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

SC102/2018
[2019] NZSC Trans 6

JESSE-JAMES WINTER
Appellant

v

THE QUEEN
Respondent

Hearing: 16 May 2019

Coram: Winkelmann CJ
O'Regan J
Ellen France J
Williams J
Arnold J

Appearances: A L Bailey and E Huda for the Appellant
C A Brook and Z A Fuhr for the Respondent

CRIMINAL APPEAL

MR BAILEY:
May it please the Court, counsel's name is Bailey. I appear for the appellant along with Mr Huda.

WINKELMANN CJ:

Mr Baily, Mr Huda.

MS BROOK:

Tēnā koutou e ngā Kaiwhakawā. Ko Ms Brook māua ko Ms Fuhr e tū nei mō te Karauna.

WINKELMANN CJ:

Tēnā kōrua. Now Mr Bailey, I understand Mr Huda is going to address us first, is that correct?

MR BAILEY:

Yes, as long as you're happy for ground 1 as set out in the submissions to be dealt with first.

WINKELMANN CJ:

Yes, we are.

MR HUDA:

May it please the Court, detailed written submissions have been filed by Mr Bailey and by my learned friend, Ms Brook. My aim is to avoid repetition and I've made a few notes reflecting upon what Mr Bailey has said and the Crown. I wish to confine my submissions to those points unless Your Honour has any questions.

It will be helpful to start by agreeing or pointing out certain things that we do agree and the first is I will respectfully adopt my learned friend's factual summarisation of a few matters. In particular, it is accepted as correct and well written paragraphs 9 to 11 of the written submissions of the Crown, and it will provide a convenient platform to speak to the admissibility of the text message point. The pertinent point that paragraph 10, starting from 10.1 to 10.12 makes, is some of the nature of the threats that were made to the intended victim and it also records at 10.9 the key text message that is at issue, the, what I will refer to as shorthand, the arming up text message.

Now the arming up text message was sent at 7.13 pm and in that context with the last bit of factual matter for the first ground of appeal I would also ask for Your Honour or draw to Your Honour's attention another text message which is not in the submissions. It can be found in the telco data at page 401.0034, or perhaps an easier reference is text number 496 in the telco data which as at page 11 of the text booklet.

WINKELMANN CJ:
So it's 401.0034?

MR HUDA:
Correct.

WINKELMANN CJ:
Text number?

MR HUDA:
496.

WINKELMANN CJ:
Now the purpose of pointing out that text message, because that's where one sees Mr Winter and an inference can be drawn as to his state of mind, of course, that he is saying he did not know things were getting that bad. Now that's at 8.19, so 19 past eight, and obviously the arming up text message was sent at 7.13.

O'REGAN J:
But who is this message sent to, and what things are getting bad? Do we know what he's talking about?

MR HUDA:
William Reaich was not a part, was not a witness in the trial, and those text messages relate to him, if all the texts are read subsequently and just the one

before that, relate to him trying to organise a vehicle to get from where he is to his stepsister, Ms McGrath's, home. So he wasn't at her house. He was just trying to organise a ride to get to her house and there will be some communication about where he says, "I going in for mish," which is text 512, he is saying that to his girlfriend and before that he is trying to organise transportation.

O'REGAN J:
But he says to Mr Reaich, "Didn't know things get that bad." Well, what were the things that had got bad?

MR HUDA:
Well, the only inference available is the conversation earlier on in relation to a threat to Ms McGrath, who is his stepsister, son, or at least that's how they have interpreted or she interpret –

WILLIAMS J:
Presumably it's the relationship between Hatcher and McGrath had got that bad, isn't that what he's saying?

MR HUDA:
That's right. So the nature of the threats and the arguments going back and forth, because it's been going on since midday, or roughly around midday.

O'REGAN J:
But why would he be saying that to Mr Reaich?

MR HUDA:
For the purposes of organising transport to her house. So he's saying that to her to organise the other car, and if we look subsequently there is a suggestion of, right at the bottom of the message, at 543, the only inference we drew during the trial is that all of these parties knew each other obviously in some context and there's talk about a white WRX carload.

WINKELMANN CJ:

Your point is he's just reflecting in the course of organising this, he's just saying in a kind of a gossipy kind of way to this man, "Didn't know things were getting that bad"?

MR HUDA:

That's right.

ELLEN FRANCE J:

I'm not quite sure how it helps you. I had seen that, read that series as just a series leading to him getting the ride. I didn't think it helped you in terms of the particular issue we're dealing with.

MR HUDA:

Sure. The reason and I was pointing that out is simply because there are – is to make the pertinent submission that factually, not legally, factually, there were two distinct objects of this joint enterprise. One involved the use of a knife and one involved assault of some serious nature absent a weapon.

O'REGAN J:

Why is this relevant to that?

MR HUDA:

Well, the reason why it's relevant, Sir, is because if the joint enterprise is accepted that it's always involved weapons and –

O'REGAN J:

Well, it doesn't have to always involve weapons, just has to involve weapons when it happens.

MR HUDA:

That's right and the point being when Mr Winter joins the enterprise, the enterprise already had a certain character and that can be accepted because

there were threats made of – there's at least a number of threats made to the actual, sorry, to the intended victim.

WINKELMANN CJ:
Such as slitting throat, et cetera?

MR HUDA:
Slitting the throat. So that's there and we've got the knives there, but the two what I may call latter parties, Mr Winter and Mr Kumar, are joining on what basis? To beat this guy up or beat this person or to use the knife or not to use the knife? That's where the knowledge of the knife becomes a critical issue.

WINKELMANN CJ:
Are you adding this text messages to the other one between Mr Williams and Mr – isn't it Mr Winter and Mr Hanson, where Mr Winter says something to the effect he's all talk.

MR HUDA:
That's right.

WINKELMANN CJ:
So it's showing he's not really, are you saying he's not, at this point in time, committed to anything or what?

MR HUDA:
I'm saying there is a hesitation on his part, at the very least to any form of commitment.

ELLEN FRANCE J:
I'm just struggling to see how that's relevant to the admissibility of the arming up text.

MR HUDA:
Merely to colour Mr Winter's frame of mind as to what he is getting into, because if he knew, if there was, for example, proof of a fact that Mr Winter

knew that weapons were involved, then the arming up text argument has to fall away because –

ELLEN FRANCE J:

The Judge says it's not relevant, the text messages is not relevant for the purpose of his knowledge of the knife?

MR HUDA:

That's right, but assuming that is correct, and assuming this Court accepts that, so the next point will be –

O'REGAN J:

Well it's not being challenged so of course we accept it.

MR HUDA:

Certainly. So –

WINKELMANN CJ:

So the point is, it's accepted, the case didn't proceed upon the basis that he was a party to the joint enterprise at the time that that, that the text message which we're concerned with, was sent, so it was proceeded on the basis at trial that that was before he joined the joint venture.

MR HUDA:

That's right.

WINKELMANN CJ:

Okay. So isn't your argument that it wasn't made in furtherance of the joint venture?

MR HUDA:

That's right, so that's the heart of the argument, as in whether that particular text message was made in furtherance and –

WINKELMANN CJ:

I also wondered whether there was another issue, if you took out, if it couldn't be proved that he knew about the knife, what was its probative value against him?

MR HUDA:

That's right, it has to form, come down under the section 8 calculus if probative value and unfair prejudice.

WINKELMANN CJ:

So can you just, what Justice France is asking you is how this point you're taking us to at the moment relates to that first point which is how does it go to this question about whether or not the text message was in furtherance of the joint enterprise.

MR HUDA:

It directly it does not. I was merely pointing that under the factual heading to show the transient nature of what had happened throughout the day to add to Ms Brook's summary, which I have accepted as correct at paragraph 10, that throughout the day things have changed, there were threats being made. There was talk about, by the principal offender to his girlfriend, "Don't judge me if I have a black eye," nobody would draw an inference of a weapon from that, traditionally that sort of language is used in a punch up, obviously, then. So I was just merely, from the appellant's perspective completing the factual scenario.

WILLIAMS J:

So is your point that in that exchange with Reaich, he doesn't mention a weapon, is that all you're trying to get across?

MR HUDA:

That's right.

WILLIAMS J:
Okay.

MR HUDA:
So the next point coming down to the more pertinent substantive question is how, or whether this text message was sent in furtherance. In terms of the furtherance argument there are two points that has been advanced by Mr Bailey in his written submissions and if I can, I'll call it the narrower point and the broader point. If I may speak to the narrower point first and the broader point next. The narrow point is the simple question of looking at the statutory text and asking ourselves whether it was sent in furtherance of the joint enterprise. The submissions on that point is fairly simple. It was sent to a third party, who was not part of the joint enterprise. That third party was his then partner, and as was accepted by the trial Judge it was sent, well before he became a part of said enterprise.

WILLIAMS J:
I note the Crown argues that the Judge may have been overly conservative in that regard and it was possible to argue that he joined the enterprise earlier, what do you say to that?

MR HUDA:
Well how much earlier would have to be dictated by reference to some sort of objective evidence, and the Crown does say that in a footnote, that they could have left it to the jury to decide, but we've got fairly reliable telecommunication data and given that we have that data we ought to look at that and then decide on an objective basis because the Crown submission, which is at their footnote 40, was the evidence did leave open the possibility for example that there was a five minute telephone conversation in which the jury could have drawn an inference of the knowledge of the intended weapon. Now there were a number of phone calls –

WILLIAMS J:
That's the one with Ms Hatcher…

MR HUDA:

That's right.

WINKELMANN CJ:

Well knowledge of the intended weapon or knowledge of the intention to attack?

MR HUDA:

Knowledge of the intention – the way the Crown put it was, "Acquired knowledge of the intended use of a knife (or knives)."

WINKELMANN CJ:

That's not really the point though, is it?

MR HUDA:

So in my submission that is not a safe inference to be drawn, simply because they're talking about a number of things.

WINKELMANN CJ:

The factual scenario was that she was saying that she thought she was going to be attacked. That he had a duplicate key to her back door and he'd threatened her son, the victim had threatened – not the victim –

MR HUDA:

The intended victim.

WINKELMANN CJ:

Yes, the intended victim had threatened her son, and therefore there's an obvious inference that Mr Winter might have been going around just for his step-sister and your point is there's no evidence to show, from this material, prior to his arrival, or prior to his departure on this trip, that he was part of this plan to attack?

MR HUDA:

Involving a knife?

WINKELMANN CJ:

Mmm.

MR HUDA:

So that's why that –

WINKELMANN CJ:

Well the Crown said it didn't really need to show he knew there was a knife, didn't it, I think.

MR HUDA:

Well the knife point at the case comes from the knife block that was in what is an odd place for a knife block to be found, right smack bang in the middle of the couch, so the argument, or the cross-examination and Mr Bailey's closing address centred around whether he had enough time to get inside the house, because if he had got inside the house it was there to be seen, right in front of your face, somewhere where ordinarily a knife block would not be found, on the couch, with knives missing. So if you can get him inside the house the strength of the inference of the conclusion that he knew about the knife has to go up significantly in favour of the Crown.

WINKELMANN CJ:

Okay so we have just dealt with, I've sort of gone off a side-shoot that the Crown had submitted it was possible that he joined, Crown, joint enterprise earlier, and you've said no there's really no evidential basis in which you could possibly have safely inferred that. So if you proceed on the basis that it isn't, that the text message was sent before the joint enterprise was performed, we know from *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 that that can still be admissible to show the nature of the joint venture that he is joining, if it is sent in furtherance of the joint enterprise. So the Crown says, you could say it's sent in furtherance of the joint enterprise because he's sending a text to his partner making arrangements that he's not going to be home at that time because he's off on this mission. What do you say to that?

MR HUDA:

Sure, the response is truly the proper scope of this concept of furtherance of a joint enterprise. In my submission you have to somehow further enterprise. This did not, him saying to his partner, who was not a party to any criminal enterprise, I'm going to be home late, or this is what I'm doing, it's stretching it in a very broad way. The scope will significantly increase if that can be said in furtherance of the joint enterprise in a highly indirect way. It's –

O'REGAN J:

The argument is that if it's part of the arrangements for establishing the joint venture, that it's in furtherance of it, and the Crown says it is part of the arrangements because he's explaining to his girlfriend why he won't be there.

MR HUDA:

Yes, I understand that, Sir, and my question is whether that, whether the concept of furthering the joint enterprise should be given such a broad meaning. Certain concepts in the evidence law are given broad meanings like that. For example, the one that comes off mind is section 44, the sexual experience provision. It talks about sexual experience directly or indirectly in relation to the complainant with a person other than the defendant, so the Courts have traditionally, and in this Court in *Best v R* [2017] 1 NZLR 186 have given a very broad meaning which fits with the purpose of the section and so forth. The question really comes here is should it be given that scope of a meaning if it –

WINKELMANN CJ:

And why do you say not? What's wrong with this? Why does it go beyond the bounds?

MR HUDA:

It did not assist in any way the actual criminal enterprise at all.

WINKELMANN CJ:

It was not in any way a communication to really prosecute it, is that your point?

MR HUDA:

Yes, further it in the actual sense of the enterprise. It was him dealing with his personal…

ELLEN FRANCE J:

Well, the point that's made against you I think by the Crown is that you have to – the "in furtherance" has been held to include evidence showing the enterprise in operation and on your approach if someone joins a conspiracy late in the piece how does the Crown ever prove the scope or existence of the conspiracy?

MR HUDA:

Well, that was the point, that is perhaps the pivotal question and there is two answers to that. The first, and this was what I said about the broad point in the submission and the narrower point, so just to overlap with the broader point is that as Mr Bailey said in his submissions that everything has to be looked at from the point in time this particular defendant, or co-conspirator, joins the conspiracy because that is what he is charged with. If you put in text messages that are going before the time and things morph over time as they invariably do, then this background will always be able to colour his later conduct when he was not part of that.

Now as Mr Bailey used the term, if one uses the policy argument of look, if you use, if you join a criminal enterprise then you run the risk of everything that's gone before you. If that's the policy argument then the section 22 argument must fall away because you're saying, "Does it matter?" As long as you join a criminal enterprise, everything before that, and yes, we'll make some adjustments as to knowledge because it's a subjective requirement, but everything before that to prove the origin and nature and character will come in.

WINKELMANN CJ:

Well, that's the second point. So the first point is whether or not it's in furtherance and now we've moved on to the second point. Is that your second argument?

MR HUDA:

That's right and –

WINKELMANN CJ:

Yes, so you're saying –

ELLEN FRANCE J:

Well…

ARNOLD J:

Just before we move off the furtherance point, in your submission you cite that extract from *Kayrouz v R* [2014] NZCA 139. I may not be pronouncing it correctly but in page 12 of your submission the contrast is drawn there between conduct and furtherance of the plan or the conspiracy and statements which are incidental even though they refer to it, and for myself I find that quite a difficult line to understand. Has there been – I've read quite a number of these cases but not all of them, but where's the best discussion of what is incidental to a conspiracy but nevertheless mentions it?

MR HUDA:

Well, the best case that I've been able to find and read about it is the Australian case of *R v Ousley* (1996) 87 A Crim R 326. O-U-S-L-E-Y. I'm not quite sure if I'm pronouncing it right. And there they talk about an incidental matter about what they describe as ramblings to a third party.

WILLIAMS J:

Ramblings, did you say?

MR HUDA:

That's right, Sir. So that, look, I think there was a meth operation and they said, look, obviously operations of that type would be done in a need to know basis. That he was saying something to a third party is neither here nor there. It's incidental to it.

ARNOLD J:

Yes, I thought that, I mean that was a pretty extreme example, I thought.

MR HUDA:

That's right, but the narrower we get, the closer to the line we get, I think that's where it may have resulted in the Court of Appeal saying some Judges would have done this whereas other Judges would not have because it's on this…

ARNOLD J:

I suppose the point is that, you know, when you look at a conspiracy and agreement to do something, there are going to be a lot of things that go to the heart of what you're doing, who is going to do what and how are we going to do it and all the rest of it, and then there will be a number of arrangements that are sort of consequential. One of them is, "By the way, I'm going to be home late for dinner," that sort of thing, and as I think Justice O'Regan has put to you, you can see those in one sense as part of the organisational arrangements for the conspiracy. It's not simply the core of it. There are these things around the edge. But on the other hand you could also, I suppose, describe those peripheral things around the edge as incidental and that's what I am struggling with at the moment.

MR HUDA:

And I mean that has been a point of struggle, Sir, and to be quite honest that's why I say that ultimately it'll have to be a decision on what this Court decides within the scope. It's never helpful to draw odd analogies but I don't practise in relationship property but at least I know that if the very fact that one partner in the relationship does something at home or does something else, allows another partner to go and work, that's usually taken into account in saying,

"Look, if he or she wasn't doing this you wouldn't be able to do that." It's that type of an argument here where they're saying that, "Look, I'm letting my partner know I'm not going to be at home because I'm doing this," but letting her know doesn't somehow further the joint enterprise until unless one says that, look, if your partner didn't give you permission you wouldn't have been able to go, or something along those lines.

WINKELMANN CJ:

Well, let's say he'd said in his text message, "Look, I'm going to be late home because I've reached an agreement with X, Y and Z that I'm going to do ABC and so that's going to take me a couple of hours."

WILLIAMS J:

Actually, you don't even need, "I'm going to be late home, honey," just, "Me and some guys have reached an agreement. We're going to stab," without any organisational elements at all. It's a little illogical that that wouldn't be admissible because it's so obviously relevant.

MR HUDA:

I would say, Sir, I would draw a distinction, and I'll explain why, between the example, if I understood it right, between what the Chief Justice put and what Your Honour put. If Mr Hanson named some of the parties, that becomes admissible to prove his state of mind and the *Messenger* paragraph that the Crown cited in its written submissions at paragraph 24, "Statements made by other persons about what they are intending to do, against the background of their statements about what they have done, however, can be led as evidence of the state of mind." So if he said, "I'm going with Winter, I'm going with Jesse to stab this guy," and there is independent evidence of Mr Winter's involvement, which there would have been under the second stage for this to be considered, then it implicates Mr Winter into that arrangement earlier on.

WILLIAMS J:

What if Winter's not mentioned though? "I'm going to deal to Hatcher with my knife and a few of the boys are coming with me."

MR HUDA:

That's right and this is the second scenario and in my submission obviously these things have to take a look at a contextual approach, but I would say if we have this case scenario and that text message that Your Honour put, I would say that still doesn't help to say how that is furthering the joint enterprise.

WILLIAMS J:

Well, it's not, but rather tempting to let it in, don't you think because it's right on point?

MR HUDA:

That's right, it would be tempting to let it in and that's why I say that one must go back to the words of the statute because some of the common law cases, if read, it does say that, look, this evidence is in, not because of any juris – sorry, rationale but simply because of its power for probative value.

WINKELMANN CJ:

Okay, so Mr Huda, if we take it back to first principles, you're saying look at the words of the statute and don't extend it beyond the natural meaning because this is actually very – this evidence sits right out at the edge of what's admissible because it's hearsay, it's an exception to the hearsay rule, so you should not push the words of the statute. Is that your submission?

MR HUDA:

That's right.

ELLEN FRANCE J:

Can I just check, if you look at, and I'm not sure how you say it, *Kayrouz*. If you look at paragraph 36, and I'm looking at it in the respondent's bundle at tab 5, paragraph 36.

MR HUDA:

Yes Ma'am.

ELLEN FRANCE J:

That sets out a number of situations where the Courts have said this material is in furtherance. Do you agree that, would you agree that in all of those, that those examples are all correctly treated as being in furtherance?

