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

SC 19/2025
[2025] NZSC Trans 19

MANU HORI IONGI
Appellant

v

THE KING
Respondent

Hearing:	22 October 2025
Court:	Winkelmann CJ Ellen France J Williams J Kós J Miller J
Counsel:	K E Hogan KC and T Hu for the Appellant N E Walker and H D Benson-Pope for the Respondent

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CRIMINAL APPEAL

MS HOGAN KC:

Tēnā koutou, e ngā Kaiwhakawā, ko Ms Hogan ahau, māua mō Ms Hu, mō te Kaipīra.

WINKELMANN CJ:

Tēnā kōrua.

MS WALKER:

Tēnā e te Kōti, otirā tēnā koutou katoa, e Ngā Kaiwhakawā o Te Koti Mana Nui, ko Ms Walker māua ko Mr Benson-Pope he māngai mō te Karauna e tū nei. Good morning, your Honours. Ms Walker and Mr Benson-Pope for the Crown.

WINKELMANN CJ:

Tēnā kōrua. Ms Hogan.

MS HOGAN KC:

Thank you. Your Honours, Mr Iongi is observing via video link. We have tested that just five minutes ago.

WINKELMANN CJ:

So we will observe our normal attempted practice of trying to give you 15 minutes, uninterrupted.

MS HOGAN KC:

Thank you.

WINKELMANN CJ:

It is a best endeavours, you understand.

MS HOGAN KC:

Of course.

WILLIAMS J:

Yes, occasionally we actually achieve the actus reus.

MS HOGAN KC:

If it assists, I have spoken with my friend Ms Walker and we propose that I will be completed within two hours. There will then be two and a half hours left and

she should also have two hours and then a 30-minute reply period if that suits the Court, conscious we are finishing at 4 pm.

WINKELMANN CJ:
Yes, thank you.

MS HOGAN KC:
I trust you all have seen the road map that was filed yesterday morning and if perhaps I can orientate myself to that before I get underway.

This is the third in a series of party liability gang context manslaughter cases that this Court has expressed interest in and heard and much of the hard work has already been done thanks to the *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1, (2024) 31 CRNZ 293 decision and then the *Kuru v R* [2024] NZSC 184 decision. Both of those decisions are relevant to today's hearing.
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Burke very helpfully focused on section 66(2) and the mens rea elements required for that section. As this Court will well be aware, *Burke* stands for the need for foresight of the type of assault that actually occurred in order to be party to a crime and here, of course, the assault that actually occurred was a shooting and the Crown had to prove foresight of that for section 66(2) liability.

Additionally, *Burke* stands for the proposition that for a shooting or a crime involving a particular weapon, the defendant has to have knowledge of such.

Now this case does not fall afoul of *Burke* in any way. The Crown pre-*Burke* pitched its case appropriately and the Judge directed on those elements, but nonetheless *Burke* is engaged, particularly when I argued that in this case there was no route to a manslaughter outcome. Really on the Crown case it was murder or nothing and the elements of section 66(2) are vitally important to that argument.

KÓS J:

Breaching the rule at five past. Do you say there was an adequate weapons direction?

MS HOGAN KC:

Yes, I do. I concede that and if necessary I can refer to this Court's comment in *Kuru* which informs that submission.

Turning then to *Kuru* in an introductory fashion, in that case I submit the focus for this Court was on the admissibility of likelihood evidence and very much on what can be done through inferences, what can be done by the Crown through inferences, and in particular *Kuru* stands for the proposition that a fact-finder cannot draw impermissible or irrational inferences.

This case, as I have said, rests on the work done in *Burke* and *Kuru*. We do not argue for the appellant that there was any *Burke* error in this case but, as I said, *Burke* informs our argument that a manslaughter outcome was fallacious.

This case squarely engages *Kuru* and we say there were a number of *Kuru* errors in this case. This is the crux or the primary argument on our appeal.

We say *Iongi* goes one step further than both *Burke* and *Kuru* in that it invites the Court to address the scope of inferences directions to avoid future potential injustices in this space in a Crown case very reliant, solely reliant, on circumstantial evidence and inferences. In terms of that point, inviting the Court to assist in further trials of this nature, Ms Hu will address the Court on overseas jurisprudence in particular and what guidance can be drawn there.

In my road map I have at part 2 in a very elementary fashion, no pun intended, set out what the elements are for party liability in manslaughter cases and I have done that because the reality is no matter how long I have sat with this file, and for me it has been many years now (I was junior counsel in the first trial, lead counsel in the second trial, at the Court of Appeal hearing), I need to refresh myself time and time again as to what the elements are. So excuse me

for putting them out in such a simplistic fashion. I know they are much more involved.

WINKELMANN CJ:

No, it's helpful, thanks. No need for apologies.

MS HOGAN KC:

One slight amendment, I did think it was slightly simplistic, at 2.2(b) where I've underlined what was required for murder under section 66(2), that MI (Manu Iongi) did not foresee a killing, of course, that's not sufficient for murder. There has also to have been knowledge that the killing was done, was to be done with murderous intent. So if it's of assistance, I suggest just the words "with murderous intent" follow the underlined words "did not foresee killing". I didn't want to be too simplistic there. I'm aware that for murder there would have to be that additional element.

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I have endeavoured to show in part 2 which elements are in issue and just to walk you through it in case my shorthand is not good enough, I concede that it is a moot point for the purpose of this appeal that a principal fired a shotgun at a person. So, the first element under section 66(1), liability for Manu Iongi is not in dispute. There was a principal offence.

The second element the Crown had to prove beyond reasonable doubt was, for section 66(1) liability, that Manu Iongi helped or the other iterations of providing assistance that section 66(1) provides for. My shorthand is, helped by either words or conduct in that shooting and the asterisk there denotes that the appeal argument is that there was no evidence or certainly no rational route to a beyond reasonable doubt conviction in respect of that element.

The third element is that Manu Iongi intended to help the principal fire a shotgun at a person and again I say there was no evidence or no rational route to conviction in respect of that element.

And then the fourth element is, for manslaughter, that Manu Iongi knew that firing a shotgun at a person would cause more than trivial physical harm and I concede that that's a moot point on the Crown case here. That if the Crown had proved Manu helped and intended to help a person fire a shotgun at a person then it is a given that he would have known that would cause more than trivial physical harm.

WINKELMANN CJ:

So can I just ask you, you conceded that any evidence – any weapon direction that was needed was given, but I had noted an absence of focus on Mr Iongi's knowledge of the presence of a weapon, which all seems relevant to these points.

MS HOGAN KC:

Yes so certainly the argument was made at trial that there was no evidence whatsoever as to where the shotgun was in the vehicle and whether Mr Iongi knew it was in the vehicle en route to the shooting and there was no direction about that.

But the point I'm making here is that if the Crown satisfies to the requisite standard the fact-finder that Manu Iongi intentionally helped and intended to help a shooting, he must have known there was a gun. So, I'm not conceding that there was evidence he knew there was a gun, but in terms of the academic analysis of the elements, if the jury crosses the hurdle, the high hurdle required for section 66(1), helping the shooting and intending to help a shooting, then it would not trouble the jury that he knew of the shotgun. There was no evidence that he did.

The Crown, of course, relied on the fact that the shotgun must have been in the vehicle during the 13-minute journey to 73 Calthorp Close. But the only evidence, apart from the fact there was, of course, a shooting at that address, regarding the shotgun was 10 minutes later when it was in Viliami's possession in the rear seat. So no evidence whatsoever of Manu Iongi having any association with that shotgun other than merely being in the vehicle.

KÓS J:

It's an embedded weapon direction, it's embedded in the elements, but it's not quite what we had in mind in *Burke* which will be a direction to the jury along the lines of "you must be sure that Mr Burke knew that" – I can't remember the name of the assailant in that case but – "Mr X had a knife with him".

MS HOGAN KC:

Yes and if that's an argument available to me today then I will take it, because it would potentially have focused the jury on the defence inferences that I had nominated in my closing. But I really was guided by the observation in this Court in *Kuru* which seems equally applicable here, this is at 103 of *Kuru*, that: "[This] case is similar to *Burke* and also required a weapons direction [but] there was no misdirection in this regard because the common purpose was defined as including the carrying of firearms (essentially the equivalent of a weapons direction)." And I do give the Crown credit here in that at all times its case was pitched at firing a shotgun at a person, so there was that embedded focus on a weapon as this Court observes in *Burke*.

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WINKELMANN CJ:

I was interested in the point, because it seems to be one of the live points at trial and, as you say, it was and so it was a critical point for the jury to be satisfied.

MS HOGAN KC:

Yes.

WINKELMANN CJ:

Before they – because in most trials, the evidence of joining the common, the joint venture, is knowledge of a weapon. That is the evidence the jury weighs.

MS HOGAN KC:

Yes and a subsidiary point to there being no evidence of an association between Manu Iongi and the weapon in the vehicle was that even if he had

been aware of the vehicle [*sic*], it would not have been a red flag to him because of the propensity evidence adduced by the Crown that Falala always had or very regularly had weapons in his vehicle. So even if Manu Iongi had seen the shotgun in the vehicle during that trip, it would not necessarily have been a red flag to him because that was commonplace. It would not have indicated this was an unusual car journey or a car journey with a different purpose from every other car journey.

MILLER J:

The Crown case really depended, did it not, on his prior knowledge, really at the point where he got in the car at the beginning of the journey, of what was the purpose.

MS HOGAN KC:

That's right and there was absolutely no evidence of that.

A nice segue from that question, Justice Miller, is with reference to section 66(2) and here I'm still on page 1 of my road map, the Crown had to prove that Manu Iongi joined a plan to fire a shotgun at a person. Knowledge alone is not enough for section 66(2) liability. Knowledge of the plan is insufficient. He must have entered the agreement and agreed to assist.

Knowledge would only be sufficient for section 66(2) liability if this was a manslaughter by omission case. So if Manu Iongi was under a duty to act with knowledge or once he had knowledge, and he omitted to perform that duty, then knowledge would be sufficient. But as I said, this was not an omission case.

There is no evidence he had any such knowledge, as Justice Miller observed, but even if there was, bare knowledge is insufficient for section 66(2) liability. He must enter the agreement and agree to assist with it. So that's a point I wish to make in relation to 2.2(a) of this road map.

WILLIAMS J:

The Crown's case, he is, on perhaps the least culpable version of his involvement, he was there just in case.

MS HOGAN KC:

Yes, I mean –

WILLIAMS J:

Is that enough?

MS HOGAN KC:

I say if the Crown could prove he was aware of that being his role, if there was evidence to that effect by communications or the like, that he was being brought along as muscle and he entered into the agreement to be that muscle, then yes. But there is no evidence of that.

WILLIAMS J:

Except his presence.

MS HOGAN KC:

Mere presence is all the Crown has, yes, and I will go on and talk –

KÓS J:

Well, the Crown's big point, which it repeats four times in its closing, is that only a trusted participant would have been brought along. That's their core argument. They put it several different ways, but that's their core inference.

MS HOGAN KC:

Yes and in my submission, I'm going to go into this in much more detail in due course, is that that is the norm or the rule that underpinned the Crown case and as a norm or a rule it was, first of all, unevidenced, second of all, significantly less compelling than the norm or rule in *Kuru*, that a president would know what was going on, that didn't hold water despite being evidenced in *Kuru*. There are so many variables that can attach to a norm or a rule that need to be

excluded before a verdict of guilt could legitimately be reached. So, I do acknowledge the norm and rule, the norm/rule relied on by the Crown, but I will endeavour to argue strongly when I get to that point, looking at *Kuru*, that it is far from enough.

WILLIAMS J:

Is the Crown case better here though? Because the equivalent would be Kuru in the car.

MS HOGAN KC:

I say the Crown case is significantly less than in *Kuru*. The only distinction, the only pro-culpability distinction, is that greater presence, that greater proximity, in this case as opposed to *Kuru*.

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WILLIAMS J:

What do you say? That's offset by the fact that Kuru was the pres?

MS HOGAN KC:

It's offset by the fact Kuru was the pres and the norm or the rule that attaches to that. It's offset by the fact that Kuru had a motive, whereas Manu Iongi had none. So there's a variety of anti-culpability distinguishing factors that I'll walk the Court through when I get there.

I think I have…

WINKELMANN CJ:

What about the fact that he picked up a weapon a day after?

MS HOGAN KC:

So it's acknowledged that that's an act of an accessory and he could have been prosecuted on an accessory charge, but it is not probative of the mens rea or the actus reus required the night before.

KÓS J:

The point you made to the jury in your closing address was that it's exactly the situation that the other Mr Iongi – don't know how you pronounce his name, Havea?

MS HOGAN KC:

Havea, yes.

KÓS J:

Havea – was in.

MS HOGAN KC:

Yes. So the Crown will in response point out that Havea didn't necessarily know that there'd been a shooting whereas Manu Iongi in the vehicle, uncharacteristically quiet, looking straight ahead, as opposed to his two co-defendants who are fidgety, looking behind, the demeanour evidence, the Crown says, indicates Manu Iongi had some appreciation of what had happened at 73 Calthorp Close, and so that may be a slight distinguishing factor between his activity, picking up the gun the next day, and Havea's activity, holding the gun over the night, although, of course, Havea had been told by – and I can't recall whether it was Falala or Viliami, they were the only two he interacted with verbally at the address, that it was a hot gun. So Havea too had some, was given some information about the events that had just occurred.

WILLIAMS J:

You mean "hot" in terms of stolen rather than hot like a cup of tea?

MILLER J:

Physically hot.

MS HOGAN KC:

He provided both descriptions. So Havea said the words "it is hot" was communicated to him and then his evidence was when he held the gun it was warm or hot like a cup of tea. So two distinct pieces of evidence.

So Havea had immunity for – not for accessory. The Crown didn't consider he was an accessory without sufficient knowledge of what the gun had been used for, but he did have immunity for a firearms charge.

KÓS J:

You challenged his evidence at length in your closing address but you don't need to do that here, do you?

MS HOGAN KC:

No, and it was challenged again at length in the Court of Appeal which may be why the Court of Appeal really omitted to deal with in detail the argument that was put in front of the Court of Appeal and why we're here today regarding unreasonable verdict and the dearth of information given to the jury in the Judge's directions. If *Kuru* pre-existed the Court of Appeal hearing, we might not be here and, you know, to the extent counsel could have done more on this topic in front of the Court of Appeal, she wishes she had but it is, it was a live issue and was, is very much sort of the focus in the Court of Appeal. In the Court of Appeal judgment there's much more on Havea and the impropriety finding and whether his evidence is admissible, and as conceded by the Crown in the Court of Appeal pre-trial on the Havea evidence issue, its case against Manu stood or fell on Havea's placing him in the vehicle of interest that night. The Crown acknowledged it had nothing else other than that to place Manu anywhere near this incident.

All Havea's evidence did, however, was establish that Manu Iongi was in the vehicle of interest soon after the murder. He was seated in the front passenger seat while Falala who owned the vehicle was driving and the murder was in Viliami's possession in the rear seat behind Falala. As I've already said, Manu was observed by Havea to be quiet, uncharacteristically quiet, looking ahead. The other two, by comparison, were fidgety, looking behind them and only they interacted with Havea.

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There was no evidence that Manu Iongi did any guilty act or had a guilty mind in relation to the shooting. There was no evidence he did anything active such as drive, get out of the vehicle at 73 Calthorp Close, handle the shotgun. That he took any action to help encourage or procure the shooter to shoot anybody. There was no evidence that Manu Iongi joined a plan to shoot anybody. There was no evidence of any socialising or communication, let alone planning prior to the shooting. There was no evidence that Manu Iongi had any motive or that he shared or had bought into in any way the motive held by the other two.

WINKELMANN CJ:

The evidence that they were members of a gang, how did that come in?

MS HOGAN KC:

It came in pursuant to an agreed facts document following a pre-trial challenge which was unsuccessful.

MILLER J:

Also they, the other two defendants who gave evidence, admitted it, right?

MS HOGAN KC:

They did and the Crown called Ezekiel Loamanu who also gave evidence. He was similarly a gang member. Stephen Fisi'ihoi, the son of the deceased, against in respect of whom Falala and Viliami had significant animus with, he gave evidence of being a member of the same gang.

WINKELMANN CJ:

So you, so someone, objected to the admissibility of the evidence that they were members of a gang in a pre-trial.

MS HOGAN KC:

Yes.

WINKELMANN CJ:

And it was ruled admissible.

MS HOGAN KC:

Yes and that was an objection by Manu Iongi that was unsuccessful.

ELLEN FRANCE J:

Could I just check, if on the basis that the evidence of Havea was accepted, was it open on your submission for the jury to conclude he must have been in the car where the shooting took place?

MS HOGAN KC:

Yes, that was a concession made as an alternative at trial that even if the jury accepted Havea's evidence, at the most that had him in the vehicle at – parked outside 81 Calthorp Close, so the shooting was at 73, there were three houses between 73 and 81, I will shortly detail the evidence of the 14-year-old girl inside 81, who says the evidence the car parked near, proximate to her address. So the concession was made that if the jury accepted Havea's evidence, at its highest it put him in the vehicle front passenger seat at the scene of the crime but it did nothing more than that.

I also conceded that there was an inference he entered the car voluntarily. There was no suggestion he was forced into the vehicle or kidnapped or anything of that nature, so but that's as far as the inferences from Havea's evidence go, in my submission.

WINKELMANN CJ:

So the evidence about when he's picked up in the vehicle, what's the evidence of who is driving when he is picked up?

MS HOGAN KC:

There's no evidence. So everything tracks from Havea's observation as to where people were, in the vehicle.

ELLEN FRANCE J:

Havea is saying he's there nine minutes later, therefore –

MS HOGAN KC:

Yes.

ELLEN FRANCE J:

– on the evidence, as I understand it, there's no opportunity for him to have been picked up en route, for example?

MS HOGAN KC:

No. I mean, the CCTV footage isn't continuous.

ELLEN FRANCE J:

No, no, I understand that.

MS HOGAN KC:

But there was no foundation –

ELLEN FRANCE J:

Yes.

MS HOGAN KC:

– to put that as a reasonable possibility. It was conceded that the jury could infer that Manu Iongi was in the vehicle from the Flat Bush area. He lived proximate to the other two. But we know Falala, for example, had been out on a date. They hadn't been socialising prior to the car journey. So there is no suggestion or available inference that the three men were socialising significantly before that car trip.

There is an inference that Manu Iongi entered the car voluntarily at about the time or proximate to the journey starting and that he was in the front passenger seat as he was seen sometime later at Havea's. The CCTV –

WINKELMANN CJ:

Whose car was it?

MS HOGAN KC:

It was Falala's vehicle and he was seen driving at Havea's.

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ELLEN FRANCE J:

So you'll come to it in talking about the various evidence from the neighbours but if, for example, the jury found that the car was, engine was running, what – and I'm putting to one side for the moment joining a plan, et cetera – why is the inference not available that he was the lookout?

MS HOGAN KC:

So the issue of whether the car was left running is the next best evidence the Crown has. The evidence that the car was left running is far from strong. So Jacinta Niulevaea – and I hope I'm pronouncing that correctly; I haven't got the spelling directly in front of me – was the 14-year-old girl at number 81, the only witness upon whom the Crown's submission that the engine was left running rests. She heard the car pull up. She did not hear it stop. She did not hear any doors open, but she heard the handbrake being activated. Her opinion, and it was only an opinion she gave, that the engine must have been left running, is rested on after the two car doors slammed shut. On the return journey, she didn't hear the engine start again. So that is the only evidence that underpins the Crown argument the engine must have been left running. I say the activation of the handbrake on a flat road, and we can show you a photograph of that, the inference is to the contrary. The driver activated the handbrake and got out, and that was Falala, and the other person who got out was Viliami, the person holding the shotgun. So the Crown says –

KÓS J:

Why do you say that?

MS HOGAN KC:

Why do I say?

KÓS J:

Well, the inference the Crown seems to invite is that the driver would remain behind the wheel so there's a getaway. If Manu was in the front passenger seat then it was Manu and Viliami who got out of the car. That's the invitation.

MS HOGAN KC:

That's the invitation and the Crown argument throughout. I say first of all the evidence that the engine was on is weak in the extreme. The activation of the handbrake indicates otherwise. If someone was sitting in the vehicle ready to go, the handbrake wouldn't necessarily be on. The activation of the handbrake is much more indicative of the driver exiting the vehicle.

The manner in which the vehicle left the street, loud and fast, indicates that the driver was well aware there had been a shooting, a potentially gone wrong shooting, and given that all the other surrounding circumstances regarding animus, previous visits to the house, the comment outside the Portacom: "Are you here?" all of those indicate that the people who went three houses down to the shooting scene were people who had been there before, who had a motive, who knew who they were looking for, and then they ran back to the vehicle in a panic and we see them still, a few minutes later at Havea's house, fidgety and panicky because they know what's happened. Conversely, the 18-year-old cousin brought along for the ride, who knows what he thought was happening or was going to happen, is quiet, dumbfounded, front passenger seat, didn't get out of the car because there were only two car doors heard by the neighbours on the return to the vehicle.

WINKELMANN CJ:

So what about the jury verdict? Do you think that supports the view that the jury concluded that the other two got out of the car?

MS HOGAN KC:

My view in relation – so I'm going to get to the point as to why I think the verdict is a compromise verdict, that they fundamentally decided Manu was not involved in a plan to shoot. If they'd found he was involved in a plan to shoot

at a person, he would've been convicted of murder. So fundamentally they decided he was not involved in a plan to shoot and they then somehow answered one of the manslaughter questions incorrectly to find that he had knowledge that there may be a shooting but not of the person.

WINKELMANN CJ:
But that's not really the question I'm asking you. I'm ask – because the other two were convicted of murder –

MS HOGAN KC:
Yes.

WINKELMANN CJ:
– the logic seems to me would be that if you're going to differentiate anyone on the facts situation it is the person who's not out of the car doing the shooting is the person who's not convicted of murder.
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MS HOGAN KC:
Yes, your Honour, I agree with that observation.

