IN THE SUPREME COURT OF NEW ZEALAND

SC 41/2006

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **QIU JIANG**

Appellant

AND **THE QUEEN**

Respondent

Hearing 9 October 2006

Coram Blanchard J
Tipping J

Counsel W G C Templeton for Appellant
A Markham for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.00am

Templeton Yes may it please the Court I appear for the appellant.

Blanchard J Yes Good Morning Mr Templeton.

Templeton Good morning Sir.

Markham May it please the Court Miss Markham for the respondent.

Blanchard J Yes Miss Markham. Now Mr Templeton I assume that you can both see us and hear us even if we may appear from an unusual angle.

Templeton Yes I'm on your right-hand side.

Blanchard J Yes, yes, it's one of the faults in the system which I hope we can rectify. Mr Templeton I may be able to assist you by saying that the concerns that we have about this case are not really in relation to any breach of the co-conspirators rule. I think it would be fair to say that

we're not convinced that there's much mileage in that but we are concerned about the essential difference, certainly to the way the matter was charged between the first instant at the Burger King and the other incidents over the telephone, so it may be more fruitful for you to address your submissions to that.

Templeton I understand. Have Your Honours received a memorandum that I prepared reviewing the matter late yesterday?

Blanchard J Yes, although it arrived only just before we came over here.

Templeton Yes I'm sorry for that Sir but what I attempted to do not in an exhaustive way was to summarise what appeared to be four issues as they emerged from the submissions as they had been filed and in light of Your Honour's comment before in the first issue that I identified there was the apparent deficiencies in the indictment given the fact that the charge the appellant was facing was said to be blackmail and plainly based on the question of threats, the concern that occurred to me was that when the way the case then presented itself in Court in terms of both what Her Honour said in her summary relying upon referring to the question of a conspiracy and secondly in the light of what the Crown now claimed was the liability of the appellant in terms of being a principal party and this is referred to in para.6 of the Crown's reply submissions referring that the applicant actually committed the offence and procured the threats, so she was in the Crown's eyes acting as it were in two capacities.

Tipping J Does it follow Mr Templeton that really the crime with charging the present appellant or applicant with two offences, one as a principle and the other as a secondary party, but comprised in one count?

Templeton Correct, and in my submission that must have been confusing to the jury no matter how it was outlined to them, and compounded I might add Sir by the fact that Her Honour then referred to in para.31 of her summation of the reference to a conspiracy, so a conspiracy occurred because that was the only basis in which hearsay evidence was allowed. So in my submission there must have been a very confusing picture painted to the jury by the time they left to retire in terms of exactly what it was or how it was that the applicant was indeed liable. Because we have on the one hand the face of the indictment as I attempted to say in my summary, she charged as a principle offender. We then have a situation where the questions they'll be asking themselves what's meant by the words "together with". The Crown in their submissions say well she was liable for having committed the offence and having procured the threats and then we have Her Honour saying and implying plainly that a conspiracy related to this particular position. So we have a situation where in my submission not only was that unfair to the applicant in preparation of her defence, because as it emerged through the trial these three capacities emerged. That wasn't plain from the face of the indictment from the word go. The second

real issue arising from that was what message that gave to the jury. Now it is I accept that the Crown were entitled to draft and file the general form of indictment which they did in this case. In my submission

Tipping J I have to signal Mr Templeton that I'm not at all sure about that so if the matter comes to us I would want that point explored. There is an element of duplicity in this case, the way it was presented to the jury which may or may not be appropriate or justified.

Templeton Yes Sir. Well in my attempt to research the problem over the last few days I found an old High Court of Australia authority in 1984 that suggested it was plainly preferable that when there are different capacities alleged there must be particulars given of the charge, but it seems to me there's no clear authority apart from s.323 of the Crimes Act which I mention in my reply submissions that says that in relation to an indictment, and I refer you to para.343, para.5 in my reply submissions – section 343 indicates that a party may be convicted upon a count charging that person having committed the charge or, as an alternative, or upon a count alleging how he became a party to it.

Tipping J But this is not all, this is and.

