IN THE SUPREME COURT OF NEW ZEALAND SC 49/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **L**

Appellant

AND **THE QUEEN**

Respondent

Hearing 14 December 2005

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Henry J

Counsel P Davey for Appellant
J Pike and B Horsley for Respondent

CRIMINAL APPEAL

10.04 am

Elias CJ Thank you.

Davey May it please your Honours my name is Davey and I appear on behalf of the appellant.

Elias CJ Thank you Mr Davey.

Mr Pike Yes, may it please the Court I appear with Mr Horsley for the respondent.

Elias CJ Thank you Mr Pike, Mr Horsley. Yes Mr Davey.

Mr Davey Yes may it please your Honours the first matter that I wanted to go to is at page 4 of my submissions and address the first ground of the appeal which related to the legal ingredients of the crime of attempted sexual

violation. And really what I wanted to do was highlight initially just the statutory sections that relate to the attempt and in particular to start of with s.129(1) which says that everyone who attempts to commit sexual violation is liable to imprisonment for a term not exceeding 10 years. And in my submission it's important to focus on the wording of that section in the sense that it does actually state that it's an attempt to commit sexual violation and so really in accordance with my general submission that that is an intent to prove, it requires an intent to prove that particular crime of sexual violation.

And that's really emphasised in my submission by s.72 which is on page 5, subs 1 which refers to everyone who having an intent to commit an offence, and that really is the nub of this whole appeal, is what is meant by that word having an intent to commit an offence. And in my submission that focus, those words having an intent to commit an offence focus on the subjective intent of the particular accused in that particular situation.

Now there's been much debate as I've set out in my submissions in the UK about whether or not it's intent to have sexual intercourse in circumstances that amount to an offence or whether it requires proof of actually having intent to commit the offence of sexual violation itself. And really when it comes to it the decision that I rely on to a great extent is the decision in **R v Whybrow** (1951) 35 Cr App R 141 that's referred to. It's at tab 4 of the bundle of authorities. Which dealt with the issue of attempted murder and what was required to prove the intent in that particular case. And there has been an attempt, what I suggest, since this decision to draw a distinction between circumstances and consequences in terms of attempts. But really what the Court of Appeal in that particular case did which was followed of course New Zealand with **R v Murphy** ([1969] NZLR 959) for attempted murder, was to focus on that for an attempt the intent is the essence of the crime. And that's really my submission that that is the whole essence of an attempted criminal act is the intent by the particular accused in that, or a particular person in that situation. And so the Court in that case didn't try to distinguish between result crimes and conduct crimes or consequences and circumstances but really its decision was based on that intent is the essence of the crime and so on that basis if you attempt to murder someone, you must actually have subjective intent to kill them. And that being able to rely on the other limbs of recklessness for attempted murder is, the Court said and which was followed by the Court of Appeal in R v Murphy subsequently in New Zealand to say that that wasn't, that you couldn't rely on that second ground and rely on the recklessness definition for murder itself.

And so really what I'm saying is there's no reason to distinguish between the crime of attempted murder and what's required to be proved as opposed to this particular situation in attempted sexual violation and that.

Tipping J In those cases the mens rea of the completed crime was capable of being wider or different from simply meaning to kill. Here the mens rea of the completed crime is lack of belief on reasonable grounds. We can't eliminate, it's one thing to confine the mens rea for the purposes of an attempt. It's another thing to read it out altogether isn't it.

Mr Davey I'm not seeking to read it out altogether. What I'm saying, what I'm submitting really is that the intent under s.72 is, the mens rea required is the intent to commit the offence. And so it's that intent to commit the specific offence is what needs to be proved for the mens rea in an attempt.

Tipping J Do you accept that to be guilty of an attempt you must or it is an ingredient, the crown must prove that you have no belief on reasonable grounds. In other words that you must prove that element of what would have been the completed crime.

Mr Davey No.

Tipping J That's why I'm suggesting you're reading it out. I didn't think you were accepting that that was an ingredient of attempt.

Mr Davey No I don't.

Tipping J You don't so that's why I put it to you that it's different to confine the mens rea for murder. Here you're seeking to read it out.

Mr Davey No I'm also seeking to confine it in the sense that it relates just solely to the subjective intent of the person in that particular situation.

Tipping J But the mens rea of an accused for full rape is lack of belief on reasonable grounds isn't it.

Mr Davey Yes.

Tipping J You have to intently penetrate and the crown also has to prove the fact of lack of consent. But as to the accused's mind, they have to prove lack of belief on reasonable grounds. Now I understand you're saying that that last ingredient is not relevant or present for attempted rape. I'm just trying to understand what the argument really is. Because if it is that, it's reading it out altogether as opposed to murder where you're confining it or limiting it to one particular species of mens rea.

Mr Davey Yes. It's, there's a little bit of overlap there because essentially I understand what Your Honour's saying in terms of Justice Anderson and the Shepherd Case basically said that that other limb of intent to have, the other limb of without the consent of the other person or without believing on reasonable grounds, both those limbs effectively His Honour was saying come out of an attempt.

Tipping J Well that with great respect is very difficult. Because it means you are eliminating altogether the mens rea of the completed crime. You see you don't have to know that there is a lack of consent. The lack of consent is a fact that the Court has to prove but what it has to prove as to the accused's mind is the third ingredient.

Mr Davey Yes. And essentially my argument is that it is effectively limiting that third ingredient, the without believing on reasonable grounds that the other person consents to that sexual connection, is reading in an intent, an intent to have non-consensual sexual activity with the complainant.

Tipping J It's not an intent to have non-consensual. It's an intent to have sex without believing on reasonable grounds.

Henry J I don't see how you can have an intent not to have reasonable grounds.

Tipping J No quite.

Henry J Isn't the only intent in s.128 itself, that's the substantive offence, the only mental element is intently to have the sexual connection.

Tipping J Sorry, yes that's what I meant. I'm sorry, yes.

Mr Davey Yes but then what I'm submitting is that when one looks at s.72 which is, and what the intent is required under s.72, is that it requires everyone who having an intent to commit an offence. So it actually requires an intent to commit a particular crime at that point. Which shouldn't be read simply as an intent to having sexual intercourse but more intending to have sexual intercourse without consent. That's really where.

Tipping J But isn't the intent to commit an offence, doesn't it signal really an intent to complete the actus reas.

Mr Davey Ah, no. In my submission it requires an intent to commit every element of that offence.

Elias CJ I think that's really rather what's being put to you by Justice Tipping. But I wonder whether you're argument is that intending to have non consensual intercourse in fact covers the eventuality with the completed offence of knowledge or reasonable belief. So that when one is looking at attempt, which is at an earlier point in time, the intent that is relevant is to accomplish non consensual intercourse.

Mr Davey Yes that's effectively my submission Your Honour.

Elias CJ Yes. Not that the other elements of the completed offence don't come into play but that they are subsumed by the intent to have non consensual intercourse at the stage of attempt.

Mr Davey Yes effectively, yes. Because really, as I've said, the intent, the subjective intent of a person in that particular situation my submission is that the key element in an attempt crime. And that was really the basis on which the English Court of Appeal in R v Whybrow decided that for a crime of attempted murder, that that required an intent to kill. And that was the essence of their reasoning.

Tipping J Could I just further that up just, as I'm a little confused. The intent is to commit non consensual intercourse. And it's on that premise is it that you don't need to concern yourself with the belief on reasonable grounds. That's the basis on which the what one can call the third ingredient of the completed offence isn't relevant to analysing what the ingredients are of the attempt crime. I'm sorry if I'm being confusing Mr Davey.

Mr Davey No, no, no. It's a very, obviously a very subtle distinction. I mean obviously this particular crime has had academics in the UK sort of debating it on both sides as to what needs to be proved for this particular crime. And it's easily a matter on which there can be two competing points of view as to what is required for this particular crime. But really, and what I was trying to do in terms of coming back to the sections, was saying the crime is the attempt to commit sexual violation and so it's that intent to sexually violate, it's the intent to sexually violate someone which must necessarily mean that it's without consent really is where, it's not an intent to have sexual intercourse, it's an intent to sexually violate is what I'm saying. I'm saying.

Elias CJ Which is non consensual penetration on your argument.

Mr Davey Yes.

Elias CJ Yes. And it's hard to see that anyone could intend non consensual (nc) penetration without, if accomplishing that object, either knowing that the person wasn't consenting or having not reasonable belief. So that in a completed offence none of those elements are being excluded.

Mr Davey Yes, yes.

Elias CJ Now the problem that you have with that is that Glanville Williams says that that's an appealing but simplistic approach. And I think that's the argument you face from the respondents isn't it.

Mr Davey That's right. But in saying that, the distinction that has been drawn in the UK has thrown up issues in relation to other cases and difficulties in terms of for instance in the Attorney General's reference of the number 3 of 1992 which followed the decision in R v Khan. It was held that the Court in that case didn't need to prove a specific intent to endanger life and it was sufficient to show on an attempted arson charge. And where the difficulty is in that case is that at that time the English Court of Appeal were referring to the Caldwell definition of

recklessness which is whether any reasonable person would have perceived the risk as opposed to a subjective intent. And that's basically the learned author says well that's going to introduce strict liability into the law of attempts. And really in my submission the same issue as here, is that if the attempt to commit the crime under s.72 is focusing on the subjective intent of that person doing those acts, then it's inconsistent with s.72 to look at it from the perspective of whether a reasonable person would have believed in those circumstances. If, and it comes back to my point that if the focus of an attempt at criminal act is on the subjective intent of a person in that particular situation, then it doesn't make sense to introduce a reasonable person test as to whether a reasonable person in those circumstances would have intended to actually, or would have realised that the complainant was not consenting. You go back to those first principles of what the purpose of an attempt is.

And my concern is that when you do start making these distinctions, I mean ultimately these are directions that have got to be directed to juries and to ordinary people with no legal training, and once you start making these technical distinctions that has happened in the UK, because with attempted sexual violation, if you talk about it, if you start making the distinction between circumstances and consequences which is what Dr Williams suggests, then you start running into theoretical arguments as to whether or not other offences of result crimes and conduct crimes and it becomes a complicated process. And for instance, as I've pointed out, the learned authors in Adams on Criminal Law suggested since this case was heard in the Court of Appeal that perhaps assault with intent to commit sexual violation as opposed to attempted sexual violation is a result crime and therefore there should be a distinction between the two. And then you get into what really in my submission is artificial distinctions between offences and that then creates further difficulties later on. Whereas if you actually look what the Court of Appeal did in R v Whybrow is they didn't worry about those distinctions, they just simply said, the key matter in an attempt case is the subjective intent of the accused in that particular situation.

And of course there isn't, as has been said in a number of cases as in R v Murphy and in the decision that I referred to Your Honours of R v Bell in the Tasmanian Court of Criminal Appeal, that there's no necessary connection between a mental intent for an attempt charge and for the completed offence. And in my submission that's, it's understandable for an attempt situation to perhaps require a higher standard of mental intent because after all the actual act hasn't yet been actually completed.

And so it's not inconsistent to have the two different ones and of course that's been for a number of years in the case of attempted murder itself.

Tipping J Sorry, could you explain what you mean in this context by a higher standard.

Mr Davey What I mean is in terms of requiring, for instance in the crime of attempted murder, a specific intent to kill as opposed to the Court being able to rely on causing.

Tipping J I understand that in murder. But in rape?

Mr Davey In rape really subjective intent to have non consensual sexual intercourse as opposed to the Court being able to rely on the situation where in circumstances where a reasonable person would say that there was no belief on the behalf of the, the complainant was consenting.

Tipping J Do you mean that the accused actually wants non-consensual intercourse or that the accused is prepared to go on despite lack of consent.