Right, I am now officially on page 2 of my road map, although we have covered some interesting topics from that page already, but if I can just touch briefly on this Court's jurisdiction in a case like this. I am not going to confirm the scope of your jurisdiction. You are obviously very familiar with that.

Two points to make. I am not seeking anything more in this case, jurisdictionally, than the Court did in *Kuru*. So, *Kuru* stands for the jurisdiction you have to reconsider whether a verdict is reasonable and to direct an acquittal if satisfied it is not.

I also, before going into more detail on why the verdict isn't reasonable, endorse the Court of Appeal's observation in *R v Munro* [2007] NZCA 510, [2008] 2

NZLR 87 that the need for appellate review is much greater in purely circumstantial cases such as this.

Without direct evidence, the jury cannot find the accused guilty unless the circumstances exclude any reasonable hypothesis other than guilt. Neither is an inference or hypothesis reasonably open on the evidence that is consistent with innocence, the jury must give the accused the benefit of the doubt and acquit.

In circumstantial cases, there is a much greater risk of impermissible reasoning or rationality errors.

MILLER J:
That's really getting into your *R v Hodge* (1838) 2 Lewin 227, 168 ER 1136 direction as well, isn't it?

MS HOGAN KC:
It is, it is, although before I get to *Hodge* there are, of course, some useful – or before Ms Hu gets to *Hodge* – there are some very useful examples already in our senior courts or our appellate courts as to what constitutes impermissible reasoning or rationality errors.

Two your Honour Justice Kós had spoken about in the (**citation** 10:37:06) case, *K v R* [2020] NZCA 656, when your Honour was the President of the Court of Appeal and again in the *R v Lyttle* (CA167/2020) [2022] NZCA 52 cost decision of *R v S* (CA373/2020) [2022] NZCA 52, (2022) 30 CRNZ 825 the second case heard there and they both inform the submission that equating unlikelihood or rarity with guilt is impermissible.

So in this case, the Crown argued it would be unlikely for Manu Iongi to be in the car without knowledge or being part of a plan, therefore he is guilty. That is an example, in my submission, of impermissible reasoning.

WINKELMANN CJ:

So what authorities did you say for that?

MS HOGAN KC:

Ms Hu, I believe, is bringing them up. So they are footnoted in my submissions, unfortunately not in the bundle of authorities, but *K v R* at 144 is the (**citation** 10:38:15) decision: "As this Court recently emphasised in *Sami v R*, it is important that evidence of a low statistical probability that a particular event occurs does not become, in the mind of the jury, equated with an equally low probability that the defendant is not guilty." And at the end of 148: "As Dr Garavan said in his evidence, 'we get cases all the time which are extremely or incredibly rare…' In these circumstances," the Court said, "it would have been preferable for a clear direction to have been given to the jury that they should not reason from rarity to the absence of reasonable doubt."

And in the *Lyttle* case at 164, in the decision given by Justice Collins, but as I said, your Honour Justice Kós was on the bench, at the end of that paragraph the Court observed: "... it is not necessary to use statistics when falling into the trap of reasoning impermissibly that because certain events are improbable, one can safely deduce guilt from those facts."

So that is the type of reasoning that infected the Court or the fact-finder's decision-making in *Kuru.* Because it would be improbable for a president not to know or have endorsed or have ordered an attack or a killing, Mr Kuru must be guilty and here the argument run by the Crown is because it would be implausible, they said, that someone would be in a vehicle without knowing of the plan, he must have known of the plan.

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The Court also discussed impermissible reasoning in *Kuru*. Your Honour, Justice Winkelmann, in that case described it as follows. This is at paragraph 54, and you recited how Justice Cull had described it, the rational, or the logic, the fallacious logic being that: "…Presidents of gangs know about and sanction rival gang attacks; this was a rival gang attack…; Mr Kuru is a

gang President; and therefore, he must have known [about] and sanctioned this rival gang attack."

The crucial qualifications that were required to be present to make this not fallacious were omitted from Detective Inspector Scott's evidence and the Crown theory. Norms or rules such as these can vary; norms or rules such as these can be broken; at times, events happen spontaneously; and Justice Glazebrook made reference to those qualifications, those crucial qualifications, at paragraph 56 of the –

KÓS J:
I mean the fundamental point you're making is that these are elemental requirements on which the jury has to be sure.

MS HOGAN KC:
Yes.

KÓS J:
And so probabilistic reasoning is likelihood reasoning, and likelihood's not surety.

MS HOGAN KC:
Yes. So the difficulty in the case law and in everyday life is terminology. So drawing an inference is a method of reasoning, but you can infer something is likely. You can infer something is probable, or you can infer something is beyond reasonable doubt, and that's where they needed to be and that's where we come to the problems, and again Ms Hu's going to address this, with ensuring that when juries are instructed about inferences and how they draw inferences, they know they have to be in that far-right camp, my far-right.

WINKELMANN CJ:
So is your point the variation to the norm that was not, that could not be excluded was that even if they had in their minds planned to do this they may have indeed assumed that Manu would be, because he was a cousin, whatever

happened he'd be all right, he didn't need to be a part of the plan, he's not going to be telling on them?

MS HOGAN KC:

Yes, or, I mean there's just so many variables that could have existed in relation to this car ride. They could've woken Manu up, told him to come along, and he asked no questions. There could've been no discussion. The two of them, Falala and Viliami, could have been on a mission and he was half awake in the back seat.

KÓS J:

What do we know about whether the mission was impulsive or planned?

MS HOGAN KC:

Nothing, other than the fact that there was a build up of tension between Falala and Viliami and Stephen Fisi'ihoi. But in terms of that evening, nothing. It's a complete lacuna of evidence about communications.

KÓS J:

That's really unusual. There's no texts, there's no evidence, direct evidence, unlike *Burke*.

MS HOGAN KC:

No, nothing. It is unusual and I have sympathy for the Crown, but it's either unusual because either the police didn't find evidence, or the evidence was hidden from police, or it's unusual because the evidence doesn't exist and Manu Iongi wasn't communicating with these people because he wasn't part of a plan, and that is the risk here regarding impermissible reasoning.

So moving on from what is impermissible – on the third – the next point in relation to impermissible reasoning that we have already in New Zealand case law also is in *Kuru*. This is Justice Glazebrook at page 91 of the decision, paragraph 284, referencing choosing between available inferences. So where there are equally available inferences, or even if they're not equally available

but if one is not proven beyond reasonable doubt, it's impermissible to decide between them.

So we do already have recent relevant comments about what constitutes impermissible reasoning or irrational logic.

1045

Perhaps rather than next address the logically unavailable manslaughter argument which is not really the primary argument, I'll move to the key argument regarding the lack of evidence and then come back to that *Burke*-type logical fallacy, there is no manslaughter available here argument at the end.

Would that suit your Honours?

WINKELMANN CJ:

Yes.

MILLER J:

Before you do, you've taken us to authorities about the error of equating proof beyond reasonable doubt with probabilistic reasoning. Were the jury here directed in probabilistic terms?

MS HOGAN KC:

No, the jury received the stock standard direction regarding burden and standard at the beginning of the summing up and then the stock standard inferences direction with none of the glosses that are already in our Bench Book which I will take you to, so we will be suggesting our Bench Book could be slightly expanded in terms of the *Hodge*-type situation, but there is quite a lot of useful stuff in the Bench Book already, in particular referencing *R v Maxwell* (1988) 3 CRNZ 644 (CA) and cases like that, and none of that was directed on. It was the very basic inferences direction that was given.

So the fundamental point in relation to a circumstantial case is that it works by eliminating other possibilities so that the circumstances can be explained

rationally only by the guilt of the defendant, and that fundamental point, I say, was lost sight of in this trial by the Crown, the Judge and the jury. The Crown in electing to charge Manu Iongi, the Crown in its opening, the Crown in its closing and the Crown at sentencing, in my submission, lost sight of that fundamental point.

As your Honour, Justice Kós, has already observed it was a key feature of the Crown case at opening that it would be totally implausible for one of the three defendants to be unaware of the purpose of the trip while in the vehicle. That's at Case on Appeal, volume 2, page 494, and the Crown doubled down on that in its closing. So that's the opening. "The Crown says it would be totally implausible in such circumstances for one of the three defendants to be unaware of the purpose..." "Put another way, it's unbelievable to suggest that someone who was unaware of the purpose of the trip and who didn't share an intention to be fully involved in it would be brought along for a drive at that time of the night. Everyone in the car in those circumstances had to have been knowingly involved in the plan; and the Crown –

WINKELMANN CJ:
What page is that one?

MS HOGAN KC:
That's at 494 of volume 2.

Then in closing, and the Crown provided a typed closing which is in volume 2 but I'm going to refer you to the transcript of the closing so there can be no error – that's in volume 9.

KÓS J:
Was that typed closing given to the jury?

MS HOGAN KC:

No. It was given to the Court and that's why it's found its way into the Case on Appeal but there was actually a transcript, and my friends in their submissions have made that point, which is in volume 9 and is a safer source.

So at page 145 of volume 9 in their closing address the Crown said again "it would be totally implausible in such circumstances, and these are all the ones I have gone through, the time, the route, the speed, the gun [in the vehicle], all of that, it will be totally implausible in those circumstances for one of the three defendants to be unaware of the purpose of the trip," and similar wording from the opening.

Earlier, at page 137 of that volume, the Crown referenced the gang connection, referenced association, and said: "You would only bring people you know well and trust into your car, into a plan that involves the retributive and potentially fatal shooting of someone."

The Crown emphasised again that Manu was a member of the Crips gang along with the others at two other places in the closing, pages 75 – and I've already said here at 137.

1050

Now, I don't suggest and with reference to *Kuru* and this is also there is a similar comment in the Court of Appeal case of *Cameron v R* [2010] NZCA 411, that the Crown is not entitled to make such submissions.

At paragraph 109 in *Kuru*, the Court cited trial judge comments without criticism that: "... there is plainly a *submission* to be made that in a Chapter with a relatively small membership, it is *unlikely* that there would be such a confrontation without the President's knowledge or authorisation." So, there is no criticism by this Court in *Kuru* of the Crown making a likelihood submission and I don't suggest otherwise. The Crown –

WINKELMANN CJ:

Well, no, because that's really what the jury is doing, isn't it, it's making its own assessments of likelihood.

MS HOGAN KC:

Yes and the Crown is entitled to make likelihood arguments, but –

WILLIAMS J:

Why is implausibility not unlikelihood?

MS HOGAN KC:

I don't say it's different.

WILLIAMS J:

Okay.

MS HOGAN KC:

So it's a continuum and I acknowledge that implausibility is closer towards the beyond reasonable doubt end of the continuum than unlikelihood but the point being is the jury needs to be at the beyond reasonable doubt.

WILLIAMS J:

Absolutely.

MS HOGAN KC:

And if that equates with implausibility, it needs to be made clear so –

ELLEN FRANCE J:

But you don't dispute, do you, that you can draw together those sorts of circumstances, membership of the gang, the existence of the earlier conflicts, et cetera, and that the Crown can make a submission that you can draw an inference from that in terms of what knowledge there might be?

MS HOGAN KC:

Yes, I don't, I don't dispute what your Honour said. So the Crown can point to all the evidence pointing one way and make a likelihood submission, that's a circumstantial case.

WILLIAMS J:

Need to bring the mic in front of you.

MS HOGAN KC:

So the Crown can point to evidence pointing this way and make a likelihood case. The defence arguments pointing the other way have to be brought to the fact-finder's attention and the fact-finder has to be beyond reasonable doubt this way, that's the point I'm making. I'm not suggesting the Crown can't make arguments about the threads that are pointing that way.

So but I do submit that where in a purely circumstantial where the Crown is making those likelihood probabilistic implausibility arguments, the risk of impermissible reason is front and centre and the Court needs to ensure the jury is correctly directed on the topic.

And I am not yet at the criticism of the Judge's directions part of my oral address, that will come, but so I am saying that the Crown's approach informed the need for very careful directions, without criticising the Crown's approach as being unavailable.

WINKELMANN CJ:

So it's just your submission in some ways is simply that implausibility without anything else is not enough because it has to be beyond reasonable doubt, implausible is not enough and if all you have got is a circumstantial case, I mean, the world is full of things that are implausible and yet they happened.

MS HOGAN KC:

Yes, yes.

WINKELMANN CJ:
Right.

WILLIAMS J:
Well, it's, yes, it's not implausible enough, you say.

MS HOGAN KC:
Yes.

WILLIAMS J:
To be beyond a reasonable doubt.

MS HOGAN KC:
Yes, that's right. So, now I propose to take a close look at the outcome in *Kuru* and argue why the outcome is also required here.

The first point I make and I don't think it is in dispute, is that whether or not there was defence evidence is irrelevant to this inquiry. The burden and standard at all times rests on the Crown. There is no issue with explanations being offered through cross-examination and submission. It is exactly what happened in *Kuru* and it is exactly what happened in most of the inference authorities in the bundle of authorities.

The Supreme Court of Canada in *R v Villaroman* 2016 SCC 213, [2016] 1 SCR 1000 at 35, which I think Ms Hu is just going to bring up which is in our bundle of authorities, makes it explicit: "Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and it is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt." So on the Crown's evidence, here there were reasonable inferences other than guilt.

1055

WILLIAMS J:

Well, usually those are negatived by other evidence so that you can, you know, cross-check, as we used to say when we were summing up, "you can cross-check, triangulate, et cetera". Your case is pitched on the basis that there was no triangulation available here, there was only an inference in which there were multiple responses.

MS HOGAN KC:

Yes.

WILLIAMS J:

Multiple possibilities.

MS HOGAN KC:

Yes. And like in *Kuru*, that fundamental failing on the evidence could not have been cured by direction. Now, I will go on and criticise the Judge's directions because that gives me another avenue for a successful appeal, but my fundamental point is that the evidence in this case was such that no reasonable verdict of guilt was available and it shouldn't – the charge shouldn't have been brought, the judge should have 147'd it, it shouldn't have gone to the jury for verdict. Even if the Judge had given *Hodge*-compliant directions, in my submission we'd still be here today if Mr Iongi had been convicted, as he was, of manslaughter.

There is no greater rationale for a guilty verdict in this case than there was in *Kuru* and we've already touched on that briefly in response to questions from Justice Williams.

If I can take you to page 10 of *Kuru*, the key pillars of the Crown case are there, were at (a) what I have called the "norm" or the "rule". So the norm or the rule in the case of *Kuru* was that he was the president of the relevant gang and that was a key feature of the Crown case such that the Crown was criticised for effectively putting its theory of the case into the mouth of Detective Inspector Scott.

Detective Inspector Scott was, of course, able to give evidence of the role of a president generally, this Court didn't criticise that, but this Court criticised and ruled inadmissibility, it ruled inadmissible, him going that next step and annunciating the Crown theory through his evidence that, as the president, he would have known.

So in *Kuru* there was this norm or this rule. Now, here, we have two norms or rules relied on by the Crown, the first being anyone in that car or everyone in a car knows what everyone else in a car is planning and/or everyone in a gang, the Crips, knows what other gang members are doing. So both of those norms or rules are relied on by the Crown.

KÓS J:

Well, I don't think the Crown separated them. It said three gang members together in a car know what they're doing.

MS HOGAN KC:

Yes, you may be right. So a more detailed norm than a combined norm. Point one, unlike, so in unpicking that with reference to the *Kuru* case, unlike in *Kuru*, there was no evidence to found that submission. At least in *Kuru* they had evidence about the role of a president of a gang generally to underpin the norm/rule submission.

Secondly, the norm or rule in the *Kuru* case was much more compelling than the norm or rule in this case.

ELLEN FRANCE J:

Well, that depends a bit whether you're looking at in isolation, doesn't it, or whether you're looking at it in context. I mean, he is, on at least one view of the evidence, available view of the evidence, he is in the car. Mr Kuru is in the general area, yes, he is getting close, but he is not, he is not at the house.

MS HOGAN KC:

Yes, I am going to address separately the issue of proximity. So really, here, it's just I am focusing on the normal rule regarding awareness or knowledge. So in *Kuru* it was the president would be aware or would know. Here, it's the people in the car, that people in a car who are gang members would be aware and would know.

1100

ELLEN FRANCE J:

Yes, I suppose, perhaps I'm indicating I'm struggling a little bit with this "norm/rule" idea.

MS HOGAN KC:

Well, I suppose the reason why I have adopted that wording is to, in my effort to understand the Crown argument and how it might have been cogent – and I don't see that there is cogency – but even if we don't elevate it to a norm or a rule, the Crown is saying three gang members in a car would/did know what all were up to.

WINKELMANN CJ:

I can see your point. I mean, I can see your point that there does seem to be a norm operating there, three gang members in a car – the word "gang members" are included for a reason – in a car would know. I'm not so sure about the notion that it's a norm or rule that people, three people, in a car going to do something serious all know what is going to happen. That's an appeal to the jury's common sense, isn't it?

MS HOGAN KC:

Yes, I hear what – yes, and that's what the Crown, I concede that that could well have been the Crown's intention, but it is no – it is weaker, in my submission, than the president of a gang submission.

ELLEN FRANCE J:

Well, I think particularly in the context where in fact there isn't any expert evidence, you are more in the appeal to common sense.

WINKELMANN CJ:

Yes. Although you would say putting, tipping "gang" in there makes it something different?

MS HOGAN KC:

Yes. And –

WILLIAMS J:

Well, isn't your point common sense isn't enough here?

MS HOGAN KC:

Yes.

WILLIAMS J:

Common sense is not equal to guilt. It helps, but you need more.

MS HOGAN KC:

Common sense, if common sense was that no one could be in a car without knowing what everyone in the car was thinking, but common sense doesn't take us there. So I'm not saying put common sense aside.

WILLIAMS J:

Well, common sense makes it likely. That's the point, isn't it? Common sense gets you to probabilistic reasoning.

MS HOGAN KC:

Common sense makes is possible, I concede that.

WILLIAMS J:

I think it makes it likely.

MS HOGAN KC:

I certainly wouldn't that everyone in a car would know what everyone else in a car was planning to do.

WINKELMANN CJ:

In a strange hour of night.

MILLER J:

What are the permissible inferences that the jury might take from the evidence of the two defendants that got into the witness box? On one view of it they conceded that they were on a mission, just a different mission.

MS HOGAN KC:

Yes.

MILLER J:

To explain away the CCTV footage.

MS HOGAN KC:

Yes. But they were very –

MILLER J:

They, of course, denied that Mr Iongi was there, they obviously lied about that. What are the permissible inferences which the jury might take about Mr Iongi's knowledge, once they accept he's in the car? The Crown seems to have stayed well clear of this, I think probably wisely, but it is part of the context. We are very much interested in what Mr Iongi knew about this when he gets in the car and the discussions that are presumably had before you get to Calthorp.

MS HOGAN KC:

Yes, well, if – so the only, the only available inference from the defendants' evidence, Falala and Viliami's evidence, is that they were on a mission. There is no suggestion on their evidence –

KÓS J:

To deal drugs.

MS HOGAN KC:

To deal drugs. But even if the jury said, "well, it wasn't a drugs mission, it was a retribution mission", there's absolutely no basis to infer from anything they said that Manu Iongi was any part of their activity or decision-making or planning that night.

WINKELMANN CJ:

So can I just take you back to a point I was just about to make which is, just in case you're unclear, because it's important for Ms Walker to understand, that I do see something in your point that the use of the word "gang", putting that into that submission, effectively brings some prejudice in against your client into that equation and your argument is it's unfair prejudice because there was actually no evidential foundation to the submission that three people in a gang will know what's going on who are together. I see something in that point, so it's something I would be helped by Ms – just in case there is a suggestion that your notion of norms was completely without foundation. But I do have more difficulty with the notion that just three people in a car would know something is a norm, I think that's just an appeal to the jury's common sense.

MS HOGAN KC:

And of course if we, again harking back to *Kuru*, he was an 18-year-old younger cousin associate member of a gang, as opposed to in *Kuru* the president of the local faction with a motive.

1105

So back to page 10 in *Kuru*, the Crown case in that case rested on the norms, sorry, him being the president of the gang, it being a planned and co-ordinated attack. That's a factor that's akin to this case. There's nothing, I don't think, to distinguish between *Kuru* and this case in terms of that factor. The launch of the attack from near Mr Kuru's house. Similarly, the trip originated proximate to Manu Iongi and the other brother's house. So that's a factor that's not

distinguishable between the two cases, and then the Crown also relied in *Kuru* on Mr Kuru's presence in Tiki Street. So he had a presence, albeit not as proximate a presence as in this case. So it is conceded that the proximity of Manu to the offending in this case is a pro-culpability factor, or it's more pro-culpability in this case than it was *Kuru*, but nonetheless Mr Kuru was present, and in that case this Court said that his presence was suspicious at 292. So whilst an innocent explanation had been put forward, which is something we don't have in this case, it didn't necessarily hold water in that it was suspicious that he was present in that area near the attack.

So whilst I concede there is more proximity between Manu Iongi and the offending in this case than there was in the *Kuru* case, it was still a factor in the *Kuru* case, and presence was insufficient in the *Kuru* case for culpability.

Another factor relied on by the Crown in *Kuru* was motive. Mr Kuru, as the president with a longstanding –

KÓS J:

I mean isn't the difference though here that what you didn't have was Mr Kuru present with the people who committed the crime? In this case you do have Manu Iongi present with the people who committed –

WILLIAMS J:

I don't think Mr Kuru was even present. The evidence didn't get him to the scene. It got him close but didn't get him there.

MS HOGAN KC:

Yes, it got – I mean –

WINKELMANN CJ:

It got him around the corner.

MS HOGAN KC:

– the Bench will be significantly more aware of the facts than me, but on reading only the decision.

WINKELMANN CJ:

It got him around the corner. He was around the corner.

MS HOGAN KC:

And moved away from it at a similar time.

KÓS J:

Putting Mr Kuru to one side, the difference here, fundamental difference here, is that he is there with. On the – I mean the murder's clearly occurred.