MR HUDA:

I have looked at all of those cases and aside from *R v Mahutoto* [2001] 2 NZLR 115 (HC), if that's the right way to pronounce it, which is the case on paragraph (c).

WILLIAMS J:

Mahutoto.

MR HUDA:

Thank you Sir. I take some issue with *Mahutoto*, aside from that the rest are, in my submission, the result would follow, even on the suggested approach, there is nothing controversial about that.

WINKELMANN CJ:

Well, unsuccessful attempts to get others to join the conspiracy would be in furtherance of it, wouldn't it?

MR HUDA:

Unsuccessful attempts would. I mean the question then would arise against who, admissible against who. I mean if we're trying to say the principal is desperate to get 10 people involved because he's definitely into doing this, then yes.

WILLIAMS J:

This argument really overlaps with the second, it must be the broader argument you make, which is we've got to remember this is a fiction. This is an imposed ratification of something that, whatever was in their mind, the defendant can't have known about the particular –

MR HUDA:

Things that he didn't know about.

WILLIAMS J:

Yes, that's right, so keep that firmly in mind, you're saying, when you decide what furtherance means.

MR HUDA:

That's right.

WILLIAMS J:

Because ratification won't work in private law but in criminal law it's dangerous.

MR HUDA:

That's right. I mean that's one of the things that Mr Bailey went through in the submission in detail about that, whether there is, I mean some commentators say, some cases say, look, it's not about a unified theory, it's about the great probative value, and some, Justice Chambers in *Mahutoto* said look, you know, it doesn't really matter, this is how we justify it, because once you join you assume everything else that has gone. Now there is some difficulty in this imposed construct simply because in criminal law obviously it's laws 101 that mens rea is a subjective thing. So you're using this sort of material when the defendant is not in, to inform subjective considerations of knowledge and so forth. So –

WINKELMANN CJ:

That was the basis on which I was going, I would question this suggestion about creating a fiction. If you look at it in the present case the Crown does still have to prove mens rea, they still have to prove knowledge of a knife, so it's not a fiction in that sense.

MR HUDA:

No, in the present case Your Honour is right. The fiction element, if we can call it that, is significantly minimised by the knowledge of the weapons direction.

WINKELMANN CJ:

Well if the situation was different and you had messages in the context of in the furtherance that did indicate knowledge of the knife by Mr Winter, that might be different, but that wouldn't be a fiction either, would it?

MR HUDA:

No. It would not because then you'd have concrete evidence that he knew about the weapon.

WINKELMANN CJ:

Can I take you back to the point I made earlier, which was this was admitted under the *Messenger* thread that you can admit statements made by co-conspirators prior to the time the defendant joined on the basis that they're admitted to prove the nature and content of the joint enterprise that he joined.

MR HUDA:

That's right.

WINKELMANN CJ:

I was interested in what exactly the probative value of this was if the Judge directed that the jury could not take into account this text to show that Mr Winter knew there was a knife.

MR HUDA:

That's where the argument of, we say under the section 8 consideration, the probative value and unfair prejudice should come out in favour of the defendant because the origin, and just because there is some evidence doesn't mean the Crown can't have more, I accept that, but just for the present purposes, the intended victim did give evidence that he was

threatened that they would slit his throat and so forth, and various other stuff of along the lines of bashing or being hurt or whatever. So in terms of the probative value it must be quite low because in my submission –

WINKELMANN CJ:
Well quite low, what is it, what do you say it is, what do you accept it is?

MR HUDA:
In my submission in the context the probative value must be none aside from the argument that it shows the current argument must, well it would probably have to be that it shows his willingness to inform others. If a probative value is arrived at, it arrives from that line of reasoning, but in the context, the way it is, in our submission –

WINKELMANN CJ:
What does it show against Mr Winter?

MR HUDA:
Nothing, that's our position as recorded at paragraph 75, if I've got my…

ELLEN FRANCE J:
Why doesn't it show, tell you something about (a) the existence of a conspiracy and (b) its scope, at least at that point in time?

MR HUDA:
Well first, taking into the point about why doesn't it show anything about the existence of the conspiracy. At that point the conspiracy, and this is one of the fears that we have, the only way legitimately say there was talk about a conspiracy is because of the use of the plural "we". If he had sent a text message to his partner saying I am arming up –

O'REGAN J:
But he didn't.

MR HUDA:

But he didn't and so the joint enterprise concept must have to come from the word "we". Now there was already evidence of existence of a conspiracy. It's in the admitted facts document, that these two, that Ms McGrath –

O'REGAN J:

The Crown's allowed to prove the conspiracy any way it likes, isn't it?

MR HUDA:

And that's why I prefaced what I said before that, look, just because there is some evidence doesn't mean the Crown can't use more. But that's where one has to do the probative value and unfair prejudice calculus, because over here there is ample evidence of a conspiracy. There is no doubt that there was the existence of a conspiracy. In fact it's pretty strong, I believe Mr Bailey even concedes the matter, that Mr Winter joins said conspiracy because there is text messages, you can't really get away from that, and the polling data showing transportation, so the question really arises in terms of furtherance and how does it prove anything against Mr Winter, and the probative value has to be a very broad one of origin, that this is the conspiracy he joined. This is the nature, this is the type of the conspiracy he joined. That it would be taking a very broad view to extract a probative value. But if one says, you cannot take it into account to prove his knowledge, that is accepted, as it happened, then the probative value in our submission is none because you can't use it to use, to inform this knowledge or draw inferences about his state of mind, because it's his state of mind that is at issue, and was at issue like, for example, in the Judge's handout to the jury and things, as I said, do morph over the course of a period of time. So that's the point about the probative value, until/unless there's a general proposition the Crown can say, look, this is the conspiracy and this is another piece of evidence that shows the conspiracy, but once again I'm not entirely sure how well the concept of the origin of the conspiracy fits in with the wording of section 22, because we must go back to section 22 which, of course, doesn't use the word "origin," "nature," or anything along those lines and I wonder whether that is correct. I know that there's a long, strong line of cases that say that but we have

section 22 and the question is whether that should be maintained. If so, why? There could be a policy rationale, there could be a logical one, however they put.

WINKELMANN CJ:

So your point is that there wasn't, as it happens, much probative value to this against Mr Winter but there was considerable risk that the jury would see this as proving a conspiracy to use some sort of weapons?

MR HUDA:

That's right. From the use of the word "we" and the admitted facts document of membership of the Bandidos, of various levels of membership of the Bandidos gang. I think they use the word "probationary member" or a "prospect" and things along those lines.

ELLEN FRANCE J:

But then you have to deal with the fact that they were directed not to use that in relation to inferring knowledge of the knife, not to use the text for that purpose.

MR HUDA:

That's correct. That's perhaps the key hurdle to, one of the key hurdles to overcome for the appellant on this appeal given that the Judge gave clear directions that you are not to use it. So before I address Your Honour on that and there was the –

WILLIAMS J:

Can you just help me, you said there was no probative value of the arming up text vis-à-vis Mr Winter specifically. Was there any concession as to the breadth of the conspiracy at the trial or in the Court of Appeal? In other words was it agreed that the conspiracy with or without Mr Winter involved a weapon?

MR HUDA:

No. So –

WILLIAMS J:

So that's its probative value, isn't it?

MR HUDA:

With, sorry, whether it was agreed that there was a weapon with a –

WILLIAMS J:

With the breadth of the conspiracy, step 1 of this reasoning process.

MR HUDA:

Right, I can answer that question, Sir. Yes, it was agreed in the sense that nobody ever challenged what is in the evidence referred to as the bigger guy, that's a reference to Mr Hanson because of his stature, had in possession a knife and these injuries occurred from a knife.

WILLIAMS J:

Yes, well, that's the perpetrator, the principal offender, but I'm talking about the conspiracy.

MR HUDA:

No.

WILLIAMS J:

At that early stage, was there agreement about – was there a fight about the breadth of the conspiracy?

MR HUDA:

There was.

WILLIAMS J:

Well, that's its probative value then, isn't it, because that establishes it? And that's relevant to Mr Winter at that first stage as it is with everyone else in the

group. You then have to go to the second stage to establish whether Winter knew about the conspiracy that is now established.

MR HUDA:

That would be one way of looking at it, Sir, and I accept that, and if I may just refer Your Honour to the, what is referred to as the memorandum of Judge O'Driscoll that's post-trial, it should probably just be called the minute of the Judge, it's on page 101.0163.

WILLIAMS J:

Have you got a tab?

WINKELMANN CJ:

Tab 21.

MR HUDA:

Tab 21, Sir. And if I may refer in particular to 101.0168, and that's page 6 of the Judge's minute, at paragraph 31. So that, to answer Justice Williams' question, is the context in which this text message and this dispute of admissibility occurred, and that is a particularly good minute because it was issued after the trial as opposed to the judgment on section 22A that was some point during the trial. So the Judge had a grasp of the evidence and a feel of it after how it came out.

WINKELMANN CJ:

And that's why the Crown said you didn't need to give a knife direction.

MR HUDA:

That's right.

ELLEN FRANCE J:

Can I just ask you, Mr Huda, about a passage from *Ahern v R* [1988] HCA 39, (1988) 165 CLR 87, the Australian case. I just want to be clear about what

your argument is, so if you look at tab 23 of the Crown bundle, page 93 and then going over to 94.

MR HUDA:

From the passage where it talks about a case called *Tripodi v R* (1961) 104 CLR 1?

ELLEN FRANCE J:

No, I'm looking at, well it's the bit just above the discussion of *Tripodi* and then going over to the next page. So as I understand it the distinction that's being made there is about evidence relating to the existence of a conspiracy and participation in it and the point being made is that in terms of proof of the existence of the conspiracy, if you go over the page, its permissible to use the acts and declarations of each even in the absence of the other, not as proof of the truth of any assertion or implied assertion but as facts from which the combination might be inferred. As I understand it the argument is well in that sense it's not being used as, it's not hearsay, and that's the point that's made by the Court of Appeal in the *Morris (Lee)* judgment that's referred to in *Kayrouz*, and I just wanted to be clear, do you agree with that –

MR HUDA:

If I may take a brief moment Ma'am. The way I understand that passage is, "But as facts from which the combination might be inferred." They're talking about, "But as facts from which the combination might be inferred." And the use of the word "combination" if they're referring to a common, the existence of the joint enterprise, then the issue will arise whether the person is a witness in the trial or not, because the distinction between obviously if Mr Hanson was a witness in a trial, no hearsay issues would arise. The question is under the second limb of 22A the reasonable evidence that a defendant was a member of a conspiracy, and the one – sorry in A, the reasonable evidence of a conspiracy has to, according to *Messenger*, be arrived at without referring to non-hearsay evidence. Now that's an attempt to get around that rule by saying, we're not adducing it for the truth of its contents, because if you can convince a Court it's not being adduced for the truth of its contents, then it's

not hearsay and it's admissible. So that, in my submission, goes to a determination that the Judge will have to make whether it's truly being offered for the truth of its contents, or the fact that it was said, and may not be correct.

In terms of the broader argument which is set out at paragraph 53 of the appellant's written submission, I mean the submissions for the purposes of writing draw some stark contrast between each step may not be so in practice. So the point being that under section 22A there has to be reasonable evidence of a conspiracy to allow a hearsay is admissible against a defendant. So does the question of reasonable evidence of a conspiracy encapsulate the origin of, the origin, what I will call the origin argument, which is what Justice Chambers said, whereas here Mr Bailey has gone through and is trying to persuade the Court that, look, this may not be the correct way of thinking, this ratification, this theory of ratification, that the moment you join what I will call the run-the-risk argument because it's a policy decision that the final Court of Appeal can well make and say, look, this is, you take the risk of what you join, but if we get away from that and think about why then that comes to what he has said in paragraph 53, 54 and 55 of the appellant's written submission, that admissibility truly begins, or should begin, from the point in time the person whose criminal guilt or otherwise is being determined by the fact finder because that's what the jury is there to decide.

On reflection, there are certain bits that may need to be added to that submission there in 53, 54 and 55 and that is because who gets to decide when the conspiracy begins or ends and that sort of question, because traditionally there is a division between Judge and jury, so as a threshold assessment like the Judge made in this case, obviously not every case we're going to have a minute, detailed minute by the trial Judge after having heard all the evidence, I mean we were lucky to have that, so you're going to have to deal with cases like that in the future so any rule has to accommodate broad principles and obviously applied to this case, or at least that's my submission, and the Judge will be in a position to direct the jury if there is a clear point in time that the Crown says the appellant joined, or the defendant joins the conspiracy. So if that's the Crown argument, there may be a defence

argument in which case obviously the ultimate decider of fact, the jury in this instance, would decide whether they accept the submission made by the Crown or the defence and for the reasons that support that submission.

Where it's clear, like in this case, the Judge took a very clear view of the evidence, then the evidence before the conspiracy, before the defendant joins the conspiracy, should not be let in, is the submission being made at 53, 54 and 55, because everything centres around the person whose guilt you're trying to determine. That is perhaps the second –

ARNOLD J:
I don't follow this at all because it does seem to me you have to, the first thing you have to establish is that there is reasonable evidence of a conspiracy or joint enterprise and as part of that you need to know what the nature of it is, and then there's the question of if somebody joins at a later stage, what that person knows about what he or she is joining, and in this case it's been pointed out that the Judge said you've got to be satisfied that he knew about the knife. So I don't quite understand where the risk occurs.

MR HUDA:
In terms of the risk, Sir, is obviously, to put it in a broad way, to adopts the words in the written submission, is the jury has heard all of this evidence, that are not directly relevant. Now that often occurs, and this Court of Appeal dicta is saying that, look, in a multi-accused trial –

ARNOLD J:
But it is relevant. As Justice Williams has put to you, you've got to establish as the first thing, that there's reasonable evidence of a conspiracy, and surely that must include the nature of it. What sort of conspiracy, what were they conspiring about.

MR HUDA:
Certainly. What we are attempting to do in this second limb of the argument, if we can call it that, is the boarder limb, is to say that of course you'll have to

explain the existence of a conspiracy, and by that you have to explain its nature and so forth, but the question is, at what point in time do you look at, so just to make the example easier, if we had a conspiracy running over a span of two days, it starts on a Monday and then the defendant joins on a Tuesday, on Tuesday the conspiracy obviously is still existing, that's why we're having a trial, so you point to evidence from Tuesday, and I know it's not always going to be able to be demarcated that easily, but at least theoretically you are pointing to the point in time, choosing a point in time that is much more relevant, pertinent and logically linked to the defendant as opposed to hey, this is what happened on Monday, this is the nature of the conspiracy this person joined.

WINKELMANN CJ:
Are you also making a statutory interpretation argument about section 22A?

MR HUDA:
Have to be, that's…

WINKELMANN CJ:
So your argument is that the section on its plain meaning reading suggests it's only, hearsay statements made in furtherance of the conspiracy that the defendant has joined, so it's speaking at the present time already joined, is that what your argument is?

MR HUDA:
Correct.

WILLIAMS J:
What if in your two-day scenario, classic Hollywood blockbuster movie, all the planning is done on the Monday, and then someone goes and gets a driver. How could the planning on the Monday not be admissible as to the scope of the conspiracy. You wouldn't have a case without it. Perhaps that's what you'd like, but is that realistic.

MR HUDA:

Well perhaps that's what I would like but that's not how the evidence law acts, and it shouldn't act that way, because the Crown equally has a right to a fair trial and this is why conspiracy cases has, throughout the time, various approaches have been taken. Difficult cases, especially of the most broader principles, as Your Honour just pointed out, not really au fait with English history, but there was the treason years. There's a lot of conspiracy cases that came from people in America and people in the UK conspiring with each other and broad propositions were put in place that said, look, you can take this into account, you can take that into account because people didn't necessarily know each other and I think *R v Walters* (1979) 69 Cr App R 115 (CA) mentions some of the cases from the 1930s and they effected the purpose, like Your Honour said, they planned everything for the entire week, then there was a gap, and that affected the purpose so as not to evade interception and so forth. On the third day of course some hard decisions, some decisions will have to be made. There cannot be hard and fast rules, I must accept that, but in the context.

WINKELMANN CJ:

What about the fact that section 22A doesn't seem to allow hearsay evidence to be used to prove the fact of conspiracy?

MR HUDA:

Well, hearsay, well, that truly is a point that must strengthen the defence argument because you cannot use hearsay statements for the purposes. I mean, this is something that I've thought about.

WINKELMANN CJ:

But you might, which is sort of of consistent with *Ahern*, isn't it, which says you can't sort of bootstrap the thing up?

MR HUDA:

That's right. I mean on one point you can use, you have to use direct evidence, and then on another point you can use non-hearsay evidence to prove the origin, and…

WINKELMANN CJ:

But that doesn't mean it's not admissible. It just means you have to find the evidence elsewhere and then it can make the evidence, the evidence can still come in.

MR HUDA:

That's right because that's the admissibility threshold. Also in terms of the getaway driver, Mr Bailey just put me a note in saying that perhaps the getaway driver doesn't need to know, the jury doesn't need to know about what happened on Monday because the getaway driver doesn't know, because we're trying to determine the guilt of the getaway driver. However artificial one may think, I think there is some logic to that because we're not trying to establish are all these people part of a conspiracy? That's why. Let's punish them all. The question is this person's liability, what does he know, what is he liable for, and even on the sentencing stage the consideration will still be the same, simply his criminality, his culpability, from his acts, what he knew, what he did. So –

WILLIAMS J:

But that's about what he knew of the conspiracy. It's illogical to say you can't hear about the conspiracy if the issue is what did he know about it.

MR HUDA:

That's right, so should there be some bracketing involved, if that's – precise, not a precise word – some limitations put on the conspiracy, because I mean I accept it as a matter of principle that the Crown can't just run a case which starts with, "Here are three people in a room." They have to talk a little bit about how the three people got into the room. I mean we can't have a law where the Crown is not allowed to prove any context. That cannot be right.

The Crown has to be able to do that. But in proving that context we'll have to always be aware of the probative value and unfair prejudice calculus and this, I think all of this will boil down to two key points. The first is the Chief Justice was alluding to if you cannot use it for the purposes of knowledge what was the true probative value, and, second, all being said the Judge did give a knowledge of the weapons direction, and I think that's the hurdle, so what are you complaining about, and the illegitimate prejudice or unfair prejudice, I'll just use the word "prejudice" although I accept that it has to be unfair, at paragraphs 68 and 69 of the appellant's written submission.

So I won't repeat what's there. It's already there to be read, and I accept obviously the Judge in very clear terms said about Mr Winter needing to know, or the jury needing to find, that at the point of engagement, those were the Judge's words, that he knew about the knife. This –

ARNOLD J:
The jury asked a question about that, didn't they?

MR HUDA:
What was meant as the point of engagement?

ARNOLD J:
Yes.

MR HUDA:
That's right, and the jury asked a question about that. So an inference can, of course, arise that they were grappling with the concept, not skirting past it, from that question.

And what the issue really is that it still leads open to a – and as for the appellant I must have to argue that the quickest route, the jury took the quickest route to verdict – is that it shows or capable of using tendency, not really tendency but character type reasoning. This is what the group does.

O'REGAN J:

Are you saying that jury basically ignored the Judge's direction?

MR HUDA:

To some extent, yes, because it was particularly discreditable conduct in this trial. When I say "discreditable conduct" I want to clarify that. There are far worse offences being committed and tried before the jury, like sexual offending against children, but this was discreditable in the context that the three people or four please I believe who were hurt had nothing to do with it. They were absolutely nothing to do with it.