Mr Davey I'm saying that it's actually an intention to have non-consensual sexual intercourse with the complainant.

Elias CJ On, sorry had you finished that answer.

Mr Davey Yes, yes.

Elias CJ Allied to that question is, I wonder whether you can help me, I was so seduced by the intricacies of the argument that I think I've lost my way in terms of where this takes you. Suppose we were to agree with your proposition, what's the result of that in this case.

Mr Davey Well in this case, in my submission, the jury would have effectively been given the direction that was proposed by Justice Anderson in R v Shepherd as requiring that they needed to be satisfied that the appellant actually intended to have sexual intercourse without the consent of the complainant. And as opposed to whether someone, whether any reasonable person in those circumstances would have believed that the complainant was consenting which lowers the bar, in terms of what the jury need to be satisfied in terms of proof of the intent in this particular case.

Blanchard J Is that's saying that the defence lost the ability to point to an unreasonable belief in consent.

Mr Davey Ah, well it was the slightly unusual situation in the sense that the appellant in this case was denying any sexual contact whatsoever.

Blanchard J Yes, well keep away from the facts of the particular case. Is the difference between the direction that you say was the appropriate model and the direction that the Court of Appeal says is the appropriate

model the absence for the defence of an ability to point to a belief which was unreasonable.

Mr Davey Ah, as counsel, that wasn't the way in which the case was run in the particular case but it was more, even if her evidence was put to one side, it was a situation where the trial judge was directing the jury on what they needed to be satisfied in terms of if they were satisfied this act did occur, then it's really his direction to them that they needed to be satisfied that it was, this act was done without the accused believing that the complainant was consenting. And so effectively, by including the reasonable grounds part in it, the jury might have been in a situation where they thought that the accused herself may have believed that the complainant was consenting but no reasonable person in those shoes would have believed that the complainant was consenting.

Blanchard J So she may have had an unreasonable belief.

Mr Davey That's right. Yes.

Blanchard J So that's the missing element.

Mr Davey Yes.

Blanchard J Well that would be quite contrary to the evident policy in the change in the law that was made in 1985 to the elements of the full crime. Could it possibly have been that Parliament having made that deliberate decision was not intending that the law of attempt in relation to sexual violation was to be adjusted accordingly? And the second question is, in a case where penetration or lack of penetration is the issue, is the judge going to have to direct in the alternative with an ingredient, with the ingredients not the same.

Mr Davey Yes. On the first matter, I mean the same argument could be run in terms of the crime of attempted murder, that in terms of the completed offence, Parliament has extended just beyond simply an intention to kill when you're reckless as to whether or not death ensues as well, and so.

Tipping J But you never get the problem of alternatives. The … either dead or he isn't.

Mr Davey No you don't, no.

Elias CJ Is the problem not the unreasonable belief element but the fact that when you're talking about an attempt you're talking about a state of, when you're talking about the state of knowledge for the completed offence you're talking about hypothetical circumstances. And it's simply too dangerous to invite the jury to come to assessment of hypothetical circumstances which may well be the policy behind the Court's determination in attempted murder.

Mr Davey Yes, yes. Because.

Elias CJ It's not to say that an unreasonable belief is something that would entitle someone to an acquittal if the rape was carried out. Or that your client lost an opportunity say he might have had an unreasonable belief in her consent but simply that if he lacks an intent to have non-consensual penetration the matter is quite clear. Whereas if all the circumstances are to be assessed, they're hypothetical at the stage of the attempt.

Mr Davey Yes and just on that, in terms of the completed crime, there's the act of penetration which fixes the point in time at which you can say that there was, that the jury can easily say that there was a lack of belief, fixes a point in time. Whereas with an attempt, any act, the act in itself doesn't necessarily need to be a criminal act. It could be a.

Elias CJ Wholly preparatory. Well, no, going beyond.

Mr Davey Going beyond.

Elias CJ But that's a proximity issue isn't it.

Mr Davey It is but the act itself may not actually be a criminal act. But it may be a substantial step in completing the criminal offence.

Tipping J But the Court of Appeal said didn't they that your mind had to be, or the question of consent had to be directed to the act that constituted the attempt. But that cant be right can it.

Mr Davey Sorry say that again Your Honour.

Tipping J I haven't got the page, but the ratio of the Court of Appeal seems to have been that the lack of consent had to be directed to the attempt act rather than the completed act.

Henry J Paragraph 26 page 17 of the case.

Tipping J Thank you.

Elias CJ Paragraph 26?

Henry J Paragraph 26, page 17 of the case.

Elias CJ Yes Thank you.

Henry J It's the last paragraph before paragraph 27.

Tipping J I've put a bit question mark beside that in mine.

Henry J It should really read, without the consent of the complainant the activity which amounts to the intended connection I think, and without believing on reasonable grounds that the complainant consents to that intended activity.

Tipping J Mm.

Mr Davey Yes, yes and that raises difficulties, which as Your Honour stated, was in terms of the hypothetical situation going forward. Because Dr Williams even acknowledged that in theory, for the crime, you could be convicted of attempted rape in a situation where the complainant ultimately gives his or her consent if before hand no reasonable person in those circumstances at that particular point in time could have believed that the complainant was consenting, then if the complainant ultimately consents, then there's no completed offence. But in theory you could actually be convicted earlier in time for attempting even though ultimately consent was given.

Henry J Does that mean you can attempt, intent to have non consensual intercourse without committing an offence. If all you do is attempt, you don't complete the action.

Mr Davey No, no.

Henry J That doesn't sound right.

Mr Davey No, no. No it doesn't, no.

Henry Well wasn't that what you were putting forward.

Mr Davey Ah, what I was putting forward was in terms of, it's probably not a fair, no it's probably not a fair point actually on reflection.

Elias CJ You were putting forward the acknowledgement by Glanville Williams that if it all comes down to intent you could be convicted of an attempt to have non consensual intercourse even though the person was consenting. That was the point he was making. He didn't actually have a solution to it beyond the fact I think that these things fall to be considered in actual cases by sensible people.

Mr Davey That's right, yes.

Tipping J Well you may be doing something to which there is present consent but you may intend to go on to something that ex hypothesy wont have consent. That's the thing. But I'm attracted Mr Davey to the way in which they looked at it in principle. Never mind the actual result in the Attorney-General's reference but the way they looked at it at page 128 of tab 10 in your case book. The last page of the Attorney-General's reference case where, and I think you've cited a passage from this at paragraph 47 or your submissions, where the report says, and it's at

letter C, in order to succeed in a prosecution for attempt, it must be shown that the defendant intended to achieve that which was missing from the full offence. Unless that is shown, the prosecution have not proved that the defendant intended to commit the offence. Thus in Khan the prosecution had to show an intention to have sexual intercourse, the full actus reas, and the remaining state of mind required for the offence of rape. And then they go on at letter E and F to talk about you don't have to intend all the elements of an offence and so forth. And they traverse the debate in England and say that it's been resolved in the way, evidenced by Khan and the draft code, is consistent. And I presume the code has now become more than a draft. And I'm not aware of any alterations. Now that seems to me to be conceptually quite simple. And the only thing that differs between the completed crime and the attempt is that you haven't quite got there physically but you intend to get there.

Mr Davey Yes although, if I can just.

Elias CJ It begs the question of course of what the intent is in relation to the full crime. Whether it's possible to roll it up or not.

Mr Davey Yes, I mean the Court of Appeal in that case has really focused on the physical act as opposed to what the intent of the person is in that particular situation. And the difficulty generally, I mean in terms of the approach of the academic response to the Attorney-General's reference case has been that that decision actually needs to be treated with some care. There's quite a discussion in terms of this very point that Your Honour's making behind tab 13 by the learned authors Simester and Sullivan in their Criminal Law Theory and Doctrine at page 307 where they talk about what the Court of Appeal in the Attorney-General's reference case adopted this missing element approach. And the difficulty in my submission is that it takes away, I mean in terms of an attempt, if we go back to the Police v Wylie, it's an intention to commit a crime and taking, doing acts towards the commission of that crime. And the missing element approach almost tends to suggest the sort of last equivocal or the last equivocal act before actually.

Tipping J Well that's clearly gone. Section 72(3) says so.

Mr Davey Yes.

Tipping J Yes. So I'm not, I'm not trying to espouse that Mr Davey because it's impossible in terms of s.72(3). But what I am toying with is the fact that if you look at 72 as a whole you're not I think seeing a complete code. You're seeing a section that's focused much more on acts than on intention. And I think it's open to the view that there isn't a complete code in 72 that the mental ingredients are super added from the common law. And what 72 is talking about is the physical actions. Because that's clearly what they're talking about in 72(2) I think. And I'll just get the section in front of me. You see if you look at the

wording of 72(2) the question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence. The act, preparation for the commission of that offence. Nothing there to do with mental states at all. Whether it's sufficient proximate. But it's linked with the for the commission of that offence. And I'm rather inclined to think that the use of the concept of an offence and that offence in 1 and 2 are analogous. And that the draftsman here hasn't set out to achieve a complete self contained code for both actus and mens in the case of attempt. Now I'm sorry to speak so long but I feel obliged to put it to you because frankly that is I think a line of thought that needs careful investigation. I'm not wedded to it but I think it's distinctly on the table. And I think Mr Pike's submissions tend, although perhaps not putting in quite that way, tend to suggest as much.

Mr Davey Yes although if Your Honour notes that throughout s.72 it's repeated in each subsection the intent to commit an offence. So it's the act done with intent to commit an offence. And so that mental element of intent to commit an offence is highlighted throughout s.72. And really if one is going back to first principles in terms of attempts, then although it's a dissenting judgment in R v Donnelly ([1970] NZLR 980) it was Justice Haslam who quoted from Sir John Salmon. And I've set out the passage in my submissions.

Tipping J Could we just go to it.

Mr Davey This is at paragraph 32 on page 8.

Tipping J Thank you. But the object, for the purpose of accomplishing the object, when Sir John talks of ulterior intent or motive, the object is putting it bluntly, having sex isn't it, in that context. Not having sex with a certain mental state.

Mr Davey Well no if one looks further down at the last paragraph that I quoted from, His Honour stated the particular form of mens rea prescribed in the statutory definition of attempt entails the accused having in mind a purpose which on the facts as he believes them to be would constitute a crime.

Tipping J Yes I know. I find that difficult. This was a dissenting judgment wasn't it, as you said.

Mr Davey It was although the majority in Donnelly where they drew a distinction between legal and factual impossibility and the law of attempts, I mean has been the subject of some academic debate and also not been followed in some overseas jurisdictions as well. And that's really why also in my submission that a simple approach in terms of taking an intent to commit the particular crime avoids the potential difficulties further down the track in trying to distinguish between circumstances and consequences, offences involving circumstances and consequences

and because undoubtedly, even though this case applies just purely to attempted sexual violation, it's clear from the experience in the UK that it was then used as a basis for determining what was required for the crime of attempted aggravated arson in the Attorney-General reference case. And that decision is, just going back to that perhaps, in terms of what Simester and Sullivan say, and this is behind tab 13, at page 307 of their discussion of this missing element approach, they at the bottom paragraph they talk about, even if reconciliation with earlier cases is theoretically possible, however, the truth of the matter in the Attorney-General's reference is a radical departure from them. If intention is required only for those elements of the full offence where D has not brought it about the scope of the attempt is considerably enlarged. A noteworthy feature in Attorney-General's reference was the Caldwell recklessness was found to constitute adequate culpability in the context of attempts liability. It was hardly any step further to allow negligence to suffice. And then they give an example of dangerous driving. Supposed he is immediately stopped before joining the highway, driving a dangerous vehicle. It is established that he intended to drive onto the highway but the evidence will short of proof that he is aware of the condition of his car. If, however, a careful competent driver would have been aware, then D intended to bring about the missing element and possessed the culpability for other elements not required for the full offence, on the authority of Attorney-General's reference D would be guilty of negligent attempt to drive dangerously. And they refer to that being as a bizarre result.