Templeton Correct, I agree Sir, and I say that's injustice in this particular case, particularly point 1 not letting the applicant know the nature of the case she was asked to meet and point 2 how it then presented itself to the jury.

Tipping J There is a case Mr Templeton called *Crossan* 1943 NZLR at 454 a divided Court of Appeal, 2 to 1 which I think would repay study.

Templeton Thank you Sir, I was not aware of it.

Tipping J And it's referred to in the text of *Adams* under a discussion of parties as I recall it, ss.3296 and 3301 of the Crimes Act by the relevant sections and they are not easy to reconcile and the Court of Appeal in *Crossan* was divided as to how they should be interpreted.

Templeton Thank you Sir, I was not aware of it and in my research I did not discover that particular case so if I summarise perhaps in this first issue, this first question, it is really a matter of if I understand Your Honours correctly, a situation where the true nature of the Crown case was not only obscured to the defence from the outset, it also was a question of whether it was appropriate and proper to charge the applicant together with others as Your Honours indicated before in terms whether it was a separate offence on its own, because certainly conspiracy is a separate offence in itself, quite apart from the blackmail charge. So in short the submission is that the indictment was deficient and unfair.

Blanchard J I suppose there's also a question also of what she was actually found by the jury to have done. Did she personally make a threat at Burger King, acting perhaps on her own, because there doesn't seem to be any evidence of participation by these other unknown people at that stage, or was the jury thinking that she was guilty of being a party to the threats that the other unknown equal made on a couple of other occasions?

Tipping J Or both?

Blanchard J Or both?

Templeton Or both, precisely.

Blanchard J Or a combination.

Templeton Precisely and indeed I think that's not helped by Her Honour's summation.

Tipping J On this point you might like to look at *Chignall.* Do you remember the *Plumley-Walker* case, whether it happened at Auckland or Taupo case Mr Templeton? *Chignall 1991 2 NZ 257*, particularly at 264 and 5 where there's a discussion about how a Judge should direct on unanimity issues in a situation like this and I have some concern about that aspect also, because the Judge didn't, she just gave a general unanimity direction as I recall it. She didn't say you've all got to be agreed on one or all agreed on the other, or all agreed on everything. She didn't bring it down beyond the general and that causes problems when you have two potential offences within the one count.

Templeton I'm grateful to Your Honour. Is there anything further Your Honours wish me to add or say further on this particular point?

Blanchard J I don't think so, no.

Templeton Sorry Sir?

Blanchard J I don't think so.

Templeton The second point identified in the memorandum which related to the question of the saneness of the threat, do I take it from Your Honours that you do not wish me to address you on that, because the issue there was that in the Court of Appeal at para.31, sorry para.32 of the Court of Appeal judgment, the Court there indicated that, and I just pause there by way of background before I go into that further. The Court may be aware in this particular case the saneness of the threats came from words used by the unknown others identifying and relying upon what the applicant had told them, and that's recorded at page, the case at page 43 which is contained in Her Honour's ruling number 2.

Tipping J The point here is the lack of independence of any testimony linking the saneness, but that's an evidentiary point isn't it Mr Templeton, rather than a point of principle. The question is whether or not the Judge directed the jury sufficiently as to be careful because the saneness if you like emanated in effect from the evidence of the complainant. Or is there more to it than that?

Templeton There's more to it than that Sir. The saneness issue here raised the question of whether the applicant participated in the common design and at the bottom of page 43 and top of page 44 the two examples Her Honour recorded referred to last bullet point on page 43 that "Jiang Qui told me if you don't pay I'm going to break your legs" and the top bullet point at page 44, the last three lines, "the caller said amongst other things, that Mr Wang had to pay money or else Jiang Qiu had paid him $10,000 to break Mr Wang's legs". Now the point is that her Honour used that evidence amongst two other items to be satisfied that the evidence on the balance of probabilities was sufficient to go to the jury that she had indeed participated in the common design. My simple point is going back to what His Honour Justice Blanchard said in *Morris* is that when it comes to the question of proving participation the evidence must be external or independent as Justice Tipping said. The difficulty however in this case is that in para.32 of the Court of Appeal judgment Justice Chambers said that the words weren't used in that sense at all. The others words were not being relied on for the truth because the last two lines of para.32 'the others words are what described as verbal acts insofar as the current inquiry is concerned and refers to an Australian decision. No my short point is that that is with the greatest respect an artificial distinction. Plainly the crucial evidence of participation namely relying upon the words of what the others had said about the applicant in her absence not only breaches the established principle but the Court of Appeal seemed to put a new gloss or twist on what and when you can use the others words and Justice Chambers seemed to rely or identify and what he said was the words were used as verbal acts, akin to physical acts. Now that seemed to be to me a new interesting interpretation of independent or external evidence.