O'REGAN J:

So you're asking us to assume the jury, in defiance of the direction of the Judge, basically went and used the evidence that he said not to use to prove that your client knew about the knife?

MR HUDA:

That would be the ultimate conclusion but they would not have to use it in the knowledge sense because they can just say this is what the group's behaviour is, and a jury may not sit there and think about if there is a valid distinction or not between, hey, this is what the group does, you're a part of the group, you're a Bandidos gang, this is one of the ways we can take into account, and so –

O'REGAN J:

But they already knew that the Bandidos gang was involved, didn't they? They didn't need the text message to know that.

MR HUDA:

No, but the text message put a character of or informed the character, or perhaps the habits is perhaps the better word to look at, of members of the said Bandidos gang. We are doing what we do, sort of a thing, and to the extent –

WINKELMANN CJ:

But that's what the Bandidos gang does. The "we" is the Bandidos gang. "We're doing what we do."

MR HUDA:

That's right. So to an extent in a fine point analysis if one was writing perhaps there has to be a suggestion that in some way the direction was not faithfully followed to its 100 percent, not necessarily totally.

O'REGAN J:

So if the others hadn't pleaded, if the two principal offenders hadn't pleaded and they were all a part of the same trial, the text undoubtedly would have been in evidence, wouldn't it, and the Judge would have given the same direction? Are you saying that in that case there would have been an unfair trial?

MR HUDA:

No. Your Honour is correct. Oddly enough that's exactly the point Mr Bailey and I were talking about last night. That in my submission is a legitimate way of thinking about it, however, as a pragmatic way of thinking about it. So if the question arises, if Mr Hanson was a part of the trial the evidence would be admitted because he sent it, so under section 27 admit it against him. Pragmatically, as a matter of trial strategy, because we're talking only about pragmatics here, not about formalism, me for Kumar, Mr Bailey for Winter, would have a body to blame. It's always fantastic to have someone to blame in a trial like this as the big bad guy. So as a matter of pragmatics we can't ignore that. We also cannot ignore that he may have given evidence. It happens often in gang trials when one person takes the blame and does not take everybody else with them. That's –

WINKELMANN CJ:

Isn't your simple answer that the Judge would have to direct unless he was satisfied that it was admissible against Mr Winter, which is the question we're

concerned with? He'd have to direct that they couldn't take into account against Mr Winter?

MR HUDA:

And that would, well ultimately it would come to that, but depending on, because we're talking about a hypothetical scenario we don't know what this gentleman may have said in evidence. So if he had never given evidence then, yes, ultimately that's what the Judge would have to say. That's not admissible against Mr Winter at all.

O'REGAN J:

Well the Judge would have said, don't take it into account in determining whether Mr Winter knew there was a knife, which is exactly what he told them to do in this trial.

MR HUDA:

But what I was trying to say Sir was we lost the forensic benefits. The –

O'REGAN J:

Well are you saying it's an unfair trial without McGrath and Hanson but it would have been a fair trial with them in, is that your argument?

MR HUDA:

Correct, because in co-defendant –

O'REGAN J:

No, that's all right, thank you.

WILLIAMS J:

Well if Hanson was in he'd be denying the knife because he'd pleaded not guilty.

WINKELMANN CJ:

This is getting a bit hypothetical.

WILLIAMS J:
It is.

WINKELMANN CJ:
Isn't the simple point that under, unless this is admissible against Mr Winter, which is the point we're concerned with, it's irrelevant whether or not Mr Hanson would be there because if he was there it still wouldn't be admissible against Mr Winter and the Judge would have to direct that.

MR HUDA:
That's right.

WINKELMANN CJ:
It all turns on the admissibility point, which is what we're concerned with.

MR HUDA:
That's right.

WILLIAMS J:
It does seem to me this phases into your second ground.

MR HUDA:
That's correct.

WINKELMANN CJ:
So your simple point is that there is, that the jury would be concerned that Mr Winter not get away with really quite discreditable conduct and so they would be likely to ignore the Judge's, there is a risk they would ignore the Judge's directions and use this evidence impermissibly, particularly because it carried this additional prejudicial weight, which you had mentioned earlier, which is that actually blackens the Bandidos gang.

MR HUDA:
That's right, and a jury could well think along those lines and indeed believe that they are adhering to the Judge's direction. There's some fine line

distinctions about the Bandidos gang's character and their habits and knowledge and so forth.

WINKELMANN CJ:
And they could permissibly take that into account is your point.

MR HUDA:
Yes. Mr Bailey just handed me a note, which reflects what the Chief Justice just said, that they could take that into account without defying the Judge's directions.

In terms of the discredible conduct point, as Justice Williams pointed out, obviously flows into the next argument and Mr Bailey will address on that. I wanted to briefly address one or two points very broadly. There's a lot of cases, and the Crown will refer some to Your Honours, and Your Honours will have read a lot of them. The question often arises between communications being vis à vis within joint conspirators. So we're extracting principles that are said in that factual context, not extrapolating principles from cases where things have been said to a third party. So *Kayrouz*, for example, is a question about conversations amongst co-conspirators and whether that conversation was incidental or in furtherance. I think the added element, and that's where *Kayrouz* says that, look, we have to have a degree of realism and common sense of how we approach this concept of furtherance, and that must be correct in that context because –

WILLIAMS J:
You're talking about the communication with people outside the alleged –

MR HUDA:
People inside, has to be dealt with in a very realistic way. That must be correct. I mean although as defence counsel I like to jump up and down about every pithy little text message, if you take those things out it deprives the Crown of its context and text messages need to be read as a whole. But over here we have got this conversation so when these cases are read and the

principles are being extracted and applied, I'm just bringing to Your Honours' attention, which Your Honours no doubt will bear in mind, that this was sent to the partner, who was not a party to the joint enterprise.

I'll just briefly check my notes that I've covered everything.

WILLIAMS J:
Can you just tell me in principle why communication with a third party that might unarguably be in furtherance of the conspiracy, should be looked at suspiciously.

MR HUDA:
Well…

WILLIAMS J:
For example, a text to the local gas station owner, "Bro, are you open? I need a tank full of gas. We're on a mish." Why would that be problematic in principle, just it's not part of, the receiver is not part of the group? Doesn't it all come down to, my point is, what the message actually says.

MR HUDA:
It has to come down to what the message actually says, ultimately, absolutely, because in Your Honour's example the gas, I mean if they're going to drive from Wellington to Porirua you need gas, and one may say, look, this just puts into context their willingness, their preparation, what they're doing to affect the criminal purpose and I'm trying to draw this distinction, which is a hard one to draw, as was being talked about before about matters that are incidental, as opposed to matters that are within –

WILLIAMS J:
I see, so you say this is an example of incidental?

MR HUDA:
That's right.

WILLIAMS J:
Okay.

MR HUDA:
And perhaps in a broader way, and it's there to be read at paragraph 77, Peter Gillies is an author from whom Justice Chambers derived some assistance from in *Mahutoto* and if you've read the book, it's not too big, it's included there, we cited an extract, it talks about some of the issues that arise of over-eagerness of putting in evidence and I suppose that's also a concept that the Court of Appeal has dealt with numerous times in multi-accused trials, but it's to be borne in mind I suppose.

Unless Your Honours have any questions on the first ground?

WINKELMANN CJ:
No thank you Mr Huda. Thank you for your submissions. Mr Bailey?

MR BAILEY:
Yes, may it please the Court. Just before we finally leave from the appellant's perspective, ground 1, hopefully the Court appreciates I've got ultimate carriage and responsibility for all matters and if I may just have a slight indulgence to add just a little bit of commentary to –

WINKELMANN CJ:
A very little bit.

MR BAILEY:
Yes, there was an earlier discussion and we were looking at the text messages, and I think I heard the question from the Bench right, well the Crown has said Mr Winter could have joined the, or a conspiracy prior to when the Judge concluded and if Your Honours still have the text booklet in front of you, text number 75, which is page 401.0024, text number 75, so that was obviously around midday and that's Ms McGrath asking Mr Winter if he can come and see her and then further down, text number 124 he finally replies.

O'REGAN J:
Which number was it? 2?

MR BAILEY:
So the second text I refer to, 124. That's Mr Winter's reply saying he can't and what's happening.

Now the next text which I would have thought is the obvious answer as to when the earliest Mr Winter could have joined is one we had been looking at, 496, and it's not written in perfect English but, "I thank him. Didn't have gas or would be there. Nick bloody good man for helping out. Didn't know…" Now, so clearly Mr Winter's not part of the conspiracy there, I would submit, because he's thinking he can't even get across town from Diamond Harbour you'll see from the cellphone location. He was polling from Diamond Harbour which is quite some distance away from Christchurch proper. So that text, and this is really the point I make, was sent after the arming up text message. So obviously I don't know which matters will be of significance to the Court but I would submit that's pretty clear there that he wasn't contemplating of even going anywhere.

In terms of the arming up text message, and this is very briefly the second point, so if we start at text 335. 335, that's the girlfriend asking Mr Hanson, "Are you home," and then he replies, "In Hornby," 337. Now, because I think the Crown sort of flavour as well, he's doing something he wouldn't otherwise be doing, ie, getting involved in potential violence so he's got to sort of make arrangements for that and therefore this text is furthering those arrangements, but 341, which is the important text, should just be seen as him blurting out something that she's not even interested in or hasn't asked. She hasn't, for example, said, "What are you doing? Why aren't you home?"

So in terms of how the Courts often approach it, whether it's sort of looking at it like a business enterprise, and obviously this wasn't a business of violence, but in terms of the operation, whether that was necessary, whether it assisted,

whether the others would understand that it was something that had to be said, the –

WINKELMANN CJ:
So are you saying he's not saying, "I'll be home late"? He's just blurting it out?

MR BAILEY:
Yes, off his own bat, and skiting rather than doing anything he needed to do. So that was – and thank you for the indulgence. They're two matters that I wish to raise.

In terms of the ground 2, the matter I'm dealing with, I do have a two-page outline which hopefully will assist the Court. And I intend to keep to this as much as I can, of course, more than happy to receive any questions from the Bench. The structure is predominantly taken from matters that I think arise from the Crown's submission and this Court will come to its own views, no doubt, to the extent there are different approaches overseas, but it does strike me as somewhat surprising that despite our respective research the parties aren't in agreement as to whether there's a distinction between, for example, UK and Canada, or a material distinction, and New Zealand law. So just using, as I say, this outline as a platform doesn't, New Zealand currently take a different approach to other jurisdictions. I would describe it as almost an unfettered discretion whether a Judge is required to or should leave or give the jury opportunity to convict on an included offence, which is seldom utilised, and I think that's borne out by the case law and practice and coupled with that, when it comes to the threshold it's extraordinarily high. So the Crown, the way I've interpreted their submissions, say well it is pretty similar, all the jurisdictions. It's really the interests of justice New Zealand *R v Mokaraka* [2002] 1 NZLR 793 (CA) talks about that, and that's really the same as what the overseas cases are, as I've said UK, Canada and Australia could likewise be said to be based on interest of justice but, and this is the important thing in my submission, what the interests of justice are said to require is some very different outcomes compared with the New Zealand approach. So obviously

the approach of the UK courts, for example, in the Canadian courts, they've deemed their principles derive from what's deemed to be in the interest of justice or what's needed to ensure the interests of justice are met, but the way we go about that seems to be currently quite different and I think this is a point almost, or made by the Crown, third bullet point, for intervention *Mokaraka* effectively requires a jury to enquire about lesser included offence to provide required evidence for miscarriage, and I've submitted that's an ad hoc approach because in many cases it's just going to be luck or perhaps a curious juror wanting to know something. Some jurors, for example, might have more knowledge and know, generally know you've got what you're given, you can't go outside of that and not bother asking the question. So to pin your mast on whether a miscarriage of justice has occurred based on essentially the jury enquiring about that at some stage in their deliberations is, in my submission, very risky and wouldn't pick up any miscarriages of justice.

Moving on to number 2, the United Kingdom approach and *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 in particular. Now I think there were four Lords that wrote separately and is often the case they adopt slightly different language but all were pretty much saying the same thing, in my submission, and what I've quoted there is from *Archbold* and I think he's, the author's tried to incorporate all the tests into one. "such alternatives which should suggest themselves to the mind or any ordinarily knowledgeable and alert criminal Judge, but not alternatives which ingenuous counsel might identify through diligent research after the trial." And I've provided the reference there and I assume the Court's well-resourced with textbooks and whatnot.

Now really I make that point because I think it would be an error if the Court was to approach this obvious alternative, as it's quite often referred to, as meaning that it just has to smack you in the head as being so obvious that any Judge should have immediately, without really having to think about the matter, would have put it before a jury, but it's not that it requires, as it should in my submission, some consideration in all cases, and it doesn't have to be obvious in the sense, as I say, that it just immediately becomes apparent

without any real consideration. So I say that not the same test as New Zealand and in particular *Mokaraka* and it can't be reconciled with that.

The Crown at 39 of the Crown submission, paragraph 39, cited what they say the principles are, which purportedly summarise –

WINKELMANN CJ:
Paragraph 39?

MR BAILEY:
Paragraph 39 of the Crown submissions.

WINKELMANN CJ:
So why are you saying purportedly summarise?

MR BAILEY:
Sorry?

WINKELMANN CJ:
Okay, so, it's just a quote from *Barre*?

MR BAILEY:
Yes, sorry, so what I should have said was *R v Barre* [2016] EWCA Crim 216, [2016] Crim LR 768 was purporting to summarise.

WINKELMANN CJ:
I thought you were saying the Crown was purporting to summarise.

MR BAILEY:
Now obviously in terms of what the English position is I'd say the go to is *Coutts* and there's always a risk that, you know, it's like a photocopier going over and over again, things get slightly distorted, but *R v Foster* [2007] EWCA Crim 2869, [2008] 1 WLR 1615 is mentioned there, you'll see the quoted parts of *Barre* at 2 and 3, and what I've quoted in my handout is essentially what's written, what the Crown have cited in *Barre*, bullet point 4, and it would seem

to almost incorporate the two-stage test, should have the Judge done it, if not has there been a miscarriage.

WINKELMANN CJ:
Now it's time for a morning tea break. Is that a convenient point?

MR BAILEY:
Yes thank you.

WINKELMANN CJ:
Will we come back to this when we reconvene?

MR BAILEY:
Yes.

WINKELMANN CJ:
Right, we'll take the adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.47 AM

MR BAILEY:
So just continuing under…

WINKELMANN CJ:
So what was the point you were making about the quotes from *Barre*?

MR BAILEY:
The point I was making, Your Honour, and I don't think there's any doubt even on the Crown's submissions that there's not a particularly – there's not really a two-stage test, ie, there's no real proviso that's usually applied in the English cases but this summary of those *Foster* and *Coutts* case and *Barre* may suggest there is, in particular I was referring to point 4 in the Crown's submissions on page 14. So page 14 of the Crown's submissions where

there's a quote from *Barre*, "The question remains as to whether the safety of the conviction is undermined." So I say that doesn't actually accurately set out the *Coutts* test and *Archbold*.

ELLEN FRANCE J:

Sorry, is it only in that respect are you saying it's not an accurate summary or –

MR BAILEY:

Yes, I think that that's it, that's the… Certainly in the…

O'REGAN J:

But isn't that the appellate standard only of the safety of the conviction? I mean that's the same as our miscarriage test, isn't it, essentially? I don't – how can that be wrong?

MR BAILEY:

I don't think it's wrong but it's suggesting that – sorry, if I just read that quote, "Where an alternative verdict is erroneously not left to the jury, on an appeal to this Court the question remains." In other words there's a sort of further step but the UK *Coutts* approach is pretty much if it was erroneously not left then it would be assumed to have created a miscarriage of justice. Perhaps I should just…

WINKELMANN CJ:

Take us to *Coutts* and the part you rely on.

MR BAILEY:

Sorry, Your Honour?

WINKELMANN CJ:

Can you take us to the part you rely on in *Coutts*?

MR BAILEY:

Yes, I can. I may also hand up, just I think this'll be the only other document that I hand up. So I think no doubt there's probably again various comments made by the different Lords but paragraph 91 of the appellant's written submissions, paragraph 91, and I think really Your Honours only need to read the first line of Lord Hutton's part, and I've quoted there, "That approach is an unsatisfactory one and should no longer be taken."

And just in terms of what *Archbold* has said on this matter, paragraph [7-99], under the heading, "Alternative Verdicts," paragraph [7-99], so the document I've just handed up, the first five or six lines there.

ELLEN FRANCE J:

I can see the point being made about the difference in terms of the notion of looking at what – sorry, if I – the notion of that additional step that's referred to in *Mokaraka*, if we put that to one side, if you look, for example, at Lord Bingham in *Coutts*, paragraph [27], he there says, "While the murder count against the appellant was clearly a strong one, no appellate Court can be sure that a jury, fully directed, would not have convicted of manslaughter." That does seem to be still looking at it from the point of view of what in the New Zealand context would be the section 232 miscarriage test, or am I not reading that correctly? So in other words my only query is whether it's right that you go immediately to there must have been a miscarriage?

MR BAILEY:

Well, yes, I think the footnote that I should have added, I think it says in *Coutts* at least somewhere that in all but exceptional cases it should be assumed. So I suppose that allows for the possibility that the jury might, in one of their questions or probing for information or whatever, specifically write something to the Judge or ask the question that makes it clear that they aren't going to go down a wrongful path or what have you, but I think it really follows and that would, I would say, supports it because it was a strong case and I don't think there was any suggestion that the directions were wrong.

WINKELMANN CJ:

So you're saying it's almost put, I mean, "nullity" is the wrong word but are you saying you're almost into that category?

MR BAILEY:

Almost an assumption that, yes.

O'REGAN J:

You have to deal with this under the appeal provisions of the Criminal Procedure Act 2011, don't you?

MR BAILEY:

Yes, and that's one of the –

O'REGAN J:

I mean either there's a miscarriage or there isn't.

MR BAILEY:

Yes, and I'm just saying UK say, well, there was…

WILLIAMS J:

These are miscarriages?

MR BAILEY:

Yes.

WILLIAMS J:

It's not quite as simple as that though, is it, because in *Coutts* and in the other English cases they say, well, if the other, if the included offence is trifling, no. If it would be unfair for some other reason to the defendant, no.

MR BAILEY:

Yes.

WILLIAMS J:

But you start with the proposition that the included charge is included unless there's a good reason not to?

MR BAILEY:

Yes, yes, I think that's a better way.

WILLIAMS J:

It doesn't go any further than that, does it?

MR BAILEY:

No, and I think even just looking at Lord Bingham's analysis at [27], it wasn't very in depth.

WINKELMANN CJ:

Well, but the different point is whether, what the consequence of a failure to put the included charge is and it seems to me that what Justice O'Regan says to you is right. It must fit within our statutory model and even, I think it's Lord Hope, isn't it, and Lord Bingham, him and Bingham, seemed to actually contemplate a similar model which is where the evidence was so strong that a reasonably – that a jury properly instructed would convict and the – it's not an inevitable result. It's not the result that follows, which would be consistent with our statutory model and I suppose the question for you is why should we step outside our statutory model and how can we?