Tipping J I wonder if the learned authors are really being entirely fair to characterise it in such blunt terms as this missing element approach. Because the Court in Attorney-General's reference at D on the last page said thus in Khan the prosecution had to show an intention to have sexual intercourse and the remaining state of mind required for the offence of rape. They weren't just saying you had to have an intention to have sexual intercourse. But they added to that the necessary mens rea.

Mr Davey Yes, yes they did but then it still comes down to this circumstances distinction that was made. Because what effectively they're saying is that there is an intent to have sexual intercourse in circumstances where it amounted to a crime. And.

Tipping J What's wrong with a test which would say you've got to intend to have intercourse, and the prosecution must show that you did not believe on reasonable grounds that there would be consent to that intercourse. What's wrong with that. It's consistent with the completed crime. What would be the policy reasons against reading it that way.

Mr Davey The policy reasons in my submission is that A you're dealing with an attempt, you're dealing with an attempt so a completed act hasn't actually been done. And so there's, as a result then it's not unusual for a specific intent to be required in that situation where you actually

haven't completed the higher standard of proof may be required in terms of someone who's just merely committing and act. The other issue is in terms of it's involving a hypothetical situation in the future and that raises issues about when do you say, what act do you rely on to say that no reasonable person in that particular situation would have believed in consent. Because there may be a number of acts involved. Whereas at least with a completed crime you know that there's a point in time at the point of penetration that you can focus on it. And really from a policy point of view, in my submission by making the distinction, there ends up this difficult situation that's occurred in the UK where distinctions are tried to be made between crimes that are conduct crimes, crimes that are result crimes whether they relate to consequences or circumstances, and then you end up in a, well, in my submission, they end up being artificial distinctions. Whereas if you go back to the first principles and say, well what is the basis of an attempt crime, or what's the key issue of it, and it's proving that someone had a subjective intent to commit a particular offence.

And that's the policy that is in my submission, that's trying, is punishing someone who has a particular intent to commit an offence. And does some acts towards it, towards doing that.

Henry J Mr Davey, is the short argument you're putting fwd that an intent to commit a crime must involve an intent that all the elements of that crime are satisfied.

Mr Davey Yes it is.

Henry J And one of the elements here is consent.

Mr Davey Yes.

McGrath J Mr Davey you haven't come to Khan but given that your emphasis on what I take to be a policy argument of a higher standard being appropriate as the act is not completed, I wondered if you had any observations on the policy reposte in Khan which was really along the lines that it would be artificial in a charge of sexual violation for there to be directions requiring different states of mind depending on whether or not sexual intercourse was actually completed.

Mr Davey Yes that was raised as an issue in R v Bell that I referred to where the test, mainly in, I mean actually, no the Court in that case said that there's no necessary connection between the mental element required in a completed offence than that in an attempted offence. Whereas Your Honour was referring more to the directions to the jury and desirability of having consistency there.

McGrath J Yes.

Mr Davey Although in my submission that by itself should impose a difficulty. Because the jury can be directed, just in terms of any other multiple charge, when other multiple charges are being, that this is the requirement that needs to be proved for the attempt of and of attempted sexual violation. And in my submission the direction that was suggested by Justice Anderson in the shepherd case is quite a simple and easily understandable direction to a jury that His Honour at page 3 of that decision said, the Court must prove beyond reasonable doubt that the accused intends to commit the prescribed sexual activity and intends that it will be carried out without the consent of the victim. So it's a, yes.

Elias CJ Is the worry, I'm just trying to feel, it's very difficult in the circumstances of this case because as you've said, this defence wasn't really run because the defence was that the activity didn't take place. But it does occur to me that if the jury has, I'm just thinking of it as a matter of practicality, if the jury is being invited to consider the circumstances and questions of reasonable belief and if the direction is not sufficiently focused upon the consent to penetration, it may be that there is a lot of room for, or the there is room for the jury to look at consent in relation to the acts which are the attempt rather than in terms of the offence. And in this case I suppose there was the factual issue that the complainant, or the accused on one view, and of course it's a jury matter and it's a matter of degree and proximity and so on, desisted. And so there was a real issue in there as to whether there was an intention to have non consensual penetration.

Mr Davey Yes, yes. That's right. I mean the complainant in this case said essentially that.

Elias CJ He said no and got off the bed or something.

Mr Davey She tried doing it a couple of times but then I stopped and told her I couldn't do it. I was too afraid and got up and said good night and went to sleep.

Elias CJ Yes.

Mr Davey And so effectively nothing further happened after that at all. And so there was a real issue in front of the jury, despite the way the defence was run, that they still nevertheless in my submission needed to still look at the Crown evidence and be satisfied that there was actually an intent to have non consensual sexual intercourse at that point in time. And that's effectively, yes. So there was a real issue there for them to determine. Despite the way that the defence was run. And I think that's why the trial judge went into quite some detail about the issue of consent to the jury himself in terms of what they needed to be satisfied on.

Elias CJ But it had to be very pointed about the offence, the non consensual penetration. Because otherwise the jury might slide into looking at the activity that was the attempt. And to considering whether that was with the consent of the complainant or not.

Mr Davey Yes, yes, yes.

Tipping J There's a difference between attempted rape and indecent assault.

Elias CJ Yes, yes exactly.

Mr Davey Yes.

Tipping J That's why the Court of Appeal with respect was completely wrong in the passage we were looking at a few minutes ago with my brother's Henry's assistance. You're not trying to defend that I know.

Mr Davey No.

Tipping J But it just doesn't help much to have that version in play.

Mr Davey Yes, yes. No I agree. That's.

Tipping J There is in Khan if I can follow from my brother McGrath, a passage at the bottom of 787 which, from the pragmatic point of view, there may not be a total correspondence here between pragmatism and logic, where at the very bottom of that page 787 tab 7 they put side by side attempted rape and completed rape. And they analyse what the essential difference is. And I must say from a pragmatic point of view, it's pretty attractive.

Mr Davey Yes it is on its fact. I agree. But the difficulty you do run in my submission is, because with attempted rape you are looking at, it's not clear what act you're going to be relying on in terms of the intent to have non consensual sexual intercourse.

Tipping J It's not as, if you like, it's not as quite as precise analysis as we've just been engaging in with you. It's a relatively robust approach to the issue and I'm not for one moment discounting Mr Davey at all the more sophisticated way you're looking at it. But we've got to be careful haven't we that we don't let pure logic sort of overwhelm you know the manageability of this - how it can be explained to juries and how it can be administered on the ground. We mustn't do violence to principle. And you would say we would be doing violence to principle if we watered down this you must intend to have non consensual sex. And that's it, that's the bottom line.

Mr Davey Yes but in my submission that actually, as I said from the passage from Justice Anderson, is actually quite a simple direction to give to a jury in terms of being able to say that the accused intends to have the

prescribed activity, sexual activity and that it will be carried out without the consent of the victim. And that's quite a simple proposition to put to a jury that a jury can easily understand.

Blanchard J They can understand it in isolation. But what about in the situation where the judge is having to direct in the alternative, direct as to the completed act, direct as to an incomplete act.

Henry J I think Justice Blanchard's referring to a case where the charge is of the substantive offence but the jury can bring in an attempt even though it's not actually charged, if they're not satisfied that the substantive offence occurred.

Mr Davey In terms of penetration sir?

Henry J Yes. You'd end up with a very difficult instruction to the jury wouldn't you. If it was complete, you don't need to worry about consent. If it wasn't complete you do need to worry about consent. There seems a certain illogicality to that.

Mr Davey I wouldn't go so far as to say that you don't have to worry about consent at all Your Honour. But it does, I mean that would only arise in a situation where there was actually a physical act attempting whether to penetrate, and it wasn't clear whether penetration occurred or not.

Henry J Not uncommon.

Mr Davey No, no. It does.

Tipping J I've had the very experience where a jury were being troubled by whether there was or was not penetration. And it got. I mean it's a very real issue.

Mr Davey Yes. Yes it does occur. But really in my submission it comes back, well I mean two different directions could be given. And it comes back down to the fundamental principle of what an attempt is. It's focusing on the subjective intent. And if that's explained to the jury in an attempt charge, then that is what the focus is, then in my submission both directions could be given.

Tipping J But it's of the essence of your argument that there has to be a higher standard for the attempt. So presumably there is a materially different ingredient that the jury are looking for for the attempt as against the completed crime. And that's where I'm having my difficulties both conceptually and pragmatically. It's this higher standard that you say as a matter of policy has to be applied because you haven't quite got there. And to use the Chief Justice's expression, it's still hypothetical.

Mr Davey Yes.

Tipping J	Therefore you need this higher standard. I want to know exactly what this higher standard is and be satisfied that it's workable before buying your argument, putting it simply.

Mr Davey	That, well in terms of that, the higher standard is really that there's an intent to have the non consensual sexual intercourse and that it is workable in terms of, in my submission, in the way that Justice Anderson directed that a jury should be directed on this, and it's quite a simple direction. The difficulty is also though in my submission marrying up s.72 with having an intent to commit an offence and then as being the matter that's really directed, the matter that is the focus of an offence under s.72 and then having to put an objective element into that of a reasonable person. So that creates difficulties on that side as well.

Elias CJ	Well for my part, I am attracted to the view that if you intend to achieve penetration without consent that covers eventual knowledge and belief. And there's no inconsistency between the direction that's given for the offence of sexual violation and the offence of attempted sexual violation. But as I've mentioned I know that that view has been academically criticised as simplistic.

Mr Davey	Yes, I mean it has been criticised, but then the opposite criticism has also been made that making the distinctions creates and artificial distinction and that creates difficulties as well in terms of analysis of other offences and, yes in terms of analysis of attempting to commit other offences. Whereas a simplistic, a more simple approach, keeps in my submission, a simple consistent line in terms of what is required for an attempt. And we don't get into the difficulties that have happened in the UK over these distinctions between circumstances and consequences and whether an offence is a result crime or conduct crime and the issues.

Henry J	You've really got to stand firm on your basic proposition don't you that this offence requires an absence of consent by the victim. And you can't intend to commit that offence unless you're aware of that absence of consent.

Mr Davey	Yes.

Henry J	That's a short point.

Mr Davey	Yes, yes it is.

Henry J	Despite any supposed illogicality between that and the substantive offence. That's what the section says.

Mr Davey	Yes.

Elias CJ Is there anything else you wanted to develop in support of this first ground of appeal Mr Davey.

Mr Davey No Your Honour. I think that that's all I wished to say on that point at this stage.

In terms then of the second ground of appeal, that one perhaps is a little bit more straight forward in terms of the points. Essentially what I'm saying there is, and it relates particularly to the ruling that was made by the trial judge in response to a question from the jury towards the end of their deliberations. A response to questions from them. And that's set out behind tab 23 of the Case on Appeal. And this was quite late in the evening, towards the end of the jury's deliberations. And they, page 170 of the case on appeal, the question came from the jury, can we please re-clarify the law associated in relation to attempt and clarify the points of consent. And then His Honour gave the direction in terms of what was required for the attempt, including the belief on reasonable grounds. And then really my concern is in relation to paragraph 5 on the next page. After he's talked about the evidence he says in relation to that evidence, you must be satisfied that what the accused did was for the purpose of actually beginning to commit the crime, not just thinking about it or preparation for making the attempt.

And then the jury went away again and it is clear that they were having still difficulty with that. And they asked a question, a further question, if the jury finds that those acts did happen, is that sufficient to prove guilt. And at paragraph 12 on the next page, His Honour again repeated the answer is that you must be satisfied that what the accused did, namely those acts, was for the purpose of actually beginning to commit the crime, not just thinking about it or preparation for making the attempt.

