

# Appellant road map for hearing

## 1 Series of party-liability gang-context manslaughter cases

### 1.1 *Burke* – focus s 66(2) mens rea elements

- (a) Foresight of type assault that actually occurred (shooting)
- (b) For a shooting, had to know of weapon

### 1.2 *Kuru* – focus likelihood evidence and inferences

- (a) Improper likelihood evidence
- (b) Cannot draw impermissible/irrational inferences

### 1.3 *longi*

- (a) Squarely engages *Burke* – no error, but informs fallacious verdict argument.
- (b) Squarely engages *Kuru* – errors. This is crux of/primary argument on appeal.
- (c) Goes beyond *Burke* and *Kuru* in inviting Court to address scope of inference directions to avoid future injustices. [Ms Hu to address]

## 2 Analysis of elements of charge/verdict (per *Burke*)

### 2.1 Unlawful act (s 66(1)):

- (a) [Moot: Principal fired a shotgun at a person;]
- (b) MI helped by words or conduct;\*
- (c) MI intended to help principal 'fire a shotgun at a person';\*
- (d) MI did not know principal meant to cause death or meant to cause injury reckless as to death (murder)<sup>∞</sup> but [Moot: MI knew firing a shotgun at a person would cause more than trivial physical harm].

### 2.2 Unlawful purpose (s 66(2)):

- (a) MI joined plan to fire a shotgun at a person;\*
- (b) MI did not foresee killing (murder)<sup>∞</sup> but foresaw shooting (i.e. assault of type that actually occurred);\*
- (c) [Moot: MI foresaw infliction of more than trivial physical harm;]
- (d) [Moot: MI knew of shotgun.]

<sup>∞</sup> finding necessarily made by jury, but logically/plausibly unavailable if MI knew of/foresaw principal firing a shotgun at a person. Logical/plausible route to manslaughter only if MI knew of/foresaw lesser unlawful act. Counsel at trial apprehended lesser unlawful act route to liability available, but that is not manslaughter per *Burke* and that was never Crown case.

\* no evidence/no rational route to conviction (*Kuru*).

### **3 Unreasonability of verdict**

- 3.1 Jurisdiction
- 3.2 Jury manslaughter verdict logically unavailable (*Burke*) – as above
- 3.3 Much less to justify verdict than in *Kuru*, which verdict was unreasonable
  - (a) Greater proximity to offending
  - (b) But no motive and no evidence norms/rules re involvement/knowledge
  - (c) And norms/rules relied on much less probative
- 3.4 Catalogue of *Kuru*-identified errors:
  - (a) Crown: appeal to rarity/unlikelihood reasoning – contributory, increased need for trial Judge care.
  - (b) Trial Judge (stand-alone appeal grounds):
    - (i) did not identify risk of impermissible/irrational reasoning (erroneous s 147)
    - (ii) did not fairly sum up defence case
    - (iii) did not identify key circumstances favouring defence inferences
    - (iv) did not give proper instructions on circumstantial evidence and inferential reasoning and risked binary enquiry v proper application of burden/standard
  - (c) Jury: verdict necessarily rested on impermissible/irrational reasoning

### **4 Desirability of specific direction to exclude reasonable inference consistent with innocence, before finding guilt (“Hodge” direction) – Ms Hu**

- 4.1 All jurisdictions canvassed emphasise flexibility / trial judge discretion as to when to give this direction.
  - (a) New Zealand and United Kingdom – little judicial discussion. Purpose of direction subsumed by directions on burden and standard of proof.
  - (b) Australia – more prescriptive. Such a direction helpful “in many if not most” cases where the Crown’s case is largely circumstantial.
  - (c) Canada – recognition that *Hodge* direction serves different purpose from directions on burden and standard of proof. *Hodge* direction specific cognitive biases (“jumping to conclusions” / “filling in the blanks” i.e. confirmation bias).
- 4.2 Greater judicial guidance on use of *Hodge* direction in New Zealand helpful. No current discussion in Benchbook. A succinct direction that improves trial process.
- 4.3 Particularly desirable in this case given its complex nature and other deficiencies in summing up.

### **5 Remedy sought**

- 5.1 Set aside conviction and order that a judgment of acquittal be entered