MR BAILEY:

I'm not asking the Court to step outside the model. So in terms of this legislation, section 232(4)(a) or (b), so as we've raised in our written submissions we say it has resulted in an unfair trial so you don't need to look at strength of the case, et cetera, et cetera. But even if you did, the more normal limb, has it created a real risk that the outcome of the trial was affected? And as I read the English *Coutts* case they are saying when it was reasonably available it would've been a real risk. So not that you'd necessarily, well, you don't at all bypass the statutory criteria even if it was

under 232(4)(a) but making a determination of if there should have been an included offence, if that's answered in the affirmative, then it will basically follow that the outcome of the trial was affected, or potentially there's a real risk that it was affected, but again I still keep to our submissions that it's a process or procedural matter which goes to the right to have a fair trial, therefore that's absolute and therefore matters such as the strength of the Crown case would never come into play.

WILLIAMS J:
I wonder if, at least looking at the way Lord Bingham deals with it, which is very practical, it seems, in approach, he cites Justice Callinan in the Australian High Court and has this lovely phrase that the jury room might not be a place of undeviating intellectual and logical rigour, as really the basis for saying there's a danger of wrong reasoning, a significant danger of wrong reasoning, where an included charge is reasonably available. Isn't that what he's saying?

MR BAILEY:
Yes, I think so.

WILLIAMS J:
So you do have to enquire into that question because that won't be always the case.

MR BAILEY:
As per what Lord Hutton said, it's in the middle of the quote, so I'm looking at my paragraph 91 in the written submissions, half way down the quoted bit, if you get to the stage where an included event should have been left, trying to determine what outcome that may have played. "In reality, it appears to oblige the appellate Court to engage in speculation as to the factors which may have influenced the jury's decision." So I think they just –

WINKELMANN CJ:

But isn't the Court there dealing with the point which had previously been made in a case in which Lord Hutton was himself involved, that you look for something like questions from the jury room to be satisfied that it had played a part and the Court was rejecting that sort of an approach?

MR BAILEY:

Yes.

WINKELMANN CJ:

And that's the context for those statements.

MR BAILEY:

Of the Lords?

WINKELMANN CJ:

As opposed to the notion that what Lord Bingham allows, which is that you can be satisfied that there had been no miscarriage of justice because the evidence was so strong on the first charge, not that you would – the jury would never have got to the included charge.

MR BAILEY:

Well, again I think the answer, if we look at paragraph [92] of my written submissions, certainly for Lord Hutton that was the test.

WINKELMANN CJ:

So I suppose exceptional circumstances is the miscarriage of justice, is the proviso effectively, as we used to call it.

MR BAILEY:

Mmm, and just in terms of following up from Justice Williams' comments, if I quickly turn to two cases using the Crown bundle of authorities, so tab 31, *R v Sarrazin* 2011 SCC 54, [2011] 3 SCR 505, if I say that right, so this is the Supreme Court of Canada, and I'm looking at page, and I'm referring to the

hard copy, so page 521, and paragraph 31, near the bottom of the page where it begins about eight lines up, “I agree with Doherty JA that,” and it goes onto the next page.

ELLEN FRANCE J:
But that’s different from the present case, isn’t it, because of the reference to matching an important branch of the theory of the defence?

MR BAILEY:
Well it’s similar, obviously there’s different charges, but one of the key issues in this case was whether Mr Winter foresaw the level of assault that ultimately occurred. So a lesser included offence, or an included offence would have matched the defence theory in that regard which, you know, it was difficult to argue that he hadn’t done anything wrong.

ELLEN FRANCE J:
Well how does that fit with the part of the defence that he didn’t get out of the vehicle?

MR BAILEY:
Obviously as he was entitled to do, and he didn’t give evidence so there was a bit more latitude then all matters could be, all realistic matters could be put in issue.

ELLEN FRANCE J:
I’m not suggesting otherwise, I’m just saying I’m not sure how that fits with the argument that you’re making.

MR BAILEY:
Yes it was raised, but it was never likely to succeed on the Crown evidence but it was an aspect that, as I say, he didn’t give evidence, he could explore, but it wasn’t, I say it was more of a true defence theory it was that he didn’t –

O'REGAN J:
Well why was it put forward then?

MR BAILEY:
It was.

O'REGAN J:
Why though? If you're saying it wasn't really a defence, why did you suggest it?

MR BAILEY:
Because obviously the Crown had to prove all the elements of the offence. He was being alleged to have gotten out of that vehicle, gone up the driveway and participated.

O'REGAN J:
So how does that trigger an obligation on the part of the Judge to leave an included charge?

MR BAILEY:
Because an important part of the defence case was that he didn't foresee, if it was him, which as I say was likely to be a relatively easy hurdle to get over, then the Crown had to prove the main issue in the case, what level of foreseeability did he have, having regard to the fact it was an unintended victim as well so –

WINKELMANN CJ:
So are we moving on then? Are we moving on to what the impact of a failure to put an included charge is to the circumstances in which an included charge should be put? As we're now in your argument. I'm just trying to trace your argument.

MR BAILEY:

Yes, I mean there's different ways, the more sort of scandalous thing, are we saying that this has to be done because jury's just disregard things intentionally. That was one way put by Justice Binnie, he described the rationale for making sure included offences were included where appropriate.

WINKELMANN CJ:

The fair trial perspective, which is what the Australian High Court said.

MR BAILEY:

Yes, but it wouldn't necessarily have to go to the full extent of saying, well the jury intentionally say, hey, the Crown haven't made this case out, let's nonetheless convict him, because it's more subtle than that and the last case I'd cite for different ways to look at it, is the *R v Foster*, again I'll use the Crown's bundle of authorities.

WINKELMANN CJ:

Can I just get clear, what are you addressing at this point in your argument? Are you addressing the final basis for putting for an included offence?

MR BAILEY:

I think my attention was drawn to Justice Williams' comment about why it needs to be included, or what the jury may otherwise do if it's not included, or words to that effect, but I may have misunderstood His Honour.

WINKELMANN CJ:

Yes, I'm just trying to follow your argument. So you've taken us to what the outcome is for a failure to put an included offence, so I'm just trying to get you to tell us what you say is the test for when an included offence –

MR BAILEY:

Oh right. Okay, so if I just finish. I'm dealing with that aspect because I'm encouraging the Court to not really adopt a prima facie position that if you succeed in step 1 of yes, the Judge made an error, there's not a huge hurdle

to get over for step 2, and we're looking at why there shouldn't be a step 2, or I was going into that, and I've just referred to Justice Binnie's comments.

WILLIAMS J:
Your problem in that regard, the important branch of the theory of the defence, may be that although the record suggests the issue of an included charge was raised, you were there so you can tell me, the Crown says it didn't form any particular focus and the evidence for that is there's no formal reference to it in a ruling or minute of the Judge. What do you say to that?

MR BAILEY:
So what I said in the Court of Appeal was I accepted that right at the beginning, and again this is why I was confused as there's a few factual things the Court of Appeal got wrong including things that I had said, but I said I'm happy, I acknowledge that, and it wasn't a huge thing, but just assume that nothing got said because I'm proceeding on the UK/Canadian approach and I was happy to say that was the right approach.

O'REGAN J:
So was it right or not?

MR BAILEY:
Yes, there was a discussion about it, as I recall. I haven't made notes. I acknowledge the Crown point that we haven't got a decision or specifics as to what was said, and I accept it wasn't, you know, a huge Judge I want a formal ruling, da-da-da, so…

ELLEN FRANCE J:
So what are you saying occurred? You're saying you raised with the Judge the possibility of an included charge and did you put forward a particular included charge?

MR BAILEY:

No, and I think it was around the time there was discussion that Mr Winter half way through the trial, or it may have been at the end of the first mis-trial a few days earlier, the Judge wanted to sort of know we've already just come to some sort of arrangement and Mr Winter offered to plead guilty to a lesser charge and it may have been around that time, but again I'm really relying on memory rather than specifics is what I said. So I'm happy –

WINKELMANN CJ:

Sorry, just so I'm clear, so it may not have occurred in the course of the trial?

MR BAILEY:

Look there's issues with memory, that you can be wrong, but I'm pretty sure it did happen in the course of the trial. I think the second trail started and there was a conversation of something along the lines of, you know, Your Honour indicated at the end of the mistrial and whether it could be resolved, obviously it hasn't been, but da-da-da. Mr Winter put forward a suggestion and the Crown hasn't accepted it, and then there was a discussion about the included offence, but again I'm happy for the reasons the Crown put in their written submissions in the Court of Appeal to proceed on the basis that there was no request because it doesn't ultimately change, it wouldn't change the Canadian approach, in my submission, or the UK approach, and even the Australian approach wouldn't be determinative of it, so I think that's the simpler way of doing it.

WILLIAMS J:

So what Justice Binnie says is the reason for including the attempted murder charge was it matched an important branch of the theory of the defence. How does that fit these facts?

MR BAILEY:

Well obviously I was submitting that Mr Winter wasn't guilty of the charge and the biggest element that I was putting in issue was essentially, it might not have been words to this exact effect, that he wouldn't have foreseen what was

going to happen ie didn't foresee knives being used, didn't foresee the level of unnecessary violence or violence that was given out at the hands of Mr Hanson. So it wasn't a tidy, "This is our defence. He wasn't there," or, "This is our defence. He was there. He thought he was just going to give a few bruises but he didn't foresee this happening. He didn't know of the knives." So I think obviously those comments were made in the context of the case, and I'm going to come to an important quote which actually summarises the Canadian position and it's not that it has to fit the defence theory so much.

WILLIAMS J:
Well, the point I'm making is that *Sarrazin* is different from your case. You may say it's not materially different but in *Sarrazin* the Judge was pushed on attempted murder and declined to include it, even though the case was, essentially, "He tried but failed." You're not –

MR BAILEY:
What tried –

WILLIAMS J:
In *Sarrazin*. Your defence didn't run as cleanly as that or as obviously as that.

MR BAILEY:
That's fine. I'm happy to acknowledge that.

WILLIAMS J:
You say it doesn't matter.

MR BAILEY:
Yes, absolutely. I still say it was an important issue of the defence case which would have meant he was guilty or something but not that level of charge.

WINKELMANN CJ:
Well, can I just get you, because you seem to be coming at this case from the bottom end rather than from the front end and I'm having difficulty, can you

just tell me what your theory is as to what the obligation of a trial Judge is in relation to included offences?

MR BAILEY:
So I say there's no material distinction and I'll adopt first bullet point under 2 of the United Kingdom approach.

WINKELMANN CJ:
Which is set out in the Crown submissions, bullet point 2?

O'REGAN J:
No, no, of this hand-up, two-page hand-up.

MR BAILEY:
Sorry, that's the…

ELLEN FRANCE J:
Sorry, so what are you saying is the test?

MR BAILEY:
Well, I'm saying that *Archbold* summarised roughly what collectively the Lords were saying in *Coutts* and it doesn't talk about defence, you know, running it entirely on the included offence ground or what-not like we've been talking about, and then –

WINKELMANN CJ:
Well, it just seems to me that it's rather an undetailed test because all of the authorities acknowledge further subtlety such as it has to arise on a realistic assessment of the facts, it can't be trivial so as to be disproportionate, you can't add a level of complexity which is actually not in the interests of the defendant.

ARNOLD J:
You can't use it in a way that would undermine the defendant's right to a fair trial.

MR BAILEY:

Yes –

ARNOLD J:

So there are a number of limits.

MR BAILEY:

I'd say that's exceptions to the general principle and I don't take any issue with those exceptions and they seem to be similar –

O'REGAN J:

So in *Coutts* Lord Bingham talks about any obvious alternative defence. I think the Canadian Judges talked about something reasonably available, some concept of reasonableness.

MR BAILEY:

Yes.

ARNOLD J:

Are they the same thing or different?

MR BAILEY:

I think they're so similar. So I suppose if I can reformulate my test it would be more like Lord Bingham, as Your Honour has just referred to, and I've set that out at paragraph 86 of my written submissions, and that's really much more on point to Mr Winter's factual case. So it's on the very top of page 19 of the appellant's written submissions, "Where there is a factual situation which requires a jury to consider the extent of the joint enterprise and whether all the ingredients of the offence have been proved," dah, dah, dah, and I'd say that quite neatly summarises it.

ELLEN FRANCE J:

Well, so are you saying there's a different test for a case like the present one?

MR BAILEY:

No, because referring back to how *Archbold* has called an, you know, summarised an obvious alternative, it's the same sort of thing. It's obvious if there's a major issue as to whether one of the elements of the offence is proved.

ELLEN FRANCE J:

Well, if we go to the summary in *R v McDonald* [2007] NZCA 142, so the Crown bundle at tab 9, paragraph 11, do you take issue with (b)?

MR BAILEY:

I'd probably take out the words "squarely confronted" because that's I think going to come back to the point that seems to be being made that I didn't get up to the jury and say, "This is the only issue that you need to consider and this is the defence case," so depending on how one interprets "squarely and confronted".

ELLEN FRANCE J:

Well, if we read that as not requiring the defence or the jury to have asked for this, would that be consistent with what you say the position should be?

MR BAILEY:

If the jury, sorry, Your Honour?

ELLEN FRANCE J:

Sorry. Your concern about "squarely confronted" as I understand it is that might require either the defence to have raised it or the jury to have raised it.

MR BAILEY:

I was referring to the element of the offence. In other words, did I squarely raise…

ELLEN FRANCE J:

No, no, no. Well, that's not how I'd read that but…

MR BAILEY:

Right. I think (a) and (b) should be read together and I do take issue with (a) and obviously it's not a matter of discretion for the trial Judge.

WINKELMANN CJ:

There must be some discretion for the trial Judge in it because the Judge will have a sense about the points that, the point that I've made that it'll be unfair to the defendant in the circumstances of the case or…

MR BAILEY:

Yes, Your Honour's right. I was just about to add that the discretion will come into it whether it's trivial, whether it's too late in the piece, whether its defence have – going to be tripped up by it. But other than that, if it's reasonably available as a possible alternative outcome then it goes in subject to those sorts of considerations.

WILLIAMS J:

Doesn't *Coutts* say it goes in despite opposition from the defence because there are more interests at stake than just the defence? There's society's interest and people not being over-convicted or under-convicted?

MR BAILEY:

Yes, but I also think it more directly on appeals particularly reflects that while it might have been a gamble but we still may have been – and obviously in the appellate context normally went against the person – but whether it was a gamble or not and whether they knew the risk, it may be a wrong outcome. So who cares? Who caused the wrong outcome essentially? If there's a basis to say the jury might not have properly convicted, then it's a bad outcome.

ELLEN FRANCE J:

What's the opportunity then for the defence to say, "I don't want the included charge. I think I can be acquitted on the more serious charge"?

MR BAILEY:

Well, I say there wouldn't be unless the defence could identify one of those things that we've talked about, trivial, it's going to be real, real prejudice rather than just, "I want to get off scot-free entirely," but otherwise, I mean this is why we're looking at the jury, it's premised on the basis that the jury may have wrongly convicted. So if someone is wrongly convicted then I just don't see the great significance of what defence counsel may have requested.

ELLEN FRANCE J:

Well, you might say that now in relation to this case but it seems a slightly surprising proposition to me in terms of the approach of the defence more generally and –

MR BAILEY:

I don't think – yes.

ELLEN FRANCE J:

– and the way in which we recognise the ability of a properly instructed defendant to make particular choices.

MR BAILEY:

Yes, well, I –

WINKELMANN CJ:

The – sorry, carry on.

MR BAILEY:

I certainly don't think it would be attractive where a Judge raises this and says, "I think we really should have an included offence," lawyer says on the defendant's behalf, "No, no, no, no," and then goes off and appeals, but despite that the English cases do allow that.

O'REGAN J:

With a different counsel no doubt.

MR BAILEY:

Yes exactly.

WINKELMANN CJ:

I think the Australian High Court in *James v R* [2014] HCA 6, (2014) 253 CLR 475 suggested that the elections by defence counsel must be part of the Judge's assessment.

MR BAILEY:

Mmm, in a second I'm going to come to that.

WINKELMANN CJ:

But needn't preclude the putting of it.

MR BAILEY:

Yes. So there is just before, I think I can get through the rest reasonably quickly, I've covered a lot, but there was just one again just in terms of when the Court gives its reasons if it's relevant as to why it chooses a certain approach and what it would mean ie why say appeal succeeded, what the rationale underlying that was, and I've referred to Justice Binnie's comments referred to in my written submissions, particularly in *Coutts* them talking about it's unrealistic to think juries just consider things in a vacuum and I adopt those comments, or slightly different, and then there was also a similar but different approach mentioned in *R v Foster*, so that's tab 16 of the Crown submissions at paragraph 60, the respondent's bundle of authorities. So tab 16, respondent's bundle of authorities, at paragraph 60, and again I'll just allow the Court to read that, but it talks about unconsciously making the wrong decision.

ARNOLD J:

Sorry, I'm looking at the wrong paragraph?

MR BAILEY:

Paragraph 6-0, 60.

ARNOLD J:
Oh 6-0, thanks.

MR BAILEY:
Thank you, so in just slightly different ways of looking at all potential concerns and why this rule is in force, at least in the UK. So I'll come back to my outline, bullet point 3 under the United Kingdom approach, I think the Crown, and this is reasonable I've included that bullet point, it made the point that *Coutts* concerned a murder case but I don't think any UK cases have held that the principles don't apply. I think it was made clear in *Coutts* that the principles do apply. I've provided a reference to *Foster*. I suppose we can look at that within, in fact we're on the *Foster* decision now, but at para 36, a few pages earlier.

WINKELMANN CJ:
Are we concerned with whether it applies outside murder because I don't think the Crown contests that, so we don't need to waste our time with that.

MR BAILEY:
Okay, that's fine, thank you. The next bullet point, outcome, and this is really to reinforce the submission that *Mokaraka* is not similar to the *Coutts* approach. So I again just rely on what I've filed in my written submissions. So those two cases are referred to in the appellant's written submissions at, and the cases will no doubt be attached, at paragraphs 94 and 95, and I've particularly included those because they are assault charges. From memory, there was nothing out of the ordinary in terms of jury deliberation which suggested they were going to wrongly convict or could wrongly convict, but it was determined in both cases that the Judge was wrong not to leave a lesser or included offence, and I think the Court will share the view that once, when those decisions are reviewed, they wouldn't have been decided the same if the *Mokaraka* principles were at play.

Next and last bullet point under United Kingdom approach on my handout, "Difference in approach to New Zealand," explains Crown's observations at

paragraph 60 of its submissions which, and I know New Zealand is a smaller country and what-not, but bearing in mind this is not normally done, or infrequently done, and *Mokaraka* was decided in 2001 or thereabouts, 2002, so about 17 years ago, and I think the Crown's right, there's only one decision in which it's been successfully argued, again that's not consistent in my submission with the suggestion that New Zealand's doing what.

WINKELMANN CJ:
Your point is it on your submission a wrongly narrow approach in *Mokaraka* explains this?

MR BAILEY:
Yes.

WINKELMANN CJ:
Okay.

MR BAILEY:
Because there have been some appeals, there certainly have been some appeals and they haven't largely succeeded, so we've got one case since 2002 where it succeeded.

Turning the page, Australian approach, I don't think it's entirely necessary for the appellant to full out criticise the *James* approach because it's not, in my submission, that different. It seems like it is different, which has already been touched upon in oral submissions or oral questions today, but it's not that different, in my submission, to *Coutts*, and the Crown noted somewhere in their written submissions that the *Gilbert v R* [2000] HCA 15, (2000) 201 CLR 414 and *Gillard v R* [2003] HCA 64, (2003) 219 CLR 1 principles were essentially the *Coutts* principles for murder cases, i.e., if generally they should be left, particularly if there's a basis for a manslaughter verdict.