And those directions in my submission are clearly contrary to s.72(2) of the Crimes Act (CA) which makes it clear that in terms of whether a matter goes beyond preparation or not is a matter of law for the judge to decide, not the jury. Whereas those directions really effectively stated that it was for the jury to decide whether the matter went beyond preparation or not. And so that's, for some reason … (reading) … argument of the Court of Appeal. The Court of Appeal didn't actually address this particular point that I was making in terms of it breaching s.72(2) and also the law that was set out in, or the law in terms of appropriate directions in R v Ostler and Christie ([1941] NZLR 318) which seems to be the accepted position in New Zealand. I've referred to the relevant passage from that at paragraph 84 of my submissions. The function of the learned judge on the second count was to, this is at page 19, it was to direct the jury that he held that some act or acts did or did not in the circumstances amount to attempt. If the jury held that the act or acts had been done and done with the necessary intent in the relevant circumstances had been proved.

And in that case the Court ordered a retrial in respect of effectively the directions to the jury in that case were that they needed to decide whether a matter amounted to an attempt or not.

Tipping J Was this direction at the bottom of page 172 and on to 173, I take it that was the last direction that was given. It's a composite isn't it of the earlier problem plus the addition. So it repeats the problem and repeats the correction.

Mr Davey Yes and I actually.

Tipping J It's an extraordinary.

Mr Davey I actually stood up after that and said to His Honour that that confused things more because there was an earlier, because as Your Honour said, repeated the earlier direction and then what he had subsequently told the jury. And so particularly when one looks at the last paragraph of that direction, where, reading from the evidence that he continued to stop her after she persisted, it indicates she must have known he was not consenting and she had no reasonable ground for thinking that he would, effectively in my submission trespassed into the jury's area as to whether the matter of intent was for them. But His Honour gives the impression that that intent has been proved to his satisfaction. And then says, but then adds on the passage at the end, but that really it's a matter for you.

Tipping J But just focusing for the moment on the earlier bit, is this how the judge initially described for the jury the attempt in this case, the passage cited in paragraph 16 of the record. That the accused formed an intention to commit that crime in this case, as I have said, sexual violation by unlawful sexual connection etc, did some act. Surely he must have explained to them somewhere what he meant by unlawful sexual connection. I presume that's to be found somewhere else is it.

Mr Davey Ah, yes I think he did in the summing up.

Elias CJ When he's dealing with sexual violation or something.

Mr Davey Yes.

Tipping J Anyway, your better point is that it just repeats the confusion.

Mr Davey Yes.

Elias CJ Well yes and the earlier serious confusion in paragraph 131 where he suggests that they decide whether the actions described did occur and whether they occurred without the boy's consent and without any belief on the accused's part based on reasonable grounds that the boy did consent. I mean that is not looking at the crime as charged. That's looking at the actions. And whether they happened with his consent.

Mr Davey Yes. Whether they occurred without the boy's consent, yes, yes.

Tipping J It's the preparatory if you like. It's the attempt actions. This is where I assume the Court of Appeal got this. They were in effect ratifying that the mind had to go to the attempt actions rather than the completed, yes. Although I'm not sure about it. It's so unclear that.

Mr Davey Yes. Yes, it's probably, and I think, and the trouble is in my submission also with the other directions in terms of preparation and that they really needed to be satisfied that really what they had to determine was beginning to commit the crime. And you couple those all together, put those all together.

Tipping J He had to say clearly didn't he that if you accept this evidence I direct you that in law that does amount to the physical ingredient of an attempt. But you also have to consider whatever else. But he seems to have in places decided it and then in another place he's put it to them to decide.

Mr Davey Yes.

Tipping J And it's all over the place.

Blanchard J It's pretty clear though that he thinks that if the jury finds that the actions as described occurred, that was more than preparatory.

Tipping J Well I think he's given them the.

Blanchard J And he's really then given the accused another chance by saying to the jury well you decide.

Henry J I'm just wondering where the miscarriage is in that.

Mr Davey Well the.

Henry J As opposed to Ostler and Christie where there was some danger that the jury might have acted on some other acts as constituting an attempt. There seems to be no danger of that here.

Mr Davey Well the danger, there's two danger's in my submission. One is that given two directions about preparation, that the jury thought that all they needed to be satisfied on was that the accused had actually gone beyond beginning to commit the crime or gone beyond that stage was what they needed to decide. And so that was what they had to, that it was just really a matter of them deciding whether there was actually beginning to commit it. And secondly that really it was for the jury to determine whether or not the acts were done with the necessary intent. Whereas the way His Honour's directed it is that, especially in that last passage, is that the evidence that he continued to stop after she

persisted indicates she must have known he was not consenting and that she had no reasonable ground for thinking he would. That that effectively may have confused the jury into believing that the judge believes obviously that the issue of intent has been proved and that was evident from.

Elias CJ Well there's no direction on intent to commit sexual violation in paragraph 68 either. I mean I would have thought that the concern is that both in 68 and in 131 all the discussion of consent is about the activity that was taking place. It's not directed at an attempt to commit sexual violation.

Mr Davey Yes.

Tipping J I mean we're all very familiar with these concepts. Or a lot more familiar than the jury would be. And I think there are three problems. That he seems to suggest that proximate conduct is enough irrespective of mind. He focuses the minds on the wrong act. And he appears to say that it goes without saying that on these facts there is the necessary mens rea. Is that a fair?

Mr Davey Yes. Yes, that's.

Tipping J I'm encapsulating the points you say where the danger lies or where the miscarriage lies.

Mr Davey Yes, yes. No, that's a very helpful, so Your Honour's put it a lot better than I think I have in my submissions. But that's essentially what I'm saying.

Tipping J You see the Court of Appeal obviously thought that the mind was focused on the right acts. But I'm not at all sure that that is right. Because they have to be focused on the ultimate conduct, not the attempt conduct.

Mr Davey Yes. Which essentially is what Justice Anderson was saying in the Shepherd case, that directing your mind to that future activity or looking at the accused's mind being directed towards that future activity of sexual intercourse as opposed to the actual acts that are occurring themselves.

Elias CJ Penetration without consent.

Mr Davey Yes.

Elias CJ Mm. Is there more you want to add on this.

Mr Davey No, no I think that's all.

Tipping J Well I need some help I'm afraid on why we should strike down both counts. But that may be better after the adjournment. In other words I can see the good case made subject to Mr Pike for saying there's something wrong here with the conviction for attempt. But I don't quite see it as sharply as you would like me why that infects the other count.

Mr Davey Very well Your Honour. Yes, perhaps, I mean I'm in the Court's hands as to whether you wish me to address that now or after the adjournment.

Elias CJ We'll take the adjournment now and we'll hear you on that later thank you.

Mr Davey Thank you Your Honour.

Court adjourns 11.29 am
Court resumes 11.50 am

Mr Davey Yes really so in terms of the last matter. What I am seeking is a retrial in respect of both counts in the indictment on which the appellant was convicted. And the reason for that, although the error of law related to this particular in my submission related to the attempted sexual violation count, that they were so close in proximity and time that there's a real risk that the jury may have believed that if she was guilty on the attempted sexual violation count that they have consciously or otherwise used the basis of finding guilt on that count towards, as supporting guilt on the second count which occurred only it seems on the evidence somewhere between one to two weeks in similar types of circumstances.

Tipping J It's pretty clear that the difficulties the jury were having were centred very discretely around this idea of attempt isn't it. And however problematical the judges directions might have been in that respect, I have some difficulty when there was a requirement to deal with them separately and we have to expect that juries are able at least to some reasonable extent to do that, to see how there could have been cross infection from the difficulties on the attempt concept to when it's actually completed, where it's much more straight forward. That's where I need some help Mr Davey if you could. It may be that you can't say a great deal more than what you've got in your written submissions. But.

Mr Davey Yes, I mean really in terms of, the direction that His Honour gave the jury in terms of considering each charge separately was at page 141 of the case on appeal. In paragraph 10 where he says I emphasise here as both counsel have that just because you might find the accused guilty of one charge, does not mean she is necessarily guilty of any other. The converse also applies. If you find her not guilty on one charge, that doesn't necessarily mean she is not guilty on any other. Each

charge must be considered separately to ensure that the Court has proved the evidence necessary to prove each element of the charge. So there was a direction but it was a relatively brief direction as part of the summing up much earlier on in the day. And His Honour said each charge must be considered quite separately.

But didn't also then elaborate in terms of the evidence in respect of each charge must also be considered separately. And the difficulty in my submission is that by not, there is nothing said to the jury that they needed to be careful that the evidence on one particular charge they needed to be satisfied that that can properly be used in relation to the other count or what part of it would be relevant to that. And that really in the circumstances, that really there was the risk that they may say, oh well she was guilty on this one, therefore it's more likely that she was guilty on the second one which only occurred some week or so later in similar types of circumstances. Whereas if they'd been correctly directed on the attempt charge at that time and decided that the appellant was not guilty on that charge, then they may well have viewed the second count in a different light. My concern is that, or my submission really is that there was a risk as a result of the direction on the first count that it may have influenced their decision on the second one.

Especially given so late at night and in terms of the directions that were given at that point in time.

Blanchard J Was the defence on both counts that the acts had not happened.

Mr Davey Yes it was yes. As I submitted in the Court of Appeal, I mean ultimately if the jury didn't believe that version of events from the appellant then it was nevertheless necessary for them to obviously go back and look at the crown case and be satisfied that the crown had proved each of those elements on each charge beyond reasonable doubt. Including consent. There's probably not too much more I can say on that point.

Tipping J What about the question of sentence Mr Davey. If we were to take the view that the first count cannot be sustained, the sentence imposed, was it, it was five and a half years ultimately wasn't it.

Mr Davey Yes it was.

Tipping J Was there anything said in the course of reaching that figure which suggested that it was designed to reflect both counts or, one would assume that would be the case. And if the attempt count shouldn't be sustained for whatever reason, then prima facie at least, you'd have thought the sentence should be re-examined.

Mr Davey Yes.

Tipping J … we're against you on the infection of the, you know what I mean, but your client presumably would wish the sentence to be re-examined.

Mr Davey Yes, yes. Yes Your Honour, yes.

Tipping J And that presumably you'd say should go back to the Court of Appeal. We're not really here to deal with a matter like that.

Blanchard J Well we have to.

Tipping J We have to really. Because you never know what's going to happen. The crown, there may be a retrial, there may not be a retrial and the question of sentence might have to await all those sort of issues.

Mr Davey Yes, yes. And that would seem to be a sensible course. Yes I don't have anything further at this stage thank you Your Honours.

Elias CJ Thank you Mr Davey.

11.58 am

Elias CJ Yes Mr Pike.

Mr Pike May it please the Court, the law of attempt has become encrusted in the crown's submission with a number of fallacies and misconceptions that really in large measure arise from the very special place of intent and the analysis of intent in the crime of attempted murder which seems to have been the one that has exercised the Courts for many years. And some of the reasoning from the idea is there that no matter what mens rea may be necessary or sufficient for the crime of murder, the only level of intent that is sufficient for the crime of attempted murder is meaning to kill. We don't traverse that because that's not before the Court. The crown accepts that that principle special to the law of murder is so embedded in the law that it would be idle now to say that that too could be reviewed as being open to debate.

Elias CJ Well you sort of indicate that that's your view in your submissions.