MS HOGAN KC:

Yes.

KÓS J:

The jury has found that the murderers were Viliami and Falala.

MS HOGAN KC:

Yes.

KÓS J:

And your client was with them.

MS HOGAN KC:

He was in – the inference, the only available inference, is that he was in the front passenger seat of the vehicle parked some houses away from the shooting. So I concede there is greater proximity than there was in *Kuru*.

WILLIAMS J:

There is an available inference that he was driving. Less plausible but there's nothing that excludes him from that role.

MS HOGAN KC:

Other than Havea's observation later.

WILLIAMS J:

Yes, nine minutes later.

MS HOGAN KC:

Yes, and as I've said in my written submissions, the Crown theory that he was either the shooter or that he acted as a lookout or that he was a getaway driver or he intended to be present to encourage the shooter, those theories are available. They are possibilities. My argument is that they are not the only reasonable possibilities and as such there cannot be a conviction, that the reasonable possibilities consistent with innocence couldn't be logically discounted.

MILLER J:

I notice the Crown didn't seem to run another way of looking at his support and that is looking after the car which is there, keys in it, engine running, while the deed is done. So not a lookout as such but someone who's there protecting their getaway vehicle.

1110

MS HOGAN KC:

I mean, that too, your Honour, is a reasonable possibility. But that is, in my submission, all it is.

So perhaps if we can turn to the photo booklet, Case on Appeal 05 at – we'll start with page 9. This is the, if we go to page 9 to start with, this is the Google Maps of the scene. The house where the shooting occurred is circled in red. You'll see it is slightly set back from the road and it had this funny little u-shaped turnaround road or driveway next to it.

If you go four houses to the left along Calthorp Close you'll see, if you squint, the number 81 on the roof of a house. That is the house that Jacinta Niulevaea

was in when she described the vehicle coming along the road and she heard it stop past her house towards the end of the road and the handbrake activated. So, proximate to number 81 but probably, I think the Crown and I were agreed at trial, probably somewhere in front of maybe 79 or 77 was the vehicle stationary.

If we can now go to page 20 in this booklet, you'll see that it was a flat road. So, the vehicle would have been parked somewhere behind that police vehicle we see LEK. You can see the rope – the ropes, the caution tape, I should say – around the scene and the Fisi'ihoi house is out of sight to the left up that funny little u-shaped road. So the vehicle, as it would have been parked somewhere behind this what we see LEK here –

KÓS J:

How do we know it's flat? There's clearly elevation in the – beyond the bend?

MS HOGAN KC:

But, yes, the houses are on elevated, a slightly elevated area, but the road itself is not, is perhaps if we just –

WINKELMANN CJ:

So it's on – so the road we're looking at is on the other side of the Mini there, it's a far side of the Mini, in the bottom there?

MS HOGAN KC:

So number – so we're on Calthorp, the photographer is standing on Calthorp Close.

WINKELMANN CJ:

Yes.

MS HOGAN KC:

And Jacinta Niulevaea's house is to the behind and to the left of the photographer and then the next –

WINKELMANN CJ:

The next photo, if you look at the next photo, if we scroll down, is the photographer now gone to the other side of the cars and photographing back towards where that red car was?

MS HOGAN KC:

No, so the photographer is now photographing at a right angle to where he previously was but further along the road. The house with the Portacom out the front is the –

WINKELMANN CJ:

On our right in that photograph.

ELLEN FRANCE J:

No, on the left.

MS HOGAN KC:

On the left, the black Portacom, there Tracey – sorry, Ms Hu is just putting the mouse over it, that is Stephen Fisi'ihoi's Portacom and the shooting happened at the lounge of the main residence which is just to the left of that Portacom.

So perhaps if you go back up to that photo, you can see the yellow car in position there, so the photographer is standing pointing up that little cul-de-sac or u-shaped road that goes towards those houses set back somewhat from Calthorp Close.

But the evidence of the neighbours who heard things, placed the offender's car parked on Calthorp Close behind where this red car is parked.

WINKELMANN CJ:

When you say "behind" do you mean on our side of where it was parked, or on the other side?

MS HOGAN KC:

On the left-hand side of the road as we're looking at the photograph.

WINKELMANN CJ:

Yes, but closest to us or on the other side of the car?

MS HOGAN KC:

Closer to us.

WINKELMANN CJ:

Right, thank you.

MS HOGAN KC:

Sorry, to the rear of the red car, not behind the red car.

KÓS J:

There's a little horseshoe on the map, isn't there?

1115

MS HOGAN KC:

Yes. So if we go back to page 9 of that booklet, Ms Hu. Now you can see that little horseshoe, it's very faint, near where the deceased's residence is circled.

KÓS J:

And the Portacom is at the bottom of the red circle?

MS HOGAN KC:

That's right. It's not visible in this Google Maps because my understanding is this was post-dates the events and the Portacom was not there, and the red vehicle, the red police vehicle we saw was parked in that, in front of the houses that were either 79 or 77, and Ms Niulevaea's house is at 81.

So in *Kuru* the Crown had he was the gang president, it was a planned and co-ordinated attack, the attack was launched from near Mr Kuru's house, Mr Kuru was out of his house in proximate or in the vicinity of the attack,

Mr Kuru had a motive. There was also some demeanour evidence adduced by the Crown, casual enquiries undertaken by him. This is referred to at page 73. Mr Kuru was "calm and amused rather than confused". The Crown in that case submitted that fitted with him having sanctioned a shooting. There was also evidence about Mr Kuru doing things after the attack, holding a meeting, messaging people, and in that case there was also antisocial gang-type evidence like there was in this case, association with firearms and ammunition on other occasions and things of that nature.

So as I have said, in terms of what we have here that can distinguish Manu Iongi's case from Kuru's, there is very little to distinguish it in a pro-culpability way. The only factor is the greater degree of proximity that Manu Iongi had, his closer presence. But with reference to those photos I have just shown you, if he was in the vehicle, front passenger seat, he was up to three houses away with no line of sight. I've already made the point in the Crown argument that because the engine stayed running, the evidence of which is very weak, the driver must have stayed in the car, ie, Falala, so the other two must have got out, doesn't hold sufficient water. The evidence of the engine staying running is weak. It solely rests on Jacinta Niulevaea's statement that she did not hear the engine restart. It is undermined by the activation, the noisy activation of the handbrake on what I say was a flat road which indicates that the driver exited the vehicle, activated the handbrake and exited, and even if – the third point is even if Manu Iongi was one of the two that exited the vehicle, if that inference is available, it is acknowledged that will strengthen the Crown's case but from it him exiting the vehicle and approaching the scene of the crime, the Crown still can't discount some of the possibilities that exist that he –

WINKELMANN CJ:

I struggle with the notion that the verdict is consistent with a jury having concluded that he exited the vehicle.

MS HOGAN KC:

I agree with your Honour, if that's an area I don't need to delve into.

WINKELMANN CJ:

That's all right. I'm not speaking for my colleagues.

KÓS J:

Well, I share that view too.

MS HOGAN KC:

So worst case scenario, if he was out of the vehicle and with the person at the scene, there is still the reasonable possibility that he thought this was going to be a standover or that the gun was solely being carried for self defence. There is no evidence of him entering into the plan to fire a shotgun at a person and willingly assisting that.

Mere presence isn't sufficient, as this Court well knows, and there is nothing, even though his presence is significant, to take this case beyond the realm of mere presence.

WINKELMANN CJ:

Has this car got a very noisy handbrake? Do people inside houses hear cars' handbrakes being engaged?

1120

MS HOGAN KC:

The only evidence we have on that topic, I believe, is Jacinta Niulevaea's hearing of it.

WINKELMANN CJ:

What kind of car was it? A BMW?

MS HOGAN KC:

It was a BMW. I don't know much about cars and I didn't pay much attention. There was evidence on that topic. My friend may be able to help you.

MILLER J:

An older one with –

MS HOGAN KC:

It had a shotgun hole in the bottom left footwell.

MILLER J:

Did it have a traditional handbrake? Because the modern ones, of course, are electric. This is a ratchet-type handbrake, I imagine.

MS HOGAN KC:

I don't believe – I believe it was an aged model.

MILLER J:

Yes, right, so it has this, the traditional ratchet handbrake, "click-click-click".

MS HOGAN KC:

I can't assist your Honour, I'm sorry. Oh, perhaps if we go to exhibit – booklet 5.

WINKELMANN CJ:

It's exhibit –

MS HOGAN KC:

Oh, 1, page 192, there is a photo of the handbrake. Page 1 – sorry, book 1, 192.

WILLIAMS J:

Yes, it's one of those.

WINKELMANN CJ:

We've got there ahead of you.

MS HOGAN KC:

Sounds like you have got there a lot faster than us.

WINKELMANN CJ:

Well, some of us have. I haven't attempted, I was waiting for...

KÓS J:

It's 192?

WILLIAMS J:

198 of the exhibits thing.

KÓS J:

Oh, 198, sorry.

MS HOGAN KC:

Volume 5.

KÓS J:

Right, yes.

MS HOGAN KC:

Just roll down, that was it. There is the handbrake.

KÓS J:

And the shotgun hole.

MS HOGAN KC:

I believe the shotgun hole is on the front passenger footwell.

KÓS J:

Yes, it is, yes, 200.

MS HOGAN KC:

There, yes. So I say whilst there is the pro–culpability distinguishing factor of greater presence, that's not sufficient and there are the anti-culpability distinguishing factors I have already touched upon earlier that there was no evidence about gang relationships. He wasn't, Manu Iongi, wasn't the

president. He was the younger, significantly younger than Falala, somewhat younger than Viliami, cousin.

MILLER J:

The argument was that he was enlisted to help by his seniors.

MS HOGAN KC:

Yes.

MILLER J:

So it's not at all like *Kuru*.

MS HOGAN KC:

Yes, but without evidence of that.

MILLER J:

Yes, I understand that's your point.

WINKELMANN CJ:

So there's no evidence of text communications, et cetera?

MS HOGAN KC:

No. So the only – there was not a single – Manu Iongi's house was bugged, his cars were bugged, his phones were searched for a long period of time. Not a single inculpatory statement found by the police. The only statement of relevance by him, adduced as evidence in this case, was exculpatory, "no one's mother should be dead," or "deserves to be dead", or something of that nature, it's in the written submissions. So the only communication involving Manu Iongi was exculpatory.

ELLEN FRANCE J:

But you accept it's not necessary to have communications if, for example, you've got a group gathering and they've all got weapons and they're all marching down the road, you have to be able to draw some conclusions from

what people might know about what they're doing. You're not suggesting otherwise?

MS HOGAN KC:

No. So if I can take the Court to page 96 of *Kuru*, my submission is that the Crown case here is weaker, it is worse, it is less than in *Kuru* in terms of impermissible and impermissible reasoning in an unreasonable verdict: "The evidence of Mr Kuru leaving early for his school appointment and his presence on Tiki Street would not on their own have sustained the inference (beyond reasonable doubt) that he left ... not for his appointment with the principal but to oversee the plan."

So I say here the presence, the evidence in relation to Manu Iongi is insufficient and, like in *Kuru*, the other actions relied on by the Crown are just as consistent with him knowing as not knowing about the plan beforehand. I say there is no other evidence of an action by Manu Iongi that is sufficiently probative of involvement or knowledge.

1125

There's, as your Honour, Justice France, has observed, no evidence of communication, and I acknowledge there is suspicion and there can be suspicion about Manu Iongi's involvement, even strong suspicion, but that is not sufficient as this Court said in *Kuru* at paragraph 310: "Suspicion about his involvement, even strong suspicion, is not sufficient." And at 312 this Court said: "While appellate courts must be careful not to usurp the function of the jury as fact-finder, this is not a case where there was a plausible route for a reasonable jury to convict Mr Kuru beyond reasonable doubt. There was a total absence of direct evidence against him. The remaining strands of circumstantial and other evidence are either equivocal or otherwise insufficient to establish guilty either individually or considered as a whole. It is therefore not appropriate to order a retrial and a verdict of acquittal must be entered."

Now there will be, in my submission, no flood gates risk here as there wasn't in *Kuru*. I mean, there could have been, in this case, evidence which would have

provided a rational basis to infer Manu Iongi's guilt beyond reasonable doubt. As we know –

WINKELMANN CJ:

This is where it comes back to Justice Kos and my question to you about the weapons direction because the logical thing that a jury would need to have been confident about was that they knew there was a, that this shotgun was being taken out of the car, because it could be a sort of moving thing and he could know whose house they're going to and then he sees them get out of the car with a shotgun and the fact he stays there looking after the car could be enough for a jury to be satisfied that it's – I don't know, yes.

MS HOGAN KC:

I'm –

WINKELMANN CJ:

But going back to my point –

MS HOGAN KC:

I understand your Honour's point.

WINKELMANN CJ:

My point is where was the – because when I read the summing up the Judge tends to deal with all the defendants quite similarly. Well, where was the focus on the knowledge of the weapon in the directions?

MS HOGAN KC:

There was no reference to it other than in counsel's argument and, as I've said, my argument was even if he'd seen the shotgun in the car it would not have been a red flag given the community within which he was operating. As this Court knows, circumstantial evidence derives its force from the involvement of several factors that independently point to a particular factual conclusion. Here, there is simply Manu Iongi's presence, nothing else. In another case there may have been evidence of Manu Iongi buying into the motive or having his own

motive. There might have been planning communications. There might have been contemporary in the car communications. There may have been better eye witness observations. Three footsteps could have been heard. Manu Iongi could have been seen in the driver's seat at some point in time. Manu Iongi could have been seen holding or associating with the firearm at some point in time that evening. That evidence just doesn't exist in this case and it either doesn't exist because there was no ability for the police to locate it or the police simply didn't locate it or because the evidence doesn't exist and that is why unreasonable verdicts cannot stand. There is a real prospect that Manu Iongi, as an innocent, has been convicted of a culpable killing. Like in *Kuru*, the jury needed to be able to and could not discount the myriad of reasonably available exculpatory explanations which pose an insurmountable problem for a decision-maker acting rationally.

Moving on very quickly, fundamentally this is an unreasonable verdict appeal. However, trial Judge errors were contributory and they were sufficiently serious to themselves found a successful appeal. I won't go through the argument in relation to the section 147 decision. It effectively mirrors the unreasonable verdict arguments I've been making.

Focusing then on the Judge's summing up, he made two key errors. One, contrary to my learned friend's submission, I say his summing up was unbalanced, and, two, he did not appropriately direct the jury about how to deal with inferences.

If I can just bring up the existing Bench Book.

WINKELMANN CJ:

Well, it's 11.30 so shall we take the break and come back and deal with it when we come…

MS HOGAN KC:

Thank you.

WINKELMANN CJ:
So you'll need to be reasonably succinct.

MS HOGAN KC:
Yes.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.46 AM

MS HOGAN KC:
I am going to try and be seated within 10 minutes so that you can hear from Ms Hu because her submissions are going to be useful. We were just about to look at the New Zealand *Criminal Jury Trial Bench Book*, if Ms Hu can please bring that up, in relation to inferences.

The *Bench Book*, or I'll start, the *Bench Book* makes reference to the decision of *Maxwell* and contrary to it Justice Powell did not mention to the jury the inferences available as raised by cross-examination of counsel, despite the *Bench Book*'s recommendation. He did not identify the key circumstances upon which the Crown and defence rely and the inferences that each invite the jury to draw. He failed to refer to key circumstances that favour the defendant which the Court of Appeal in *R v Hart* [1986] 2 NZLR 408, (1986) CRNZ 474 (CA) and *Maxwell* said would be fatal to a conviction. He did not paraphrase the defence closing address which in itself would have been insufficient but would have been something.

His coverage of the circumstantial evidence and inferences, arguments, was unbalanced and here, I am just going to bring up the parts of his summing up highlighted in submissions. Excuse me for referring to my submissions rather than the case on appeal, but we've folded some relevant parts.

So at paragraph 133, and he also touched on it at paragraph 123 which I am sorry is not in our submissions, he references circumstances the Crown relied

on for inferences and you'll see there at 133 he said: "The Crown says you can infer intention from a wide range of factors including the time of night the BMW left Flat Bush, the route taken, the short stop on the way, and the accounts of what occurred from the neighbours at Calthorpe Close [and who was] the driver and two who got out of the car." So he made express references to circumstances relied on by the Crown and inferences the Crown said could be drawn.

Then at 134, the next paragraph and again this is in the context of his summing of Falala's case, not Manu Iongi's, Falala's case, he said: "In contrast, the defence position is the inferences that are available all fell well short of meeting any of the tests ... pointing in particular to the lack of detail and/or the inconsistencies in the evidence provided by the neighbours."

Now, they may have been defence arguments run by Falala, lack of detail, inconsistencies, but they were wholly unrepresentative of Manu Iongi's arguments.

1150

Manu Iongi's arguments were that a number of circumstances led to innocent inferences. Innocent inferences reasonably arose from the circumstances and the Judge made no reference to either the circumstances relied on by Manu Iongi or the inferential arguments put forward on behalf of Manu Iongi.

KÓS J:

Well, I mean, there's two elements of balance here. One is between the Crown and the defence, the other is as between the defendants.

MS HOGAN KC:

Yes. So I say, firstly, it was unbalanced as between the Crown and any defendant because of that very, I acknowledge it was brief, but nonetheless it was a reference to circumstances relied on by the Crown for inferences and there was no reference or no equivalent reference to circumstances relied on by the defendants, just two cursory arguments put forward by Falala.

But then as between the defendants, it was also unbalanced. There was no reference in the summing up of Manu Iongi's case to anything of substance. He said in his summing up and this is at paragraph 140, this was it, he said: "... with regard to Manu Iongi's intention Ms Hogan's submission was that there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention ..." and that was it.

And then when, and I am very grateful to my friend Ms Walker because I was actually out of the courtroom in another hearing during the summing up, Ms Walker raised the issue of Manu Iongi's case not being sufficiently addressed in his summing up, he brought the jury back and basically said the same thing. Nothing of substance, just the same thing, that Manu Iongi says there is not enough to infer an action and he then made reference to the "passive bystander" point in the relation to Manu Iongi.

ELLEN FRANCE J:

So just in terms of that latter part, so I'm looking at 827, so the additional part of the summing up.

MS HOGAN KC:

Direction, yes.

ELLEN FRANCE J:

"... there is otherwise no evidence by which [he] could be inferred as being anything other than a 'passive bystander'," et cetera, and nothing in relation to intention. In terms of the part relating to the passive bystander, what else do you say he should have said, just in general terms?

MS HOGAN KC:

So I said he – my position is that he had to refer, firstly, to the circumstances, the factual circumstances relied on to inform that submission.

ELLEN FRANCE J:

Right, sorry, I'll just...

MS HOGAN KC:

And I have got 12 such circumstances, I need to find reference in my closing, that he should have recited, although they also go to the mens rea element not just the actus reus element point, and he should have referenced the circumstances and referenced the arguments resting on those circumstances about innocent inferences that could be drawn from those circumstances.

WINKELMANN CJ:

So your point there is that he needed to link that to the inferences, because this is a circumstantial case.

MS HOGAN KC:

Yes. So other than a very, very high-level summary of Manu Iongi's case regarding mens rea, there was insufficient evidence to infer mens rea, in the primary summing up he did nothing.

KÓS J:

Well, it's a very bare bones summing up. What if he had just done a *Hodge* direction?

MS HOGAN KC:

The *Hodge* direction would have helped but he still needed to in some way encapsulate the substance of Manu Iongi's case. Not just the basic "mens rea is not proved, actus rea is not proved", he needed to encapsulate why Manu Iongi said mens rea wasn't proved and actus rea wasn't proved.

WINKELMANN CJ:

So he needed to basically tell the narrative, "look, this is equally consistent with other narratives, other scenarios that are not guilty".

MS HOGAN KC:

Yes, yes, and I, again at the outset of this oral submission, I made the point that the logic here is incurable and that it would be an unreasonable verdict in any case. But here, if the jury had been properly directed, they could and should have acquitted. So it wasn't – it's not meaningless that he didn't do a proper direction.

1155

WILLIAMS J:

I see the Bench Note notes that his additional comments were provided in draft to counsel and comments made on them?

MS HOGAN KC:

Yes, so, obviously this isn't a counsel incompetence appeal, but points to be made there.

The Judge, there was extensive discussion about the question trail and the directions, the big picture directions to be given. He said in the course of that discussion and this is one of the transcripts we have, he said in advance that he would do a minimal account of the different arguments, so counsel was anticipating that he would give a minimal account of the different arguments. In fact, he didn't do that. As I have said, counsel was – Ms Hu was in the courtroom, I was in another hearing and I returned to the courtroom to see Ms Walker on her feet raising an issue with the way he had addressed the particular argument run by Manu Iongi.

Now, it is unfortunate that was the case. So I was somewhat hamstrung in terms of what needed to be done by way of additional direction and, of course, there was always the knowledge within the courtroom that the defence case should have been properly summed up. But hindsight is a wonderful thing. The *Hodge* direction, for example, wasn't raised with the trial Judge, I acknowledge that.

ELLEN FRANCE J:

And I'm not suggesting holding you to it, but just in fairness to the Judge, it was, it did seem to be agreed, that the addition would cover off at least the point raised by Ms Walker.

MS HOGAN KC:

Yes, I concede that, although by way of context there had been a strong 147 run, there had been strong closing submissions made. The Judge had been very firm that he only wanted to provide a minimal account. I was unaware that that point that it was a non-existent account of defence arguments.

KÓS J:

Just to check, he had taken counsel through the question trail but presuming not the summing up?

MS HOGAN KC:

That's right. There had been the usual discussion –

KÓS J:

Yes.

MS HOGAN KC:

– about whether counsel wanted any particular directions and there was a discussion about a lies direction and things of that nature. He said he'd tick the inferences and correct, you know, so the usual directions had been discussed, but not the content of the summing up and as I have noted there was that indication that he would give and this is, as I said, in the 4 December '23 transcript which think has been provided to this Court subsequently at counsel's request, I have not located it in the Case on Appeal, at paragraph 6, or page 6, sorry, of that transcript, that he would do a minimal account of the different arguments. So there had been that level of indication given. So, the date of that transcript is 4 December 2023 and it's at page 6.