And the Court in *James*, so that's tab 26 of the Crown bundle of authorities, tab 26, they talked about *Gilbert* and *Gillard*, and that was their extent of an

implied analysis of whether it should apply to non-murder cases, so they rely on the gravity of murder.

WINKELMANN CJ:
I don't think that's at issue. It's not an issue from the Crown that principles still apply outside murder, included charge principles.

MR BAILEY:
Under *James*?

WINKELMANN CJ:
No, in this case. I'm just not sure why we keep on spending so much time on that point.

MR BAILEY:
So *James* doesn't take the same approach to non-murder cases as it does to murder cases, and I –

WINKELMANN CJ:
In what way?

MR BAILEY:
They essentially say that there's no real discretion for a trial Judge not to leave it particularly where it's a possibility for murder, but it's clear that that approach wasn't adopted entirely for non-murder cases as they were discussing in *James*, and that's why they've said they don't, *Gilbert* and *Gillard* do not state any wider principle respecting the obligation to leave alternative verdicts for included offences.

ELLEN FRANCE J:
So in that sense for non-murder cases they are in fact closer to the New Zealand, the current New Zealand position?

MR BAILEY:
Yes. I wouldn't say the same, certainly wouldn't –

ELLEN FRANCE J:
No, no, no.

MR BAILEY:
Yes, exactly. So I've just – the first bullet point is – well, they haven't really explained for not adopting the *Gilbert* and *Gillard* approach to non-murder cases. They did, they didn't overlook the *Coutts* decision, so across the page at paragraph 27. They just really summarise what the *Coutts* decision is. So if they were intending, and it seems they were, not to adopt *Coutts* for non-murder cases, it's somewhat surprising they haven't gone into more of a detailed analysis as to why they've drawn the distinction. And I'm really just raising these points because it might be relevant to the weight this Court puts on the *James* approach.

The third bullet point I've noted, important to note that there was already an alternative count available to the jury in *James* which led to the comments in *James* that the appellant was contending for a rule of greater stringency that that proposed in *Coutts*, and that's at just the line below, paragraph 28.

So it certainly wasn't a case of the *James* High Court turning their nose on included offence or alternative charges and the importance of them being included in some cases. It was really the appellant saying there should have been a total of four charges, including three alternative/included offences.

It's already been mentioned, this is the bullet point 4, in the Bench today I think that adversarial system that the High Court in Australia relied on, and I suggest and submit that that is difficult to reconcile with actually what the legislation they were considering was which is at paragraph 13 of the *James* decision, and it's identical really to the UK legislation that was considered in *Coutts*. So that 239 talks about the jury may find the accused guilty of that other offence, so it empowers the jury to do that, and it certainly doesn't incorporate directly the adversarial system. It doesn't say they can do that only if the defence was wanting that, et cetera.

And then their last passage which is perhaps of some importance in that case was the last bullet point I've got under "Australian Approach". The conclusion of the High Court as to why no included offence was necessary in that case is important.

WINKELMANN CJ:
Now you're going to have pick up your pace here because we seem to be just sort of moving very slowly through the authorities but we haven't got to its application to this case and out of fairness to the respondent we should definitely be finished by lunchtime with your submissions.

MR BAILEY:
Yes. We will be.

WINKELMANN CJ:
So we seem to be losing shape in where we're going with this case.

MR BAILEY:
Well, I thought there was some importance to determine at the first stage whether overseas jurisdictions were consistent with the current New Zealand –

WINKELMANN CJ:
Yes, but perhaps you can just move it a little bit more.

MR BAILEY:
Sure. Well, that was the last one under the Australian approach, so at the end of the day this case, *James* case, was dealing with a particular set of facts and the distinctions and differences of charges which were being sought there weren't described as very subtle.

So the Canadian approach, if I may move onto that, so that quote at the first bullet point comes out of the Court of Appeal decision which ultimately went to the Supreme Court of Canada which is included in the bundle and which

we've already looked at. So unfortunately I haven't referred to that in my written submissions and therefore it's not in my bundle and similarly I don't think it's in the –

WINKELMANN CJ:
It's at tab 31 of the Crown's.

MR BAILEY:
It is in – well, that's the Supreme Court case. This was the earlier decision which was quite a lengthy decision, because the Supreme Court only considered the proviso, if I can call it that, and the application of the proviso. It didn't address the principle for the first step. So I was asked earlier about what should the test be and I say what I've set out there which was referenced, may I say, to a number of cases. It wasn't just the Court of Appeal coming up on their own bat. So it was a ready summary of the Canadian law and still remains, as I understand it, the approach.

O'REGAN J:
And you're saying that should be the test in New Zealand as well, are you?

MR BAILEY:
That would, I am sure, result in the same outcome in 99% of cases if compared to the UK approach that I've suggested. So they're saying slightly different phrases but that's quite an attractive approach in my submission.

ELLEN FRANCE J:
Well, it doesn't really, we've been over this ground, but it doesn't really tell you anything about what the Judge is meant to look at and on one view of it would apply to most trials.

MR BAILEY:
Yes, so I'd say –

ELLEN FRANCE J:

There's often going to be an included offence.

MR BAILEY:

Well, often, well, always, nearly all –

ELLEN FRANCE J:

Possible, I mean.

MR BAILEY:

Yes, there'd have to be consideration of included offence. It's just a – this'll become more of a procedural, usual procedural consideration.

ELLEN FRANCE J:

Well, for what purpose, given the – from a policy point of view the way things have operated in New Zealand the prosecution has a role in relation to the laying of charges and are you suggesting that's now going to be altered to something where the Judge on a regular basis is deciding whether or not there should be an included charge?

MR BAILEY:

Yes. I'm not submitting that that approach would have to succeed to determine this appeal because I'm saying even approaching this from *Mokaraka* there's some pretty strong reasons why we needed an included offence, but I'm saying yes, it would be very common and certainly consideration would have to be given.

ELLEN FRANCE J:

Well, and what's the policy reason for that?

MR BAILEY:

It's the all or nothing. It's the lack of options. It all comes back to that in my submission. And so in cases where it's just identity is the only issue, that's made clear, defence counsel get up in opening address, say, yes, this person

was obviously intentionally assaulted with GBH level but he – wasn't the defendant. Then it's probably not a realistic possibility for the jury to convict of a lesser offence in most cases because that's not an issue that needed to be determined on anyone's case but I would say using the words here "realistic possibility" certainly was when – as I said in the written submissions, the Crown went for quite a low threshold for "seriously assault", so the common enterprise, the objectives of the group, so there was a reasonably big jump from that to GBH. I mean "seriously assault" is a bit loose and obviously it could include a very serious assault but it wasn't a, it wasn't a they intended to cause GBH and that's what happened or they intended to inflict knife wounds or whatever. So what I'm saying is there was certainly real issues as to proving section 66(2), the foreseeability, particularly bearing in mind that this is an unintended victim.

So it was a realistic possibility using that language, in my submission, to include – for the jury to be satisfied that Mr Winter knew he was involving himself which could well likely result in, you know, serious violence even to others but not quite at the wounding stage because that was what the direction said and it was the charge, so it wasn't – it was more specific than a GBH. It was a wounding.

WILLIAMS J:
Can I just go back to the structural question Justice France asked? Do you have any knowledge of changes that have occurred either in the UK or Canada in charging practice as a result of *Coutts* and/or the Canadian equivalents shifting the emphasis in their law?

MR BAILEY:
I don't have – there might have been an article I read some time ago but I think the flood of cases perhaps supports the fact that was a pretty significant change. There are – obviously we haven't cited all of them but it certainly looked like it was being utilised on appeal.

WINKELMANN CJ:

On what basis do you say there's a flood of cases, because if you don't know the answer just say you don't answer. Are you saying because you've seen several reported? Why do you say there's a flood of cases?

MR BAILEY:

A flood, perhaps a little bit loose, but a number of reported cases that we can find that not all succeeded but a lot did. I suppose if one…

WINKELMANN CJ:

So you don't have any empirical basis for it, just an impressionistic basis?

MR BAILEY:

No, I don't but…

WILLIAMS J:

You said you recall an article that refers to this?

MR BAILEY:

I think I do –

WILLIAMS J:

Anyway, well, we can do –

MR BAILEY:

– that talked about support of change of approach. I don't think there's any doubt it was a major decision and I'm sure a search of cases that cited *Coutts* for that particular reason would support it being a significant case, but yes, point made that I shouldn't get into the extent of the…

WINKELMANN CJ:

Right, if you can just move on, please.

MR BAILEY:
So the last bullet point under Canadian approach, I've just referred to what I think we've already looked at, yes, we have, which is the tests in Canada for matters on appeal where this issue is raised so I don't need to go over that.

Final heading, "Included Offence." So the one the appellant relies on is the injuring with intent as the most logical included offence available, and coming back to the point I made earlier, one of the favourable things about injuring with intent was it's pretty consistent within the group's intention which was to seriously assault. In other words, if Mr Winter had an intention to seriously assault someone, it's not a great step to say he would have foreseen someone intentionally injuring even a third party given the circumstances of the case, going to a foreign address, for example.

ARNOLD J:
Can I just ask – sorry.

O'REGAN J:
Not grievous bodily harm? The serious – how do you get to injure rather than GBH as the intention?

MR BAILEY:
Well, the intention, if the alternative was, well, included offence was given and it was injuring with intent to injure then the jury could convict of that one if they were obviously satisfied that he foresaw injuries but didn't foresee the GBH level of injuries, and I'm saying you get to there by all the other background circumstances.

O'REGAN J:
But the knowledge of the knife was needed for a wounding.

MR BAILEY:
Yes.

O'REGAN J:

But it wasn't necessarily needed for an assault that had caused grievous bodily harm, was it?

MR BAILEY:

No. So the Judge –

O'REGAN J:

So, which would have been just as serious as wounding with intent to cause grievous bodily harm, wouldn't it?

MR BAILEY:

What would've?

O'REGAN J:

I mean you're saying that the obvious included charge involves the intention to do something of less gravity than actually happened.

MR BAILEY:

Yes.

O'REGAN J:

Whereas the only significance of the knife was that the GBH was going to be caused by a knife rather than by kicking someone in the head.

MR BAILEY:

Yes.

O'REGAN J:

Why do we have to say that it was a lower level of intention? Why is that obvious on the facts, given the nature of the threats that were made and so on?

MR BAILEY:

Well, because the threats, at least as the evidence suggests Mr Winter knew, didn't involve the mention of a knife. So I'm saying this is on the basis that the jury –

O'REGAN J:

But he did know that there was going to be, that there was something really bad happened between Ms McGrath and Mr Hatcher, didn't he?

MR BAILEY:

Yep.

O'REGAN J:

And that a big group of people was being assembled to deal with it.

MR BAILEY:

Yes.

O'REGAN J:

And given that there was going to be four of them and one of him, wasn't it reasonably likely that they were going to beat him up pretty badly and that they might cause him grievous bodily harm?

MR BAILEY:

Well, of course the problem with this we always, often dealing with young males who don't really consider what, you know, two seconds and –

O'REGAN J:

Well, four against one, four gang members against one, they weren't going to give him a tap on the shoulder, were they?

MR BAILEY:

This wasn't a – no, but I mean assaults vary and the sort of assaults you see in prison and on the YouTube footage, you know, whatever in the jail fights, it's not – you know, they're pretty brutal, punching kicking, and I know GBH is

not necessarily the highest level in the world to prove, but you can obviously give someone a pretty forceful go without wounding and without even causing GBH, so –

WINKELMANN CJ:
What about intent, what about causing grievous bodily harm with intent to injury?

MR BAILEY:
Well, that would hypothetically require, or would require, that Mr Winter foresaw that someone would get GBH but that Mr Hanson wouldn't do it intentionally, you know, intentionally injure which I just think is a little bit….

WINKELMANN CJ:
Well, is it? It seems quite realistic to me. If you're going to do a serious assault, isn't it reasonably foreseeable that someone is going to get seriously hurt?

MR BAILEY:
Not without intention. Well, they say – I'm not saying these other alternatives aren't available. This was the one that I suggested in the Court of Appeal was the most attractive and…

O'REGAN J:
It's the most attractive because it's the least criminal. I mean that's pretty self-serving, isn't it?

MR BAILEY:
Well, any alternative that was a step down from this, the significant charge, would have been.

O'REGAN J:
Yes, well, what I'm querying is why do we have to go a step down? This was a really serious incident and there were four of them going to beat up one

man. Why do we have to assume they were only going to injure him and then say, “Oh, look, he’s – we feel sorry for him. Now we’re going to stop”?

WINKELMANN CJ:

Which is how the Crown ran its case really, wasn’t it? It didn’t need to show a knife.

MR BAILEY:

It didn’t, no, well, no, but the Crown as I said earlier weren’t prepared to put this as these members were intending to GBH someone, that that’s got to be important. I mean they thought about that and it was only, you know, through the trial that I think that was – the Judge required them to advise what the level was that the group intended, what was the conspiracy, and they went for seriously assault, so I just – I don’t think the Crown can benefit now in saying, oh, well, it was always going to be GBH was –

O’REGAN J:

Serious assault can include GBH, surely. A serious assault is a serious assault, isn’t it?

WINKELMANN CJ:

Yes, nobody intends – you wouldn’t say that they formed a group with an intention of grievous bodily harming someone, grievously bodily harming someone. You’d say they formed a group to seriously assault them.

MR BAILEY:

Well, as I said, it’s a bit low – you know, you wouldn’t say they formed the group to GBH someone but you would word it in a way that would, you know, be more clear as to these sorts of injuries which would be, you know, maim or significant bodily injuries or what have you. If you seriously assault, you can infer the type of injuries to an extent but it doesn’t actually really – it’s vague.

WILLIAMS J:
So do you say that intent to GBH was not realistic on the facts of the conspiracy as Winter, you say, knew them, because that's the test in the Canadian case you cite?

MR BAILEY:
Am I saying it was a realistic possibility that he wouldn't foresee GBH but would foresee a lower level of harm?

WILLIAMS J:
Yes. Are you saying that the foresight of GBH was not realistic in Mr Winter's case?

MR BAILEY:
I'm not saying a jury couldn't return the verdict they did but I'm saying it was also realistic the jury wouldn't be satisfied to that level.

WILLIAMS J:
I'm thinking of the injuring with intent to GBH. The test you pose is what's realistic here.

MR BAILEY:
Yes.

WILLIAMS J:
So you'd have to conclude that that level was not realistic, this level was, otherwise the logic would be to start at the highest included charge and then work your way down in that cascade that the Judges complain about.

MR BAILEY:
Yes, I just suggested the injuring with intent to GBH as an alternative. It is not as attractive as a charge which the actus reus is the same as the mens rea because I think it would be unlikely that Mr Winter would foresee some degree of injury occurring but that the person who did it, ie, Mr Hanson or some other,

wouldn't foresee that level of injuring, but again I'm not suggesting there was one, only one alternative.

O'REGAN J:

But if that's right and we end up with a cascade, we're better just to not put one, aren't we, just leave it as the Judge did in this case? I mean otherwise you could have four or five going down: injuring with intent to cause grievous bodily harm, causing grievous bodily harm with intent to injure, injuring with intent to injure. I mean, where do you stop?

MR BAILEY:

What I'm suggesting again that would be another attraction to injuring with intent to injure because there's one – there's not realistic –

O'REGAN J:

Yes, but how realistic is it when you're assembling a group of four gang members to beat up one person that they're only intending to injure him, given how angry they were?

MR BAILEY:

Well, don't necessarily agree that they're gang members is relevant but…

O'REGAN J:

Well, it's the facts of the case –

MR BAILEY:

Yes.

O'REGAN J:

– and Mr Winter knew that.

MR BAILEY:

The Crown have at least acknowledged that it's relevant the charge that he had to foresee was to someone other than that intended to be the victim, so paragraph 67.1 of the Crown submissions. "Further, intent to cause GBH also

depended on Mr Winter's knowledge of the knife, because it was only on that basis that he could be expected to have foreseen GBH might be caused to someone other than Mr Hatcher."

WILLIAMS J:
So the argument is the knife created an element of randomness which the lack of an implement would not have?

MR BAILEY:
Well, that's the way I read it, yes.

WINKELMANN CJ:
Where is that?

MR BAILEY:
[67.1] of the Crown's submissions.

WILLIAMS J:
The flavour of that is also in the Court of Appeal decision, isn't it?

MR BAILEY:
Yes, I think it is, but I just, for the appellant, can't accept that just going with a number of people, one's a girl, didn't physically get involved, lack of evidence as to what was planned, et cetera, et cetera, that you can just say, well, four people who have got gang connections or somehow connected through interest in gang would without doubt intend to or would have foreseen GBH, particularly to a third party. Now for what it's worth, I don't think the Crown's submission, well, it's certainly not consistent with what they said at trial because, as we've already talked about, they didn't want a knowledge of knife direction, but, using what the Crown said now, you couldn't assume essentially that GBH would be foreseen, well, easily foreseen just because there was a number of people going there.

So what I'm suggesting instead of having five alternatives, for example, you wouldn't – providing one alternative would still give the jury the opportunity to convict on the more serious charge but injuring with intent to injure was pretty much clearly proved if the jury was satisfied of Mr Winter's involvement because they had to, of course, be satisfied that he was part of the group of people that intended to seriously injure. So I'm just saying no, you don't need to, like essentially was the *James* Australian High Court case, you don't need to have every alternative available or every lesser charge but there needs to be a realistic alternative which is more consistent with the defence. And I'm saying if there was an alternative charge with injuring with intent to injure then the Judge wouldn't direct that they had to have knowledge of the weapon for that charge.

The last bullet point, the Crown have said while, if they wanted to, the jury that is, punish Mr Winter, the MAF would have been a way to do that, a male assaults female only. Prior to that, the Crown submit that even injuring with intent is bordering on "trifling", but certainly male assaults female is a lot less than injuring with intent, so the Crown would have to accept it would be trifling if they're saying injuring with intent is trifling and therefore that's not going to give the jury much satisfaction to convict coupled with that the male assaults female didn't relate to the two primary victims, and as I say in the last line on the hand-out, one of whom Mr Winter assaulted. So again that's the submission that the jury clearly wasn't – the submission that if the jury wanted to do justice to the case and pin something else on Mr Winter that would have been sufficient can't be made out in my submission.

WINKELMANN CJ:
It's a good point to stop because it's 1 o'clock.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:
Ms Brooks.

MS BROOK:
Thank you, Ma'am. May it please the Court, I might just start by reassuring you that I don't propose to go through the Crown's written submissions in any detail but merely to confine myself to matters arising from the exchange with my friend that I've had the advantage of seeing this morning.

So turning first to the first ground of appeal about the admissibility of the arming up text message, as the Court will have seen from the written –

WILLIAMS J:
Just a moment, I seem to have a dead screen and I've sort of mooted the idea of typing my notes. This appears to have been a mistake for this case.

WINKELMANN CJ:
Do we just want to adjourn for a moment and get it sorted out?

MS BROOK:
Perhaps if we adjourn and the Court's registrar can sort it out.

COURT ADJOURNS: 2.10 PM

COURT RESUMES: 2.21 PM

MS BROOK:
I was just saying as the Court will have seen from the written submissions that have been filed the Crown's position is that the text message was properly admitted. The appellant's written submissions read very much as a wholesale attack on the co-conspirators' rule, suggesting that the rationale for it can no longer be justified or at least it should be limited in scope, and, of course, the difficulty with that submission which has perhaps been pursued with

somewhat less vigour this morning is that it's a statutory rule, it's no longer simply a common law rule, and it provides that certain evidence is admissible as long as certain criteria are met and there's no support in the statute or in any common law authority that the appellant has cited for the proposition that the application of section 22A is limited to statements made after the particular defendant has joined the conspiracy.