Mr Pike Yes there is an argument for it. It is not of sufficient strength to say that, we're not here for that purpose. It is not of sufficient strength to the degree that any resiling needs to be done. I will do some immediately in the sense that the 167B murder which is really the only one which one could look at sensibly is also being liable subject to attempt actually has within its own definitions elements of attempt that are almost a statutory construct that a person is deemed to be bringing about the, deemed to be in the process of bringing about the result of death by inflicting such harm on another individual, reckless as to death, and knowing that death's likely to ensue, that they will be almost in a slight sense constructively guilty of murder. But that analysis contains within itself an element of what we might call embarking on a

more serious crime. You've embarked on a particular sort of grievous assault in the end of which have killed somebody. We can't prove intent but we are deeming you to be guilty of murder.

The only reason one put up the proposition at all, and as I say, without distracting the Court unnecessarily on this, is because the crime, there is an element but a very pragmatically reasonable one, but an element of illogicality in the analysis because the idea that a person may be, can only commit murder if they intend to kill is not correct. Obviously a person can commit murder if they don't intend to kill but intend something of a much, or not much, but a lesser state of affairs. And the part of the analysis of attempted, of what is the sufficient mens rea for attempted murder involves a proposition which in law is not true, that is that you must have an intent to kill to commit murder. And of course you don't. So one can talk about the immediate logical attractions to jump into the idea, oh you have to attempt to kill somebody to be guilty of murder. No you don't have to.

Elias CJ Well as you say, it's not before us. I'm sorry that I provoked you into that Mr Pike.

Mr Pike No, no, I just.

Elias CJ But your submission is that murder is anomalous.

Mr Pike Yes, yes. All the proposition was intended to do and I accept it's distracting now because of rethinking, it is distracting because it is so imbedded that it's not, and the arguments can be so implausible outside of logic and linguistics that it doesn't help.

Tipping J Isn't the real point that there is no basis to reason from attempted murder across the board.

Mr Pike Yes that is exactly the point. And all I was trying to do is to say that in itself attempted murder has its own quirkiness too but that's set in concrete as far as we are concerned. Let us move on. But what has happened I do submit in the outline of the submission is that two ideas have taken a grip on some Courts and some commentators at different times. First is that there is a thing called a crime of attempt which has its own particular sets of, it's own jurisprudence quite almost in isolation or anterior to but in isolation from the thing that is being attempted. That's the first one. The second one is that there is a concept that at common law and even by statute, there is such a thing as intention which has a settled and clear meaning. And so we say with respect that neither of these is true. That they have both played a part in bedevilling analysis of attempt. For instance if I can leap straight to the argument mounted on s.72(1) and (2) where it talks about, with intent to commit a crime and so on. Even if we assume it is right that that is signalling that intent has to be analysed in terms of s.72 and not in respect of the particular offence that is being, the allegation that is

being attempted, that intent there has some meaning. I.e. it means something in that highest echelon of intent, desire to bring about the forbidden consequence. The difficulty with that, it is submitted, is that nowhere in the law can it be said that … any case or any proposition that intent means any such thing as a universal proposition. Now it may as an existential proposition in a number of particular instances but that's a matter of statutory interpretation. But as a matter of common law, and that's the only place we can turn to there being no general part in the Crimes Act, as a matter of common law it is submitted it is clear that intent can mean anything from what the artificially high level in the case of Steen in 1946 or 47, a well known case where intent was said to be intention to assist the enemy was desire to assist and it wasn't enough that the person knew that every single thing they did or every broadcast they made would inevitably assist the enemy, that wasn't enough for reasons they didn't want Mr Steen to be hanged. There was a great deal of sympathy and they should have gone down the compulsion line. But the difficulty was with respect, is that intent can mean desire as in Steen and it can mean simply no more than knowledge of the circumstances and foresight of the consequences. It can certainly include reckless states of mind. And the English have now accepted that in the holy of holy places in the law of culpable homicide with that line of cases with Nedrick and Malone and so on.

It is submitted that once it is, if it can be accepted that these errors, that these common, that the two generalisations are made that there is a special law of attempt and there is a special law about the meaning of intent, if they can be swept aside, then the very simple and direct analysis which is espoused as long ago by the learned … Stephens to which note is made in a footnote in our case, it I think it's just simply a footnote 8 on page 5 of the case. Stephens Digest puts the proposition it is submitted with the usual clarity one finds in that gentleman. An attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute as actual commission if not interrupted.

Now essentially with respect that is the same as the analysis in the Court of Appeal in England in Khan. And it is the direct, it is in a sense simple but then ordinarily most of the criminal law ought to be that simple. That's not always so. But here it is submitted there is no, there is no basis, juridical or otherwise, for encrusting onto the simple observation that the person either commits the crime or is guilty of an attempt to commit it if they get close enough to their object with the intention to commit the particular crime that is alleged.
And then of course that follows the rhythm of, follows from our Crimes Act which of course, as noted in our argument, deals simply with attempt as almost a procedural issue in …

Tipping J I'm just a little struggling to see what you're actually submitting Mr Pike. Do you mean that with intent to commit an offence in s.71(1)

means with intent to complete the physical conduct that would constitute the offence.

Mr Pike It means with the intent necessary. It can be read as meaning with intent, with the intention necessary to be guilty of the completed offence. So that one must have simply the same state of mind throughout. In the case of sexual violation, the person we must accept, the person cannot be guilty of the offence unless, as we all must agree, that the person intends to have unlawful connection within the meaning of s.128 and takes sufficient proximate steps to achieve that purpose. But that means no more or less than that it is submitted. S.72 in our argument does not with respect have any intrinsic, the word intent there has no intrinsic meaning that is different from the intention to commit the crime. And that would follow from the fact that an indictment may be proved, either having committed the crime or on the same without amendment.

Tipping J So it means with intent to commit an offence means with the mens rea necessary for the commission of that offence.

Mr Pike Yes. And talks about an offence in 72(1) and then it talks about the offence in 72(2).

Elias CJ I don't understand anyone to be arguing to the contrary on this point. The question is really how you encapsulate the elements of the offence.

Mr Pike Mm, true.

Elias CJ In relation to the appropriate directions for attempt.

Mr Pike Indeed. With respect Your Honour, if there is no disapproval or disagreement with that proposition, then essentially then my friend's argument evaporates. Because one simply then looks for the meaning of intent in only one place. And that is of course the particular crime that is alleged to have been attempted. That in the case of sexual violation it is a person who in the absence of consent, which is obviously a circumstance, intends to have sexual connection with another person without having any reasonable belief that that other person is consenting. Now that is the.

Blanchard J Is consenting? Will consent?

Mr Pike Will is consenting. I mean that's in terms of the ultimate crime, the mens rea must be that if I achieve sexual connection as I wish to do, that the person will not, there is no, I don't have a reasonable basis for believing consent. And so with that mens rea in mind as to both the actual committing that are preparatory and your foresight as to the final what will be the case when sexual connection is achieved, you have exactly the same mens rea. If I achieve what I'm, once I've achieved sexual connection, I will not have any reasonable belief in consent.

Elias CJ Well I don't understand why you apply it to the actions attempt which constitute the attempt. I would have thought it was without any belief that the other person will consent.

Mr Pike Well practically and linguistically, that would be so because it is a future event. And that's the point I think which.

Tipping J Isn't the key to it that the consent must focus on the penetration, not on any steps antecedent to the penetration.

Mr Pike Well certainly if we're dealing with that, that's where the time of consent is critical. Because not all attempted sexual violations will involve an assault. In this case we've got into a situation where with respect there has been a certain artificiality crept in I would submit in respect of my friend's argument simply because this was a case where proximity would pass with flying colours on the unequivocality test or any other test one could dream of because the evidence is plainly that this was so close to achieving the purpose that it would be with respect somewhat arcane to argue that there might have been a different and stated knowledge of the victim's, of the boy's, state of mind from the time that she had hold of his penis and was attempting to insert it into her and the time that that actually might have been achieved. We're dealing with seconds away. So in this case of course the Courts looking at the case, the facts of the particular case, might simply express the law on the basis that this was virtually an achieved result, a goal.

Tipping J You don't support the Court of Appeal's focus on the antecedent acts.

Mr Pike Well in this case with respect as a general proposition, one wouldn't. In this case with respect the submission is made that the Court of Appeal must have been simply directing its mind to the fact that the act, you cannot really distinguish between the acts that had amounted to the attempt and the completed offence because they were so close to being accomplished. It would be different if one looked at that with putting the amitriptoline into the drink which was a shadowy feature of the case which the trial judge rightly thought ought not to really detain the jury. But it'd be a very different analysis if you talked about putting the amitriptoline in to make him drowsy and then started focusing on his possible consent to that act. It would all tumble in to a nonsense of course because he wouldn't even know the act was occurring. But analytically it is submitted what the Court of Appeal has said, that in ellipsis, on the facts of this case, was there any reasonable belief in this boy's consent to the acts that amounted to the attempt. Because they were not only proximate but unequivocally seconds and millimetres away from achieving the full crime. And so one wouldn't necessarily see a basis for rigorously dissecting out the mens rea.

Tipping J Well as a matter of doctrine it's wrong isn't it. It may be that in these particular circumstances doesn't make a hapenny'th of difference. But as a matter of conceptual doctrine, it's wrong.

Mr Pike Well as a matter of doctrine one would submit that a person to attempt a crime must have carried throughout the mens rea. These are intent crimes. And we find them obnoxious, and public policy is penalising these crimes because we believe that a person who shows a propensity or is attempting to bring about or wants to commit a crime is nearly as bad as the person who actually does it. So we punish attempt for that reason.

Elias CJ Well half as bad actually.

Mr Pike Well we do, we make a distinction because logically or illogically of course the harm has not been, or not all of the harm has been brought about. So plainly, pragmatically, we do say that's half as bad, indeed. But with respect the intent flows. It is a matter we would say of quite simple analysis that a person forms an intent, in this case to have sexual connection knowing, with the state of mind knowing that when that object is achieved, there will be a set of circumstances where he or she will have no reasonable belief in consent. With that state of mind locked in as it were, then a series of acts is embarked upon. One has to infer the intent from acts. Unless the person unwisely confesses that their purpose all along was to have sex and they didn't have the slightest concern whether there was consent or not, absent that, there can only be a conviction if the inference is from the actions of bringing about that state of affairs. Obviously in many cases of attempt, the inferences can only be drawn safely if the acts are more proximate than in some other cases.

Here with respect they were so proximate that the inference of what she had in mind about reasonable grounds were proximate and temporarily connected with the crime. The boy was saying, he testified, don't do it. I don't want to do it or stop or whatever. So there was a voluble, some physical resistance. Wriggling around, oral communication that he didn't want this to happen and so on. So in this case those events coincided, her attempts, this is at the time when there was already a sexual, a quite serious indecent assault had been committed. She had grasped his penis by this time. And so in these circumstances the case almost decides itself, it is submitted, because there could never have been a situation where a person could, a jury could have thought that the acts, that her belief as to the state of mind or her state of mind would be different from the time when that set of acts occurred, from the time when she actually achieved her purpose which as I say, could only be a matter of, realistically, seconds.

Elias CJ Well except on one view, which the jury wasn't invited to consider, when he objected, it came to an end. Which isn't necessarily consistent

with an intention to achieve penetration without reasonable belief in consent.

Mr Pike Well with respect, the desisting came after there was an attempt, a physical attempt to insert herself on the penis or which ever way one would like to look at it.

Henry J Depends what the jury accepted doesn't it. We don't know that.

Mr Pike No but we have to, there's no basis for assuming with respect, that they rejected without any rational basis that part of the boy's evidence and accepted other. I mean if there was a basis on the record for that, for making it dangerous to suppose the jury had accepted all of his testimony and not just some of it, then that would be a fair point sir. But in this case there is no basis on the record in which it could be reasonably said that there was a basis for saying, look the boy's not telling the truth or he's not reliable as to saying no. Or not reliable as to squirming around. But here with respect the judge in any event made it very clear in his summing up, and this is why this is perhaps putting the cart before the horse, but it may be the best place for the cart in this particular case, in the summing up we say the judge was correct and he made it very clear that the person had to have an intention to commit sexual violation, unlawful sexual violation at the time, sorry, as the desired object of her sexual assault on the boy. He didn't make it, would not have led the jury in any way to suppose that there could have been, that the intent had to be relevant or could be relevant only to the preparatory acts but then they would have a different intent or may not need any intent at all if connection had been achieved.