And as I have said, I don't accept that there was even a minimal account and in particular none of the arguments put forward by Manu Iongi were addressed.

Now in contrast, this Court has or rather the appellate courts, the Court of Appeal, has seen similar arguments being run by counsel in the cases of *Cameron* and the recent case of *Dunn v R* [2025] NZCA 216 and even in *Kuru* that the directions were analysed in those cases. In each of those cases, significantly more work was done in the summing up regarding the inferences case.

If we can just briefly go to *Cameron*, as the Court of Appeal recorded, the trial Judge recited 10 defence arguments against the Crown inference. The trial Judge made two express references to the Crown being required to exclude, so you'll see there that extract from the summing up, 10 defence arguments against the Crown inference were recited in the Judge's summing up.

Then if we go to the next paragraph –
1200

WINKELMANN CJ:
That's your father referred to there, I think.

MS HOGAN KC:
Yes, it is. I'm conscious he's sitting in the back of the Court. He'll be very proud.

The trial Judge, I mean he mounted the same argument, I think, on significantly weaker grounds than I am.

ELLEN FRANCE J:
Yes, I was interested to see we had the repeat of the *Hodge*…

MS HOGAN KC:

And he, in his trial, had the trial Judge telling the jury on two occasions that the Crown was required to exclude the defence arguments of accident and suicide. There was nothing equivalent in this case.

If we go to *Dunn* at paragraph 66, the trial Judge in that case repeated the arguments for and against drawing the "beyond reasonable doubt" inference at length, and then after doing that, repeating the arguments, then emphasised the "beyond reasonable doubt" requirement that remained on the Crown. Effectively, in – the Court of Appeal in *Cameron* and in *Dunn* has found that effectively *Hodge* was complied with by that approach, and we don't have that here. So there is an example of what the trial Judge did in *Dunn* and, importantly –

WINKELMANN CJ:

And *Hodge* is compliant within the sense the jury would've been clear that they had to, to convict, they had to exclude the reasonable possibility of the other evidence?

MS HOGAN KC:

Exactly. So while the *Hodge* wording wasn't expressly recited, the point of *Hodge* was complied with in both *Cameron* and *Dunn* according to the Court of Appeal judgments, because of the recitation of the arguments and the emphasis in the context of drawing inferences of the burden and standard, and in our case we, of course, didn't have the recitation of the arguments nor the repetition of the burden and standard in the context of inferences, and another example, *Kuru*, the inferences arguments being run by both the Crown and the defence were traversed in detail by the trial Judge. So three very recent examples of it being done significantly better than it was done in this case.

There were 12 arguments put forward for Manu – sorry, there are 12 circumstances relied on by Manu in counsel's closing address as to why the Crown's inference couldn't be drawn, and I'll just run through them very briefly: no evidence of planning; no evidence of socialising together before the car ride;

only two out of three people exited the vehicle; no line of sight from the vehicle to the shooting; the driver was likely out of the vehicle as indicated by the handbrake; the comment at the Portacom: "Are you home?" indicated at least one of the people at the Portacom knew the occupants of the address which Manu didn't; the driver sped off which indicated he was aware of there having been a shooting; in the vehicle at Havea's Manu Iongi was in the front passenger seat; he wasn't driving; he wasn't holding the gun; he was looking straight ahead; he was quiet as opposed to the others who were fidgety and looking behind themselves. There was no bravado in that vehicle to suggest that a plan all three had been part of had been accomplished.

Manu Iongi had no motive whatsoever, and here I respond to a question posed earlier. This was not your typical gang versus gang situation like it was in *Kuru*. This was a dispute between members of the same gang, a dispute between Falala and Viliami and Stephen Fisi'ihoi. The normal gang norms or the reference to gang behaviour are not necessarily engaged in such a personal issue. The issue was between Falala and Viliami and Stephen Fisi'ihoi. Referencing the gang context was (a) unnecessary and (b) particularly risky of unfair prejudice in a case such as this where it's not your typical gang v gang situation.

There was no inculpatory statements made by Manu Iongi despite the very extensive investigation by police into him. The only statement he made was exculpatory. The Judge should have referred to those factual circumstances. The Judge should have referred to the strongly put arguments that were made resting on those circumstances, and they are set out in written submissions. I don't need to go through them with you.

1205

The trial Judge did not have to repeat verbatim or even in detail defence submissions, but the circumstances relied on by Manu Iongi and the arguments they informed needed to at least be referenced.

That takes me to the end of that point and I propose to retire and let Ms Hu address you on the overseas jurisprudence. I'm conscious I haven't addressed in oral argument the secondary point regarding the vanishing line between murder and acquittal in this case. The argument is effectively recited on the road map and also in written submissions, but I certainly don't want to abandon the argument if it's of interest to any of you. But perhaps I'll let Ms Hu address you first and we can come back to that if necessary.

WINKELMANN CJ:
Thank you.

MS HU:
Good afternoon, your Honours. I propose to be brief and speak very briefly about the desirability of giving a *Hodge* direction, both in this case and in New Zealand generally. It's a direction that before the jury can find guilt they have to exclude reasonable inferences consistent with innocence and in New Zealand and in the UK so far the Courts seem to have expressed that this direction is helpful but it's not mandatory.

In *Hart* the Court of Appeal said it was more important for the Judge to give practical and fair assistance on the actual specifics of the evidence, but the *Hodge* direction could be a helpful way of directing the jury in cases involving circumstantial evidence, and again in *Cameron*, Mr Hogan's case, that was considered to be a permissible way of directing the jury but not a mandatory one, and the UK in *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276 (HL NI) has adopted a similar non-mandatory type approach.

Australia and Canada have taken a more prescriptive approach and I submit that's because they have a different understanding of the purpose of the direction. Here in New Zealand we seem to think it's an element of the direction of to do with beyond reasonable doubt and so long as the Court has directed on "beyond reasonable doubt" in sufficient terms then that's enough and there is a collective judicial shrug about whether this further direction should be given and we move on.

There is, post-dating *Cameron*, there is a Supreme Court of Canada case called *Villaroman* that Ms Hogan has taken this Court to already and I think that quite helpfully draws a distinction between the purpose of the direction for beyond reasonable doubt and the purpose of the *Hodge* direction. I can take the Court to the relevant passages.

WINKELMANN CJ:

Yes, can you do that?

MS HU:

Yes. So the relevant paragraphs start from paragraph 25 of the judgment and the Court says, well, the *Hodge* direction generally was previously understood to be an elaboration of the reasonable doubt standard, and if that's all it was then it's understandable why it's not necessary, why it could be confusing in certain circumstances, but that's not all that *Hodge* is concerned with and it's concerned with the special dangers inherent in inferential reasoning because it's, in my submission, it's a hard task to reason from in a circumstantial case and a harder one where the case is based on only circumstantial evidence, and the concern is that the jury might unconsciously fill in the blanks or bridge gaps in the evidence to support the inference that the Crown invites it to draw, and where we have a trial that centres around the hypothesis of whether someone is guilty, there's always the risk that the jury will, I think in modern terms, enact confirmation bias and focus on the strands of the facts that confirm that hypothesis.

WINKELMANN CJ:

Are you taking us to the passages in the case?

1210

MS HU:

Yes, I will. So and at paragraphs 28 and 29, at 28 the Court says: "[28] The reasonable doubt instruction describes a state of mind — the degree of persuasion that entitles and requires a juror to find an accused guilty ..." And

it's a direction, “directed to describing” how sure the jurors must be before they convict.

“[29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence [and that] is the danger to which Baron Alderson [in *Hodge*] directed his comments.” And that is the danger about “filling in the blanks” and “jumping to conclusions” and the Court says, well, it has also been confirmed by more recent social science research.

And here at paragraph 30: “Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only ... inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of ‘filling in the blanks’ ... too quickly ...” so it does have a discrete purpose from the beyond reasonable doubt direction.

In this case, it serves a dual purpose. It would have been a helpful way for the jury to understand that they needed to exclude all of the defence inferences consistent with innocence before they could find guilt, but also it, in a case where the defence case was perhaps given a lighter touch than usual, the concerns about confirmation bias and jumping to conclusions they are particularly acute and the *Hodge* direction would have been particularly helpful in this case and perhaps greater judicial guidance on the use of the *Hodge* direction in New Zealand consistent with what the Canadians and the Australians have proposed would be helpful.

Those are my submissions on the point, thank you.

MS HOGAN KC:

Short of whether this Court would be assisted by that side issue regarding there not being a manslaughter outcome logically available here, I propose to –

WINKELMANN CJ:

I think perhaps if you just run through that for a few minutes because I, for one, I am finding it difficult to follow that one.

KÓS J:

This is because the joint enterprise is set so high.

MS HOGAN KC:

That's right. Sorry, I now just have to find my piece of paper. Here it is.

WINKELMANN CJ:

And you have got the microphone a long way away from you.

MS HOGAN KC:

So again the crux of the argument is set out in shorthand on the road map and built into written submissions, but really the point here and it was a point made perhaps clumsily in the 147 argument and also when question trail discussions were under way at trial, that if Manu Iongi intended to help the principal, Falala or Viliami, to fire a shotgun at a person, or if he joined a plan to fire a shotgun at a person, he had to know, well, for section 66(1), to know that Falala and Viliami meant to cause injury reckless as to death, or for section 66(2) he had to foresee that Falala and Viliami, had to foresee them killing someone with at least that reckless murderous intent.

So because the plan nominated by the Crown was to fire a shotgun at a person, there was just no way a manslaughter mens rea could exist. It was murder or it was nothing. If the jury found that Manu intended to help Falala or Viliami to fire a shotgun at a person or if the jury found he joined a plan to fire a shotgun at a person, they were required to convict him of murder but they didn't, they acquitted him of that.

WINKELMANN CJ:

"Required" because it would not be reasonable for them to have concluded other than he intended, that he had reasonable foresight, that they would injure someone being reckless as to that injury causing death.

1215

MS HOGAN KC:

Yes. So if the Crown – I've tried to think of a shooting case which could allow for a manslaughter outcome – if there was a plan to kneecap someone, death would not necessarily be foreseeable. If there was a plan to shoot someone in an extremity, I mean with a shotgun that's a very risky plan still, but if it was a different weapon and a different plan, a kneecapping, for example, in the gang context, then death would not necessarily be foreseeable and in that type of shooting case there's a route to manslaughter.

WINKELMANN CJ:

Does your argument turn upon what they need to have been satisfied, that there is – well, what do they need to be satisfied of to convict him of manslaughter?

MS HOGAN KC:

So they had to be satisfied, and here I say they can't have been both satisfied, that they can't have been both satisfied that Manu intended to help or join the plan to shoot someone, shoot at a person, and at the same time not know the shooter, for section 66(1), meant to cause injury, reckless as to death. They just can't go hand in hand.

WINKELMANN CJ:

But tell me what – okay, so are you saying for manslaughter they have to have been satisfied that he was helping them to do something, helping them to carry into effect their plan to shoot at someone –

MS HOGAN KC:

So this is where I –

WINKELMANN CJ:

– or else joining a plan to shoot at someone and therefore, if he knew that, it's the same as – there's no gap between that and…

MS HOGAN KC:

And reckless murder intent.

WINKELMANN CJ:

Yes, unless you can conceive of circumstances in which you know that a jury wouldn't be convinced that someone would foresee, if it's section 66(2), foresee that the people doing the shooting would have the requisite intent.

MS HOGAN KC:

And here I'm really referencing the reckless murder intent, the murderous intent. You know, it's murder if you mean to cause injury and are reckless as to death, and shooting anyone in a vital area has to be reckless as to whether death ensues.

KÓS J:

As opposed to, for instance, a plan to go and shoot up the Portacabin?

MS HOGAN KC:

Exactly. Now that may well have been the case and there may have been a different shooting plan but there's no evidence of that.

WINKELMANN CJ:

Well, that wasn't the Crown case.

KÓS J:

Well, that wasn't what the Crown put.

MS HOGAN KC:

Exactly, and I do respect and give credit to the Crown for being firm and not shying away from what they say the plan in this case was. They haven't been soft to try and encapsulate every scenario, which potentially would have been

inadmissible, so I give the Crown all the credit for doing that, but because they've done that in the unique circumstances of this case where the plan was enunciated as a plan to shoot at a person, it's got to be murder or nothing, and by acquitting Manu Iongi of murder but convicting him of manslaughter something has gone wrong. Something has gone wrong in the jury reasoning. They've answered two questions inconsistently and for that reason the verdict is unsafe.

Another way to look at it is to posit a retrial. If your Honours directed a retrial how would the Crown do it? They can't charge him with murder. He's been acquitted of murder. How do they charge him with manslaughter in a way that fits the evidence? In my submission they can't. A manslaughter outcome would only be available for a shooting death if the knowledge or the foresight related to the shooting of a non-vital area of the body, as I've said, such as a kneecap, and there is, of course, no basis to formulate such a plan in a Crown theory in a retrial.

MILLER J:

This murder or nothing argument really applies to both limbs of section 66, doesn't it?

MS HOGAN KC:

It does.

MILLER J:

And in your favour that section 66(1) is more likely because the Crown case is he was in the car for a purpose, not just a passenger but he was there to help in some way. That's the whole reason he was put there.

1220

MS HOGAN KC:

Yes. So that's that argument. I acknowledge it's a relatively novel one but in my submission it's compelling. Now I just need to find my very brief conclusory notes.

KÓS J:

Do you want a piece of blue paper, Ms Hogan?

MS HOGAN KC:

I know. I tried to go computer, but I didn't trust it.

KÓS J:

It's the method.

MS HOGAN KC:

Here it is. So the primary argument is that a *Kuru* outcome is required in this case. No fact-finder could reasonably eliminate other possibilities such that the circumstances relied on by the Crown could only be explained rationally by guilt of the defendant. As a result, the conviction should be set aside and a judgment of acquittal entered for the same reasons this Court enunciated in paragraph 21 of *Kuru*: there is a complete absence of direct evidence, and the circumstantial evidence is either equivocal or otherwise insufficient to establish Manu's guilt.

Additionally, the appeal should separately succeed because of the miscarriage of justice occasioned by the trial Judge's summing up. I say in relation to that ground, the outcome should also be a directed acquittal.

Manu Iongi cannot be re-tried for murder. As I have just argued, the Crown cannot legitimately conceptualise a legitimate route to manslaughter and whilst Manu Iongi could legitimately be tried for being an accessory after the fact, he has now served more than a four years' sentence on what I say was an erroneous verdict and there is no public interest to re-try him on anything less.

Unless the Court has any questions.

WINKELMANN CJ:

Thank you, Ms Hogan.

MS WALKER:

Just as I am rising to my feet, I am told by my learned junior to ask Ms Hu for the ClickShare, so I...

So in the time available, it is proposed that I will cover the unreasonableness of verdict ground and also the first of the miscarriage of justice grounds, that is to address the point about the deficiencies in the Judge's summing up about the defence case. Mr Benson-Pope will address you on deficiency B, so inadequate on inferences in this case and the possibility of a *Hodge* direction in future.

I will endeavour to follow the order of my written submissions which I obviously rely upon but to draw your Honour's attention to the relevant parts as I go and also hopefully to show you some of the exhibits and relevant facts to hopefully contextualising the offending.

At paragraph 1.4 of the Crown submissions, though, the overarching submission is made on the first ground that it is together all of the circumstantial threads of evidence that provided the jury with an entirely sound basis to find the appellant guilty of manslaughter and the verdict was, the Crown says, reasonable if not generous.

Now, this was a circumstantial case against all three defendants for murder. There is no distrust in our law of circumstantial evidence. There is no preference for direct over indirect. Eye witnesses can be mistaken or lie, as was alleged Stephen Fisi'ihoi did on the 4th of December when he identified the defendants coming to shoot up him and the occupants there. Admissions, as we know, can be false.

So there is no preference in our law for circumstantial over not or the other way around and so the Crown says there was nothing questionable here about the nature of its case and the fact that there was no direct evidence, as your Honour's have pointed out. No text messages, no evidence of planning in communications and things like that.

So the only question for this Court is on this ground about its sufficiency and the Crown's primary point here is that this is not a mere "bystander" case. This is not a case about the scene of a party at a spontaneous gang violence incident. This was a case of a close relative and a fellow gang member, familiar in his own way with firearms and ammunition, who was in a car with two known occupants, his cousins, that travelled, in effect, directly from their homes, the areas where they lived, between 2.30 am and 3.10 am in a circuit which I'll show you shortly, and that in those circumstances he not only played a role at the scene, which could be inferred from the neighbour's evidence, but importantly he collected the murder weapon the next day and in doing so demonstrated his willingness to be continually involved in the plan.

1225

So the Crown says in those circumstances it was entirely reasonable for the jury to infer he knew of the gun, he knew of the plan and he was knowingly involved. The jury was well placed to assess the reasonableness of the parties' completing submissions, so for the Crown on the one hand that Manu Iongi was in the car and therefore knowingly involved throughout, and on the other hand that he wasn't in the car and that's an important point. The primary defence here was that Havea Iongi had lied and he wasn't in the car. Indeed, it was also put to Havea that he didn't come back the next day to collect the gun, and I will return to that later but the primary defence was he wasn't even there, but if he was there he was a near bystander, and a third limb of the defence if you like, but if he was not just a near bystander he didn't have the necessary mens rea.

So the Crown's point here is that the jury was perfectly well placed to assess those submissions as they were opposites, and as the appellant didn't call or give evidence as he was perfectly entitled to do, or not do, and because his co-offenders maintained that he wasn't in the car with them that night, there was no alternative evidential narrative for the jury to consider as there was in *Kuru*. So these were all matters of submission on the Crown evidence, the Crown says.

So in the Crown's submissions between pages 12 and –

KÓS J:

Can you just help me with that last point? What do you mean there's no alternative narrative? I mean, there's a very short narrative here and the question is what inferences do you draw?

MS WALKER:

Quite simply, if we're comparing it to *Kuru*, that he didn't give evidence and the jury didn't have the benefit of his account of the matters that my learned friend raised.

KÓS J:

Yes, but we can't condemn that though.

MS WALKER:

No, you can't condemn that and I acknowledge that. He was perfectly entitled to rest on his hands. I'm simply making the point that in *Kuru* the jury had the benefit of hearing the defendant himself give evidence as to why he was on the street and why he was heading to the school and what he meant about the meeting at the house asking the gang members what had happened here. So here you don't have the benefit of that narrative. That's fine, but it's a case which deals with inferences from the Crown evidence along.

WINKELMANN CJ:

Can I just ask you to clarify? You said his co-offenders maintained he was not with them –

MS WALKER:

Correct.

WINKELMANN CJ:

– so there was no alternative for the jury to consider. I think that's what you said?

MS WALKER:

Those were two distinct points. So the first one is that both Falala and Viliami gave evidence. Both of them maintained, as his Honour, Justice Miller, has pointed out, that they were on a mission that night but it was a mission to sell drugs, conveniently in the same location as the CCTV but for the one street that took them to the scene of the crime, and so there was much to work with in terms of the credibility or lack of in terms of that account, and within their evidence they both maintained that Manu was not with them in that car on that mission to sell drugs, therefore he wasn't at Havea Iongi's house when they pulled up within 10 minutes of the murder. So there was a very difficult hurdle for the jury to overcome. If they accepted Havea and rejected the defendant's evidence, they're stuck with Manu Iongi in the car which is the Crown's case, of course, and we're already onto the second limb of my learned friend's defence. So –

WINKELMANN CJ:

Can I just ask, I'm just not clear about the significance of the fact that they gave evidence maintaining he was not with them, because that doesn't constrain him running his – if that's rejected by the jury, and Mr Havea's evidence is accepted – that doesn't constrain Manu from running a defence that – that he was in the car but he was a bystander or he didn't have a mens rea.

MS WALKER:

No, no, of course not. No, he –

WINKELMANN CJ:

So it doesn't exclude those inferences?

MS WALKER:

No, and he was always at liberty to do that and my learned friend was careful in the way she did it but it is a little like running a rape trial where you say: "I didn't have sexual intercourse but if I did it was consensual." So there was a difficult –

MILLER J:

He left a vacuum and that was a matter of trial tactics.

1230

MS WALKER:

Yes.

MILLER J:

Yes.

MS WALKER:

So in terms of the Crown case and the evidence I have, just summarising for your Honour's, really, that at pages 2 to 8 in the Crown submissions we record a very succinct summary of the facts relevant to the appeal. But it won't be lost on you that the Crown's closing address in this part alone was 43 pages of the transcript and in the final part of the Crown closing I think I refer to about 17 strands of evidence. I appreciate there is some nuance in the way that you carve those up and some might include others, but on one count there are at least eight of those that apply to Manu Iongi and I can return to those later, but this is a very short summary of the Crown case. But given it's centrality to the reasonableness of verdict ground, I wanted to spend the time that I have before the lunch break taking your Honour's to some of the more important parts of the evidence that built up the circumstantial case.

So, the first is on page 2 of the Crown's submissions and it's just really to ensure that the Court appreciates the context and importance of the tensions in this case because they really were very important. So, the Court will be aware that what kicked all of this off is that Falala Iongi gave Stephen Fisi'ihoi, both of whom were Crips gang members, several grams of methamphetamine in exchange for a firearm. There was initially a dispute about that when the handover came to take place. Falala was disappointed that it wasn't a sawn-off shotgun, he asked for the meth back, Stephen Fisi'ihoi said "no take-backs" and so that is what kicked off the dispute.

There was then one significant event after that before the 4 December shooting and I am mentioning this because your Honours will see a rising in tensions and escalation in violence which is relevant to the Crown case on murder.