The only limitation is that at common law you can't use a hearsay statement to prove the defendant's participation in the conspiracy but you can use it to prove the existence and purpose of the conspiracy itself. So in this case it could be used to establish the fact of a conspiracy between Mr Hanson and Ms McGrath and the fact that its purpose was to violently assault Mr Hatcher. But it couldn't be used to prove Mr Winter's participation. That had to be proved by other evidence such as his own text message, his presence at Ms McGrath's address, his presence at the scene of the offending and so on.

The appellants relied on some extrinsic materials to suggest the law just should not be as it is and you will see the Crown hasn't really engaged with that material in the written submissions because, to put it bluntly, there's not much the Court can do about that in the situation that we're in, but I do need to draw your attention to one matter. There's a reference in the appellant's submissions to views expressed by the New Zealand Law Commission which are said to provide some support for the appellant's position and those references are to the issues paper that the Law Commission released as part of its second review of the Evidence Act, and as I'm sure this Court will be aware the final report was released in February this year and that's report number 142, and the appellant hasn't referred to that report which obviously overtakes the issues paper and the reason for that might be that the Law Commission did not in the result consider that there was any need to limit the scope of section 22A as the appellant suggests. In fact, the Commission recommended broadening the application of section 22A to capture all statements made, not just hearsay statements, and that picks up the point that Your Honour, Justice France, raised with my learned friend about that passage in the Australian case of *Ahern* and which is now reflected in

section 87 of the Australian Evidence Act 1995, that's a federal statute, and that provision substantially mirrors our section 22A but it's not confined to hearsay statements, and that's the position that the Law Commission has now recommended that we move to. So I just wanted to clear that up that there's no support from the Law Commission at least for the proposition that section 22A should be limited in scope.

So turning then as to whether or not the message was admissible based on the law as it is, that obviously depended on the Judge being satisfied that it wasn't merely incidental to the conspiracy but evidence of the conspiracy in operation, and Your Honour, Justice Arnold, asked about the difference between the two which does seem to be quite nuanced. There are some passages though that might assist and I refer the Court –

WINKELMANN CJ:
It's not conspiracy in operation, is it? Is that the words of the statute?

MS BROOK:
That's the words of *Kayrouz* which says that statements made in furtherance of the conspiracy may include statements made showing the conspiracy in operation, and that was the category of statement that this message fell into.

WINKELMANN CJ:
Perhaps it's best to use the words of the statute though. Anyway, carry on.

MS BROOK:
Sure. If I could take the Court to *R v Platten* [2006] EWCA Crim 140, [2006] Crim LR 920 which is at tab 21 of the respondent's bundle and specifically paragraphs 34 and 35, and I should say it's a bit confusing because counsel in this case was called Mr Winter, so when you read the quotes in isolation it can be a bit troubling. So there counsel, Mr Winter, had submitted to that Court that the statement in question needed to be made in furtherance of the conspiracy and therefore it meant it needed to be a statement which drove the conspiracy forward and couldn't be mere narrative, and the Court referred to a

passage in *Archbold* and then went on to say at paragraph 35, “The exclusion of what is described as ‘mere narrative’ applies, however, only to ‘narrative’ after the conclusion of the conspiracy. Statements made during the conspiracy and as part of conspiracy, because they are part of the natural process of making the arrangements to carry out the conspiracy, will be admissible.”

Your Honour, Justice France, also referred to *Kayrouz* at paragraph 36. That’s at tab 19 of the Crown bundle. I’m sorry, tab 5. That’s page 19, tab 5. So at paragraph 36 the Court says that the New Zealand Courts have taken a pretty broad approach as to what may be intended to, said to be intended to advance the common design, and then over the page at paragraph 37 the Court says, “We note that while a conversation that is solely about events that have already taken place would not be admissible, if it can be shown that the discussion is for the purposes of keeping the conspirators informed about what is going on so as to ensure that the conspiracy is able to proceed on its course, it will be admissible.” So drawing all that together, in my respectful submission the difference that Your Honour, Justice Arnold, referred to depends at least in part on whether the statement is about past events or whether the statement is about things that are happening or are going to happen and statements about past events will be merely narrative or incidental statements which are excluded once the conspiracy has concluded unless –

WINKELMANN CJ:

That’s a little bit irrelevant though, isn’t it? I mean isn’t the focus that’s mere narrative, and I appreciate that counsel for the appellant used that expression to encompass this, but the critical issue is not whether it’s mere narrative, it’s whether it is any way part of the natural process as the Court says in that case you referred us to, *Platten*, of making the arrangements to carry out the conspiracy?

MS BROOK:

Yes.

WINKELMANN CJ:

And as was pointed out to us it doesn't even seem to be telling his partner that he's going to be late, simply just a blurt out.

MS BROOK:

Well, you have to read it in context with the other messages between Mr Hanson and his girlfriend which precede that. She's obviously quite anxious about when he's going to be home. I think she wants him to be home by 6 o'clock. He's explaining to her what they're going to do and why, I guess to bring home to her the seriousness of the situation which he's involved in, the need for him to support his friends, or family indeed, and so the Crown position is certainly –

WINKELMANN CJ:

Do you want to take us to that bit?

MS BROOK:

I'm sorry, Ma'am?

WINKELMANN CJ:

Well, where's the – I mean the text messages. You're saying it shows that she's anxious as far as – it says there's a text message saying, "Are you home?" Because it doesn't –

MS BROOK:

So at 3.29 pm which is message 206 she says, "Well, look, I'm seeing – I've got other things to do. Can I assume you'll be home by six?" He then says at message 209, "Yes. If I have a black eye don't judge me," so he does give her the impression that he will be home by six at that point. Then later on we know from subsequent messages that he sends to Mr Winter Mr Hatcher is a no-show, so they were obviously expecting that something might happen at that point but it doesn't, and then there's a message that Mr Hanson then sends to his girlfriend again, that's message 261. It's not clear what this is in reply to but he sends her one saying, "No, just getting ready for my beat down

LOL I love this shit," is what that appears to say. And then again at 10 past seven, that's message 326, he sends her another message saying, and again it's not clear what this is in response to, there might have been phone calls that we don't have records of, he says, "Someone's threatening my brother's sister and said he's going to fuck my mum. Do I need to say more? I'm sorry but you know," and so the flavour seems to be that she's obviously wanted him to be home by six, he's not there, he's trying to justify why he's not there, and the Crown says that what that is is that he's making arrangements to, if I can put it colloquially, get her off his back so that he can concentrate on what the Crown says is the common plan.

WINKELMANN CJ:

So the thing that concerns me about this, just looking at it from a principle point of view, is that this is an extension to the law. It allows in evidence which is not normally considered reliable because on the basis of this theory, whatever it is, whether it's an agency theory or whatever, so it's allowed if it's in pursuit of the conspiracy, is it right to give that a fair, large and liberal, in the particular context which is criminal context, is it right to give that a fair, large and liberal interpretation, particularly when it's before someone has joined a conspiracy, because this is hardly really making the arrangements to carry out the conspiracy.

MS BROOK:

Well, the Courts –

WINKELMANN CJ:

It's really dealing with his domestic arrangements.

MS BROOK:

Yes, which the Crown says was effectively making arrangements to facilitate the conspiracy because he needed to make sure that he was available to do it. I mean that meant making these domestic arrangements that the Crown says.

WINKELMANN CJ:

So addressing the first part of my question though which is about whether – because it is pushing it, isn't it? You'd have to accept this is going – it's not exactly at the heart of the conspiracy, is it, making his domestic arrangements?

MS BROOK:

I completely agree that it was not the overwhelming case for admissibility under the co-conspirators rule. The Court of Appeal held that really it was a matter for the trial Judge who'd heard all the evidence to decide whether the balance tipped in favour of admissibility or not, and the Crown essentially adopts that position.

WINKELMANN CJ:

But taking it back to the point that I made, is it right to give it a fairly large and liberal interpretation given the context?

MS BROOK:

Well, I'm not sure I can agree with the suggestion that is a liberal interpretation. We're concerned obviously with section 22A of the Evidence Act which I don't see that there's really any support in the wording of the statute for the suggestion that it should be restricted to statements made after the defendant has joined.

WINKELMANN CJ:

No, I'm not talking about – I'm just not talking about before and after. It's simply that it's really quite incidental. It's about as incidental as you can get.

MS BROOK:

Well, the Court, the passages of *Platten* and *Kayrouz* that I've just referred the Court to suggest that "incidental" really means statements about events that have already occurred, not things that are happening or about to happen.

WINKELMANN CJ:

But isn't that dealing with the facts of that case?

MS BROOK:

Well, I'm applying those principles to the present case.

WILLIAMS J:

The underlying principle is probably not when it happened but the risk involved, and there's a danger after the event, not in the heat of the moment, that the record gets reconstructed.

MS BROOK:

Yes.

WILLIAMS J:

And so it's not reliable, right? It would have been perhaps better if, whatever the first case was you cited, just said that, because it's not really about timing. There's no particular principle about timing that would suggest that except for the risk involved in backfilling the narrative, right? Much less risk when the thing's live and happening. They are much more likely to be spontaneous and honest, et cetera, et cetera, right?

MS BROOK:

Yes.

WILLIAMS J:

The problem with this is this is, "Sorry, can't be home on time, darling, I'm busy with a conspiracy."

MS BROOK:

Yes.

WILLIAMS J:

And that is incidental. You really have to say the principle covers ancillary communications at the time that relate to the conspiracy. The danger with,

"Sorry, darling, I'm busy with a conspiracy," is that also could be a backfilling. It's much less likely to be the sort of spontaneous thing you get from, "Oi, get over here. We've got trouble."

MS BROOK:

I accept that admissibility of this particular message was nuanced. It wasn't straightforward. It wasn't –

WILLIAMS J:

Do you see the risk involved?

MS BROOK:

I do but I would also point out that section 22A already had some safeguards built into it because before we get to this point you have to have already satisfied or got to the point where there's reasonable evidence of the conspiracy and reasonable offence that the, evidence that the defendant did at some point join it. But I accept what you're saying. That's the risk with any hearsay statement.

ELLEN FRANCE J:

What the Judge said this evidence was relevant for was to prove a common intention on all of the parties to carry out a serious assault.

MS BROOK:

Yes.

ELLEN FRANCE J:

And if that's what it's, if that's the purpose, then you can see the argument that the notion of "arming up to do what we do" is some pointer in terms of that intention.

MS BROOK:

Well, it was – the Crown case about probative value was –

ELLEN FRANCE J:

Well, arguably on.

MS BROOK:

Yes. The Crown case was that it had probative value to establish the purpose of that conspiracy and that it was to violently assault Mr Hatcher, and Your Honour, Justice Williams, had a conversation with Mr Bailey about this, and it's important to remember that even though Mr Hanson and Ms McGrath had pleaded guilty and the jury knew about that, it was in the notice of admitted facts that they had pleaded guilty and been convicted of wounding with intent, but that's not the same as establishing a conspiracy and it was only the fact of the guilty pleas and convictions that was in the notice of admitted facts. There were no admitted facts at all about the existence or purpose of the conspiracy. The defence didn't give an opening address. So the Crown had to proceed on the basis that everything was in issue, and my friend has acknowledged today that that was the way the defence case was run, and therefore had to proceed on the basis that it did have to prove the existence of that conspiracy and, importantly, its purpose, and the arming up message was one of several that the Crown referred to in its closing address in order to establish that. There was no emphasis on this message as opposed to any of the other messages that were before the jury. They were just referred to collectively as messages that the Crown said the jury could use to establish the existence and purpose of the conspiracy.

WINKELMANN CJ:

So it still leaves you, I mean it might tend to, it's obviously, if you take away how reliable it is, it looks like it's proving something against Mr Hanson, but how do we know that it's reliable? He's just talking to his partner. He may be talking absolute rubbish. That's the whole point about hearsay. It's dangerous and that comes back to my question about the risks of drawing the net so wide that you capture these sort of incidental kind of discussions which post-event narratives are, might be, which incidental arrangements with your spouse might be, you know, which bragging to your friends might be.

MS BROOK:

That's absolutely right but that's not an issue that really arises in this case because we know that Mr Hanson did have a knife and did go and stab somebody.

WINKELMANN CJ:

No, no, it arises in terms of how reliable evidence it is as to the nature of the enterprise, doesn't it, that was agreed to at that time, that Mr Winter was joining?

MS BROOK:

Yes, as I say, I've accepted that this was a finely balanced question of admissibility, so perhaps this would be a convenient point to turn to, well, what if their message wasn't admissible? What's the prejudice to the appellant in this message having been before the jury even though it might not have been strictly admissible under section 22A? And in my submission that's quite straightforward because the Crown says that there was no illegitimate prejudice at all. The message was sent by Mr Hanson, clearly implied that at least he was intending that he would be armed when he confronted Mr Hatcher, as was the plan, and there was no dispute about that because Mr Hanson had, of course, pleaded guilty. There was no dispute at trial that he at least had a weapon and he used it. So it's difficult to see how the fact that he told his girlfriend that in advance could have been prejudicial to the appellant.

WINKELMANN CJ:

Well, I mean it might be were it not for the Judges because it might show that he always had that intention as opposed to having an intention at some later time but the point really is the Judge direct them, the jury, that they couldn't take that into account as evidence that Mr Winter knew.

MS BROOK:

Exactly. So the Crown would have liked to be able to use that message to go further and attribute knowledge of the knife to the appellant, for example, on

the basis that if Mr Hanson was telling his girlfriend that he was going to be armed then he obviously wasn't being particularly secretive about it and that perhaps increased the likelihood that Mr Winter would also have known.

WILLIAMS J:
Well, he might tell her something that he wouldn't tell his comrades.

MS BROOK:
He might've and it's by the by because that's not the way that things happened.

WINKELMANN CJ:
When you say the Crown would like to have, you mean just hypothetically?

MS BROOK:
Yes, yes.

WINKELMANN CJ:
Because it wouldn't because it would have been pushing it too far?

MS BROOK:
And that's the position that the Judge got to, and he specifically directed the jury that they could not use that message for the purpose of determining whether or not Mr Winter knew that Mr Hanson had a knife, and he did that because he didn't consider that the evidence satisfied him that Mr Winter had joined the conspiracy at the time the message was sent. Now as I've said in the submissions really that was a question of fact which he could have left to the jury and my learned friend referred you to the text messages and took you through them in some detail in support of his submission that actually, based on the messages that were being sent, Mr Winter couldn't have joined the conspiracy until well after the arming up message was sent, but he did overlook two matters which I suggest are important, and I'm referring to the telco data which is at the – sorry, my screen has just gone blank for a second there. I can't actually see it on my screen now but it's definitely tab 7 of the

additional materials. I can't give you the exact page reference but it's message 124 which was sent at 1.54 pm.

O'REGAN J:
Give us the message number again?

MS BROOK:
124.

WILLIAMS J:
"Na I karnt meat wat up"?

MS BROOK:
Yes. My screen has just come back on now so I'll just – no, it's gone. Which is when Mr Winter tells Ms McGrath that he can't meet her as she had previously requested and he asked her, "Wat up?" She then telephones him at 1.57, and this is described as being message 138 but it's actually a phone call, and they spoke for over five minutes. So had the Judge not taken the position that he did, the Crown could have invited the jury to draw the inference that in that phone call Ms McGrath told him all about what was happening with Mr Hatcher and recruited him to the conspiracy at that point.

WINKELMANN CJ:
But that would have been a wild inference for a jury to draw, wouldn't it, because there's no suggestion that they, that on the material – when is the first time someone say that they're going to use – had they been talking about using a knife before that?

MS BROOK:
I'm not talking about knowledge of the knife at this point. This is just about the point at which Mr Winter joins the conspiracy to assault Mr Hatcher.

WINKELMANN CJ:
So have they been trying to get people together to do an assault at this point?

MS BROOK:

Yes, Ms McGrath sends a couple of messages saying things like, “Do you want to come and smash Dan? He’s got the key of my back door.” She tries to recruit a few people, it would seem.

WINKELMANN CJ:

What about the fact that at a later stage Mr Winter says he can’t come?

MS BROOK:

He’s already said that before this particular phone call. So he says, “I can’t come. What’s up?” They then have a –

WINKELMANN CJ:

No, no, the later one where he says he can’t get there.

MS BROOK:

Yes, and then they organise a ride for him to get there, and there’s another five-minute phone call. So we’ve got these two five-minute phone calls straddling the arming up message.

WILLIAMS J:

With this, “Na I karnt meat wat up,” that “meat” is not meat as in meat? That seems to be –

MS BROOK:

That’s, “I can’t come to see you,” because she sent him –

WILLIAMS J:

Yes, she’s “meat,” well, they seem to refer to – maybe this is a Bandidos thing, I don’t know, but everyone’s “meat” for some reason.

MS BROOK:

Yes, it’s odd.

WILLIAMS J:

So whatever it was, he can't. But do we know what it was?

MS BROOK:

It's "meet" as in M-E-E-T, I think.

WILLIAMS J:

No, it's not. It's – that word "meat" is used as a reference to a person if you go through these texts.

MS BROOK:

I think in some cases it's a misspelling of "meet". Well, that's the inference that I drew from reading it is I think there – it might be an autocorrect –

WILLIAMS J:

It turns up a lot misspelt like that and I thought it must be that's their word for, you know, in mob text it's "dog", perhaps with Bandidos it's "meat". I don't know.

MS BROOK:

Maybe it is but I certainly took it to mean, whether they mean it as M-E-A-T or they mean it as M-A-T-E, they mean the same thing. They're referring to a person.

WILLIAMS J:

Yes, okay. So you think it was, "I can't meet" –

MS BROOK:

"I can't meet you mate."

O'REGAN J:

She said, "Can you come over?" and he said, "No I can't."

MS BROOK:

Yes, and he said, "No I can't."

WILLIAMS J:

Where does she say, “Can I come over?” “Can you come over?”

MS BROOK:

That’s at…

WILLIAMS J:

Before 124.

MS BROOK:

Yes, it is, it’s at 11.38 am.

O’REGAN J:

75.

WILLIAMS J:

Yes, yes. You see, there’s “meat”.

O’REGAN J:

She says “meat” as well.

WILLIAMS J:

Yes.

MS BROOK:

Yes.

O’REGAN J:

She does too.

MS BROOK:

So I thought that that was “mate” that she’s meaning, so, “Can you come see me today mate?”

WILLIAMS J:
I don't think so because it's spelt that way all the way through and it's a reference to everybody, so…

MS BROOK:
Maybe, maybe.

O'REGAN J:
Might be the Canterbury spelling.

MS BROOK:
But she definitely says –

WILLIAMS J:
Yes, could be a dialectual thing in Canterbury. Who knows?

MS BROOK:
She definitely says, "Can you come and see me," and he says, "No I can't. What's up?" and then they have this five-minute conversation, and of course they have a closer relationship than the other people that she was texting and trying to recruit to the plan, being that they were half-brother and -sister.

Anyway, that's all a bit by the by because given the very clear directions that were given to the jury as the use that they could make of that message, it was very restricted. They were told, "You can only use it to prove the existence and purpose of the conspiracy between Mr Hanson and Ms McGrath." So the Crown position is that there was no illegitimate prejudice that was attaching to its admission and certainly not to the extent that might give rise to a risk of a miscarriage of justice.