Tipping J Would this point be captured by a ground reading, was the evidence sufficient to allow the operation of the co-conspirators rule? We're not talking about the legal ingredients of the rule, we're simply addressing here whether the evidence was sufficient in any event to allow it to operate. Would that capture your point?

Templeton Well I have been looking at the point and it really is a matter; of principle more than anything else because of the situation where if the classic definition of independence or external evidence which emanated from *Ahern* is given this new gloss as a matter of law as indicated by the Court of Appeal in its decision then it is a legal issue, quite apart from evidential issue. It's both.

Tipping J Well that question would assuming we were satisfied Mr Templeton that we wanted to go into this, that question would allow it wouldn't it, because you've in effect got to mesh whatever we say the relevant rule is with the sufficiency of the evidence? I'm just trying to get a formula that would capture your point without involving some quite unnecessary examination of aspects of the co-conspirators rule.

Templeton I understand

Tipping J Such as the level of certainty and that sort of thing.

Templeton Yes, yes. Well if I understand you correctly you consider that the issue, there's no need to go under the co-conspirators rule itself per se.

Tipping J Well my brother and I didn't think so but you've now addressed a particular aspect which we'll have to consider whether we ought to embark upon it. Previously I thought there was going to be some major debate about what you might call the evidential standard for the invocation of the rule. Here you focussed on a much narrower aspect of the rule.

Templeton Correct, because if this is correct the Crown case against the applicant falls over there and then because there is no evidence, no external evidence of participation. This is a crucial component of that evidence in terms of what the Judge relied upon because Her Honour in her address to the jury she refers to the saneness of the threats and in her assessment of participation she refers to and relies upon the saneness of the threats. My simple point is that she transgressed the fundamental important rules as noted in *Morris* and *Ahern* unless, unless there's a new gloss or spin to it as indicated by the Court of Appeal in para.32 of the subject decision.

Blanchard J Well alright I think we can see the point that you're deriving from that.

Templeton Returning then to what I attempted to identify as the third issue, it comes back to this question of what is the relevant legal tests? Whether it is the balance of probabilities, whether it is the reasonable evidence test, and if indeed it is the latter as I've mentioned in my reply submissions the decisions of *Walters* in 1989, in *Crowe* and *Harris,* three subsequent Court of Appeal decisions in the 90's all refer to the question of safeness in terms of assessing whether the evidence was sufficiently safe to go to the jury and as I've attempted to explain in the reply submissions, the difference between that and the balance of probabilities all being more likely than not is quite significant in this case in my submission because the evidence relied upon going back to the safeness test and the other two items that the Judge relied upon, the trial Judge relied upon in this case, would not satisfy in my submission the safeness element. Now the difficulty is that is noted by the Court of Appeal in the subject judgment is Justice Chambers referred to his

own decision in para.24 of the judgment *Mahutoto*, if I've pronounced that correctly, where, it's not in the bundle, but it was a High Court decision reported in the law reports, it was in fact the same year as *Morris* where he analysed *Humphries, Buckton, Harris* and *Crow* and indicated that Justices Blanchard and Morris had not had cited to him his decision in *Mahutoto* which showed plainly in his view, that is Justice Chambers' view, the proponents, and I'm using his words here, 'the proponents of Court of Appeal authority favoured the reason evidence test' whereas of course Morris referred to the balance of probabilities test. Indeed the only authorities that supported the balance of probabilities test was perceived to be the majority in *Buckton* and of even *Morris* itself against that

Blanchard J To be fair about *Morris* it may as was said in that judgment, it made no difference in the particular case, so it's not a definitive ruling on that point.