Before 4 December, in a date in November, Falala and Viliami went to 73 Calthorp Close with a colleague called Mapa Vuna. On that day, there was a dispute on the lawn outside the house and as part of that dispute Viliami blind-shot or punched Stephen Fisi'ihoi. His response to that was to go into his Portacom to get his bat, to come out and to hit Viliami with it, which caused him to fall over. Now, that is important because it is the first physical violent act between the two sides, if you like.

Following that, there was a trading of messages on social media, a warning from Stephen Fisi'ihoi to Falala and Viliami not to come back to his family home and a response from Falala, smirking and pointing. It is a provocative response, the Crown would say.

But in any event, as the narrative continues, after this and this at the bottom of paragraph 2.2 of the submissions, the next escalation in tension, if you like, happens on the 4th of December, which is the subject of charges 1 and 2 at trial, and that is the day when Falala and Viliami return to Calthorp Close.

The evidence of the eyewitnesses to this incident was that they parked the BMW on the opposite side of the street, so furthest from the house, and that they both walked up the driveway. Both, as Justice Powell found in sentencing, carrying firearms and Stephen Fisi'ihoi observed first-hand Viliami Iongi firing a shotgun, first of all, at a friend of Stephen Fisi'ihoi, George Vuna, who was significantly wounded with the shotgun pellets and then turning to the right and training his attention on Stephen Fisi'ihoi's Portacom.

And so, on that day, you've seen an escalation in tension from an initial verbal dispute, punches and baseball bat, to the firing of a shotgun at the premises, at people, and at the Portacom.

ELLEN FRANCE J:

So the, sorry, the only thing the Crown says linking Manu Iongi with that is he is a member of the gang?

MS WALKER:

Correct. The Crown never attributed knowledge of that incident to Manu Iongi. It couldn't.

ELLEN FRANCE J:

So how is it relevant then?

1235

MS WALKER:

It's relevant, the Crown says, to the planned response by Falala and Viliami and the fact that in the circumstances of the 4th of December shooting and what had occurred before it, the shooting on the 15th of January would not have happened but for in the circumstances it did with them bringing Manu Iongi along unless they intended to bring him into their circle of trust or confidence, if you like, but it was their response to the earlier shooting, it was Falala and Viliami's response. They hadn't been arrested or spoken to by police about it, so those were outstanding matters of some criminality, and so by the time the 15th of January came along the Crown says that the surreptitious nature and the planned nature of the excursion was such that in order to bring Manu into that they had to intend for him to know about what they wanted to do at Calthorp Close. I can expand on that more eloquently when I come to that part of the submissions.

KÓS J:

Can we just test that for a second?

MS WALKER:

Yes.

KÓS J:

Let's take two plans. One is the plan you propose.

MS WALKER:

Yes.

KÓS J:

Another plan is that they all decide they'll go there and shoot up the Portacabin.

MS WALKER:

Yes.

KÓS J:

Drive-by shooting and drive off.

MS WALKER:

Yes.

KÓS J:

So the plan changed.

MS WALKER:

Yes.

KÓS J:

We have absolutely no idea whether Manu had anything to do with either of those plans but it's equally consistent what occurred that the plan changed.

MS WALKER:

What you see from the neighbours' evidence which I'll come to shortly is that they changed everything on the 15th of January except for the car and the addition of Manu, the Crown says. So they changed the time of night, 2.30 in the morning, a time when you're highly unlikely to be seen by anyone. That in itself –

KÓS J:

A good time for a drive-by shooting.

MS WALKER:

Yes. Well, I think the neighbours' evidence here takes prominence because two of the neighbours heard prior to the shot a knocking. Funny thing to happen at 2.30 in the morning unless you're trying to gain someone's attention, and then: "Are you home?" and that was the evidence of two different neighbours, and so the Crown says those two accounts were actually quite important, together with the other evidence, to show that this was not just a shooting up of a cabin. You don't need to gain anyone's attention to do that. You can do that any time you like.

KÓS J:

My point is that at the start of the journey it might have been a plan to commit a murder, it might have been a plan to do a drive-by shooting. How can you say one is more likely than the other as far as Manu's concerned?

MS WALKER:

The plan, and this is why the Crown pitched the common purpose as highly as it did as the plan was to go to 73 Calthorp Close to shoot at a person was because of what had gone before. There was no point in this escalation from Falala and Viliami's point of view and it being anything less than that. So if that was the common purpose, and that's why the Crown pitched it as high as it did, it had, didn't have credibility, in my submission, to pitch it any lower, then that would have been evident, the Crown says. It's an inference that when you're travelling to that scene in those circumstances and you're pausing, as I'll come to in a moment, moments before the shooting at the Puhinui Cemetery off-ramp, and there is a loaded shotgun in the back of the car that's wrapped in a towel and it's 60 to 70 centimetres wide as Havea Iongi said, which is this. He held it up in court and he said that's the size of the gun. It was sawn off. In those circumstances, arriving slowly at the property, the engine running, two people getting out, the shot being fired relatively soon after: "Are you home?" and the knocking, the plan would have been clear to Manu Iongi and that's the Crown's

submission. In those circumstances at that time of the morning following the acts of the 4th of December and prior to it –

WINKELMANN CJ:

So can I just clarify? You said earlier that the Crown accepts it cannot impute knowledge of the 4th of December events to him.

MS WALKER:

Yes.

WINKELMANN CJ:

I assume that you mean – but –

MS WALKER:

I can't prove that he knew about them and –

WINKELMANN CJ:

But your case relies upon him knowing about them, does it?

MS WALKER:

No.

WINKELMANN CJ:

I mean just as you've articulated it. I'm just trying to understand what you're saying.

MS WALKER:

No. No, in fact the manslaughter verdict, and this is in the Crown submissions, is likely a reflection of the fact that he didn't know about what had happened on the 4th of December and so he could well have been, as the Crown said at trial, in that car, in those circumstances, to add extra muscle, to add extra support, to be the lookout, to remain in the car, to be the driver, all of those things that were necessary to execute this highly planned response from Falala and Viliami, all of those things, but there was the very distinct possibility that because he didn't know and the Crown couldn't prove he had knowledge of the

4th of December, his co-offenders did, but it was a reasonable manslaughter verdict outcome to say that all he foresaw was when the shooter was going to fire a shot at a person at that address he foresaw at least the infliction of more than trivial harm and that's because he hadn't been at the earlier events, he hadn't know about the escalation from verbal violence to physical assault to shooting and not achieving the goal.

1240

WINKELMANN CJ:

So can I just take you back to your proposition about the firearm.

MS WALKER:

Yes.

WINKELMANN CJ:

I want to ask you a couple of things about that. First of all, it's wrapped in a towel in a back seat of a car in the dark and he's in the front passenger seat?

MS WALKER:

That's when Havea Iongi sees them, 10 minutes after the shooting. And so the fact that there is a towel in the car, the Crown suggest that it has to have been in the car prior to the shooting as well. That makes sense. You wouldn't travel with a sawn-off shotgun and ammunition in your car without some attempt to conceal it, possibly what if you were stopped by police on the way?

So the Crown says that gun would have gone into that car likely concealed in a towel and so when they get to the scene he, the towel, is obviously not concealed it any longer and it's taken to the site for the shooting.

WINKELMANN CJ:

Yes but that doesn't really, I mean, so you're asking the jury to assume that he was in the back seat to see the gun, or told about it.

MS WALKER:

As the Crown closed its case, you're in that car for, I think, 13 minutes prior to the scene and there is a pause at the Puhinui cemetery, it's inconceivable, the Crown says, that you were in that car, in those circumstances, at that time of night, with your two cousins who know what they're about to do, that you wouldn't know about there being a gun in the car and what their intention was. It's implausible to suggest that and some of the other –

MILLER J:

His knowledge of the gun does not depend on seeing it in the car.

MS WALKER:

Correct.

MILLER J:

It would depend on his prior knowledge of the plan.

MS WALKER:

Could depend on prior knowledge of the plan. Could depend on overhearing, being part of conversations in the car.

MILLER J:

I mean, prior to actually arriving at the address, he knows of the plan.

MS WALKER:

Yes, and I suppose the –

MILLER J:

Your case really rests on that, doesn't it?

MS WALKER:

That – I'm sorry, your Honour?

MILLER J:

That when he arrived at the address, he knew what they planned to do?

MS WALKER:

Yes, yes.

WINKELMANN CJ:

It rests upon the fact that he wouldn't have been –

MILLER J:

Which necessarily involved a gun.

MS WALKER:

Absolutely.

MILLER J:

Right.

MS WALKER:

And that's why the Crown pitched it that high.

WINKELMANN CJ:

It rests on the notion that he wouldn't be in the car unless he – he wouldn't have been in the car with them and they wouldn't have had him in the car with them unless he was part of the plan.

MS WALKER:

Correct. Correct. There's a lot at stake here. They've already shot up at a house and wounded a man. Why would you bring someone on this trip and risk them not being aware of it and not taking the care necessary to keep what they're about to do quiet and undiscovered, why take that risk? These are forensically aware young men, as I can come to as well.

WINKELMANN CJ:

So the other aspect about the gun evidence I was interested in is your, when you were saying "this isn't a mere 'bystander' case", you said it was a case of a close relative, a fellow gang member.

MS WALKER:

Yes.

WINKELMANN CJ:

Familiar in his own way with guns and ammunition.

MS WALKER:

Yes.

WINKELMANN CJ:

I was just interested in that, all that evidence about his familiarity with guns and it –

MS WALKER:

Yes.

WINKELMANN CJ:

– I mean, because I wasn't clear how it was probative and just not, you know, unfairly prejudicial?

MS WALKER:

Well, I think it really ties into the fact that you wouldn't bring someone on this trip, in these circumstances, if they are being brought for extra muscle, if they weren't themselves familiar with and not put off by the presence of illegal firearms and ammunition. And so all the Crown had here, really, the two strongest points the Crown had, was the TikTok video dated I think the 18th of December 2019 and there was armourer's evidence, and I can come to this and show you it momentarily, that that was a single black or grey sawn-off pump action or semi-automatic weapon which is of the kind used to do the shooting and the armourer gave evidence that what he – from what he could see in the TikTok video, it had been sawn-off likely only at the muzzle end which would have diminished its length down to about a metre, so it could have been sawn-off further if the butt end had been, too.

WINKELMANN CJ:

So your case was it was the – it was likely the weapon.

1245

MS WALKER:

The Crown case was not pitched that highly. It was that it could well have been the weapon but what it did show is that Manu Iongi, in December 2019, had access to a shotgun of the kind that was used in the fatal shooting and it could well have been the weapon although my learned friend made forceful points in closing about the differences between them and that was drawn out in her cross-examination of the armourer, but the Crown made the opposite points and that's that there were these key points of similarity between what Havea Iongi saw on the night of the weapon he handled, which was the murder weapon, and the one seen in the TikTok video. So that's the first strong limb of the Crown's case about Manu Iongi being familiar with firearms and that being important for why he was in the car.

WINKELMANN CJ:

Because there's a different aspect to it. I mean the Crown, the jury might have thought: "Oh, well, it's his weapon," possibly. You never said that.

MS WALKER:

Well, good point, if I may say so, because he's the one who come back the next day to collect it and that's another very important point in the Crown's case that somebody – and here I want to draw a distinction between Manu Iongi and Havea Iongi – after the fatal shooting, within nine minutes, they are at Havea Iongi's house and they've covered 8.9 kilometres in the nine minutes. It should have been a 14-minute drive. CCTV shows them overtaking cars and running red lights. When they get to Havea Iongi's house he's asked if he'll take the gun and he takes the gun, not knowing at that point what it's been used for. The next day Havea Iongi wakes up, he sees on social media that there's been a fatal shooting in Māngere. He puts two and two together and his partner, Ruta Lamkum, is not at all happy about this. He texts Falala and says: "Come and get your stuff." Falala says: "You can keep it." But within 15 minutes

Manu Iongi turns up, collects the gun, and all he says is: "Laters." So it's a distinction from how he was the night before in the car when they were all out of sorts, the Crown says, to how he was the next day when he collected the murder weapon and the point I want to make on this is Havea Iongi at this point, also a Crips gang member, also young, he was 20 at the time, Manu Iongi was 18, he's entrusted with a weapon and he doesn't know what it is. The next day when he finds out he doesn't want anything to do with that weapon and he gets rid of it. Manu Iongi was in the car and at a minimum, on my learned friend's case, he would have known what that gun was used for. It's offloaded to Havea Iongi and knowing that it's been used in a fatal shooting he returns the next day to collect it, and so his collection the next day was a point, a strong point in the Crown's favour, it was submitted to the jury, because it demonstrated a continuation of involvement in the plan to be involved in the shooting.

WILLIAMS J:

Well, that's possible inference. The other possible inference is that he was the guy sitting in the car and he should go collect the gun. It doesn't implicate him. It isn't necessarily a continuing series of events. It's a new series of events because he's part of the group now.

MS WALKER:

Sort of a prospect argument that, you know, maybe, he's the young guy and he's been called on to do things at the instruction of others. Is that your Honour's suggestion or…

WILLIAMS J:

Well, Manu Iongi's taken for a drive: "Come with us," bang, bang. Gun dropped off. Senior member says to him – he's a prospect, is he?

MS WALKER:

No, no. I was going to come to this. He's not a prospect.

WILLIAMS J:

Okay, right. Senior member says to 18-year-old: "Go get the gun," and he goes to get the gun. It doesn't necessarily mean that he was in on the plan at all. But it does mean now he is, of course, because he was there when it happened.

MS WALKER:

Yes, and so one of the first arguments the Crown made in its closing was about the association between them and the closeness of it. So at trial they heard evidence that although they were of different ages, Manu was 18, Viliami was 20, Falala was 27, there was evidence the jury heard that they were all close. So I asked Falala about this in his evidence. He said that they – this is at page 1478 of the Case on Appeal in the notes of evidence, volume 4 – that he, Viliami and Manu were close, that they respected each other. There was evidence that the jury heard that they were all patched, that is inked Crips gang members, and so there was no distinction in that sense between Manu, notwithstanding his younger age.

1250

Ezekiel Loamanu was another Crips gang member at trial who was also 20. He was hostile to the Crown. He had given a statement to the police confirming that Falala, Viliami and Manu were all patched or inked members of the gang. There was a text message data from Ezekiel Loamanu's phone at trial on the 4th of December 2019, so quite by chance the same day as the shootings, texting Viliami saying: "Cuz, have you been to Manu's yet," or, "Have you been to Manu's." There was evidence in early 2020 of Ezekiel, Manu and Viliami hanging out at Ezekiel's grandmother's house. There was evidence two months' later of Manu and Viliami driving Falala's car and, in fact, that's an agreed fact and, in fact, on that occasion Manu was driving the car and Viliami was in the passenger seat and so –

WILLIAMS J:

Where does this get you?

MS WALKER:

This gets you to showing that these are – they're cousins, they see each other, they hang out together, they are close, they respect each other and so it takes away the imbalance, the Crown says, between this being the work of Falala Iongi directing his two younger – his younger brother and his younger cousin to do something. It demonstrates, the Crown says, that he's close enough, trusted enough, to be in that car with them and –

WILLIAMS J:

Or it may demonstrate they're close and Falala's the boss?

MS WALKER:

Well, there – he probably was the boss. He probably was the boss, he's older and I did cross-examine him on whether or not he instructed them and he said: "No, I don't instruct them, I advise them." And so, I mean, there's always somebody who calls the shots, but just –

WILLIAMS J:

It is perfectly plausible, isn't it, that the senior member of the group, even if they're first cousins.

MS WALKER:

Sure.

WILLIAMS J:

Says to the kid, albeit an inked kid, "go get the gun", and the inked kid will, of course, go get the gun.

MS WALKER:

Yes, doesn't mean he doesn't want to.

WILLIAMS J:

No, but it doesn't mean he does, either.

MS WALKER:

Yes, but –

WILLIAMS J:

You see, it's the – I'm really challenging the leap of logic from "he got the gun" to "he must have known from the start".

MS WALKER:

Yes, right and I suppose that's where the other threads come in which the jury heard about. So returning to the Chief Justice's question before about the connection between Manu and firearms and ammunition, one of the other points of the evidence in the trial was that on Manu Iongi's phone was a thumbnail dated also in December 2019 of a single live Eley blue shotgun cartridge.

WILLIAMS J:

What's a "thumbnail"?

MS WALKER:

A "thumbnail" is just an image taken of the photograph itself. So all that was able to be recovered from the phone was the thumbnail but it is, it is – I have an image of it, actually, to show you but I've probably gone way off my script and Mr Benson-Pope will be despairing.

This – all right, actually, that's good, thank you – so there, so this was the photograph, the thumbnail recovered from Manu Iongi's phone and the armourer gave evidence that it's an Eley brand, you can see that from the writing at the top of the cartridge. He could tell that it was as live cartridge, the primer hadn't been broken at the top of the cartridge itself. You can obviously tell that it's blue. He could tell that it was 12-gauge ammunition.

Now, the single shot that killed Meliame Fisi'ihoi was also a blue 12-gauge shotgun with seven to 7.5 lead diameter pellets in it and the armourer, Mr Newton, gave evidence at trial that there are only, to his knowledge, based

on databases within both ESR and police, there are only three known brands in New Zealand of cartridges for 12-gauge shotguns with the same combination of features that were used to kill Meliame Fisi'ihoi and one of those was an Eley brand shotgun and –

KÓS J:

But we don't know how common they are, do we? Or did he give evidence as to commonality?

MS WALKER:

My learned friend is nodding.

KÓS J:

Yes.

MS WALKER:

She asked the very astute question in cross-examination: "Are shotguns common?" "Yes." "Are shotgun cartridges, blue cartridges, common?" "Yes." But –

KÓS J:

And Eley?

MS WALKER:

Eley, well, I don't recall there being evidence about that, but I can check that.

KÓS J:

Right.

MS WALKER:

But coming back to the point of Mr Newton, there were only three that bore the same combination of similarities to the one used to kill both Meliame Fisi'ihoi and the shooting on the 4th of December and that was a combination of the blue colour, the Eley brand, the seven to 7.5 lead pellets in it and what's called a clear Maxim brand wadding inside which is expelled when it's shot.

KÓS J:

Right, but –

WINKELMANN CJ:

So Ms Hogan said there was evidence that one of the co-defendants had a shotgun regularly in his car.

1255

MS WALKER:

Falala Iongi, yes. There was some evidence that he had a conviction for carrying a firearm and there was evidence that you saw before of the discharge of a firearm in the footwell of the passenger side of his car, yes.

WINKELMANN CJ:

So it wasn't the Crown's case that this was Manu's shotgun that was used on both occasions?

MS WALKER:

The Crown couldn't say that, no, but what Havea Iongi said was that in 2019 prior to the first shooting he had been at Viliami and Falala's house, that's Dunaff Ave, and there had been this important meeting where they had returned to the house, the two brothers had, and they had returned with a long shotgun and a short shotgun, so one was already sawn off, and they both bore the same similarities, black, single-barrelled shotguns, one sawn off and one not, and so the Crown case was that Viliami and Falala had access to those two firearms, both of which could have been the one seen by witnesses on the 4th of December, one of which, the sawn-off one, could have been the one used to kill Mrs Fisi'ihoi. Alternatively, because we just don't know, the firearm shown in the TikTok video held by Manu Iongi prior to the end of December 2019, could well have been the shotgun as well, based on the features that the armourer could tell. Now the reason that this could never definitively be said what was the firearm, it was never recovered for a start, but also at the murder there was no spent shotshell found, so it was retained within the shotgun itself or it was collected from the scene. Those are the only two possibilities that –

MILLER J:

You only have the wadding and the pellets?

MS WALKER:

Correct, from the deceased herself.

WINKELMANN CJ:

And we don't know, there was no evidence that Manu owned a shotgun apart from photographs of him with it, which is not evidence he owned it?

MS WALKER:

No. He had access to it. He possessed it. So I don't think you really own a…

WINKELMANN CJ:

Possessed it during the photograph, you mean?

MS WALKER:

He possessed it in a photograph. Yes, exactly. So…

WILLIAM YOUNG J:

So what you've got is a young gang banger who likes sawn-off shotguns who may not have got out of the car.

MS WALKER:

That's one possibility. But…

WILLIAMS J:

I'm just working out how you're joining those gaps.

MS WALKER:

Yes. I think probably the best thing for me to do is to start where I ought to have started although I'm conscious of the time and to show you the journey of a car to the scene to demonstrate the planning and the location and the distance travelled, to then take you through the way in which the Crown connected the dots and then hopefully to persuade you that there was sufficient to draw the

inferences we sought to draw. I am mindful of time though. It's 12.57. I could show you just before the break exhibit 16 from trial which was –

WINKELMANN CJ:
That would be good.

MS WALKER:
So if you – it's a physical exhibit, one that's sort of old school. Your Honours should have a copy of a large A3 map. That's it. The reason I'm giving this to you in hard copy is that it was scanned from the High Court registry in two pages so it doesn't really demonstrate what the jury were able to see from it.

So this was one of a number of exhibits at trial which was created by police after a very comprehensive phase of analysis of CCTV cameras. What it shows you is that if you go to the right-hand side of it you can see, in a red box, 40 Donegal Park Drive, Flat Bush. That's on the sort of almost bottom right-hand side. Are your Honours able to see that?

WINKELMANN CJ:
Yes.

MS WALKER:
That is where Manu Iongi lived. 240 metres away, that was an agreed fact, is 15 Dunaff Place, Flat Bush. That's where Viliami and Falala lived. Now the way the map works is that there's a key up the top. Anything in orange is a CCTV camera that captured the vehicle of interest which was agreed at trial at the end to be Falala's BMW, and to answer the question before, there was an agreed fact it's a 2005 model BMW. So cameras 1 and 2, any time there was footage capturing the vehicle of interest there is a timestamp next to it. That timestamp corresponded with footage that the jury watched as well as still photographs they received to show them the image of the car travelling and the direction it travelled.

1300

So just to assist the Court in understanding this, number 1, at 2.28 am and 14 seconds, is the first sighting of the vehicle. It then is caught on camera 2 at the same time. They were just two houses side-by-side.