So in this case it is submitted that if one looks to the, if one takes the summing up and the best place is in the record of the case, if I can do that with respect. The summing up at page 100-and, there's different numbers here on the top of the pages, but the stamp number's 147. Of course we've already rehearsed this argument, but the judge at paragraph [35] of his summing up gave the directions of course for the sexual violation count itself. And said that, and directed what sexual violation must mean in law. And also directed on the meaning of consent.

So he'd already gone through that and the criticism that's made of course amounts to, comes when he goes onto the count alleging attempt. And there with respect the.

Tipping J Are you moving into the second limb of the argument now.

Mr Pike I am.

Tipping J Well could I just detain you for a moment before you do.

Mr Pike	Yes.

Tipping J	To just put something to you as to whether you would agree or not that this would be a proper way to direct on attempt in rape. The accused did a proximate act intending to penetrate. That's the sort of classic, the proximate act with the intention to penetrate.

Mr Pike	Yes.

Tipping J	That the complainant would not have consented to penetration.

Mr Pike	Yes, that would have been the law pre-128 yes.

Tipping J	But there's one more to come.

Mr Pike	Yes.

Tipping J	You've got to prove lack of consent as a.

Mr Pike	Circumstance, yes.

Tipping J	As an ingredient of anything haven't you.

Mr Pike	As a circumstances, yes.

Tipping J	So proximate act with intention to penetrate. Lack of consent, the complainant would not consent.

Mr Pike	Yes.

Tipping J	To the penetration.

Mr Pike	Was not consenting, yes.

Tipping J	Or would not have consented.

Mr Pike	Yes.

Tipping J	And 3, the accused lacked belief on reasonable grounds that the complainant would consent.

Mr Pike	Yes.

Tipping J	Is that in accordance with your submission.

Mr Pike	Yes, yes.

Tipping J	Thank you.

Mr Pike It is submitted that the Judge did that where, although he partially undid it in places and that seems to be the problem here, but the attempt is at paragraph [65], the law relating to attempt is this. The law provides that it is a crime to attempt to commit a crime, even if for whatever reason that attempt is unsuccessful. To prove an attempted crime, the crown must prove in this case the accused formed an intention to commit that crime and in this case, as I have said, the sexual violation by unlawful sexual connection between the accused's vagina and the boy's penis. And then carried that act into effect with some, did some acts.

Tipping J Was vagina, it doesn't matter, but was vagina correct or should it have been genitalia.

Mr Pike Ah, well it would have been genitalia now because of the amendments, isn't it, yes. So having said that, this is orthodox and correct it is submitted, that she had to have that intention to commit that crime. And he'd already directed at paragraphs 35 I think or, the ones to which I've just earlier referred. He'd already directed in a very full manner what, yes paragraph 35, in order to prove sexual violation the boy, that all those four elements, the boy did not consent and gave a mens rea direction.

Tipping J But why was he telling the jury.

Mr Pike At 39.

Tipping J Why was he telling the jury that it was the second one that needed particularly careful consideration from them. Because that was for the Judge.

Mr Pike Yes, His Honour ha helpful I would submit left it to the jury to disagree with His Honour's direction in law.

Tipping J Helpfully, did you say?

Mr Pike Yes sir, because the jury ought not to have found, if the jury was satisfied that the boy was telling the truth and accepted his testimony, then of course the Judge had already directed them as a matter of law that testimony gives sufficient basis for an attempt in law. So if you believe the boy, your job beyond reasonable doubt. Then my job, direct you that you must then find that that is an attempt in law. Then you look at the intention of course.

Tipping J It was a sufficiently proximate act, not an attempt in law.

Mr Pike Well they were sufficiently, well in one sense this distinction may not be of great moment sir.

Tipping J That's part of the misdirection here, that he's told them that it is an attempt in law. It's only part of what the law requires for an attempt.

Mr Pike Well it needs the mens rea. That's the bit that's missing and that's what the jury came back on I understand, or that was objected to, that he'd said that, had tended to suggest that if they found that then there was the mental element had dropped out of the equation. Of course that was remedied at trial. But dealing only with the question with respect of what the law of attempt is, and paragraph 65 with respect states it and states it unequivocally correctly. What my friend has to do is to say that notwithstanding that s.128 enacts that the mens rea for sexual violation is penetration or unlawful sexual connection without reasonable grounds to believe that there is consent, and that's it, nothing more, nothing less, that one can take out of that proposition a wholly included subset which is that that must include a belief or to axiomatically include a belief or knowledge that the person is not consenting. Now that is true. But then that requests the Court to extract one element that would be sufficient to prove obviously lack of reasonable grounds to believe and say that that ground and that ground alone or that mens rea alone, by judicial decision, is the mens rea for attempted rape. But it is not sufficient for the mens rea, it is not, the intent to have sexual intercourse without reasonable grounds is not of sufficient mens rea for attempted rape. It's only that wholly included subset, that much narrower one, knowing there is no consent. Or possibly believing or believing that they're not believing in consent or knowing no consent. That much narrower ground is the only state of mind from which you can get home on an attempted, we'll call it, or attempted sexual violation charge. The difficulty is with that, as I keep coming back to the opening submission, is that presupposes analytically we submit, two things. That is a general law of intent which does not exist and which one goes back to James Fitzjames Stephen's proposition where there is no such thing as mens rea in the law. There is the intent, the statutory or common law intent for any particular offence which has to be found in relation to that offence. But there is no general mens rea. And to which we add, also basing ourselves somewhat on the same gentleman, that there is no crime or special crime of attempt either. Absent those conditions, there is no juridical or statutory or policy basis on which in our submission it could be said that an attempt to commit any particular crime requires an intent, a specific intent as the Canadians sometimes call it now, a specific intent to bring about those consequences. Any anything short of that such as recklessness as to the likelihood of it occurring, or even worse, objective or partially objective recklessness, as in the crime of rape in New Zealand, that the intent there necessary for the complete crime will not be sufficient for the attempted crime.

Now with respect there is simply no authority for that proposition. And in terms of what we would say analytic criminal law, nor could there be. And the Court of Appeal in England to which we strongly refer to in coming back to the Attorney-General's reference no.3 case

to which we also refer, underpins that submission. It is also underpinned essentially by the cases of Evans I think, the South Australian case to which we refer as well.

Tipping J Is another way of putting your point that the ultimate question is belief, not intent.

Mr Pike Yes, intent has, in a sense it has nothing to do with it. What the Crime's Act says is that the necessary mental element for sexual violation is this, it's defined. If you have that mental element whilst you are embarked on the process of engaging in sexual connection with another person, then you commit the attempt. You attempt to commit the crime if you do not succeed in your objective.

As we submit, the bedevilment in the law of attempt comes from the point made, and obviously one relies too, on the penetrating analysis as per usual of Glanville Williams in his article which we've referred to in our materials, if I can just take the point here to now the crown, the slim crown volume of materials. It's not at tab 3, it's at tab 4, contrary to the index. And at page 366 of the Criminal Law Review. The point that Glanville Williams makes is under this little subheading, attempts and intention, is at one paragraph. And then the second one, it may be observed in passing. And now here he's referring to this word we're struggling with here, the intention or intent. It may be observed in passing that although this provision uses the phrase with intent to, the phrase does not bear quite the usual meaning that it bears in legislation. Usually with intent to refers to some intended physical consequence of the defendant's act. Here it refers to the defendant's intention to do an act or to continue with a series of acts that when completed and when followed by any necessary consequences if the consequence is required will amount to a crime. So that is the passage with respect with which, on which we rely.

So what is essentially saying that this, as we interpret with respect, is another way of indicating that intent to commit a crime, intent to commit a crime does not have a specialised meaning at all in the law of attempt. It means no more or no less than intending to bring about the crime, a particular nominated crime, with the intention for that crime.

It is submitted further for the crown that in the analysis in these cases there is no utility whatever in defining intention to mean something less than the intention necessary, the statutory intention in New Zealand necessary and sufficient for the particular crime. Our submission is that in public policy terms it cannot be substantiated. And that if there is a concern that persons will be convicted of offences of attempt when they might not have been attempting to do it or they might have desisted or whatever the case may be, then we submit that the safety net there is proximity. The judge must rule that the acts themselves are proximate enough. Those acts, it is submitted, are the very acts from which intent must be inferred. And so there is a

connection between the idea of proximity and the idea of the proof of the intent for the particular crime.

Tipping J Mr Pike, can I just take you back to Glanville Williams. Is it implicit in his formulation there that the intention to do an act must be accompanied by the necessary mens rea for the completed crime.

Mr Pike Yes.

Tipping J Must be mustn't it.

Mr Pike Yes. We don't dissent from that.

Tipping J No.

Mr Pike Because it is important that the person, and after all the critical point is that the person is convicted in terms of, for attempting to commit a crime, when the actual attempt may not involve any criminal act. Often it doesn't. So it is important obviously from this aspect of criminal law that the Courts can be certain of what the intention was. And of course that means not only that the intention must accompany as a future, to bring about a state of affairs with the mental element throughout that the state of affairs will be accomplished. So you intend, it's premeditation in that sense. You must have the intention before you embark on it. It's not one of those cases where, you won't find it in cases where there's a fleeting, a bar brawl where somebody flings a glass around. It's unlikely to see that you're attempting to do, it'd be hard to see attempt necessarily being proved in cases where you missed and things like that.

Tipping J Well the mens rea is not encompassed, I don't think, by the concept of intent. It's encompassed by the implication that it must relate back if you like from the completed crime. That's the way I've tended to look at it. Now it doesn't probably matter how you get there analytically. But you must have a coincidence of an intended act plus mens rea.

Mr Pike Yes indeed. Well the acts, I mean possibly some of the confusion which has crept into the Court of Appeal's judgment is, the mens rea must certainly follow every act you are doing. It may be an objectively viewed innocuous act, that you're putting powder into a drink. Now the powder may not produce stupefaction. But you can be convicted of attempting to stupefy for the purposes of rape, other things being equal. And so of course you must have, it must be proved that the person putting the powder in the glass at that time intended to stupefy and with that state of stupefaction existing, have sexual intercourse and therefore no reasonable belief and so on.

Tipping J Quite.

Mr Pike All of that must follow. Must be present on the proximate acts. Otherwise of course there would be real risks of injustice. But they also, they are just the wisdom I suppose of countless judicial authority indicating that because we can never know the mind of man, or woman as it must now be.

Elias CJ Well don't presume.

Tipping J You're on a slippery slope there Mr Pike.

Mr Pike I appreciate that Your Honour, again, gracefully withdrawn. Because we can never know that, that old aphorism in Brian CJ from hundreds of years ago, we must infer intent from actions. So accordingly the Judges ensure when they let attempts go the jury that there are enough actions close enough to make it safe to infer from them that there is an intent to commit the crime in question. To that extent we submit that proximity and intent are, and their particular intent, are intertwined. But only in that sense that they are the necessary judicial safeguards, that proximity has come as a necessary sufficient safeguard, for ensuring that there is a rational basis for a jury to infer intent except in those very rare cases where the accused helpfully provides it by some other reliable means.