Now my learned friend has suggested some additional uses that the jury might have made of that message, or inferences that they might have drawn, and in my submission they're just inconsistent with those very clear directions that the Judge had given to the jury. He clearly said…

WINKELMANN CJ:

This is the inference that the Bandidos are bad?

MS BROOK:

Yes, or that the "we" in the message might have referred to the Bandidos generally whereas the Judge was very clear that it was about the common plan between Mr Hanson and Ms McGrath. So in my submission it was pretty clear to the jury that the "we" meant the two of them.

WINKELMANN CJ:

I must say I would I would tend to read it as the gang, if they're members of the gang, but the Judge directed them otherwise?

MS BROOK:

The Judge directed them otherwise and we have to assume –

WILLIAMS J:

He's really saying, this is how we roll, and he's not talking about him and Ms McGrath.

MS BROOK:

Probably not. I'd accept that, in that sense, yes, but the Judge was very clear about the use that the jury could make of it, and we have to assume that the jury followed the directions.

WINKELMANN CJ:

In what way was he clear about that point? You said they couldn't use it as Mr Winter's knowledge of the knife, but what else was he clear about?

MS BROOK:

Well actually he also, as well as saying that he also put the opposite propositions to what they could use it for, and it was very limited. I think that's at paragraphs 88 to 90 of the summing up, but I'll just check that.

WINKELMANN CJ:

90 is where he says what they can't do with it.

MS BROOK:

So at 88, it's at the top of page 101.0235, so this is paragraph 88 about half way down he says, "You're entitled to use those texts by Mr Hanson to show a common intention with Ms McGrath. You are also entitled to use those texts to ascertain whether there was a common agreement between Mr Hanson and Ms McGrath. You can use Mr Hanson's text about arming himself to prove the truth of what he was doing. It is not too much, you might think, of a leap to say that that's what he said he was doing and that's what he did."

Then he goes on to say further on that you can't use them in relation to Mr Winter's knowledge of the knife. So the suggestion that the jury might, nevertheless, have used the message for other purposes, really flies in the face of those directions. And my learned friend's submissions on this point, that's my learned friend Mr Huda, was really that we might assume that jury's don't follow directions in these circumstances and that's quite problematic because then you could never admit evidence for a limited purpose, and obviously we do that all the time in criminal trials, particularly in the situation of co-defendants when one has made a police statement and another hasn't, for example. It was also said that the appellant had lost some sort of forensic advantage by the absence of Mr Hanson and Ms McGrath, they having pleaded guilty and therefore not being at trial.

WINKELMANN CJ:

Well that was only in response to a hypothetical question.

MS BROOK:

Yes, I wasn't quite sure actually what the point was about that. I would have thought it was even easier to blame them when they're not there to defend themselves.

WINKELMANN CJ:

But it was a hypothetical. I don't know that we're…

MS BROOK:

That's fine. That's all that I had to say about the admissibility of the message unless the Court had any specific questions about that.

WINKELMANN CJ:

No.

MS BROOK:

Moving on then to the second ground of appeal, the primary submission for the Crown is that there was no included offence that could properly be left to the jury, or at least not one which was immediately apparent to the Judge, so that there was no error in declining to leave a lesser offence to the jury at trial and with respect to my learned friend Mr Bailey there was some conflation of the trial Judge's discretion to leave a lesser offence to the jury, and the threshold for appellate intervention when the discretion has been wrongly exercised. Now those are two very different things and as I've said in the written submissions there are only two cases in New Zealand in which the Court of Appeal has determined that a trial Judge has erred in the exercise of the discretion at trail, and that's *Mokaraka* and *Piwari v R* [2010] NZCA 19. So those are the only two cases in which the Court of Appeal has had to decide whether appellate intervention is required, but there are obviously lots of other cases which have considered the trial Judge's discretion to leave an included offence, but because they found no error there was no need to consider whether appellate intervention was required or indeed what the threshold for intervention might be.

So taking those two steps in turn, and dealing first with the trial Judge's discretion, the appellant suggested in his written submissions and in the roadmap handed up today that the New Zealand approach is different to the approach taken in other jurisdictions. The Crown's submission is that actually there is no meaningful difference. All the jurisdictions referred to require that

the lesser included offence be obvious, squarely confronting, or in some other way very clearly a possibility that should be left to the jury, and those terms already mean the same thing. I don't think there's any difference between "obvious" and "squarely confronting", and all the jurisdictions say that such an offence should be left unless there's a good reason not to, such as where it's going to be prejudicial to the appellant or the offence would be trifling. So there is a discretion, but it's not unfettered, and the appellant proposed today that we should change this approach so that lesser included offences would be left to juries more often, indeed I think he said much more often, which was, with respect, somewhat surprising.

There are references in the authorities to the possibility of compromised verdicts, and there's two types of compromise, and it's important to distinguish between them. There's a compromise where the jury is of the same mind and they compromise together between the position of the prosecution and the position of the defence, and they settle on, well, we'll just go for the middle road, the lesser offence which has been left to them. But other cases, and I suggest that this is one of them, can give rise to a different kind of compromise, which is a compromise in the jury room between the jurors, which might mean that a defendant is convicted of the lesser offence, when in fact he's entitled to a complete acquittal. So I'm thinking of a situation where some juries think, yes, he's guilty of the more serious offence, others think he's not guilty of anything at all, which should immediately get you to a complete acquittal unless you've got at least the majority, so they compromise on the lesser offence. So there is a real risk with lesser included offences that, and it's not just that the might not convict of the right charge, is that they might convict when in fact the defendant is entitled to a complete acquittal, and that's a risk that just needs to be borne in mind in my submission. This case is one which the Crown says was properly an all or nothing situation.

WILLIAMS J:

If you've got 66, for example, how can you leap from that to entitlement to a complete acquittal? Maybe the compromise is the best that's going to happen

in the human process, rather beautifully put by Lord Bingham again, the machine by which you do these things, does it, and it just is that way. It was for the jury to decide acquittal or not.

MS BROOK:
Yes.

WILLIAMS J:
Let's say there's a split 9/3 or 6/6 and it comes down to either a hung jury or a compromise. What's wrong with that?

MS BROOK:
Well nothing as long as they're not compromising and convicting on the lesser offence instead. The proper result there would be one of those two options that you've just described, either they're hung or they convict or they acquit. The situation that I'm talking about, let's imagine on the facts of this case, let's imagine that half the jury is completely convinced beyond reasonable doubt that Mr Winter is right in this, he knew all about the knife, got out of the car, went up there boots and all and got stuck in, properly guilty of the charge that had been laid. The other half are not sure and they're not sure he even got out of the car. Now –

WINKELMANN CJ:
Wouldn't this be a good argument were it not for the fact that we often give juries included charges, so is that risk present in every case we give jury included charges?

MS BROOK:
No, it's very specific to this case because this case had some unusual features about it, and that was in particular the people who were hurt were not the intended targets of the common plan, and that's really important. I might just turn to that now. Essentially –

WILLIAMS J:

Are you going off the point, I'm interested –

MS BROOK:

No it's probably a part of the same point to be honest. It's hard to say what offence Mr Winter would actually have committed had he not known about the knife and if I can just posit a hypothetical scenario to illustrate this. To be absolutely clear, had Mr Hatcher still been at the house bus, and he had been the person who had been stabbed, the Crown would readily accept that it would have been appropriate to leave a lesser included offence of wounding with intent to injure. If they had a reasonable doubt about whether Mr Winter knew there was a knife, they could well have decided that he was nevertheless guilty of the lesser offence, because he plainly intended that Mr Winter *[sic]* would be assaulted by a group of people, and therefore that at least some injury would be caused. It was the presence of the knife that made it more likely that the intention was to cause grievous bodily harm rather than just hurt him.

But of course that's not what happened. Mr Hatcher wasn't there and Mr Ambrose and Mr Williams were stabbed instead. So the question therefore became whether an intention to cause grievous bodily harm could be attributed to the group in respect of them, Mr Ambrose and Mr Williams, and the Crown case was that it could but that depended on the use of the knife, because whenever weapons are used, particularly in a group situation, there's always a risk that somebody other than the particular target is going to get hurt by that weapon. And so on that basis if Mr Winter –

WINKELMANN CJ:

So can you just go a little bit more slowly?

MS BROOK:

Sure.

WINKELMANN CJ:

So if Mr – so can you just go back to where you've completed where Mr Hatcher was there, but Mr Hatcher was not there?

MS BROOK:

Yes.

WINKELMANN CJ:

And so the issue you say was whether the Crown could prove an intention to prove grievous bodily harm?

MS BROOK:

Yes, an intention to cause grievous bodily harm could be attributed to the group in respect of those other people that they weren't expecting to be there.

WILLIAMS J:

And you needed a weapon of mass destruction for that?

MS BROOK:

Yes. Well, that was what the Crown accepted, that the use of the knife was what got you to an intention to cause grievous bodily harm.

WINKELMANN CJ:

Did it really?

MS BROOK:

Well, because if Mr Winter knew about the knife –

WINKELMANN CJ:

Because why did it fight the knife direction then?

MS BROOK:

I'm sorry, Ma'am?

WINKELMANN CJ:

Why did it fight the Judge's determination to give a direction about the knife? The Judge makes a note that the Crown resisted a knife direction.

MS BROOK:

I'm sorry, I'm not quite following. Which knife direction are you talking about?

WINKELMANN CJ:

About knowledge regarding the knife, I think.

MS BROOK:

That was in respect of the text message?

WINKELMANN CJ:

No. I might have this wrong but in the Judge's note.

MS BROOK:

Well, perhaps I should put it this way, the Crown case that went to the jury was that intention to cause GBH depended on the knife. It perhaps comes through a bit more strongly in the Court of Appeal judgment. The situation is that if Mr Winter knew about the knife –

WINKELMANN CJ:

So, "Crown did not want me to make a knowledge of knives direction to the jury on the basis that such a direction was not essential in this case. The Crown argument was that a common intention to seriously assault Mr Hatcher had been formed and even without knowledge of the knives the wounding with intent to cause grievous bodily harm by Mr Hanson was a probable consequence of carrying out the common purpose."

MS BROOK:

Yes, but they weren't successful in that, so the Crown case that went to the jury was that it did depend on a knife.

WINKELMANN CJ:

Okay.

MS BROOK:

So the reasoning is that if Mr Winter knew about the knife, he must be taken to know that another person other than Mr Hatcher might be wounded as a probable consequence of the common purpose. But if he didn't know about the knife –

WINKELMANN CJ:

I think I'm very slow but why was it necessary to show knowledge of the knife for an intention to cause grievous bodily harm to people who weren't known to be there?

MS BROOK:

Well, the reasoning is, and of course the Crown didn't quite accept this, but the reasoning of the Judge and, indeed, the Court of Appeal, was that whenever you've got a weapon, whether it's a knife or a gun or whatever, there's an increased risk that other people are going to be hurt, yes.

WILLIAMS J:

Collateral damage.

WINKELMANN CJ:

All right, so that's the point, simply the increased lethality of the randomness?

MS BROOK:

Yes.

WILLIAMS J:

So it wasn't actually the risk of what happened, it was the risk that in the attack on Mr Hatcher someone else would get cut?

MS BROOK:

Yes, yes. If Mr Winter didn't know about the knife and was expecting only that the group was going to beat Mr Hatcher up, you know, punching and kicking and what have you, it was much less likely that somebody else would suffer a wound, possible that somebody else would get hurt if they tried to intervene, as indeed happened. Ms Spencer got kicked when she tried to intervene. But that wouldn't suffice for wounding. And so that was the reason why the Court of Appeal at least thought that wounding with intent to injure was not an appropriate lesser included offence in this particular scenario. It's a combination of the defence being, "I didn't know about the knife," and the victims not being the targets of the common plan. It's an unusual factual scenario.

WINKELMANN CJ:

So you're saying it was all or nothing?

MS BROOK:

Yes, that's exactly right.

WINKELMANN CJ:

Because if he didn't know there was a knife then he couldn't be liable?

MS BROOK:

That's right.

WINKELMANN CJ:

He wouldn't be, he wouldn't be.

WILLIAMS J:

But why couldn't he contemplate, say, injuring with intent to injure?

MS BROOK:

Well, I've set out in the written submissions all of the possible included offences –

WILLIAMS J:

I see that, yes.

MS BROOK:

– of – just to cover all the basis because it wasn't really quite clear exactly what lesser offence was being posited. So in order to perhaps prepare myself more than anyone else for whatever might eventuate, I've listed at paragraph 67 of the Crown's written submissions every possible included offence that I could think of which would, leaving aside the facts of a particular case, ordinarily be available on a charge of wounding with intent to cause grievous bodily harm and I've explained in relation to each one why it wasn't actually available on the evidence in this particular case.

WINKELMANN CJ:

So can I just, if you're right about that, that it really was an all-or-nothing kind of a case, did that mean that the Judge, the Crown should have invited the Judge to make such a direction to the jury?

MS BROOK:

Well, they were directed that you have to be satisfied beyond reasonable doubt of all of the elements and if you don't then he's not guilty. Yes, if the –

WINKELMANN CJ:

But that's not the kind of direction that the cases contemplate, is it?

MS BROOK:

Well, only where the jury asks a question. If the jury asks a question showing, either directly asking, "Is there something else we can convict of here?" or, as was the case in *Piwari*, not asking that but asking a question which indicated that they were troubled by an element of the offence which made the difference between aggravated robbery and robbery, then the trial Judge has a choice. You either put the lesser offence or you give them that direction, "No, the Crown has put all its eggs in one basket. If you are unsure about something then you have a duty to acquit." But he doesn't have to say that

unprompted in the ordinary directions given in the summing up and the question trails because they clearly say, “If you’re unsure about any element of the offence you must acquit.”

WILLIAMS J:

So I didn’t quite follow this point you make at [67.3] where you say, you pick up the same point as you make with the wounding point, I think, which is that it wouldn’t turn on the issue of the knowledge of the knife but rather on the consequence to the victim and the consequence wasn’t in dispute. Can you just explain that to me?

MS BROOK:

Sure, sure. Just to put that in context I might just quickly – there’s sort of categories of charge that can go. So wounding was not a proper lesser offence because that requires the knife. Any intention to cause GBH, whether that was injuring or wounding, couldn’t be an option because the Judge was directing the jury that an intention to cause GBH depended on knowledge of the knife or use of the knife. So that took care of quite a few of the offences out of the equation. So that leaves injuring with intent to injure as the next one down the hierarchy which is what my friend is now saying should have been put to the jury. And the problem with that is the only difference between injuring with intent to injure and wounding with intent to injure is the consequence for the victim. Why are we putting a lesser offence which pretends that the victim wasn’t wounded? That’s just artificial in my submission.

WINKELMANN CJ:

Well, what about – there is an offence, isn’t there, causing grievous bodily harm with intent to injure?

MS BROOK:

Yes.

WINKELMANN CJ:

What about that?

MS BROOK:

Well, the grievous bodily harm that was suffered was caused by a knife. What would the –

WINKELMANN CJ:

I know but what's wrong with that as a – because it's the intent.

MS BROOK:

No.

WINKELMANN CJ:

Well, are you saying it's not available because it was caused by a knife?

MS BROOK:

Yes.

WINKELMANN CJ:

But why is it not available because it was caused by a knife?

MS BROOK:

Because you have to put the lesser offence that that turns on the live issue and because Mr Winter was saying, "I didn't have the knife," the lesser offence wouldn't then address his case.

WINKELMANN CJ:

Because is the question is what he would foresee, what Mr Winter would foresee Mr Hanson doing. So if you – so that would require him to foresee what – you require him to foresee that he, he would think, if he didn't have a knife, that they're all getting kitted up to do something, he could foresee that Mr Hanson and others could cause very serious harm with assault and you say, well, that doesn't…

MS BROOK:

But to other people. See, this is where the fact that the victims were not the targets of the common plan –

WINKELMANN CJ:

That's really the answer, isn't it? That's your answer to –

MS BROOK:

That's the difficulty so – and another situation, if Mr Hatcher was there then this would be much more straightforward. There'd be a whole lot of different included offences you could leave to the jury. But the combination of Mr Winter saying, "I didn't have the knife," and the victims not being the targets of the common plan, just take all of those other options off the table until you get down to assault with intent to injure, which the Crown says was just trifling in the context of what occurred on this particular night.

WILLIAMS J:

Was it five years' jail?

MS BROOK:

No three for assault with intent to injure.

WILLIAMS J:

Sorry, I thought you were talking about injuring with intent.

MS BROOK:

No.

WILLIAMS J:

Injuring and wounding are not mutually exclusive ideas, are they, wounding is a subset of injuring?

MS BROOK:

Yes.

WILLIAMS J:

So why then is it necessarily illogical or nonsensical to adopt that?

MS BROOK:

Well it's artificial because there's no, Mr Ambrose was wounded, so you'd be pretending that the victims were only injured, because –

WILLIAMS J:

But they were injured.

MS BROOK:

Yes they were, they were, but our law provides that there are different offences depending on what the consequences are. There's injuring or there's wounding.

WILLIAMS J:

Yes.

WINKELMANN CJ:

Is, in fact, your actual answer to everything really that it was strangers who were hurt and there is no scenario in which, without a knife Mr Winter would foresee strangers, as a reasonable possibility strangers being hurt?

MS BROOK:

Yes. Assault, yes, and which is why I've accepted that assault with intent to injure would have been available, but for the fact that it's trifling.

WILLIAMS J:

But you see he injured himself, one of those strangers.

MS BROOK:

I'm sorry, who injured…

WILLIAMS J:

Mr Winter, and he did it interestingly, and I thought you'd make something of this point, after Hanson stabbed him.

MS BROOK:

Yes, this is the kicking point. Now we get into a different problem, which is that when you've challenged wounding with intent to cause grievous bodily harm, or you've got a charge, you can only encompass the acts of that charge. This Court has said on a number of occasions you have to have separate charges for separate offences so there was no charge for the kicking, which occurred after Mr Ambrose and Mr Williams were stabbed, and that's often the case in these sort of violent melees, you don't have a charge for every assault and kick that's happened. You pick the most serious that reflects the criminality.

WILLIAMS J:

Yes, but in that case you had him as a principal, so if you chose not to charge him that's your call.

MS BROOK:

Exactly. So why would we for the option to convict him on something which wasn't part of the Crown case.

WILLIAMS J:

Mmm.

MS BROOK:

That's the risk –

WILLIAMS J:

But it does indicate, apropos of what actually happened, foreseeability of injury because he was prepared to engage in the activity that had that result.

MS BROOK:

Well the jury could have used that in other ways as well to convict him on a more serious charge. I mean he was in there boots and all, literally.

WILLIAMS J:

Yes, okay.

MS BROOK:

But I do think we need to guard against the possibility of defendants being convicted of offences which aren't actually the ones that they're charged with, when you're entitled to a complete acquittal.

WINKELMANN CJ:

What about the fact that everybody knew, well, it looked like he'd kicked – there's the compromise risk there, it was known that he'd kicked, probably, the jury would be pretty satisfied he'd kicked the victims, one of the victims, and that they have faced the possibility of him walking away free, because of the Crown's charging decisions.

MS BROOK:

Yes, if that's the way the Crown ran its case. I'd observe as well that we have in other cases juries asking questions about, well, you know, what can we do about this or what can we do about that, and I take the point in *Coutts* that, well, look, we don't want to presume that juries are necessarily going to speak up about these things, or even appreciate that they are issues, and there's two points to make about that. The first is that the reason those juries ask questions in those cases is because it's blindingly obvious that the defendant is admitting to a particular offence. That wasn't the case here. Mr Winter was suggesting that he may not have even got out of the car. It was very much everything's in issue, everything's in dispute. He was trying for a complete acquittal and he might regret that now because it has foreclosed the option. He might have been better off, he now thinks, to have said, "Yeah, I was there but I didn't know about the knife, I was just going there for a beat down."