WINKELMANN CJ:

So the numbers all run sequentially.

MS WALKER:

Correct.

WINKELMANN CJ:

We can follow the movement.

MS WALKER:

Correct but just to explain the black, not the heavy black but the shaded grey-black, that's a symbol that doesn't capture the vehicle of interest so you can see that wherever the police thought "well, they came to an intersection", they looked at the CCTV on both sides of that and they were able to say that there was or wasn't footage of it. So –

WINKELMANN CJ:

But is it only captured if it goes through it irregularly or is it captured if it goes through it regularly?

MS WALKER:

I don't know what your Honour means?

WINKELMANN CJ:

Well, are the speeding, do they have to be speeding to be photographed or?

MS WALKER:

Oh, no, no, this is a combination of literally dozens of cameras from personal homes to traffic lights to ATOC –

WINKELMANN CJ:

Okay but traffic lights don't photograph you unless you go through unlawfully, do they?

MS WALKER:

They had a combination.

WINKELMANN CJ:

"Okay", she says, horrified.

MS WALKER:

So some were very high quality, that, it was the Auckland Transport, Auckland Transport cameras, and some were very grainy and very hard to tell what they were. But the essence of the evidence is, if I can just take your Honour's through to this, if you see shaded grey 3 and 4, cameras there didn't see the car going past onto Dawson Road, but they – then you go down to camera 5 they did capture the car turning from Aspiring Ave onto Boundary Road and so – sorry, on Aspiring Ave down to Hollyford Drive and then you can see it is captured at camera 6 down at the Redoubt Road intersection and then in the next sighting of it is camera 9 which is right in the middle of the page at the very bottom.

And so just to assure the Court of the soundness of this, number one, Falala Iongi accepted that it was his car seen but, number two, each of the elimination cameras, if you like, shown in shaded grey gave the jury some comfort to know that enquiries had been made to track the route of this car and so…

KÓS J:

Can I just check.

MS WALKER:

Yes.

KÓS J:

So are these, because I watched these, I watched the videos.

MS WALKER:

Yes.

KÓS J:

You can see – you can't really read the number plates I think at any of them.

MS WALKER:

In none of them.

KÓS J:

No.

MS WALKER:

No. But we –

KÓS J:

But is it accepted that that is that car?

MS WALKER:

Yes. It was only accepted when he gave evidence of the alternative plan and he had to accept that it was his car on the footage but he was doing drug drops.

KÓS J:

Right.

MS WALKER:

But prior to that last moment in the trial, the Crown anticipated it would need to close proving attribution of the vehicle of interest to Falala Iongi and so that might be a convenient point for us to leave it there.

WINKELMANN CJ:

Yes. Take the adjournment.

MS WALKER:

Thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.18 PM

MS WALKER:

Now, just before the lunch break I was taking you through exhibit 16 and we had got to the cameras as the bottom of the diagram showing the Roscommon exit and the footage showed that the car momentarily got off that. I'll just wait until your Honour's find the – your Honour's have that?

WINKELMANN CJ:

Yes.

MS WALKER:

The car momentarily got off the motorway, got back on, only to get off again at the next exit which is the Puhinui exit and that's where camera 11 picked it up and we can see that that was at 2:33:51 and the next sighting of the car, if your Honour's were to take the Southern Motorway – Southwestern Motorway, rather, towards the left and top-hand side of the diagram is at camera 17 a little over five minutes later. So the car wasn't seen between two –

KÓS J:

Did you say there was something of a pause at that cemetery?

MS WALKER:

Correct.

KÓS J:

How do we know that?

MS WALKER:

Correct, because of the timing. So the drive time between those two points was not five minutes.

KÓS J:

I see.

MS WALKER:

It was more a matter of, I think, three minutes or two and so the inverse was that the remaining time was the pause and that was, the Crown case was that that could have been to ready themselves for what was soon to happen at Calthorp Close.

And so the car got off at Massey Road. It turned left onto Robertson Road. Your Honour's can see that trip, if you keep your eye on the orange coloured cameras it's the easiest way to follow it, and it goes up to the scene which is 73 Calthorp Close.

1420

And so the arrival at the scene and the evidence of the neighbours obviously assumed some importance in the trial. It was the most important evidence, in my submission, and the Crown closing covered it in great detail.

There were four neighbours whose evidence is relevant to role and those are Jacinta Niulevaea, the 14-year-old girl, Bertha Cooper, Yashoda Punja and Ali Nasilai and I am going to take your Honours now to paragraph 2.8 of the Crown submissions just to ensure that you're aware of one matter that the Crown has omitted from it.

So paragraph 2.8 and this is on page 4, summarises the neighbours' evidence at a very high level. That is that the car went down 73 – down Calthorp Close, rather, stopped near 73 and two of its occupants got out. We're, of course, able to infer that because two car doors closed after the shooting and two sets of footsteps were heard to run back to the vehicle.

Paragraph 2.8, we refer to the evidence: "Are you home?" Which is the evidence of – I have just momentarily lost it – Ali Nasilai and we haven't mentioned in there the evidence of Jashoda Punja, another neighbour which I

will take your Honours to now, which is that there was the sound of knocking before the gun-shot was heard.

So taking you then to that evidence, I will just – Mr Benson-Pope has just brought up for you that same scene diagram and the house is obviously circled where the shooting took place and the first witness to refer you to is, as Ms Hogan has, Jacinta Niulevaea who was at the house number 81 which is the set back off the road and the dark-roofed house.

She's the witness who heard the handbrake being applied. She's the witness who said the car didn't sound like it drove quickly down the street. She's the witness who said she didn't hear the car start up again afterwards, from which the Crown submitted it was likely left running and she also heard one man say to the other: "Hurry up," to someone close by after the shooting and two car doors close. So hers was important evidence and it was read. It was therefore unchallenged at trial.

Now, the witness Yashoda Punja, who is not mentioned in paragraph 2.8, she lived at 48 Calthorp Close which is the grey-roofed house on the bend opposite the scene of the shooting and her evidence was that at about 2.45 she heard knocking at the front door. It wasn't an aggressive knock or a light tap but just the sound of normal knocking.

KÓS J:
Whose front door?

MS WALKER:
I'm sorry?

KÓS J:
Whose front door?

MS WALKER:
Jashoda Punja, so this is –

KÓS J:

Her front door?

MS WALKER:

It sounded to her like her front door.

KÓS J:

That's what I thought, yes.

MS WALKER:

Yes, yes.

KÓS J:

When I read her evidence, that's what it sounded like.

MS WALKER:

Yes, yes, so 2.45 in the morning, perhaps a little disorientated because it –

KÓS J:

Yes.

MS WALKER:

Yes, so all we heard was the sound of a door being knocked, thank you, and hers is the grey roof immediately opposite.

Another neighbour, Ali Nasilai, who lives at 50 Calthorp Close, so she's one to the left of that and that's the dark-brown roof.

WILLIAMS J:

What number sorry, 50?

MS WALKER:

50, yes, sorry, they're so hard to see. Anyway, it's directly opposite the horseshoe and one to the left and it's the brown-coloured L-shaped roof. Her evidence was that before the gun-shot she heard somebody say: "Are you

home?" And that's another important piece of evidence. And so this is what happened prior to the gun-shot happening. The car arrives, not at speed. The handbrake is heard to apply. The car is –

WINKELMANN CJ:

Is the evidence that they're speaking loudly or, you know, shouting or is it just ordinary?

MS WALKER:

Ordinary.

WINKELMANN CJ:

Sound seems to have travelled remarkably in this area, doesn't it?

MS WALKER:

Yes.

WINKELMANN CJ:

Must have been very quiet.

MS WALKER:

Well, it's a very still time of night. I mean, there were other neighbours –

WILLIAMS J:

A 14-year-old was listening, too. Their ears are a lot better than ours.

MS WALKER:

She was attuned and as I, the submission that was given to the jury, was that she was close to the road, so and the window was open, it was the peak of summer. So the submission was that she likely heard so much because of where she was, she was attuned to the sound.

1425

And if Mr Benson-Pope brings up the next document is the diagram that the 14-year-old drew and she's got the loud bang on the right-hand side,

81 Calthorp Close on the top left is the house that she was staying in at the time. She's missed one house, you know from the photograph I just showed you there is another house in that sequence to the scene but the important point is she's written there the "car went past", so it drove past her house, "car stopped" near to the house she's called the house where the Sāmoan family lived, "man's voice" and that's her reference to her hearing a man's voice after the shooting say: "Hurry up," and then the arrow in the opposite direction "car went past again" and her evidence was there was a difference between the car arriving and the car leaving, the sound of the car leaving was like a motorbike so it took off at speed.

Now, Bertha Cooper is the final witness, if Mr Benson-Pope could just go back one. Now, her evidence is of what she heard in her house at the time and she's at 46. So 46 is opposite the horseshoe and to the right, so the further away from the property, but your Honour can see that those three houses immediately opposite the bend were the ones where there was the important ear witness evidence.

So at 46, which is the L-shaped orange roof, her evidence was that she distinctly heard two sets of footsteps running back, or running from right to left as you looked at the road, so the Crown would say back to the car and that aligned with Jacinta Niulevaea's evidence that she heard two car doors close.

So all of that, the Crown says, establishes that of the three occupants two got out and one stayed in the car. All played a part, we say.

So turning then to the Crown submissions, paragraph 2.9 at the bottom of page 4 is evidence about the forensics involved in the shot and the fatal shot, as I mentioned earlier, was fired from a 12-gauge shotgun from a distance of around one to two metres and the shot itself was a blue 12-gauge shot shell containing colourless Maxim Brand wadding, size seven to 7.5 pellets. The shot shell, as I mentioned, the spent shot shell was never recovered at the scene, unlike the 4 December shooting; however, there were traces of blue

plastic discovered in the post-mortem examination which allowed the forensic scientist to conclude that it was from a blue shot shell.

Now, just to perhaps add to this point, momentarily. The ESR scientist, Angus Newton, as I mentioned earlier, said that there were only three known brands of shotgun ammunition in New Zealand with the same combination of features, so the blue colour of shell casing, the Maxim Brand wadding and the size seven to 7.5 lead pellets and there was a photograph in the booklet which Mr Benson-Pope will bring up to demonstrate those features, so –

WINKELMANN CJ:

How many shots – how many kinds of pellets are there, shot pellets are in New – I mean, only three known brands but how many are there? Does that mean...

MS WALKER:

His evidence was, my learned friends will correct me if this is wrong, but about 170 shot shells on the database and more within the police armoury and so his conclusions were, if I recall correctly, based on that body of evidence. So his evidence was that the blue Eley brand with the clear Maxim Brand wadding and 7.5 gram lead pellets were also used in the 4 December shooting and so the Crown submitted that was a strong link to the two defendants being involved in both alongside other evidence to point to their involvement.

I have already taken your Honours to the next image which is of the comparable live – it's actually a live shot shell on the appellant's phone which has the Eley brand marking on it and I will turn momentarily to one more piece of evidence in relation to the appellant having a connection to ammunition beyond that point.

So after the shooting, if we were to return to exhibit 16, the map, the car leaves at pace and you can see the path the car took towards Favona Road, so towards the water, going to the east along Favona Road, and then going onto Savill Drive, sorry, James Fletcher Drive, rather, and Walmsley Road heading towards Ōtāhuhu, that's able to be followed.

1430

There is a marking there of a speed camera. There is evidence at trial that – of forensic awareness, because they slowed right down to the speed limit when going past that speed camera but otherwise navigated this 8.9 kilometre stretch from the scene to Havea's house, which we are coming to on the right-hand side, in nine minutes which was five less than the estimated travel time for that distance at the speed limit.

So the car then continued, as you can see, along Baird's Road down to Ōtara and then its last sighting, before a 10-minute pause when it went off camera, was when it turned left onto Hills Road at 2.57 am, that is camera 71, and that is where Havea Iongi lives.

So in the submissions, the evidence of Havea Iongi at this point is set out, I don't need to take your Honours to it, it is obviously significant evidence in the Crown case.

I have also set out in my submissions what I have already addressed earlier, in relation to Havea looking at the gun he was given and considering that it resembled the guns he had seen earlier in 2019 with Falala and Viliami, and also later when he was shown a photograph of the TikTok saying that it also resembled that one. The defining point was that they were all single-barrelled shotguns and two of those three that I have just mentioned were sawn-off.

So this is the document that was shown to Havea. He didn't see the video itself. But your Honours can see that it's the appellant sitting in a – I think there was evidence that it was the garage of his house. The distinctive striped chair, which you can't pick up in this image, was the same striped chair he's sitting on in the photograph of the live ammunition, although there was no evidence of who was holding the live ammunition.

There was some cross-examination about the reliability of Havea's evidence because this gun shows it being wrapped in what he thought was a towel which is the same one but it could well be some other sort of white cloth, but the point

is the weapon is concealed even when Manu Iongi is holding it in the TikTok video.

So returning then to the Crown's submissions. The next day, so Havea took the gun, wrapped in a towel, and ammunition he discovered later, put it in the ceiling cavity of the house and then he went to bed. The next day he discovered it and on page 7 of the Crown submissions he goes – he text Falala, said: "Come and pick up your stuff," and 15 minutes later the appellant arrived unannounced and just said that someone had told him to come and "pick it up".

When Havea retrieved it from the ceiling, ammunition fell out of it and he did a drawing which Mr Benson-Pope will bring up, this was as part of his 16 December statement, he drew two types of ammunition. On the left-hand side, he drew shotgun ammunition which was clear in its shot shell with grey balls inside it. That is largely irrelevant for our purposes. The other two drawings of ammunition are of the same thing. So, he said there were four shells wrapped in tape and he drew those four shells in more detail on the right, importantly describing the top of the shell being black and the base of the shell being gold and that is of some relevance to the appellant's case because when his house was searched in August the following year, police officers found in a Versace sunglasses case hidden in the laundry of his family home where he lived, the appellant, these five bullets which –

KÓS J:

They're not shells. They're not shot shells.

MS WALKER:

No, correct.

KÓS J:

No, they're bullets, yes.

MS WALKER:

They're .38 calibre.

KÓS J:

Yes.

MS WALKER:

Yes, that's right, so they couldn't have been used in the shotgun but they were in the towel that was given to Havea that night with the murder weapon.

WINKELMANN CJ:

Well, not these shells, not necessarily, or no –

MS WALKER:

Not necessarily these shells.

WINKELMANN CJ:

Yes.

MS WALKER:

No, but Havea was shown this photograph of the ammunition that was later found.

WINKELMANN CJ:

Shells are fungible, effectively, aren't they?

MS WALKER:

Yes. And he said that they were the same as the ones that were wrapped in the towel on the night and obviously there were four on the night, there are five here.

1435

The most the Crown made of this point is that there was ammunition found in the appellant's house later which resembled ammunition found wrapped with the murder weapon on the night. We obviously can't say it was the same.

So that then really brings –

MILLER J:

That's very unusual kind of ammunition. It's for a revolver, a pistol, isn't it?

MS WALKER:

Correct. And there was no evidence as to why that would have been in the, in the gun, wrapped with the murder weapon, when it couldn't be used in it. There was an available inference that there was another gun in the car that night, a pistol, but there was no evidence of that, that it was used.

So that really brings me to the submissions on this first ground of appeal, it has taken rather a long time, sorry, and that is on page 9 of the Crown's submissions.

I can invite your Honours to turn to page 10 where the submissions really are summarised. I don't need to take you to the law on this point and it's really just summarising the evidence I have just taken you to, so that the circumstantial evidence led at trial provided an entirely sound basis for the conviction for manslaughter and this was a planned retaliatory shooting at the Fisi'ihoi family home.

And so on page 10, I have set out the key strands in support of that. The most important being, he is in the car with them 10 minutes later but, of course, that journey started at 2.28 am when the car is first picked up on camera and that probably just is a convenient point to take your Honour's back to exhibit 16 and to highlight the end of the journey, because it really does complete the circuit.

And so Havea's house is marked as 8 Tait Place in Ōtara and after the 10-minute pause off camera which is aligned with Havea's evidence that they were there for about 10 minutes, having disposed of the murder weapon, they are then picked up again, as your Honours can see, camera 77, 78, going down Preston Road, at one point the camera clocks it at 90 kilometres an hour, down to camera 81 on Dawson Road and then loops back and is picked up again on camera 1 at 3.11.

So, a 43 minute journey covering 23 kilometres and in that time they've driven directly, had a pause of several minutes at the Puhinui cemetery, carried out the shooting, driven quickly to Havea's, offloaded the murder weapon, and returned home, all before the first responders arrived at the scene of the homicide. So, that really is an important piece of evidence in the Crown's case to say that it was a highly planned retaliatory shooting.

So, the remaining points on that page, I don't think I need to take your Honours to them. I've really highlighted them already on page 10. This includes the roles from which it could, from the neighbours' evidence, that could be inferred.

And the last point, really, is paragraph (l) on page 11 which is the appellant returning the next day to collect the murder weapon.

Now, the Crown case is therefore that this was a highly-planned shooting and it was a careful response to the 4th of December shooting which had effectively gone wrong.

WINKELMANN CJ:
So what shows it is highly planned?

MS WALKER:
The time of the morning that they set off. The route that they took. The fact that they do not re-trace their steps. The fact that they pause at the Puhinui cemetery. The fact that they go slowly down the street.

WINKELMANN CJ:
Sounds just like an ordinary – I mean, nothing is ordinary about it, but it doesn't sound highly planned, it just sounds like a series of events occurring. They take a route, it's early in the morning, they take a route and, you know, it doesn't sound highly planned.

MS WALKER:

They've got to know where they are going, they have got to have the murder weapon in the car with them, they have got to have ammunition to fire which they do, they take off at speed to get away from the scene as quickly as they can, they go quickly to another –

WILLIAMS J:

Don't think you have to plan that highly. I mean, there had been a shooting, of course they'd take off as quickly as they could.

MS WALKER:

Well, I suppose what the jury, the benefit the jury had was that they had the evidence from the 4th of December shooting which was much less planned, in my submission. On that occasion, they had parked the car –

WINKELMANN CJ:

But your discussion of "highly planned".

MS WALKER:

Yes.

WINKELMANN CJ:

You're emphasising that to make a point that he must have been in on the plan.

MS WALKER:

Yes.

1440

WINKELMANN CJ:

Whereas what you're talking about doesn't sound like a sophisticated series of movements that everybody has to know about, which is the kind of thing you're trying to imply, isn't it?

MS WALKER:

Well, it's a pretty simple plan, too.

WINKELMANN CJ:

Yes.

MS WALKER:

I mean, you drive to the scene and you shoot someone. I mean, there's not a lot of complexity to this plan but they still executed it, so –

KÓS J:

If that was the plan, coming back to my question.

MS WALKER:

Yes.

KÓS J:

That it could have been a series of different plans ranging from a drive-by, to a shooting, even a reconnaissance.

MS WALKER:

Yes and that's where the 4th of December becomes relevant again because –

KÓS J:

It does to two of them.

MS WALKER:

Yes, it does to two of them.

KÓS J:

And what troubles me a wee bit about this case –

MS WALKER:

Yes.

KÓS J:

– is that Manu's position is slightly distinct from the others, in fact significantly distinct from the others. All these are very, very good points against Viliami and Falala.

MS WALKER:

Yes.

KÓS J:

Not quite so good against Manu.

MS WALKER:

Yes, well, the Crown's main point was things had gone wrong in the past and why would he be in the car when his two older cousins were going to exact retribution if he weren't brought for a reason? I mean, that's a real – that's a common sense submission for the jury.

KÓS J:

Yes, I take the point.

MS WALKER:

That's for the jury to work out, isn't it, there's –

WINKELMANN CJ:

What night of the week was it?

MS WALKER:

That's a very good question, your Honour. I think I recall that at trial but I don't recall it now. Mr Benson-Pope might Google it. So on page 14, the – I have set out the ways in which, on page 13, that the appellant could have been guilty.

Sorry, what's that? Ms Hogan says "Wednesday", thank you.

On page 13, sorry, rather, I think I'll start there. The verdicts suggest, of course, that the jury rejected 3.7(a) – gosh, sorry, let me start again. Bottom of page 12, the evidence that the jury heard enabled them to draw three conclusions about what happened at the scene in relation to the appellant: he either got out of the car and shot Mrs Fisi'ihoi; he got out of the car but didn't shoot Mrs Fisi'ihoi, or he remained in the car.

Now, the jury's verdict suggests it rejected 3.7(a), otherwise it would have convicted him of murder. In each of the remaining scenarios there was a sound basis for them to find him guilty of manslaughter and in order to do so they had to be satisfied beyond reasonable doubt of the elements that I have set out in the middle of page 13: that he intentionally helped, encouraged or otherwise procured his cousins to fire a shot at Mrs Fisi'ihoi; when he did so, he knew the shooter would cause more than trivial harm; or under section 66(2) that he formed a plan with them to fire a shot at a person at the address to assist them in carrying out the plan; he agreed to help that plan; and Mrs Fisi'ihoi was shot in the course of it; and when that happened, he knew a probable consequences were the infliction of more than trivial harm.

And so the question trail was very clear in the steps that the jury had to take to get from involvement which in the appellant's case was question 16, to murder and murderous intent which is question 17, to manslaughter which was question 18.

Murder wasn't – sorry, manslaughter wasn't left to the jury for the shooter. It was deliberately taken away and the reason for that was, by agreement with all parties, that the person who actually fired the fatal shot at the distance that they did with that calibre of weapon had to have had murderous intent on either of the 167 limbs.

So, on page 14 the Crown set out the submissions that there were two ways it really ran its case. That if he remained in the car, an inference available to the jury was that the was doing so as a getaway driver, as a lookout, or as further muscle if needed. But as seemed more likely on the evidence, and I say that

because it was Falala's car, Falala was driving the car at Havea's, the appellant was likely one of the ones who got out with the shooter and that was, indeed, what Justice Powell found. And in 3 –

KÓS J:

He did, but how did he get there? Because why isn't it equally conceivable, perhaps more conceivable, that Falala, the driver, because I think we can take it he probably was the driver as he was the driver at Havea's house.