Templeton I accept that, except that we have a situation where as illustrated in this case where in my submission there is a difference as to which test it is and how you apply it and if it is the reasonable evidence test and indeed Justice Cooke, as he then was, in *Buckton* and Justice Somers both relied on the fact of the reasonable evidence being safe and when you apply that to the three items in the subject trial Judge's analysis, they don't need the test at all because just to refresh your memory they relied upon the Burger King incident and I emphasize this is in support of whether she had participated. The preliminary question of whether she had participated in a common design and

Tipping J Sorry, just pause Mr Templeton.

Judges confer

Blanchard J We could probably by amending a few words in the question that Justice Tipping had suggested to deal with the second point encompass this point.

Templeton No it's a separate point because

Blanchard J Well they are separate but I'm just thinking about the possibility of wording grounds.

Tipping J You want as I read or understand you Mr Templeton, you want a ground whether incorporated in another or on its own effectively is the reasonable evidence test appropriate for the purposes of the co-conspirator as well, because you're presumably wanting to argue that it should be balance of probability, is that

Templeton No not at all. This is my point, the balance of probabilities threshold I believe is lower not higher than the reasonable evidence test. The reasonable evidence test is if it means that the evidence has to be safe

Tipping J Well it can't mean that.

Templeton No, no sorry I've got it the other way around. That is the preferred test, not the balance of probability test.

Tipping J You want the balance of probabilities test do you because you say it implies a lesser onus?

Templeton No, no I got that around the wrong way. The reasonable evidence test is the preferred test.

Blanchard J Well that's the one the Court of Appeal adopted here.

Tipping J If that's the one you want you don't need to attack the Court of Appeal, because they adopted it.

Templeton Except that there's no definition of what it means. As I said before the decisions of Justice Cooke and Justice Somers in *Buckton* and indeed the subsequent Court of Appeal decisions in *Crowe* and *Harris*

Blanchard J Wouldn't it mean the same as it means in Australia and England, which is what the Court of Appeal is saying?

Templeton Yes, except that there is not the essential element, I mean Their Honours in the previous Court of Appeal decisions translate and expressly use the word 'safe' as being what is meant by that test. If that's true that is of relevance to the evidence in this particular case.

Blanchard J What's the test in England then?

Templeton I think it's the **(inaudible)** test as a decision called *Jones* out of memory.

Blanchard J Yes but what do they say that means?

Templeton From memory they don't use the word 'safe', and neither does *Ahern*. *Ahern* actually avoids that by referring to say there's no precise meaning needed to be given to the expression 'reasonable evidence'.

Blanchard J Isn't that probably the position?

Templeton Well it's a New Zealand position starting with *Justices Cooke and Buckton* and *Justice Somers and Buckton* that use the expression that it has to be safe. That then is followed on both in *Crowe* and in *Paris*. So we have four judgments adopting it and in context of the reasonable evidence test, against we have the other side of the bargain as it were, the balance of probabilities test.

Blanchard J So are you saying it's not enough for the Court of Appeal to have said the test in this country should be the reasonable evidence test as in Australia and England?

Templeton If it means that the evidence has to be safe, which is the criteria that Judges use in order to be accepted, and I'm saying it's not been applied in this particular case.

Tipping J I think there's a confusion Mr Templeton. The evidence doesn't have to be safe in itself, it has to be such that it's reasonable and therefore safe to leave the issue to the jury.

Templeton Correct, I accept that.

Tipping J So I think this suggestion of reasonable evidence means safe evidence if people shouldn't interpret it that way and I don't think one would be

Templeton No I accept that Sir, I accept that, but I'm saying if translated to the circumstances of this particular, if one applied that approach, and of course the trial Judge in this case applied the balance of probabilities test and

Tipping J That's why I said to you at the start, the issue is it is safe to leave this to the jury provided the direction is appropriate, that caution is required because it's effectively coming out of the same mouth. That's where I think the focus of this appeal should be directed. Did the Judge sufficiently caution the jury that the complainant couldn't in effect pull himself up by his own bootstraps? There I think the appellant may have a stronger potential argument than asking us to look at this thing in the abstract in the sense that the Court of Appeal has got the test wrong, or hasn't elaborated it enough. Would you comfortable with that? Because frankly I don't think we need to go beyond reasonable evidence as in Australia and England as my brother has said. Any issue of safety demonstrates a lack of appreciation of the context of the word 'safe'.