But we submit with respect that the whole of the cases we've traversed and we look at Canada and we've noticed one or two observations of the Canadian Courts which are against our argument, my friend hasn't picked them up but we must face them. And there was a case we've put in our book called **Ancio** (**R v Ancio** 6 DLR (4th) 577 (SCC)) which seems to indicate that there is some general, that there is a general idea in attempt that it is a special crime itself and it must have a special intent that goes with it. We were remiss in not providing the Court with the case to which we've referred in a footnote which seems to depart from Ancio, again from the Supreme Court of Canada, the case of Williams I think it is. Yes **R v Williams**, it's reported in (2003) Vol 2 of the Supreme Court reports. Now we were sorry I did not, I overlooked providing the Court with that case because it is very much on point. I do have copies that are not in a form acceptable ordinarily to the Court here. But I'll leave it to the Court whether it can be given to the Court.

Elias CJ Sorry, what do you have.

Mr Pike It's a printout. I have a printout, it's not in a form that the Court ordinarily accepts. But I apologise for.

Elias CJ Is it an electronic one.

Mr Pike Yes it's an electronic one.

Elias CJ Yes that's fine. Thank you.

Blanchard J Maybe he could provide a proper copy later.

Elias CJ Well it's in the DLR isn't it.

Mr Pike Yes.

Elias CJ Yes, we don't need to.

Mr Pike Sorry, Supreme Court reports Your Honour, sorry.

Elias CJ Oh the Supreme Court reports.

Tipping J 2003, 2 Supreme Court Reports.

Mr Pike Yes it is. If I may take the Court then, and thank you for receiving it, to page 10 of this printout. And at paragraph 62 of the judgment of Justice Binney. I just wish to draw the Court's attention to the antidote as it were to Ancio, or what appeared the Court was saying in Ancio. They say here, the supreme Court says the crime of attempt, as with any offence, requires the crown to establish that the accused intended to commit the crime in question. And they cite Ancio. The requisite intent is established here for the period after November 15, the respondent knowing at the time he was HIV positive engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV. The evidence showed that he'd been fully counselled by two Doctors and so on. Now the important thing about, or we submit that Williams is helpful inasmuch as it indicates that there's simply an attempt to bring about a state of affairs. Reckless as to the, reckless endangerment and one doesn't need the specific intent, as one might have read Ancio, to be meaning you needed to intend to infect the woman or the sexual partner with HIV. Here the Supreme Court of Canada has found that it was sufficient to convict of attempt that the person knowing that he was HIV positive had unprotected sex and endangered, that he was attempting to endanger. So that was all to set up the circumstances of endangerment. Which indicates that they do not necessarily agree that all criminal attempts must be accompanied by a specific intent to bring about a particular crime. It just rather seemed to us anyway that that passage in Williams which we leave to the Court without further argument, somewhat undermines the breadth of Ancio, the comment in Ancio which we've referred to in our written submissions.

But there is faint, they are the faint judicial support for the proposition advanced by my learned friend. Most of the judicial authorities squarely and clearly on point are against him with respect.

Tipping J Isn't the passage that's right towards the bottom at page 65, paragraph 65, the second citation fm USA v Dinar, very relevant. The law of attempt is engaged only when as in this case the mens rea of the

completed offence is present entirely. And the actus reas obviously is present in an incomplete but more than merely preparatory way.

Mr Pike Yes.

Tipping J That's it in a nutshell isn't it fm your point of view.

Mr Pike It is, yes. It is. Absolutely yes. And that is, yes indeed Your Honour, that I would certainly respectfully adopt that that is a very pithy way of putting the same proposition.

But no more or less is required and that in this case it is submitted there, the question before the Court is whether a different and more specific state of mind must be proved for attempted sexual violation than for the completed offence. And our answer, we submit, or the answer we submit is no. It is not necessary and there's nothing in the statute law, the history of the law of attempt. The concept of intention which is nebulous we submit and can only be determined on a crime by crime basis. Nor public policy nor any other basis could it be said that a person can attempt to commit sexual violation if and only if they intend with their proximate acts to have non-consensual intercourse with the difficulty in one formulation of it that they would not wish to have intercourse if it was consensual. That's partly reduciate(?) absurdem but it does follow from one formulation of that proposition.

So we with respect submit that on the basis of the written opinion, sorry the written submission, that the answer is to the contrary of my friend's proposition, that there is no proposition that supports him in any place other than some academic writing. But essentially the judicial authors support the Court of Appeal's approach and the approach taken in England in Khan of course and Attorney-General's reference.

With respect to the summing up, we do submit that the Judge did not fall into error at all except at one point in saying that the question of whether there was, the acts if believed were sufficiently proximate to constitute an attempt, subject to proof of intention, that that was error but it did not.

Elias CJ Sorry, I don't recall it being said quite like that in the summing up. What are you referring to?

Mr Pike At one point Your Honour in the summing up the suggestion was made, I think in 65, the, sorry I've lost the passage now. I'll just see if Mr Horsley's got it. It's at page 148 of, it would obviously be the case on appeal. Or 172, Sorry, of the record before this Court, it's at 172. No it isn't. Oh yeah, there it is, 148. Paragraph 5 on paragraph 171 and the stamp reference, that is the reference to the record in this Court, right at the end of the book. Paragraph 5 the Judge has said, in relation to that evidence you must be satisfied that what the accused did was for

the purpose of actually beginning to commit the crime, not just thinking about it or preparing, preparation for making the attempt. So that, on one reading of that I thought it was suggested by my friend the Judge was suggesting that it was for the jury to decide whether the acts were proximate enough, were done with, were sufficiently proximate. What His Honour is really saying of course is that you have to decide whether acts that I have said are proximate enough to be an attempt were done with the necessary mens rea for the crime. But it's not a happy expression of that proposition there.

We submit that we have, that His Honour has made it clear right back at paragraph [65] of his attempts direction, that he did get the law correct. Quite clearly so.

Elias CJ You can't really pick pieces out of it Mr Pike. You've got to take the whole lot don't you?

Mr Pike I do, yes.

Elias CJ And 67 is hard to defend isn't it. I mean do try, but.

Mr Pike The question of whether a particular act was not done for the purposes of actually committing a crime as opposed to thinking about it or preparing to make the attempt is a question of law that I have to decide.

Elias CJ Sorry, 68.

Mr Pike Oh, okay.

Elias CJ There's no, it's not.

Mr Pike I direct as a matter of law the accused's actions do amount to an attempt to commit the crime charged. That's.

Elias CJ Which indicated that he did not consent. He's not making it clear that it's consent, it's not consent to what was then happening, it's consent in relation to the attempted penetration.

Mr Pike I'm sorry, Your Honour, I'm not sure that I fully, I have to respectfully submit.

Blanchard J I think the "which indicated" is really referable to the "that he stopped her".

Mr Pike Yes, yes.

Elias CJ Well actually what he says is, and then I stopped.

Mr Pike Yes but I cant, I'm struggling with respect to see the deficiency in the direction that said. Because he hasn't.

Elias CJ Well where's the direction that they have to concentrate on consent to penetration. As opposed to consent to what was happening.

Mr Pike Well the first, well paragraph 35 because of course His Honour has gone through a very full exposition of.

Elias CJ I see. So you just rely on his description, sexual violation and what is said in paragraph 65.

Mr Pike Yes where he refers back to that saying, as I have said, sexual violation, that the accused formed an intention to commit that crime in this case as I have said, sexual violation by unlawful sexual connection. Which takes the jury back to what is necessary for that crime. Which was spelled out at some length. Now unfortunately there's a slight juxtaposition, there's a juxtaposition of concepts have crept in at 68 which should have been teased out.

Tipping J Mr Pike for me the real problem in 68 is the first sentence. Which I would read as the Judge saying that if you accept that the accused's actions are as the complainant portrays them to be, that in law is an attempt. Removes from them entirely on one view the matters that they have to consider. I know what he's meaning. I know what he's trying to say. But putting it as you might hear it, he's saying, provided you accept it all happened as the complainant says, that's it. That's for me the big problem with 68.

Mr Pike Well it is only in terms of His Honour's plainly referring to the acts. They're sufficient for you if you agree they occurred.

Tipping J I know, but he says attempt, do amount to an attempt to commit the crime as charged. As charged.

Mr Pike Yes indeed.

Tipping J What more could he say to tell them that if you accept the evidence of the, the physical evidence if you like of the complainant.

Mr Pike Yes sure.

Tipping J That's the end of it.

Mr Pike Oh true, ex contextually.

Tipping J I mean I know he comes back to it later on.

Elias CJ Well he doesn't come back to it – 131.

Tipping J Well not much. It's watered down but it's still got the same bit in it doesn't it?

Elias CJ Well it's the actions described by the boy did occur and whether they occurred without the boy's consent. It's nothing to do with the.

Mr Pike Yes.

Tipping J Well.

Mr Pike Well one can only with respect submit there has been a very full direction in a number of places before that that the crown's obligation is to prove the issue beyond reasonable doubt as to the absence of any belief, reasonable based belief. (Counsel confers with Mr Horsley) Yes indeed, that's right, thank you my learned friend provides me with a bit I should have provided to the Court a minute or two earlier. If one can refer to 167 of the record at paragraph [131] we understand, our submission is that this is where the issue did arise at the trial level. And it is noted here that Mr Davey raised a matter. In relation to count 1, the attempt, I remember I told you I had to decide as a matter of law for a start whether, and so on. You go on to decide the factual side of it. Just so there's no doubt about this, I want to say that to you again. Having told you it's a matter of law that the accused's actions if accepted by you do amount to an attempt, it still remains to decide as a matter of fact whether the actions did occur as described by the boy and whether they occurred deliberately and whether they occurred without the boy's consent and without any belief on the accused's part based on reasonable grounds that the boy did consent. So that's where it comes back to sort of removing that which we submit.

Tipping J But really Mr Pike, I know you're doing your level best, but if you come to the very last thing the jury would have heard, page 173, the stamped 173, 150 in handwriting, he's in effect telling them there what the answer must be. The evidence that he continued to stop her after she persisted indicates she must have known he was not consenting and that she had no reasonable ground for thinking that he would. Well if that's not taking the issue away from the jury, you know, he's entitled to express the view that this is what they may well consider.

Mr Pike Yes.

Tipping J But he's telling them this is the answer.

Mr Pike True.

Tipping J And that's about the last thing they would have heard.

Mr Pike True.

Tipping J Amongst all this rather fluid material.

Mr Pike Yes indeed. The.

Tipping J	And then admittedly he sort of waters it by the last three lines.

Mr Pike	Yes.

Tipping J	But if I'd been sitting there, I'd have been hopelessly confused.

Mr Pike	Well one makes the submission sir that overall the jury, the Judge got it right and there were infelicities as is oftentimes the case in summing up. But certainly the situation was set out very clearly at the beginning of the summing up, who had to prove what and whose job was what. And yes there are passages which in a sense with respect ex contextually could indicate, could give rise to confusion. Overall it was left very clearly we would submit, that the jury had to decide not only the legal point that was for His Honour to decide but also to decide the points as to whether or not the crown had proved her state of mind.

Tipping J	You see the problem is that if he, the part that he was responsible for deciding, which is two lines under the quote of the evidence, is perfectly okay. But then he goes on as if he was directing them as a matter of law, of what the evidence amounts to. You see?

Mr Pike	Yes.

Tipping J	I direct you as a matter of law that this evidence amounts to the physical ingredient of an attempt. And then he goes on, as if he's saying that as a matter of law, the evidence itself. It's just, with great respect, it's wholly unsatisfactory.

Mr Pike	That is a mistake but whether it's one that would lead to a substantial miscarriage of justice is really the matter which we would say with respect it doesn't.

Tipping J	Well, true. Why not.

