAMS J:

Right, to Runga's house, isn't that right? That's where they gathered?

1540

MR SINCLAIR:

No, there's – well there's the initial arrival of the Primera and there's that abuse directed that Waiora hears. Now that's characterised by my friend as failed intimidation. I don't think you can read it that way. It may have been even an alert, of course given the history of what's happened in that town, that children are what not are getting out, out of the way. At any rate the three cars all head to the cul-de-sac. Mr Friesen is told by Runga, we'll see you at Matipo. So that tells you that that is where they're going to coalesce before they finally move round for the main event.

WINKELMANN CJ:

Where does Mr Runga live, I've lost the thread of that.

KÓS J:
Rimu Street.

WINKELMANN CJ:
He lives in Rimu Street.

WILLIAMS J:
I recall the evidence saying the gathering was at 55 Matipo, and I thought that was Mr Runga's but…

KÓS J:
That's Fantham-Baker.

GLAZEBROOK J:
58.

WILLIAMS J:
Yes, Fantham-Baker.

MR SINCLAIR:
Yes, it's sort of splitting hairs to say oh it wasn't Mr Kuru's house, it was the house just opposite the street.

WINKELMANN CJ:
Well it's not splitting hairs, Mr Sinclair, I mean you can say it was all going on in the street, but it is not splitting hairs to say that it was actually outside another gang, they accumulated outside another gang member's address.

MR SINCLAIR:
Well it virtually is, even though this, in proximity terms there's nothing in it.

WINKELMANN CJ:
But you would draw – I'm sure that if, that you would draw a lot if it was 57, if Mr Kuru's address was 57 Matipo Street. I mean it is significant that they

accumulate at that spot, at that address, which is another gang member's address.

MR SINCLAIR:

That little area is the focal point –

WINKELMANN CJ:

And you say well it doesn't matter that it's that, the reality is, it's such a small area.

MR SINCLAIR:

Yes.

WINKELMANN CJ:

Mr Kuru must have known, that's your response to that.

MR SINCLAIR:

I would place more weight on the fact that Mr Kuru has been, he's clearly followed closely behind, that is indicative of his knowledge perhaps. More significant than the precise –

WINKELMANN CJ:

Your junior has left you a note I think.

MR SINCLAIR:

The precise location, thank you. Again I'm just listing these points, I hope for the Court's convenience, but Mr Kuru's reason for being on Tiki Street doesn't add up. Walking away from the scene rather than going to investigate. Too early for the school appointment. He didn't try to enquire or investigate at any stage. Wanted to maintain that separation from the returning party. No interaction with Mr Runga, despite the meeting up just opposite each other on Matipo Street just before the disbursal. Behaviour consistent with prior agreement about the sortie. None of this has happened behind Mr Kuru's back. Reasonable to interpret the meeting on the 22nd is Mr Kuru wants to know the

shooter. Is not really concerned about the fact there's been a rumble or not really after who the other participants in that part of it. So if we run the *Owen* ruler over this it's reasonable for the jury to be satisfied the president was part of a common plan to conduct a further act of intimidation, and it can't be said there's no reasonable pathway to that conclusion. Questions of weight for the jury. Reasonable minds may differ on matters of fact. It's possible to interpret the evidence in other ways but that, as I understand it, is not the point of *Owen*. Review function on appeal, not the Court substituting it's own view of the evidence. The strands of the circumstantial case, I know this is trite, I'm sorry, but they're not to be considered in isolation but against the evidence as a whole. A single inference may appear speculative in isolation but may, in context, contribute to a wider picture of guilt.

There's just one factual matter I thought I should try to clear up before I finish. I don't need to take your Honours to this part of the Court of Appeal judgment, but perhaps if you'd be kind enough to note it. but paragraph 14 of the Court of Appeal judgment deals with the evidence of guns. This is page 15 of the case on appeal. There was evidence of two guns, neither of those guns was recovered. Paragraph 14 conveys a somewhat, a different picture, or there's a risk that it might. So there was gunshot residue in the Rogerson car, and also in the Primera, and we know that Mr Rogerson has fired shotgun pellets, and we know that Mr Ratana was killed by a slug.

Now that was really all I was proposing to cover your Honours, but there may be…

WINKELMANN CJ:

So when you say, the impression, it says here: "Mr Runga still had possession of the saw-off double-barrel shotgun, while Mr Rogerson had a full-length shotgun."

MR SINCLAIR:

Yes that's –

WINKELMANN CJ:

What's the wrong impression that might be conveyed?

MR SINCLAIR:

I think it said there that there are, it mentions one gun not being recovered, while neither gun was recovered.

WINKELMANN CJ:

Okay.

MR SINCLAIR:

And it suggests, I think, that pellets were fired from the two guns, the Rogerson and the other gun.

WINKELMANN CJ:

I can't see that but it must be somewhere. End of 14?

MR SINCLAIR:

I didn't mean to leave your Honours with a mystery but that's, I think, the true state of the evidence.

WINKELMANN CJ:

Thank you. Mr Stevenson, do you have anything by way of reply?

MR STEVENSON:

Thank you, if the Court pleases, just one matter, unless there are any questions, but because it is important to the appellant, and some issue has been taken with the nature of the evidence, I wanted to just note that evidence of what Mr Kuru said at the meeting the next day, so 22 August, is at 1070 of the case on appeal evidence, and this was the evidence, 1071: "Damian was leading the meeting, wasn't he?" "Yes." So these are answers by Mr Friesen.

Question, half way down the page 1071: "And he basically he wanted to know who was there and what the fuck had happened?" "Yes."

So there was some criticism about that being a compound question, and to an extent it is, but it was also reasonably specific, and it was put again: “And that those responsible for what had happened needed to put up their hand, that’s what he wanted to establish?” “Yes, yes.” And again, question: “Who was there, what happened and those that were responsible need to put their hand up, that’s a fair summation of it, isn't it?” Answer: “Yes.”

So it was very clear to the witness, in my submission, what was being put to him and he confirmed that. He’s a patched member who’s turned Queen’s evidence said by the Crown to be giving truthful and reliable evidence, and in my submission there could have been no mistake about what he was being asked, and he confirmed Mr Kuru wanted to know primarily who was there.

So that was the only thing I thought I might helpfully clarify. But otherwise I think the appellant has stated his case and I don’t propose to repeat myself in reply if the Court pleases.

WINKELMANN CJ:

Thank you Mr Stevenson. Thank you counsel for your submissions. We will reserve our judgment.

COURT ADJOURNS: 3.49 PM