Templeton I accept that except in this particular appeal as I said before the Judge applied the balance of probability to test when analyzing the three items of evidence at the preliminary stage before the evidence went to the jury and I'm saying at that point if the correct approach had been adopted then the matter wouldn't have gone to the jury. The second point as Your Honour has raised is then when it came to the summation that raises a different question again.

Blanchard J Well alright, we've probably heard enough on that point. Have you got one other point?

Templeton Yes, then we come to the fourth point noted on that memorandum that I sent late yesterday which has been signaled again in the reply submission which was expressly answering the Court's second to last

question, namely whether the Judge's direction was adequate. I had highlighted in my response which may not have addressed the issue as the Court saw it but in relation to what was said in *R and Walters*, by the President in that case, namely that when the evidence in the co-conspirators case the evidence is essentially that of the co-conspirators of what they allegedly said about the applicant or appellant, that a direction was needed that was dangerous and unfair as *Justice Cooke* put it, that the jury should be warned that it was dangerous and unfair to rely on that evidence, or merely to rely on that evidence unless there was some other corroborative evidence. That warning was not given in this particular case. There is also a second issue as to whether Her Honour the trial Judge in this case should have also directed the jury. The was an absence of corroborative evidence given the particular circumstances where there were co-offenders but those co-offenders were unknown and yet the Crown and Her Honour directed the jury to have regard to their evidence even though it was technically hearsay evidence relying of course that it was acceptable when the crime of conspiracy arises of course which was not the subject charge of this particular case. So we have on that latter point a very confused direction given to the jury, quite apart from the absence of warning that it was dangerous and unfair to rely upon it.

Tipping J Is your point (b) under fourth supported by the proposition that although it was not mandatory an accomplice or a warning like an accomplice warning should have been given because these others were no less than accomplices if they were doing it on her behalf.

Templeton Yes, what it is can be more specific than that I think if *Walters* is the guideline authority here that the phrase 'dangerous and unfair' to rely upon it, I'm not sure the precise language of what the accomplice warning is these days, but if it goes as far as that then certainly that will cover it. The question is if in a co-conspirator's case and in a situation where there's a likelihood that the jury would rely upon the evidence of the co-conspirators, then *Walters* says that that requires that particular warning of being dangerous and unfair. If on the other hand we're making an analogy straight to an accomplice case, and indeed on the circumstances of this particular charge do warrant that analogy, then I accept that that type of warning could be given, provided it goes as far or similar to what was indicated in *Walters*.

Tipping J Yes but I'm sorry I didn't make myself clear. The rationale for the giving of the sort of warning you say wasn't given is similar to that where you have an accomplice?

Templeton Yes Sir.

Tipping J Yes. I've got one more point Mr Templeton that you might or might not have implicitly covered already. I have to say that I have some anxiety, at least prima facie anxiety on the premise that the Judge in effect when telling the jury why the evidence was admitted, which was

quite unnecessary, the jury didn't have to be told why, they just had to be told it was there and what proper use they could make of it.

Templeton Correct.

Tipping J I read her as almost saying to the jury that there was a conspiracy.

Templeton I accept that entirely and I've made that point

Tipping J I'm sorry I must have missed it.

Templeton In my late memorandum from last night I mention that. That's at para.1(b) I think.

Tipping J No, that's alright

Templeton Yes, yes, I've touched upon it – yes Sir?

Tipping J We seem to be getting quite a lot of Judges now telling juries why evidence is being admitted which can lead to trouble and I just wonder whether this might not be one of those cases.

Templeton Yes, yes, well I couldn't agree more.

Tipping J Alright thank you.

Templeton Thank you.

Blanchard J Yes thank you Mr Templeton.

Templeton Thank you.

Blanchard J Miss Markham.