MS WALKER:

Yes.

KÓS J:

And Viliami, he was the gunman.

MS WALKER:

Yes.

KÓS J:

Why do we infer that the driver didn't get out of the car?

MS WALKER:

The driver, the driver could well have got out of the car, maybe that's why the handbrake was applied.

KÓS J:

Exactly.

MS WALKER:

Maybe the driver got out and then Manu Iongi was sitting in the car.

KÓS J:

Yes.

1445

MS WALKER:

Keeping lookout. I mean, all of these were possibilities for the jury. We simply don't know which of the combinations it was, but the point was in those circumstances, because the two older cousins had done this before, and failed, there had to have been an escalation in what they were attending going at 2.30 in the morning, and so there has to have been a reason for Manu Iongi to be there and to be aware of the plan. So each of those possibilities would have seen him as a knowing participant in the plan, and –

WINKELMANN CJ:

Well, it says they might have an intention. I mean it's clear that they might have a reason why they bring him along but it's not clear necessarily that they tell him. He's their cousin. He's younger. They just drag him along.

MS WALKER:

Well, there's no evidence of him being dragged along.

WINKELMANN CJ:

No, there's no evidence about why he came at all. One assumes they were – because there's no evidence of communication so you might infer that they go to his house and pick him up.

MS WALKER:

Correct, and so – which is why familiarity with firearms and ammunition of a kind used is not insignificant.

WILLIAMS J:

That would catch every Crip in the city.

MS WALKER:

Well, it caught this one.

WILLIAMS J:

Yes.

MS WALKER:

It caught this one who was with his cousins coming from a place where they lived together at this time in the morning.

WILLIAMS J:

But you need to get further than that. It's not – you've got photos of the guy with a cartridge, you've got photos of the guy with a gun, a completely unrelated occasion, that's clear, a month earlier. We know that he's their first cousin and that they're mates and he's in the car. That's all you've got.

MS WALKER:

We've got timing and circumstance and –

WILLIAMS J:

Tell me about timing and circumstance. Help me out.

MS WALKER:

Well, I suppose to take the Court to the Crown's submissions on paragraph 15, we draw a distinction with a case like *Kuru* which was –

WINKELMANN CJ:

Is that your paragraph 15?

MS WALKER:

Page 15 of the Crown's submissions rather. This is the Crown's submission that it wasn't a reasonable possibility that he was just a passive bystander and we say this wasn't a case like *Kuru* where he clearly went not just within cooee of the scene, he went right to the scene. He was in the car with the murder weapon beforehand. He was in the car with the murder weapon afterwards. This was not one of your cases where his older cousins had called in to pick him up from, you know, a pub on the way to the thing where he might not have had a clue what was happening. There was no evidence that car detoured off that circuit that I've just taken you through. The timing didn't permit it and the

cameras didn't permit it, and so the Crown says that unlike in *Kuru* there was no evidence supporting the suggestion he was just at the scene by chance.

WINKELMANN CJ:

But they picked him up – didn't they pick him up from his home?

MS WALKER:

Well, we don't know anything before camera 1. All we know is that –

WINKELMANN CJ:

Camera 1.

MS WALKER:

– he was in the car at camera 1 because there was no evidence of it detouring to pick him up from anywhere else.

WINKELMANN CJ:

The likely inference though is that he's – they were somewhere else beforehand, one of them was, Falala?

MS WALKER:

Falala was on a date but the evidence was –

KÓS J:

In the car?

MS WALKER:

Yes, in the car, but the –

KÓS J:

So we don't have any backup past camera 1 to cameras minus 15 to the date, so that's the…

MS WALKER:

I'd have to recall that. At trial the CCTV played, which your Honours watched, was from 2:28 onwards, but the girlfriend with whom he was on a date gave evidence at trial and there was evidence about her Steps application on her, I think her Apple watch, and that indicated that he had returned her from the date by 1 am. So he was home in the vicinity at 1 am, so about an hour and a half before this car set off on its journey, so adequate time for the planning to have occurred. So –

MILLER J:

Can I just ask you a question which takes you out of your sequence here a little, but I was struck by your point that this case was put to the jury as murder or nothing for two principals. The Judge agreed to that obviously?

MS WALKER:

Yes. Yes, all counsel agreed.

MILLER J:

And was that decision made at the end of the evidence?

MS WALKER:

Yes. That –

WINKELMANN CJ:

But wasn't it the shooter, not the two principals, the shooter?

MS WALKER:

Just the shooter. Well, there is only one principal, yes.

MILLER J:

Right, yes, so the…

MS WALKER:

So, yes, and the reason for that was that the person who fired the fatal shot couldn't have had anything less than a murderous intent, including under

section 167(b), at the time they fired the shot, because of the proximity to the window and to the deceased and because of the circumstances in which it occurred, and…

So that perhaps neatly brings me to page 16 which is to round out this first ground with returning to a question of her Honour, the Chief Justice, that the jury's verdict of manslaughter didn't result in any sort of logical fallacy and it was reasonable for the jury to find that the appellant had joined in a plan to fire a shotgun at someone without being sure that they foresaw a killing with the necessary mens rea.

1450

And so to find the appellant guilty of murder obviously requires a high standard of mens rea and as the Crown says in paragraph 3.16, this is a very high standard and it is not unreasonable that the jury was sure the appellant was a willing participant to fire a shotgun at a person but not sure he had the necessary high level of foresight or knowledge required to convict him as of a party to murder.

So the most important piece of evidence in support of that conclusion which the Court of Appeal agreed with was that the appellant wasn't previously involved in the dispute on the 4th of December.

WILLIAMS J:

So let me, I'm just trying to understand the logic of that, the shooter who points the gun at the person.

MS WALKER:

Yes.

WILLIAMS J:

Could only have murderous intent.

MS WALKER:

Yes.

WILLIAMS J:

The plan is to point the gun at the person and pull the trigger?

MS WALKER:

Yes, to fire a shotgun at a person, yes.

WILLIAMS J:

And you're suggesting that if that could only have been murderous intent on the part of the shooter, it needn't have been murderous intent on the part of everyone else who understood that was the plan, with a shotgun?

MS WALKER:

It was only on the scenario that the appellant was the person, which was the Crown case, next to the shooter, that he was one of the two who got out of the car and went up to the property, standing close by, as had happened on the 4th of December.

WILLIAMS J:

So if he was in the car, what plan was he into?

MS WALKER:

Looking out.

WILLIAMS J:

Looking out, on what plan?

MS WALKER:

To shoot somebody at the address. The common –

WILLIAMS J:

With a shotgun.

MS WALKER:

Yes, yes.

WILLIAMS J:

Isn't that the same plan as the shooter?

MS WALKER:

No, not – no, well, they both share a common purpose which is to fire a shot at somebody at the address, but the, I suppose, the distinction is that under the manslaughter mens rea, he only had to be sure, this is Manu Iongi, so if he goes to the address not appreciating that they have murderous intent, appreciating only that they might wish to take out a retaliatory shooting, to shoot at someone, but not to know what the nature of that shooting was. What if it was, as my learned friend said, they call their attention on the door, knocking.

WILLIAMS J:

But I thought you pinned your colours to pointing out a person and pulling the trigger?

MS WALKER:

For the shooter.

WINKELMANN CJ:

No, but didn't you put, wasn't the plan –

WILLIAMS J:

The common plan.

WINKELMANN CJ:

I thought the plan was that they would go and attack and fire the shotgun at a person?

MS WALKER:

This is where the neighbours' evidence is important. Because there was a knock at the door and because there was someone heard to say: "Are you

home?" From that, it could be inferred that their primary intention was to summon Stephen Fisi'ihoi from the Portacom as they had done in the past. I mean, he was who they were after and so it's not necessarily the same thing to say that in those circumstances you intended – that you only had murderous intent if you were standing there with the shooter who was going to fire a shot at that person, as happened on the 4th of December and nobody died.

WINKELMANN CJ:

I don't think you're following the point that is being made though, which is that the Crown pitched the common purpose as being that the agreement was to go to the property and fire a shotgun at a person.

MS WALKER:

Yes, yes.

WINKELMANN CJ:

If you concede that a person who fires a shotgun at the person must have had murderous intent.

MS WALKER:

Yes.

WINKELMANN CJ:

Then mustn't the other people foresee that the person will be having murderous intent?

MS WALKER:

Not if you weren't involved in the 4th of December shooting and you didn't know that, you didn't know that they had murderous intent.

WILLIAMS J:

Well, then that's a different plan.

MS WALKER:

No, the plan is still the same, it's to fire a shotgun at a person, as happened on the 4th of December.

WILLIAMS J:

I don't follow that.

KÓS J:

How can that not have murderous intent?

MS WALKER:

I'm sorry?

KÓS J:

How could that not have murderous intent?

MS WALKER:

The party?

KÓS J:

Yes, well, the plan to fire shotgun at someone, what else is – I mean, it's not a blow, it's not bubbles, you know, it's not blow bubbles. What's it going to do but kill someone?

MS WALKER:

I suppose not if you didn't know that they would shoot from that close. I mean, it was a one- to two-metre range. On the 4th of December the shooting took place as they were walking up the driveway. The evidence here was that the shot was fired proximate to the Portacom and within one to two metres of the window where Mrs Fisi'ihoi was. So if you didn't know what had happened on the 4th of December and you were accompanying your cousins to the scene where they were going to fire a shot at someone, a warning shot, a retaliatory shot, it could have been to the body like to George Vuna on the 4th of December,

it's entirely possible that they didn't share murderous intent and all they were aware of was that the firing of a shot would cause more than trivial harm.

Now, as the Court of Appeal said, that's very generous, or they said that's generous and in my submission it likely was.

1455

WINKELMANN CJ:

I just don't see a distinction, I just don't see the basis for the Court of Appeal saying the distinction the verdict must reflect that they – that if you hadn't been there on the 4th of December you couldn't foresee the murderous intent. You wouldn't – the jury wouldn't be satisfied you foresaw the murderous intent.

WILLIAMS J:

Well, you weren't as angry, is the point, isn't it?

MS WALKER:

In relation to the appellant?

WILLIAMS J:

If, yes, if Manu Iongi wasn't as angry as his cousins at Mr Fisi'ihoi.

MS WALKER:

If he was just there to provide muscle or backup, yes.

WILLIAMS J:

But the danger is that, on one view of it, it might be said Manu Iongi is lucky, he got a generous call. On the other hand, isn't it equally possible the jury got confused?

MS WALKER:

No, I think –

WILLIAMS J:

But that they had him, a gangster, with shotgun TikToks and so on and so forth, they knew he was involved somehow.

MS WALKER:

Yes.

WILLIAMS J:

So he got manslaughter. The very sort of thing that the *Hodgson* [sic] warning is designed to avoid – *Hodge* warning, I should say.

MS WALKER:

Well, the...

WILLIAMS J:

Because the gap between those two possibilities is very fine.

MS WALKER:

Yes and that's the risk in a case involving a shotgun rather than a weapon such as a knife, where it's more readily concealed.

WILLIAMS J:

Correct.

MS WALKER:

But the evidence pointed to this being a retaliatory shooting and so it would have been, in my submission, incorrect to put the common purpose any lower than it was, but there was an evidential foundation for them to reach that verdict and the question trail was agreed between all counsel.

The jury clearly spent much time on the appellant's case. The transcript of – which is recorded in his Honour Justice Powell's bench notes, records that there was – they went out just before 1 o'clock on the 5th, they were re-called at 2 o'clock just soon after to have the addendum given to them on the summing

up. Later that afternoon, soon after 3.30, I think, they asked their only sequence of questions and at that point they indicated they were already at question 16 on Manu Iongi and they didn't return a verdict for another day, soon after 3.30 the next day and so there is good evidence to suggest that they gave careful thought to his position and that the manslaughter verdict was one that they could reconcile based on all of the other evidence they had heard.

WILLIAMS J:

Or the other possibility is that a number of the jurors were tainted by prejudice in this inferential case and for those who took a different view, took a view that, you know, this should have been 147'd, I guess, the compromise was manslaughter, which is exactly what this law is supposed to avoid.

MS WALKER:

There were very careful directions on prejudice and sympathy, as my learned junior, Mr Benson-Pope, will take the Court through. The trial wasn't just about these defendants who were gang members.

WILLIAMS J:

Of course.

MS WALKER:

There was Stephen Fisi'ihoi who was a gang member as well. There was Ezekiel Loamanu, a Crown witness, who is a gang member as well. There is Havea Iongi who is a gang member as well. This was a trial about gangs and so any prejudice or sympathy was countered in the normal way, in my submission.

WILLIAMS J:

It's not, I mean, obviously the gang reality it seems to me is central to this and couldn't have been avoided. It's a part of the narrative. But you've got pictures of this guy handling a shotgun. You've got pictures of him handling blue cartridges. The leap for a member of the jury to guilt is an easy one to make on an intuitive common sense basis that, in the end, could well be irrational.

MS WALKER:

And that wasn't the only evidence we had and they were the subject of robust pre-trial rulings that weren't appealed and so references to gangs, admissibility of the TikTok, admissibility of the firearms evidence and ammunition evidence, that was all robustly challenged and admitted and there had to have been evidence in relation to the gang in this case because identification was the primary issue. We needed to call evidence that when on the 4th of December the Fisi'ihoi sister Lilly saw two men coming to the property, she observed a distinctive tattoo on the left side of Falala's neck that is shown in the photographs, they said: "C's up," before the shooting took place which there was evidence about that being a gang phrase, so all of these things were relevant to identity which was the primary issue when the jury retired.

1500

WILLIAMS J:

Well, no, I don't think it was. The issue was not Manu Iongi's identity but what he did.

MS WALKER:

Well, that might segue nicely into the second ground of appeal which is about the summary of the appellant's case by him, his Honour, Justice Powell, because when the jury retired it very much was the primary defence still.

So I turn now to page 17 of the Crown's submissions and the point the Crown makes here is that while the summing up didn't involve separate summaries of each of the parties' cases, while going through the question trail his Honour did set out each party's position in relation to key enquiries the jury had to make, and in the context and circumstances of this case that was an appropriate course rather than doing a more detailed summary which wasn't required, and so in terms of key principles, which is at 4.2 to 4.3, the Crown's just reminded itself of the adequacy of the summing up needing to be in relation to the context of the trial and the issues that arose within it and the trial Judge being required to clearly and fairly put the contentions of each side at least in their broad form and in a balanced and clear way, and so in relation to the appellant, his primary

defence was that he wasn't present in the black BMW on Calthorp Close that evening. The challenge by my learned friend was that Havea Iongi had lied. That occupied a lot of time at the trial, not only –

MILLER J:

They tried to get his evidence out first, didn't they?

MS WALKER:

Correct, yes.

MILLER J:

It looks like a trial strategy that's come unstuck which is why I asked about when it came unstuck. Really, they've collectively, the three of them, stuck together to maintain a challenge to his evidence and an insistence that they weren't there at all.

MS WALKER:

Yes.

MILLER J:

At some point it's become apparent that the Crown had got them at Calthorp Close.

WINKELMANN CJ:

Well, the evidence became – was admitted.

MILLER J:

My concern about that for this defendant is that he has left a vacuum. You can see the arrangement the defendants have come to really. They all say he wasn't there. He won't run the defence that he might have had which is "I was there but I didn't know what they were going to do", so to me the issue which emerges out of this pattern is should the Judge have done something to recognise that in the event the jury found against the principal defendants there

was a vacuum which they shouldn't speculate to fill. I'm going directly I think to what I see as the issue.

MS WALKER:

I'd have to remind myself of what he did say in the summing up about the use of the defendant's evidence. There may well have been a direction in relation to Manu Iongi on that point.

WINKELMANN CJ:

But the critical issue is did he make clear that a secondary defence was that there was a reasonable – on the evidence, the jury could not exclude the reasonable possibility that Mr Iongi was simply a bystander.

MS WALKER:

Yes, and that's what I want to come to now, really just to show your Honours the points in the summing up where the primary defence was mentioned and when – then the secondary defence was mentioned, and I'll make a note of your Honour, Justice Miller's, point, perhaps while Mr Benson-Pope is on his feet so I can check the summing up in that regard.

WILLIAMS J:

It's the same point, isn't it, expressed slightly differently?

MS WALKER:

Right, okay. Well, I –

WINKELMANN CJ:

I was trying to re-encapsulate what Justice Miller was saying.

MS WALKER:

So in terms of the summing up, the first point was that Havea Iongi had lied and it was a basis for the defence for both Falala and Viliami, even though they accepted going there that night but saying it was for methamphetamine and not a firearm, and then the second branch to the defence was the one we've been

discussing that even if they accepted Havea's evidence they couldn't be sure he was anything more than a passive bystander, and so – and this is at the bottom of page 19 of the Crown's submissions, paragraph 4.9 – submitted that in the summing up the Judge provided a balanced summary of the competing contentions of the Crown and the appellant about the evidence of Havea, and this is in paragraphs 123, 124 and 125, and so I suppose 122 sets out the proposition about Havea Iongi, why the Crown says, why the Crown relies on it. 123, he records my submissions about why he can be believed, and then at 124 he sets out the defence position which is that Havea is discredited and unreliable, he has lied about having seen him, and so forth. And at 125, he also sets up that neither of them was present in Calthorp Close at the time she was killed and Viliami had said he hadn't been there at all.

1505

And I am just not sure whether the next page, 818, is on the next slide or not, but over at 818 his Honour Justice Powell ends this paragraph of the summing up by saying: "As you heard, both said that Manu Iongi was not in the BMW that night, and although they travelled to the home of Havea Iongi it was to offer him methamphetamine rather than to leave him to look after a weapon."

And so the Crown case is that this was the first key battleground of the trial: whether you could accept Havea or not. Did they offload a gun to him or not? Was Manu Iongi there or not?

And then to come to the secondary defence, at paragraph 110 of the summing up his Honour also directed the jury in relation to the secondary defence which is that if they accepted Havea's evidence, it couldn't be proved he was more than a mere bystander and your Honours can see that there: "As Ms Hogan pointed out to you being a mere passive bystander is insufficient," and that's with reference to question 3, so talking about the murder charge.

Now, in the body of the summing up, his Honour discussed party liability under section 66(1) and said that when being a passive bystander is insufficient and expressly referred to this paragraph for that point.

At paragraph 140, which is the next one, he expressly referred to my learned friend's submission that there was insufficient evidence to support a conclusion or inference that he had any necessary intention.

WINKELMANN CJ:

What paragraph is that?

MS WALKER:

140.

WINKELMANN CJ:

140.

MS WALKER:

That's at page 821. And so the Crown says that therefore both limbs of the defence were covered in this part, in this first part of the Judge's summing up, an attack on Havea Iongi's evidence and his credibility.

WINKELMANN CJ:

But was it ever put in a way where to identify the point which is that could the jury be satisfied that the Crown had excluded the reasonable possibility that he was a mere bystander? Because that was the defence.

MS WALKER:

Yes, I think coming to the addendum which is the last part of the summing up in relation to this point, that's up on the screen at the moment and recalling the point that's already been made that this was after Chambers discussions, agreement about wording, checking the form of wording and all counsel being content that the form of wording was adequate, what we have there is the summary at page 826: "Secondly, and likewise, those summaries that I gave you also apply in the same way to Manu Iongi but in the event you reject Havea Iongi's evidence that Manu Iongi was in the BMW there is no other evidence of involvement." So that is the first part. If he is there, he is not involved. "Alternatively, even if Havea Iongi's evidence was accepted and

Manu Iongi was found to be in the car, I remind you of Ms Hogan's submission that there is otherwise no evidence by which he could be inferred as being anything other than a 'passive bystander', and that in any event, there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention."

So probably to answer your Honour the Chief Justice's question, it doesn't appear in any of those parts that he phrased it in relation to "reasonable possibility" but –

WINKELMANN CJ:

Because Ms Hogan submitted to us that in the cases where the Court of Appeal has said that, have rejected the *Hodge* argument, they've said that that was because and she cites *Cameron* and – just *Cameron* I think in that regard and the Court of Appeal was satisfied it had, even though the express particular words were not used, it was satisfied it had been complied with in substance because the jury were clear they needed to exclude the reasonable possibility of other available inferences.

1510

MS WALKER:

Yes, and as Mr Benson-Pope will come to momentarily, that was not done specifically in relation to this addendum but it was done in the summing up in relation to the *R v Wanhalla* [2007] 2 NZLR 573, (2006) 22 CRNZ 843 (CA) direction. So the jury did receive that direction from the Judge.

KÓS J:

Just as part of the *Wanhalla*?

MS WALKER:

Yes, that's my understanding but Mr Benson-Pope is…

KÓS J:

Right.

MS WALKER:

I can see we're inching towards *Hodge* –

WINKELMANN CJ:

Yes.

MS WALKER:

– and I'm going to hand over to him shortly. So the Crown's submissions are that given the circumstantial nature of the case – sorry, your Honours, this is at paragraphs 4.4 to 4.8 now but I'll just summarise it at a high level given the time – it would have been difficult for his Honour to provide a more detailed summary of the defence case, and the points my learned friend made, without effectively repeating the closing addresses which he wasn't required to do or outlining all the strands of circumstantial evidence on which the Crown and the – relied on by the Crown and the defendant's rejection of them.

WINKELMANN CJ:

In fairness to you, can I just ask you to comment on this because when I read his summing up what struck me was that a failure on the part of – well, it read to me as if the Judge had not differentiated Manu in any particular way and had actually intended to address the defence more in terms of his co-defendants and that was why the addendum was necessary because in fact Manu had a situation which was obviously, as you've pointed out, quite distinct from the others too, was tending to be lumped together.