Mr Pike	Well simply because the summing up itself in enough places got it right. And it would be extremely unlikely that the jury would have gone away believing they had to prove, had to find rape. Her state of mind for the sexual violation charge subjective, and perfectly in accordance with law, but on the attempt, find it in quite a, be told by the Judge, well there it is, there's nothing more for you to do. I think he said it so often that it says, as the [131] and it's not the only place, said it so often that it's a stumble again which would not be seen as untoward by anybody and if there was anything said of it at the time it was not recorded in the case unfortunately.

Elias CJ	Um, sorry, Mr Pike. I just wonder if you can just help me with one thing, it's probably not important, but there is a variation both in your

submissions and in the Judges summing up in terms of the quotation set out in paragraph 68 of the summing up.

Mr Pike Mm.

Elias CJ And in the transcript in terms of what the boy said. Because Mr Davey's right that in his submissions he has that the boy said, but then I stopped and told her I couldn't do it. Whereas the Judge has, but then I stopped her. And told her I couldn't do it.

Mr Pike We'll have to look at the record. I'm sorry, we'll just have to.

Elias CJ It may be that you cant shed any light on that at all.

Mr Pike I can't do, I cant, while detaining the Court as I do this. Perhaps we can sort it out as between counsel. But unless the Court has any other matters, I suspect there's nothing we can add to the written factum.

Elias CJ Yes I think that's probably right. You haven't finished your submissions have you Mr Pike. Or is there.

Mr Pike Well I can't, I have in fact Your Honour.

Elias CJ Yes you have. Oh that's alright.

Mr Pike I think the points are made, I've summarised the points in writing and become repetitive I fear.

Elias CJ Yes. Mr Pike if we're against you on the summing up point, is this a case where the crown would be seeking a retrial. Or do you want to consider that?

Mr Pike I'd have to consider that.

Elias CJ Yes.

Mr Pike Yes I think the point, the only other point with respect that we would draw the Court's attention to, to the fact that we have addressed orally many of the matters raised by reason of the fact that the leave to grant it under rule 29 was whether the judge correctly directed the jury on the ingredients of attempted sexual violation are correct in relation to the Judge and jury in the attempt of the present kind. We'd understand that was as to the proximity issue. And that the issue of, obviously there has been no issue as to the function of the Judge and jury in relation to intent. At all. And so that we have had to, we confess, address orally matters which we had thought were not part of the case. So I just explain that.

Elias CJ Thank you.

Mr Pike May it please the Court.

1.01 pm

Elias CJ Mr Davey how long do you intend to be in reply?

Mr Davey I wouldn't mind an opportunity Your Honour just in terms of the decision in R v Williams, just to consider that over the luncheon adjournment if that's possible.

Elias CJ Alright, well then we'll resume at 2.15 thank you.

Mr Davey Thank you Your Honour.

Court adjourns 1.01 pm
Court Resumes 2.16 pm

Registrar All Stand for their Honours the Queens Judges.

Elias CJ Yes Mr Davey.

Mr Davey Thank you, your Honour, just a point that your Honour made before the luncheon adjournment was in terms of the evidence that was actually by the complainant about what had happened in respect of the attempt,

Elias CJ Yes

Mr Davey I know that at page thirty seven of the case on appeal the evidence your Honour is quite correct that he said that 'she tried to do it, doing it a couple of times but then I stopped', not stopped her, 'and told her I couldn't do it' which in my submission is quite an important,

Henry J Doesn't seem to make much sense though does it what did he stop doing?

Mr Davey Well he as I read it, that he was actually on top of her in this particular incident that he says happened and so he says 'then I stopped

Henry J Just wondering what he stopped doing there is no reference to him doing anything is there?

Mr Davey No, no there's not…although there

Henry J Just wondering if it was a typographical error

Blanchard J Where is the suggestion that um, that ah he was on top come from?

Mr Davey Ah that

Henry J	The earlier occasion wasn't it?
Mr Davey	Yes the earlier occasion on page 38 at paragraph, line 29 he says question 'this is in relation to the next event how were you positioned how was she positioned?', 'this time I was on the bottom and she was on top' he says so the inference I draw from that and also the way it seems to be, evidence was given that he was on top on the earlier occasion.
Blanchard J	Well if you look at page 37 line 30 third time, 'I remember her hugging me from behind we sharing the same blanket and she got me'
Mr Davey	On top
Blanchard J	'Turned over and started kissing me'
Mr Davey	'Nothing really happened she was just kissing me and then she got on top that was the third time she got me turned over and started kissing me'
McGrath J	Yes
Mr Davey	'She got me turned over,
Blanchard J	No that's the second time, the third time is what he describes in the next few lines.
Mr Davey	Yes, she says, he says 'she got me turned over'
Blanchard J	Well that's clearly with her on top. He was hardly going to be lying on his back on top of her.
Mr Davey	Ah no, that's ah correct it's not entirely, I'm sorry its not entirely clear because
Blanchard J	I would of thought that was fairly clear.
Mr Davey	Well just in terms of the way he refers later on to the later occasion to the next occasion when he says 'this time I was on the bottom and she was on top'
Blanchard J	Yes but he's described a number of instances before then where they were in different positions so it doesn't mean that this time was a contrast with the last time,
Mr Davey	No perhaps
Blanchard J	It's a contrast with some of what's gone before
Mr Davey	Yes, no your Honour may well be right on that.

McGrath J What about page 39 line 9?

Mr Davey Yes that's in relation to the sexual violation count

McGrath J Oh ok

Mr Davey I certainly don't recall that as being a typo, that was I mean, that was perhaps I mean although he doesn't describe what he was doing before that I mean the inference is that he may well have been moving himself as well from that.

I probably can't, I probably can't really take that point any further on the evidence really.

Primarily the matter that I was going to address was in relation to the first ground of appeal which, and in particular the reference that my learned friend has helpfully made to the Canadian Supreme Court decisions and initially to the R v Ancio (R v Ancio 6 D.L.R (4th) 577 (SCC) which is behind tab 5 of the respondents case book. And at page 592 of that decision there is the Canadian, from an extract from section 24 of the Criminal Code which for all intents and purposes in my submission is very similar to the New Zealand provision and ah except that the words 'carrying out his intention as opposed for the purposes of carrying out his object' in my submission is two interchangeable in effect, because of the having an intent to commit an offence in the first section and really what the Courts said in that case at, following on a page 593 my submission is quite is an important passage halfway down that page says 'the clear from the (?) common law and under the Criminal Law of Canada criminal attempt is itself an offence separate and distinct from the crime alleged to be attempted as with any other crime the crown must prove a mens rea, that is with intent to commit the offence in question, and the actus reus, that is step going towards the commission of the offence attempted beyond mere acts of preparation.

And that, and then refer to a passage from a decision of (?) Court of Appeal and then to Russell on, extract from Russell On Crime 'since the mischief contained in an attempt depends on the nature of the crime intended the criminality lies much more in the intention then in the acts done', and I think my learned friend acknowledged in his submissions that really what an attempt is doing is punishing an intent and a good example of that is the fact that section 72 provides for impossible attempts. So one can be guilty of an attempt even though it's factually impossible to be able to commit the actual crime, but what the court is, but what is criminal is the intent behind this, behind the acts, behind the acts and then what the Supreme Court did in that case was in terms of an attempted murder, if one looks at page 595 in the second main paragraph there 'secondly the elimination of the words with intent to commit murder from section 264 is not significant, section 24 defines an attempt as having an intent to commit an offence. Because section 24 is a general section it is necessary to read in the offence in question, the offence of attempted murder then is defined from having an intent

to commit murder', and so really in my submission the concept of attempted murder requiring an attempt to kill is not anomalous in that in the same way as the Canadian Supreme Court have done that in this case under section 72 having an intent to commit an offence should read in the offence in this particular situation having an intent to commit sexual violation, which by itself necessarily incorporates having intent to have sexual intercourse without consent.

My learned friend referred to the decision of the R v Williams (R v Williams 2003 vol 2 SCR) and in my submission that doesn't detract from the decision in the R v Ancio (R v Ancio 6 D.L.R (4th) 577 SCC). It was somewhat of an unusual case R v Williams (R v Williams 2003 vol 2 SCR) which wasn't, which didn't actually address in my submission the issue of a intent on an attempt but rather the physical act involved, because in that situation what the court had to determine was whether, it was a situation where the victim in that case had contracted HIV from the appellant or from the accused and ah had contracted HIV. But it couldn't be proved whether or not that contraction of HIV had occurred before he knew that he was HIV positive or afterward. And so there was an essential element that the actus reus of the offence required proof of endangering life, and it couldn't be proved that there was endangerment of life afterwards because she may have already been, had contracted HIV by that stage before he knew about the ah, before he knew about it, and so what happened was that he was originally charged with aggravated assault. The Court of Appeal in that case quashed the conviction and he was convicted of attempted aggravated assault, because it couldn't be proved that the endangerment of life, necessary ingredient of the offence, had occurred after he knew that he was HIV positive and then, ah and then, subsequently that was upheld, the crown appealed against that decision in the Court of Appeal but it was upheld by the Supreme Court the conviction for attempted aggravated assault.

And so the reference to Ancio (R v Ancio 6 D.L.R (4th) 577 (SCC) in my submission it didn't actually doubt what had been said in the R v Ancio (R v Ancio 6 D.L.R (4th) 577 (SCC) about the intent to commit a crime but really it was more focusing on what the actus reus was in that particular case

Tipping J — Can you help me with anything you can say about the second passage cited at paragraph 65 from the USA and (?) DNR?

Mr Davey — Ah no I cant your honour ill accept that just from that small passage I'm not sure that that was an intention to describe what the intent is required on a in respect of an attempt charge because really what the Court was more concerned about was whether the physical act was required in order to establish a an well yes whether in order to establish an attempt. So the focus of the judgement is on the actus reas as opposed to the mens rea without seeing the full passage of that its difficult,

Tipping J It seems to be a wee bit similar conceptually to that missing element debate we had this morning.

Mr Davey Yes well it only talks about the actus reus, being the mens rea of the completed offence is present entirely, but the actus reus is present in an incomplete but more the preparatory way. I don't read that as saying that ah that that necessarily means that there is just a missing element.

Elias CJ Well its incomplete, I mean it must be right surely that um if you intend a crime you intend the ah whatever intent is required by that crime but you fall short in terms of the physical element it seems unanswerable really.

Mr Davey Yes, that's that's correct yes

Tipping J Is the missing element has to be the physical element inherent in the short form?

Mr Davey Yes

Tipping J But the problem for you is that it talks about the mens rea of the completed offence as present entirely. So that wouldn't be consistent with your saying that the belief on reasonable grounds aspect is not engaged.

Mr Davey Yes, well I don't, its hard to take from this passage whether that is in fact what was being intended to be said in that particular case.

Tipping J But we will probably have to look at that case, but on the face of it I would of thought it wasn't, it wasn't consistent with the proposition that you're inviting us to accept.

Mr Davey Yes it's hard to say

Tipping J No

Mr Davey I can't realistically comment. What really what I was, the point I was trying to make was that in my submission it didn't doubt the process, it didn't doubt the way that the matter was dealt with in the R v Ancio (R v Ancio 6 D.L.R (4th) 577 SCC) and really in that case the Court rather then being anomalous rather then attempted murder being anomalous really ah said that primarily the mischief that needs to that its concerned in this case is the intention rather then the acts done. That's really my that is my submission really.
Yes, I don't have any other further matters unless your Honours have any particular matters?

Elias CJ No, thank you Mr Davey. Thank you counsel did you have,

Mr Davey Thank you

Mr Pike Sorry, can I entertain the court for one moment?

Elias Yes

Mr Pike If there is a retrial issue is an issue we don't seek one.

Elias You don't, thank you that's helpful. Well thank you counsel for your submissions, interesting point, and we'll reserve our decision.

Mr Davey As the court pleases

Court Adjourned 2.33 pm