Markham Your Honours if I can deal with the issue of party liability first. The Crown case was in essence that this was an ongoing campaign of blackmail that was committed over a period of approximately six weeks and orchestrated by the applicant, so in a sense it was a continuing threat of harm which manifested itself in a variety of forms, both implicit and explicit, and designed to extort payment of the alleged debt from the complainant, so with respect to my friend, it's not a case where the Crown alleged a number of discrete offences. Taken in isolation many or some of the phone calls may well have appeared quite innocuous. It was the overall context that gave them the flavour for which the Crown contended and it was in my submission a question of fact for the jury whether in light of all of that evidence the applicant's conduct amounted to a threat for the purposes of s.327, and it's the nature of the offence of blackmail or extortion in the Crown's submission that it is a continuing offence. In this case it continued up

until the point when the applicant was arrested and accepted the cash and so on.

Tipping J You mean a threat's a threat until it's withdrawn. It's getting rather sort of contractual isn't it? They were discrete threats here.

Markham There were a series of threats yes Sir but the manner in which the Crown case was presented was they were evidence of a continuing threat by the applicant sourced to the Burger King incident and it was a question for the jury whether in light of all of that evidence the element of the offence was satisfied.

Tipping J What do you mean by 'sourced' to the Burger King? There was a clear threat if the Crown's case was accepted at Burger King. There were clear further threats made on her behalf by unknown people down the line.

Markham Well indeed, there were indeed separate threats but they were part of the same ongoing crime.

Tipping J Well we don't say there was an ongoing exercise of sexual abuse do we? We charge where discrete offending can be identified the proper course is to charge it as discrete offending, unless you are into the truly representative catergory for sexual abuse.

Markham With respect Sir I think that the analogy with sexual offending is slightly different because there you are able to separate out individual acts and the mens rea that accompanied those acts. When you're dealing with the crime of blackmailer/extortion the purpose is the same throughout. The victim is the same throughout. The crime is completed when the extortion ends.

Tipping J The actus reus is surely the threat.

Markham Indeed but the threat can take a variety of forms and it's a question for the jury whether that conduct as a whole constitutes a threat for the purposes of that section. Whilst it may be possible in some cases to divide up the actus reus, and there is a question of degree involved here. In my submission the Crown approach in this case was a pragmatic one and it certainly did give the accused notice of the manner in which the Crown case was presented.

Tipping J But her capacity shifted between Burger King and she was the primary and only offender in Burger King. When it came to the unknown people on the telephone she was either a joint principal or a procurer. Now the idea of having a continuing sequence of offending where your capacity shifts is a novel one to me. Surely what was to stop the Crown from laying two counts – one when she was doing it out of her own mouth at Burger King and others through the mouth of the others elsewhere?

Markham Well there may be an element of discretion involved

Tipping J It's not discretion. Under the authorities the Crown has certain duties.

Markham Well under s.329(6) of the Crimes Act it is permitted to include discrete acts of conduct in the one count provided they're part of a single transaction. The Crown submission is that in this case these ongoing threats over a period of approximately six weeks constitute a single transaction for the purposes of that rule.

Tipping J That's how you're going to defend it if leave is granted is it and you say it's so clear that we shouldn't give leave on the point that this is a single transaction.

Markham I'm submitting that it was legitimate for the Crown to include a single count in this instance because yes it was an ongoing threat, part of a single transaction. The threats were all related to each other and referenced to each other and whilst certainly you can point to individual threats and whilst certainly the nature of the accused's liability did change, that doesn't detract from the submission that this was appropriately charged as a single count. It's similar in a sense I suppose to a homicide where you have a number of different acts of assault that lead to the death

Tipping J Oh yes, the *Downs* case. Yes the number of blows all contributing to death, yes.

Blanchard J Miss Markham I can see the force of the argument you're making and it's an argument that might in the end prevail but this is a very difficult area of the criminal law. I would have thought that the fact that we are having this debate on which there do seem to be two sides to the argument, generally two sides, demonstrates that it is a matter which would seem to fulfil the criteria that we're now looking at.

Markham And Your Honour is referring to the substantial miscarriage of justice ground or to the

Blanchard J No the point of general or public importance.