The second point I'd make is that this particular jury wasn't reticent. There were a number of jury questions. They wanted to know about the phases of the moon, there were quite a few questions that they asked, so you might think that if they were concerned about something they probably would have let the Judge know.

The note from Ms Fuhr is really in response to the matter that the Chief Justice just raised about, you know, the jury would have been pretty satisfied that he had engaged in kicking. The evidence was a bit fuzzy about who did what at the scene, it would be fair to say, such that I could imagine that a Judge might be a bit nervous about leaving that, because there would be the risk that the jury would focus on it and convict him, when really the evidence probably wasn't enough to satisfy them beyond reasonable doubt that he did that. I know the sentencing Judge was satisfied of that, and said so at sentencing.

WILLIAMS J:
But that was his own view.

MS BROOK:
But that was his own view. I perhaps just finish this topic with the observation that even if we get to a point where this Court considers that there is one of these offences that might have been available to be left, it clearly wasn't obvious. We're all casting about trying to decide what it might be. We're analysing the elements in some detail. So I don't think it would be fair to say that the Judge got it wrong in not leaving an offence to the jury, because it clearly wasn't obvious. The jury wasn't squarely confronted with a choice on the evidence the way that it has been in other cases, so in my submission, we just don't get to the position of saying that there's been an error in the exercise of the discretion, in which case you won't be troubled by what is the threshold for appellate intervention and should we intervene, but I will turn to that shortly unless the Court's got any questions about where we've got to this point on the exercise of discretion.

O'REGAN J:

When you say it's a discretion, what does that mean for the appellate stand, when it comes to the Court reviewing that? Are you saying that the appeal court won't interfere unless there's something which is, made an error of law in the way the analysis has been done, or something like that, or I mean if the appellate court just thinks it was wrong and that it should have been left what happens then?

MS BROOK:

Well this is why I say it's important to maintain the distinction between the trial Judge's discretion and the threshold for appellate intervention. So the discretion that the trial Judge has is not a complete discretion. He should leave a lesser offence if it's properly available and raised on the evidence, there's no prejudice to the appellant, it's not trifling, all of those sorts of things. Unless there's a good reason not to you should leave the lesser offence to the jury. So if there isn't a good reason, and you don't leave it, then that's going to be an error, and then you can turn to well should we intervene, and that's what I'm going to move onto now.

WILLIAMS J:

At this stage your point is…

MS BROOK:

There was no error.

WILLIAMS J:

There wasn't any good reason.

MS BROOK:

Well there wasn't an offence.

WILLIAMS J:

Sorry, there, yes, that's right.

MS BROOK:

There wasn't an offence, or at least not one that was sufficiently obvious to the trial Judge that you could say he was wrong not to leave it. It's easy to look back with hindsight.

WILLIAMS J:

That hinges on the knife and the strangers?

MS BROOK:

Yes. It's easy to look back with hindsight and analyse these things and say, well actually probably, you know, he could have left this one, but it certainly wasn't obvious because for a start he wasn't asked to leave injuring, at best he was asked to leave wounding with intent to injure, which we know wasn't the right charge. So it would be a bit unfair to say that he erred in the exercise of the discretion in those particular circumstances.

But let's just say for a moment that we do get to that point, or this Court gets to that point, and thinks, well, maybe you don't think assault with intent to injure is trifling. Maybe that should have been left to the jury. Now the appellant says that the threshold for intervention is higher in New Zealand than is now the position in the UK, but with respect that's not borne out by the cases. We've only had two, that's *Mokaraka* and *Piwari,* and on both occasions the Court of Appeal intervened without really much hesitation at all. So we followed *Maxwell*, the English case of *Maxwell* in principle because we've adopted their statement of the law as to when an appeal court should intervene, but we haven't adopted *Maxwell* in the result. The result in *Maxwell* was surprising and problematic as the House of Lords subsequently described it, because there you had a case where the defendant was squarely saying, I admit I'm guilty of burglary. I organised these people to go and burgle this guy to get back property that I thought was mine. I get that, but I wasn't intending that there be any violence, I wasn't intending the, I think it was aggravated burglary or aggravated robbery that he ended up being charged with and so for a start it was squarely raised on the evidence that there was a lesser included offence, yet the Judge didn't leave it, and then the jury asked

a question and said, “Can we convict of a lesser offence,” because it was so blindingly obvious to them, and still the Judge didn’t either leave it to them or direct them, look, if you’re unsure you just have to completely acquit, that’s the way the Crown’s chosen to play, and so it’s really quite surprising that on appeal to the House of Lords they didn’t order a retrial, and almost an identical situation arose in *Mokaraka* where you had the defendant saying, yep, I'm admitting that I'm guilty of something, but not what I have been charged with. The Judge didn’t leave it to the jury. The jury asked a question, “Can we convict of the lesser offence?” Still the Judge didn’t either leave the offence to the jury or direct them, well, look, if you’re unsure you just have to acquit. So it’s unsurprising – and our Court of Appeal in almost identical factual scenarios, when you boil it down, said, well of course there should be a retrial.

WILLIAMS J:

Well that’s true in *Mokaraka* and *Piwari*. They’re both blindingly obvious I would have thought.

MS BROOK:

Yes, yes, they are. So was *Maxwell*.

WILLIAMS J:

What then do you say, so they shouldn’t have been hard, the question is really what’s being done closer to the line and what’s being done closer to the line appears to be protecting the discretion of the trial Judge, what then do you say, if your argument is really nothing to see here, move along, what do you say to Mr Bailey’s argument that the floodgates opened in England and Canada following *Coutts* and whatever the Canadian equivalent was.

MS BROOK:

Well I suspect that what happened in *Coutts* is that the House of Lords was unhappy with the result in *Maxwell* and that obviously coloured the way that the principle in *Maxwell* was being applied in the courts, but our courts just haven't applied it in the same way. We’ve been happy to order retrials. In

Piwari there was no discussion at all about should we intervene or what the threshold might be or, you know, looking for evidence.

WILLIAMS J:
Well, happy to do so in those two cases, but that's not many cases across a generation of law.

MS BROOK:
It's not, which you'd expect because to get to that point quite a lot of things have to have gone wrong in order to get to that point, so you wouldn't expect there to be a lot of cases.

WINKELMANN CJ:
Why are there so many in England?

MS BROOK:
Bigger population, I'm not sure. The outcome in *Maxwell* was obviously indicative that you don't intervene but there's no evidence that the New Zealand courts are following that approach, and I'm not sure how we can say that, well, yes it's obvious in these two cases where it's obvious, but what's happening at the margins, because I don't know what "at the margins" is. You only get to this –

WILLIAMS J:
Well closer to the line.

MS BROOK:
But you only get to this point if you've decided that the Judge has got it wrong at trial, and that's only happened twice. So we don't know what's happening in any other situations, if I can put it that way, because you don't need to decide whether or not to intervene unless you've decided that the trial Judge has got it wrong, and happily our Judges don't seem to be getting it wrong.

WILLIAMS J:

So, sorry, am I understanding your point correctly. You're saying that the dismissals of appeals on these points are also rare?

MS BROOK:

No, there's quite a few of them, but they're all on the basis that the trial Judge was right not to leave a lesser offence because it either wasn't available on the evidence or it was trifling or whatever.

WILLIAMS J:

And you say that those dismissals would also have been dismissals under *Coutts*?

MS BROOK:

Yes, because you don't get to the threshold of appellate intervention if you've decided that the trial Judge did make a mistake. What I was saying about *Coutts* is that I suspect they thought that they needed to change something fundamental because the way that *Maxwell* was being applied, indeed in *Maxwell* and in other cases, was just wrong, and so that required them really to ensure that the case wasn't distinguished on its facts or anything like that, to actually change the principle, and my submission is that they've gone too far in saying that there's this presumptive miscarriage, and there's suggestion that in New Zealand we need to do that. Our courts, so far, have been untroubled by the notion that if there's an offence that should have been left, and wasn't, then at least in the cases that have come before the Courts so far, that's fine. But that's not to say that you'll always order a retrial in those circumstances. There might be something else, and I think my learned friend did end up accepting this in oral submissions, that even *Coutts* doesn't completely foreclose the possibility that you might uphold the convictions in those circumstances.

Those are all the submissions that I wish to make Ma'am unless the Court has any further questions for me.

WINKELMANN CJ:

Thank you Ms Brook. Mr Bailey did you have any submissions in reply?

MR BAILEY:

Yes Your Honour. I know you'll want me to be brief and I will be. I just think there'd be some benefit of some matters being covered and again I'll just go through the order of the Crown submissions. So ground 1, and no doubt I'll be corrected by the Bench if I'm not summarising my friend's submissions accurately, but at least in part the submission was made that the co-conspirators, as it's normally applied in New Zealand, has effectively been endorsed by Parliament, and the first submission I make about that as it applies to how far you can go back, ie can you go back before a particular defendant's joined the conspiracy, and it may have already been pointed out earlier, but section 22A is silent on that point, it doesn't say it applies to earlier co-conspirators, even if the defendant wasn't part of it. So (a) there's latitude to work with just with the legislation.

Then (b) in my written submissions at paragraph 28, this was the Law Commission talking about the first review of the Evidence Act, so that was in 2013, so quite some time ago. What it's suggesting there is the Courts fill in a number of gaps and it's not included but I think it's probably makes the point even better, it's not included in the bundles of authorities that the Court's been given, and I should have included it, but in the *Second Review of the Evidence Act 2006*, that's the second review not held in 2006 but the *Second Review of the Evidence Act 2006*, the actual report, not the Issues Paper, if I can just give the Court the reference. So it's at page 25 of that report, paragraph numbers 1.18 until 1.22 I think the Court may benefit from that, and if I just read part of those paragraphs. "In considering whether an amendment is necessary or desirable we recognise that law reform may be achieved in a variety of ways and that legislation is not an exclusive solution." And then at 1.20, "The constitutional role of interpreting the provisions of the Act and applying the provisions to the particular facts of the case rests with the Court. In doing so they're able to resolve issues in interpretation and develop law," da-da-da.

So all I'm saying is if there's a debate to be had legitimately about whether things as are generally being applied to date are based on solid logic and solid principles, then there's no reason why in particular the highest Court in New Zealand shouldn't be willing to engage in that, and I think that's really the intention of the Law Commission, particularly as I've noticed, I say they've stepped away from any endorsement of the agency theory somewhat.

The text message itself, I'd just again like to, particularly in light of the exchange, refer to why the Judge included that. It's at paragraph 85 of the relevant memo, document 101.0105. Perhaps if we can just go to that. It shouldn't take too long.

WILLIAMS J:
Which paragraph again? 85 did you say?

MR BAILEY:
Yes, Sir, 85.

WINKELMANN CJ:
What's the document number?

MR BAILEY:
101.0105.

WILLIAMS J:
Tab 16.

MR BAILEY:
Yes, tab 16, and he may it somewhere else. I think I've adequately mentioned it in the written submission, but he's talking about the texts between Mr Hanson and his partner. He's put "Mr Aarsten". That should be "Miss". His evidence of "arming up". So he's focusing, as I've said in the written submissions, on the actual content of the text message and the Crown, I think

quite subtly but reasonably cleverly as well, have changed that to not really the content but informing the partner as to what he's doing and then the content goes in. But he, the Judge, that is, was not, did not say it was an act of furtherance because he was keeping his partner informed who was otherwise on his back and that was necessary for him to be able to do what he was very much concentrating on actual, the content, and that's why I think he fell into error.

Ground 2, matters in reply very briefly. I propose just to mention the case. I said there was two cases that I cited in the appellant's written submissions that related to assaults and the Courts in England on appeal had said there should have been an alternative assault. The decision of *R v Hodson* [2009] EWCA Crim 1590 in the – it's not included. I'm not sure what tab, sorry, I've only got the electronic, but it's in the appellant's submissions, *R v Hodson*, in particular, at paragraph 9. Tab 16, I'm told, of the appellant's bundle of authorities.

O'REGAN J:
It's *Foster*.

WINKELMANN CJ:
16 of the appellant's…

O'REGAN J:
The appellant's?

MR BAILEY:
So it's probably better the Court, if it feels the benefit, read that decision, it's very short, or a pretty short decision, but particularly at paragraph 9. So the defence was either self-defence or didn't intend to do the action, and at paragraph 9 the Court noted in the course of argument Mr Shaw acknowledged that it was open to a jury properly to conclude he didn't, whilst he had intent, he didn't have the high intent required, and so I make that point because the point being made by my friend today is that you can't criticise the

Judge. Nothing jumped out, et cetera, he wasn't squarely confronted or anything like that, but again that's certainly not how the English have approached matters and I really at the overall picture to say was that a reasonable alternative despite the specific defence that was being predominantly put forward. But certainly I would again ask the Court to take that decision in its entirety into account as to how that English applies the relevant *Coutts* approach.

Nearly there. The discussion my friend saying, well, there's a risk of compromised verdicts and juries, essentially came down to it in my submission that juries might not do what they should do. So, for example, the six/six split and then convicting on something that none of them agreed on but to the extent that's right I'd say what we can draw from that is you can't just say the jury were properly directed on the elements of the offence, therefore there's no risk that they've done anything wrong. It must cut both ways as well.

The all-or-nothing, so second to last bullet point, the all-or-nothing submission is something that I certainly can't accept. An all-or-nothing case is properly characterised, in my submission, such as a murder where someone's been shot, or alleged murder, where someone's been shot at point-blank range. It's either murder or, if the person is innocent because he didn't do it or she didn't do it and it's, well, it's nothing. So it's not how the Crown run their case and whether the Judge gives an alternative charge that determines whether it's an all-or-nothing, it's the facts of the case. So the fact that the Judge directed a weapon that needed to be known about or the jury needed to be satisfied, doesn't actually change the overall nature of the case. It wasn't an all-or-nothing case, and therefore it was important that the – a reasonably alternative offence, included offence –

O'REGAN J:

It's pretty hard to argue that given the difficulty you've had working out which offence it should have been and the fact you never asked the Judge to do it, isn't it?

MR BAILEY:

Well, again I'm not saying that I want the Court to rely on it for appeal purposes but I don't accept I didn't ask him to do it. There was a discussion about the need for something else to be put forward.

O'REGAN J:

Well, you didn't say what it was and we – you're trying to tell us this was clearly not an all-or-nothing case, there was a clear alternative, but you didn't seem to know what it was, and even in your written submissions you seemed to be pretty vague about it.

MR BAILEY:

Well, I put forward the most obvious alternative, the most important thing, there was no alternative, and to an extent I'm encouraging the Court to take a different practice that's been previously adopted so…

WINKELMANN CJ:

What about the point that Ms Brook makes which is that it was an unusual case because in order to obtain a – that the Judge effectively structured the case and the Crown had to accept on the basis that in order to obtain a conviction against Mr Winter the Crown had to show that he knew of the knife because of the – because that was the only scenario on which he could reasonably have foreseen lethality of a complete – not lethality – serious injury for complete strangers.

MR BAILEY:

Yes. And I say you can't construct cases because the risk is going to remain that the jury will not strictly follow, whether subconsciously or otherwise, the directions. But the big point that I disagree with my friend is when she said that we can't have a charge that doesn't represent what actually happened to the victim and I disagree with that because it's like a case where it's a clear case of murder but often, as the Court knows, there will be secondary parties that go down for manslaughter and the arguments never run that, oh, we can't have someone convicted.

WILLIAMS J:

But you've got a death in that case.

MR BAILEY:

Yes, that –

WILLIAMS J:

They're not going to go down for assault.

MR BAILEY:

No, but the argument could be run, well, we can't have someone found guilty or convict them of manslaughter when this person was intentionally killed, and so it's all about what Mr Winter foresaw and in many cases in might be a murder, it might be just below it, but what the Crown might be able to prove could be well down, might only be an assault, for example. I'm not saying that was –

WILLIAMS J:

But I think the argument is that it wasn't, it's not logical to posit the foreseeing of collateral damage to innocent parties as a result of a fist fight. You require a knife for that. That made it all-or-nothing, isn't that the point I think…

MR BAILEY:

I think, yes, my friend also said, well it's not unusual where people get involved and try and assist, like the female victim did and she gets bowled over, that was only a male assaults female, so I would have thought going around to his place where it's not his house, the intended victim, it wasn't Mr Hatcher's house, going around to a house bus where there's going to most likely be other people as well as Mr Hatcher, then you wouldn't expect everyone to stand back. So foreseeing collateral damage, even to a reasonably significant degree, is not difficult, especially when to overcome –

WILLIAMS J:

So you basically say that proposition is factually wrong?

MR BAILEY:

Yes.

WILLIAMS J:

Okay.

MR BAILEY:

And there's nothing wrong with someone being convicted of quite a significantly less offence than the main offender. The final very last submission is again on the subject of disagreeing with my friend, the submission that the New Zealand cases which on appeal haven't been successful when included offence have been argued, would have been decided the same if they were decided under *Coutts*. Now we haven't provided all the cases where it's not succeeded, but we've obviously talked about the two cases where it has, but there is probably not hundreds but a few, and I'm sure if those cases were assessed, if the Court went through the exercise of going back and assessing those with the principles of *Coutts*, the same result wouldn't be achieved. I just think that's wrong. I don't think it was intentionally wrong but I just think that can't be right. *Coutts* is, as illustrated by the *Hodson* decision, that's why I want the Court to look at it and how it applies, would require an included offence in a number of cases and I say the bigger question is not –

WILLIAMS J:

Do you have a for instance to help us?

MR BAILEY:

As in when it's –

WILLIAMS J:

Not *Hodson* but a New Zealand case.

MR BAILEY:

When it hasn't succeeded?

WILLIAMS J:
And it should have under *Coutts*.

MR BAILEY:
Well the only one, I'm just trying to look through there, is tab 9 of the Crown bundle, *R v McDonald*, I'd have to refresh my memory but that's certainly a case where it didn't succeed. I'm not in a position to say whether it would have or likely would have succeeded under *Coutts*. Yes, I did look at some a number of months ago which I'm sure would be better examples, and I think at the end, I think from memory it's perhaps only 10 or so, so it doesn't seem that this matter is raised a lot.

Sorry, I said it was my last submission. There was one other that's just come to me. There was some comment about, I can't remember the exact context, but about why would the Crown offer X, Y and Z, and that's when I say it's not up to the Crown to, entirely at least, dictate the landscape and that the section that must guide the Court's approach is section 143 of the Criminal Procedure Act, which I think was included in the written submissions.

WILLIAMS J:
It's in tab 2 of the Crown's bundle.

MR BAILEY:
Tab 2. Yes, section 143, included offences. The defendant maybe convicted. Again it was likely, I think I made an earlier observation when looking at the overseas jurisdiction, and when we were looking at *R v James* [2014] HCA 6 in the High Court of Australia, but this provides, essentially this is the empowering provision for the jury, but they can't convict if another offence is proved in the approach advocated for by the Crown today.

Does the Court have any further questions?

WINKELMANN CJ:

No, thank you very much Mr Bailey. Thank you counsel for your submissions, we've been much assisted. We'll take some time to consider our decision and you will have a judgment in accordance with the usual procedure.

COURT ADJOURNS: 3.45 PM