Markham Which would be?

Blanchard J I know it's fact-related but these things always are.

Tipping J *Crossan* has been a difficult case from the day it was decided and I would have thought that this was an ideal opportunity for this Court to review *Crossan* where the Court was divided on an issue that comes pretty close to the heart of some of this and tidy up the law.

Markham Well that is a matter for Your Honours, yes.

Tipping J I'm just putting that to you Miss Markham, that quite frankly when you have a divided Court of Appeal, albeit a long time ago, and commentators saying that it's causing, or has caused, trouble and uncertainty, prima facie least it's a case for the engagement of this Court.

Markham Well the Crown's response to that would be that this is very much facts specific. It turns on the circumstances of this case and as such there is a question mark as to whether it would be elevated to the level of a matter of public or general importance and on the second aspect of the section 13 test, the focus there must be on the evidence at trial and on the summing up to the jury. The evidence was fairly straightforward. All of the evidence of the threats came from the complainant. The sole issue in a sense at trial was that complainant's credibility. Whether the threats that he alleged were made were in fact made.

Blanchard J Certainly it cased a great caution though, given the source of all that evidence.

Markham Well it's different in a sense from other cases involving accomplices where the issue there is the reliability of what the accomplice has said.

Blanchard J Here the issue is did they say it.

Markham Did they say it, and that was the complainant's reliability and the complainant was cross-examined and had those issues explored fully.

Tipping J Not only was the issue 'did they say it' but was what they were saying correct. That's why it became hearsay and everyone got horribly tangled up in the trial Court on hearsay.

Markham Well much of it wasn't hearsay at all.

Blanchard J I should imagine that the complainant wouldn't have recounted it if he didn't think it was correct. I would have thought the major issue is what was actually said.

Tipping J But didn't the people say to the complainant that it was the accused who had asked them to or got them to make these threats. The sameness of the threats certainly have a great significance there from an evidentiary point of view but you still had to decide (a) whether the complainant was correctly recounting what the people said and (b) what the people said in that respect was correct.

Markham But I think with the jury with respect Sir was directed essentially in those terms. They needed to be satisfied (a) that the threats were made and (b) that they were

Tipping J The Judge in effect told them that there was a conspiracy and that's why she was letting the evidence in. Surely the jury would say if the Judge thinks there's a conspiracy then of course they were doing it on her behalf and were making these threats as part of a sort of common design or whatever.

Markham Well the Crown submission would be that the effect of those passages in the summing up was not to direct that a conspiracy existed. The direction if anything on this area was quite favourable to the accused because it indicated that before the jury could take into account the evidence of the anonymous callers, it had to first be satisfied that there was a conspiracy or that they were acting in concert beyond reasonable doubt. Whereas under the co-conspirator's rule, once the evidence was in the jury could have regard to it to determine that very question, so the very fact in my submission that the Judge essentially directed that the jury had to be satisfied beyond reasonable doubt that they were acting in concert negates the concern that somehow a conspiracy was presupposed in the summing up.

Tipping J What about this question of unanimity? Maybe I'm on a wild goose-chase here Miss Markham but you say it was all one transaction, so all the individual incidents were evidence of a single transaction, therefore all you had to find was one incident and extrapolate from that this high-level single transaction thesis that it wasn't individual offending within the same count.

Markham Well interestingly the Judge took a slightly different approach in the summing up and Her Honour directed the jury that she did separate out the actus reus and said look at the Burger King incident first. Are; you satisfied that that took place? If you are then the element of the offence is satisfied and it's only if you're not satisfied that the Burger King event happened that you then go on to look at the evidence of the anonymous callers. So that approach which was arguably again favourable to the accused in dividing up the actus reus in that manner, that direction when coupled with the standard unanimity direction in my submission it follows that the jury could only have arrived where they did through a unanimous process.

Tipping J Well what if some of them were satisfied at Burger King and they said 'good, we can now go to sleep' and the others said 'we're not satisfied at Burger King but oh good we are satisfied about the anonymous ones so we're all satisfied'.

Blanchard J Is it your argument that the Judge's direction told them that they couldn't be satisfied on the basis of the subsequent incidents alone, that they could only be satisfied either by the Burger King incident or if they weren't satisfied by that, by combination of the later incidents with the Burger King incident?

Markham It's difficult to answer that Sir. I read that aspect of the summing up as more an either/or situation, but remembering that

Blanchard J Well if it's either/or then six members of the jury could have convicted on the basis of the Burger King incident and six members of the jury on the basis of the subsequent incidents.

Markham But that's presupposing that the jury ignored the unanimity direction.

Tipping J But they're all unanimous for guilty.

Markham The manner in which that direction was given in my submission would have made it clear that the jury had to be satisfied that the Burger King event took place, or if they weren't so satisfied they then moved on to look at the anonymous callers' evidence and that's the jury as a whole, not individual members of it.

Tipping J Oh I think with respect that's asking a bit much. I think this is something we should have a look at. It may well be that it's alright, but frankly this is the sort of thing, I mean it caused trouble in the *Plumley-Walker* case and in my experience at trial it tended to cause trouble and you have to be very careful as to directing on the reasoning process in this sort of situation and I'm not wholly convinced at the moment that the trial Judge did it enough.

Blanchard J I should add for members of counsel that for what it's worth, as I think the Chief Justice would put it. She drew our attention, because she was supposed to be sitting on this leave application this morning and her flight didn't get into Wellington. She drew attention to a judgment of the Court of Appeal in the *Queen and Dean* – I haven't got the citation in front of me but it's around about 2000 or 2001. It was a case involving particulars as to misconduct or abusive, not sexual abuse, but mistreating children – *2001, Volume 2.*

Markham That's Mead, I thought that was the *Queen and Mead.*

Blanchard J Oh *Mead*, sorry, and the Court was split with the Chief Justice dissenting.

Markham Dissenting, yes. The reason that the issue of unanimity became relevant in *Mead* though was because there was a specific direction that the jury did not have to be unanimous as to the particular facts relied upon to constitute the element. Now there was no such direction in this case.

Blanchard J But all I'm highlighting is that this is again a difficult area.

Tipping J And the question is whether the Judge went far enough with what you might call the 'stand of unanimity direction' which I think she gave no more Miss Markham, and forgive me if I'm wrong, no more than what

you might call a standard unanimity direction. She didn't go on an elaborate it for the purposes of this case?

Markham I don't believe so Sir but there is one matter which I haven't gotten to the bottom of and that is there is a reference in the summing up to providing the jury with a list of questions to help them in their deliberations and that hasn't found it's way anywhere into the Crown file so there may be something on the Court file that is of some assistance there. I simply highlight that.

Tipping J Yes, we'd need to see that

Markham Well the issues may be complex Sir but the Crown submission is that in the context of the trial the evidence wasn't particularly complex and all of this evidence came from the one complainant and it is in my submission unrealistic to suppose that the jury believed the complainant about the Burger King incident but didn't in relation to the anonymous threats or vice-versa, that's particularly when the key connection if you like between the two sets of threats that the reference to the breaking of the legs was sourced to the Burger King incident. But unless there's anything else I can assist Your Honours with?

Blanchard J Thank you Miss Markham, that's been very helpful. Anything in response Mr Templeton?

Templeton Just two quick things Sir. In reply to the Crown's suggestion that there was a continuity issue here I just draw the Court's attention to para.28 of Her Honours summing up which seemed to create a real doubt. It said para 28, "If you are satisfied that the accused did make the threat that was described at the Burger King. This element of charge will be proven regardless of what you decide in relation to the other identified callers who have said to have made threats". Now where does that leave the jury? Is that suggesting that if you accepted the Burger King threat and disregarded the others then the charge is proven? Where's the reference to the continuity in that direction? The second point Sir is just a housekeeping one. I didn't catch the name of the Chief Justice's case – what it Mean or Dean.

Blanchard J *Mead*, I got it wrong.

Tipping J *M E A D*, about 2001.

Templeton Thank you Sir. Thank you, much appreciated.

Blanchard J Thank you Mr Templeton. We'll take time to consider our decision and the Court will now adjourn.

10.53 am Court adjourned