MS WALKER:

Yes, and the passages I've just taken your Honours to show that, while brief, he did mention the primary planks of Manu Iongi's defence and they were, of course, different to that of Falala and Viliami because they had given evidence about going to Havea's but for a drug drop. So that essence of the differences was conveyed. So I think the first point is that the essence of that defence and the differences was conveyed and the addendum was necessary because even though those points had been conveyed to the jury it was necessary in a case where the last evidence the jury had heard was of the co-defendants, where

the jury had seven verdicts to return, six of them were for the co-defendants, for there to be some additional mention of the Manu Iongi defence just to bring additional focus to that for the reason your Honour gives.

WINKELMANN CJ:

Well, I mean, you acted very properly to raise it.

MS WALKER:

Yes, thank you.

MILLER J:

And some – not necessarily trying to defend the Judge here, but it is tricky when you're faced with a defendant who says: "I wasn't there. Nothing to do with this," and the Judge is then faced with having to say, well, if he was, then the Crown says this and this could be said on his behalf, albeit it hasn't really been because his case is that he wasn't there. You're always conscious of a need not to undercut the defence case.

MS WALKER:

Exactly.

MILLER J:

But do you say that that was a factor here?

MS WALKER:

Yes, exactly, and the primary defence was still Havea had lied and they weren't there.

WINKELMANN CJ:

But had the defence put the secondary defence? My reading was that they had. Have I misread it? That Ms Hogan had put the secondary defence?

MS WALKER:

In her closing, yes, she did.

WILLIAMS J:

Yes.

MS WALKER:

Yes, very much.

WINKELMANN CJ:

So she wouldn't –

KÓS J:

She starts with it really –

MS WALKER:

Yes.

KÓS J:

– and then goes to Havea and finishes with Havea. With hindsight, might have been better if it was the other way round, but that's just hindsight.

WINKELMANN CJ:

But the Judge isn't at risk of undercutting the defence then when the defence has already put that defence.

MS WALKER:

Well, the evidence was still, and my learned friend cross-examined Havea on this, that he wasn't there.

WINKELMANN CJ:

I know, but I'm just saying it's not the Judge. Sometimes Judges can say – and even if you don't accept, well, the – you know –

MS WALKER:

Yes.

WINKELMANN CJ:

– and we have to do that, but that wasn't this case.

MS WALKER:

Well, I think he was being appropriately careful because of the difficult ways in which the defences had been advanced, so I think it was appropriately respectful of those defences, including for the appellant.

KÓS J:

It's not super hard really because, I mean, here you had to first establish that he was there, and if you're satisfied, members of the jury, that the Crown have shown he's there then we have to ask ourselves why. Has the Crown excluded the possibility that he was there for a purpose that did not involve participation in the plan? How hard is that? Where's the undercut?

MS WALKER:

Or put another way, as he did, took them through the question trail and just asked whether they could be sure of it. So…

KÓS J:

Yes.

WILLIAMS J:

Happens regularly in rape trials, of course.

MS WALKER:

Yes. Well –

WINKELMANN CJ:

So, can I just –

WILLIAMS J:

On consent.

MS WALKER:

Well, because it's the wording of section 128.

1515

WILLIAMS J:

Well, and consent. If "it didn't happen" is the defence, you still have to direct on consent.

MS WALKER:

The two-pronged defence, yes, yes.

WINKELMANN CJ:

So you are making the point that you were concerned about the addendum not so much because the Judge, in your submission, was being and it was his summing up was inadequate, but because the jury had just heard two defendants give their evidence and they had to deliver six – seven verdicts, six of which were for the other two.

MS WALKER:

Yes and they had heard all of that evidence about the first shooting which didn't affect Manu except for the small ways in which we said it might have affected a manslaughter verdict. So it was appropriate to give some additional emphasis to it right at the very end which is what they received.

Mindful of time, would that be an appropriate point to hand over to Mr Benson-Pope?

WINKELMANN CJ:

Yes, thanks, Ms Walker.

MS WALKER:

Thank you.

MR BENSON-POPE:
Tēnā koutou, e ngā Kaiwhakawā.

WINKELMANN CJ:
Tēnā koe.

WILLIAMS J:
Tēnā koe.

MR BENSON-POPE:
I will come to the directions actually given in a second on burden of proof and inferences, but the summary and where I am heading on this point is that the Crown says the standard directions on the burden of proof were given and on inferences and circumstantial evidence and that those directions were adequate in the circumstances of this case and further directions were not required.

The second point and this is responding more to my learned friend Ms Hu's submission, is that no change to this established approach is required and that's really referring to the *Hodge* direction and discussion in relation to that.

So looking first and we're starting at paragraph 4.16 of the respondent's submissions, for anyone who is following along with the submissions that's on page 21, and I don't anticipate I'll be longer than 10 minutes, but that's where I'm tracking from.

Looking first at the directions on the presumption of innocence, burden and standard of proof, the respondent submits they were in line with *Wanhalla*. We can see they commence on page 796 of the case on appeal which should be in front of you. The Crown says they are in standard form and the most important part to our discussion today is on page 797, if Ms Walker can scroll through to that page, which is the reasonable possibilities direction that was referred to at paragraphs 29 and 30.

His Honour gave the direction at paragraph 29 that: “Another, and perhaps more practical way of looking at the issue, is that if having considered all the relevant evidence that what the defence is saying is reasonably possible, then you will not be able to be satisfied beyond a reasonable doubt. That is what we mean when we say that the accused must be given the benefit of reasonable doubt.”

And then at paragraph 30: “As a result, if something is a reasonable possibility from the perspective of a defendant in this case, then you must give the benefit of that reasonable possibility to the defendant.”

His Honour repeated in short form the directions on burden and standard of proof at the start of the question trail and that is at page 812 of the summing up, which may be the next page, Ms Walker, yes. At paragraph 100 on page 812, his Honour repeated in short form but not including the reasonable possibility rider.

Then on pages 804, before he came to the question trail, at pages 804 and 805 his Honour gave standard directions on inferences. The directions begin at paragraph 66 and carry on to page 805, which we’ve moved onto now. They included all of the standard features that inferences are not guesses or speculations but conclusions drawn from facts accepted as reliably established.

Perhaps of note also at paragraph 70, the end of paragraph 70, his Honour reiterated the burden of proof in the context of his direction on circumstantial evidence and inferences and that is at the bottom of paragraph 70: “Ultimately you need to be persuaded beyond a reasonable doubt that they do if you are to convict all or any of the defendants of all or any of the charges that they face.” Referring to his discussion of circumstantial evidence and inferences above.

1520

My learned friend, Ms Walker, has taken you to the references to the passive bystander theory which is what the discussion today has been most focused on. When discussing the question trail, though, and the one reference I’ll take

you to, given we've gone to them already, when discussing the question trail at paragraph 110, at this point there was a reminder, paragraph 110, of Ms Hogan for the defendant's submission that being a mere passive bystander isn't sufficient.

KÓS J:

That was in the context of Viliami's question, wasn't it?

MR BENSON-POPE:

Yes, it was, but my learned friend, Ms Hogan's, submission was directly referred to and there can't have been any confusion as to which defendant that applied to, given he was the only defendant who was advancing the secondary defence.

WINKELMANN CJ:

Well, it's talking about Viliami though, isn't it?

MR BENSON-POPE:

Yes, it is, and that was the way his Honour carried out the discussion of the question trail. He discussed – he went through the questions for one defendant and said they apply to all defendants, but as he was doing so he noted the different submission for Manu Iongi at this point about being a passive bystander and that that would not be sufficient to answer "yes" to that question.

As my learned friend, Ms Hogan, noted, today no further directions on circumstantial evidence or inferences were sought at trial and the addendum having been reviewed by all counsel, counsel for Manu Iongi indicated that it sufficiently encapsulated the case for the defendant.

WINKELMANN CJ:

The trouble I have with that is that, you know, being a passive bystander, they might have some difficulty accepting that in respect of someone who's standing passively beside someone who's shooting someone but they might have more capacity for the jury willingness to accept it in respect of someone sitting in a

car. It's the lack of connection between the generalised statement and the facts of the case.

MR BENSON-POPE:

That's possible, Chief Justice. The submission in response to that would be that in general – and I'll come to this more in a second – but in general the case law on circumstantial evidence, inferences, as suggested, that as long as the central or key inference for the parties it put forward and explained to the jury, that's sufficient.

So the respondent's submission would be that different to the case in *Maxwell* which is perhaps a useful example that my learned friend referred to which is a case, Court of Appeal decision, from 1988. In that case the issue was whether the defendant had escaped from lawful custody. The Crown had produced he'd, someone had been hit on the head when they were leaving court as part of the prison van and he'd run away later been arrested. The Crown had never produced the records of him having been remanded in custody that day at trial and the defence case had been, members of the jury, you can't exclude the possibility he'd been granted bail that day, given this lacuna, and the Judge in the *Maxwell* case, or the Court of Appeal on appeal, said no, the key submission needed to be repeated that it was possible he'd been granted bail and therefore the Crown hadn't proved its case that he was actually escaping from lawful custody. But the respondent's submission is as long as that key position that he was a passive bystander as summarised, that was sufficient and in accordance with established authority.

WINKELMANN CJ:

Well, that tends to be a little bit contrary to the direction, general drift of directions, that Judges use in their summing up to the jury these days which is to connect the law to the facts, so it's a very fact-driven direction. This is sort of re helicopter.

MR BENSON-POPE:

Except that in response to that I suppose all I can do is point to his Honour, Justice Miller's, point that it is difficult in a situation where there is a vacuum and the Judge is forced to possibly posit different hypotheticals about what could have happened or what type of passive bystander the appellant might have been, the different possible scenarios. They all fall within this umbrella heading, the respondent submits, of being a passive bystander, being there without the necessary intention or knowledge, and the respondent submits it would have been difficult for his Honour to tie the direction specifically to more facts given there wasn't that detail there in this case.

WINKELMANN CJ:

You mean there was no defence evidence on that point?

MR BENSON-POPE:

Or there was no other additional evidence beyond the factors my learned friend, Ms Walker, has summarised for you. Not that there wasn't necessarily his account but obviously that would have given the Judge something to tie those directions specifically to.

WINKELMANN CJ:

What about defence counsel's account, based on cross-examination?

1525

MR BENSON-POPE:

Yes and that, the respondent's submissions is, that was encapsulated within the heading of "passive bystander" and I don't disagree with your Honour's submission that it was helicopter summing up. It was in broad form but the respondent's submission is it sufficiently captured that key contention which was the secondary defence for the defendant, which as Ms Walker pointed out perhaps explains why it received less airtime in the summing up as well.

It's a minor point, obviously the summing up is the most important direction to the jury, but I do just note that the Crown referred in their closing to the

inferences contended for by the defendant as well as that they're not to speculate or guess and, of course, as your Honours will have observed, Ms Hogan KC in detail set out all of those inferences in the final closing address before the summing up.

We're moving now to paragraph 4.26 of the respondent's submissions which is a very brief summary of the general position, accepting your Honour Chief Justice's comments about the general drift of directions and tying them to the facts, but the specific position in relation to circumstantial evidence and inferences. The respondent's submission is that in general the position in New Zealand has been to discourage detailed jury directions on circumstantial evidence. The central concern seemingly being that elaborate and/or abstract directions risk confusing rather than assisting the jury.

WINKELMANN CJ:

Would it be elaborate to say, when a case is based on inferences and a circumstantial case and one inference is consistent with innocence and the other not, you should be, before you can convict, you have to exclude the inference consistent – reasonable inference reasonably – oh, anyway, the words.

MR BENSON-POPE:

And I'll move forward in my submissions to respond to your Honour's point.

WINKELMANN CJ:

Yes.

MR BENSON-POPE:

And this is really where does –

WINKELMANN CJ:

But my point, it doesn't sound that complicated, apart from the fact I have managed to articulate it in a very complicated way.

MR BENSON-POPE:

Which is, "where does a *Hodge* direction fit in".

WINKELMANN CJ:

Yes.

MR BENSON-POPE:

And the respondent's submission is it doesn't, or it does not. We're at 4.31 of the respondent's submissions now and the respondent does agree or considers that the Court of Appeal's recent summary in the *Dunn* case accurately summarises or identifies, first, that the direction has seldom been given since the decision in *Hart* of the Court of Appeal in the 1980s which recognised it was sometimes desirable, but perhaps most importantly, the Court's comments at paragraph 75 of that decision, which is authority 5 in the respondent's bundle, that the direction is merely a restating: "... of the concept of reasonable doubt in the language of consistency." Consistency and inconsistency versus reasonable doubt and reasonable possibilities, which is what is provided for in the *Wanhalla* direction.

WINKELMANN CJ:

What about the Canadian case that says it is not just what it is?

MR BENSON-POPE:

Yes, your Honour's referring to – Chief Justice is referring to the *Villaroman* case that Ms Hu took us to. The submission in relation to that for the respondent is the secondary part or the secondary emphasis beyond the burden of proof that was referred to in that case is the risk of speculation and the risk of the jury filling in gaps, which is what the respondent submits speculation is, and that is addressed directly by the inferences and circumstantial evidence direction.

And so the point for the respondent is that when we have the direction from *Wanhalla*, that since 2007 has created a much more detailed general direction

on the burden of proof in New Zealand, the *Hodge* direction risks confusing juries by restating the reasonable possibility part of *Wanhalla* in a different way.

WINKELMANN CJ:

But doesn't it do something else, doesn't it link the two together, really, in a critical way in a circumstantial evidence case?

MR BENSON-POPE:

The respondent's submission is that it doesn't, in agreement with the recent Court of Appeal decision in *Dunn*, that it's a –

WINKELMANN CJ:

So you stand on *Dunn*?

MR BENSON-POPE:

That it's effectively a restating and –

KÓS J:

Isn't the problem that when you've got circumstantial evidence and I accept it's as probative as direct evidence, but it's an invitation to juries to reason by instinct, by their own experience, what was called common sense before, if you're doing that you have got to be careful that you have taken fully into account both potential potentialities and ask yourself whether you can really say that one has been proved and one disproved. Isn't that the benefit of saying circumstantial evidence is slightly different and you may need a special direction where the case is substantially reliant upon it, which it was here?

1530

MR BENSON-POPE:

The respondent's submission remains that that's what's achieved by the combination of the reasonable possibilities direction from *Wanhalla* and the invitation or the direction not to speculate or guess and to only draw inferences from facts accepted as reliably established.

And it's not just the Court of Appeal in *Dunn* making this point. I do note in Australia, the High Court of Australia in *Shepherd v R* (1990) 170 CLR 573 (HCA), the case in my learned friends for the appellant's authorities, before discussing the *Hodge* direction the decision in that case says: "... it is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt."

And similarly in the *Judicial College of Victoria Criminal Charge Book* [3.6] "Circumstantial Evidence and Inferences" (Victoria) and this is referred to at footnote 105, we're at page 28 of the respondent's submissions now, footnote 105, similar comments are made in the *Criminal Charge Book* of Victoria that it really is a restating or amplification of the beyond reasonable doubt test.

The respondent's submission is that amplification is adequately done by the reasonable possibilities portion of *Walhalla*.

KÓS J:

Well, that might be right generally, but the question I think is quite what altitude the helicopter flies at when the case is purely circumstantial against one defendant and it may just be that the helicopter has to drop down a bit and describe the landscape a bit more for the jury so they are clear as to what the alternatives are.

MR BENSON-POPE:

Yes Sir, I accept your point and the only, I suppose, response I would have that there is a tension in this area and some of the recent Court of Appeal decisions identify this.

I'm referring now, moving back, back a page, back two pages in the submissions, respondent submissions to page 26. And this is the discussion of choosing between inferences and his Honour Justice Williams raised perhaps an example of this earlier when his Honour said, well, isn't it possible that he was directed to go and get the gun by a senior gang member, having no greater involvement, as opposed to the inference suggested by the Crown that

collecting the gun afterwards showing knowing involvement in the plan the night before.

And the response from the respondent is, that while each individual strand may have another possible explanation, when the jury is being directed as to inferences it's in relation to all of the strands as a whole and –

WILLIAMS J:

It's still a very logical process. The danger is you go with the vibe. So when you are discounting or in-counting, you have do that as, you know, we used to say years ago when I was summing up, this is a careful, dispassionate process of sifting through the evidence, particularly the circumstantial evidence, and if you're going to point to something else to discount the possibility of, you know, multiple reasonable options per this piece of circumstantial evidence, you have to cross-reference that. You can't just say you can ignore that piece of evidence because, you know, there are other options, but this piece of evidence strengthens that piece of evidence, if the second piece of evidence you're talking about has the same problem.

MR BENSON-POPE:

Yes and accept your Honour's point on that and the only response would be that if two granular directions are given in relation to each strand of circumstantial evidence, that risks raising the burden improperly on the Crown's circumstantial evidence cases. But I accept your Honour's point and I am referring there to footnote, the case, the Court of Appeal decision in 2022 in *H (CA267/2022) v R* [2022] NZCA 294 at footnote 95 on page 25 for that line of authorities referring to that.

Moving on and I only have a few further points to make. The respondent –

WILLIAMS J:

Sorry, can you give me that footnote again? I was just looking for your submissions.

MR BENSON-POPE:

Yes, your Honour, page 25, footnote 95.

WILLIAMS J:

Thank you.

MR BENSON-POPE:

And there's reference to cases about a number of Court of Appeal decisions highlighting that the directions on inferences are given as to the circumstantial case as a whole as opposed to the individual strands or individual pieces of evidence.

WINKELMANN CJ:

That can't be a rule, because you have to give a direction that responds to the case.

MR BENSON-POPE:

Yes and it will be fact dependent, I accept that, Chief Justice, but –

WILLIAMS J:

It still has to hold itself up.

MR BENSON-POPE:

Yes, but it's perhaps a response –

WILLIAMS J:

You can't say, "I've got, you know, half a dozen really bad strands and that's enough", the strands have to bear the weight.

MR BENSON-POPE:

That's of course correct, but it's perhaps a response to the suggestion that sometimes a helicopter approach may be necessary, but I take your Honour's point on that.

WILLIAMS J:

Okay.

1535

MR BENSON-POPE:

In terms of *Kuru* has been referred to at some length and your Honours have at length discussed the various inferences that may be drawn from different pieces of evidence with Ms Walker, but the Crown does just highlight that this wasn't a case involving the kind of leaps of logic that this Court was so concerned about in *Kuru* where in that case the defendant lived near the scene. There was no evidence he was actually at the scene, and the post-conduct evidence of his was thin at best, a meeting where he asked people, as I understand it, asked others what had happened during the events of the day before that were said to be inculpatory. The Crown says that's very different. The respondent says that's very different to the facts of this case where once the jury accepted Havea Iongi's evidence that he was in the vehicle at the murder scene that night, once they accepted his evidence that he returned the next day to get the murder weapon, the Crown says there was an appropriate and reasonable link in the chain, next step, to confirm guilt, and that they didn't need further direction to carry out that common sense task because the choice they had wasn't vague or ambiguous or binary. The question trail set out either that he intentionally assisted a plan to fire a shot at 73 Calthorp Close and if they were sure of that the Crown says there was no risk that they remained, they considered there remained a reasonable possibility that he was merely a passive bystander. So because of the way the question was pitched at that height, the Crown says it necessarily excluded, or your Honours can be comfortable that they understood they needed to be sure that he was intentionally knowingly involved in that specific plan to fire a shot.

WILLIAMS J:

At somebody?

MR BENSON-POPE:

At somebody, yes.

KÓS J:

Except, Mr Benson-Pope, that in cases where you have what's effectively a joint enterprise participant there's a case for the Courts to be very cautious about over-punishing, over-convicting.

MR BENSON-POPE:

Yes, of course, your Honour, and that was obviously discussed at length in *Burke* and specific directions or adjustments made to the necessary directions to help ensure that that is the case.

KÓS J:

Yes, but *Burke's* a rather different case, isn't it? I mean, there was clearly a joint plan in *Burke* which was to give Mr Heappy a hiding. We're just not quite sure what the plan was here. I mean, in the course of that joint plan a knife was produce. It's quite a different case from this one, in the sense that we don't know what the plan was.

MR BENSON-POPE:

Yes, excepting –

KÓS J:

We probably can infer what the plan is as regards Viliami and Falala, it's just a hell of a lot harder when it comes to Manu who hasn't got the background.

MR BENSON-POPE:

And that may, your Honour, be the reason for the manslaughter verdict in terms of difficulty inferring that high level of intent, that murderous intent was foreseen from the principal offender but for the reasons set out by Ms Walker for those individual strands that are set out at length in the Crown's submissions the respondent says it's not a case where the Court should be concerned, but I accept your Honour's general point that obviously the Courts need to be careful in their…

WINKELMANN CJ:

All right, is that it?

MR BENSON-POPE:

The only final point is that the respondent submits there's nothing in the overseas authorities that should suggest there is research or a general consensus among comparator jurisdictions that would justify a new approach in New Zealand or one that adjusts the well-tried and tested approach from *Wanhalla*. But unless your Honours have any questions about those –

WINKELMANN CJ:

No. Well, I have a question for Ms Walker because it's something that's been bothering me a bit. The evidence – so you can think on your feet.

MR BENSON-POPE:

We can trade places, thank you, your Honour.

WILLIAMS J:

You're dismissed.

WINKELMANN CJ:

The evidence that came in that Mr Manu Iongi, the photograph, oh, the TikTok of him with the gun, et cetera.

MS WALKER:

Yes.

WINKELMANN CJ:

What was that said to be probative of?

MS WALKER:

If I might just grab my notes on the ruling. So this is – the ruling was the 24th of October 2023 and the basis of the ruling was that he had access to a weapon and ammunition in relation to the photograph similar to the one

observed in the early hours of the morning of the 15th of January which was probative of his participation in it potentially.

WINKELMANN CJ:

So probative of the fact that he, it was his gun or…

1540

MS WALKER:

Yes, that he was in possession of a shotgun because there was evidence it was a sawn-off shotgun, single-barrelled, which was the murder weapon according to Havea, that was the description of the murder weapon, that in the preceding month he had access to that firearm and he was in possession of it which was evident in the video, and my learned friend made all the necessary points about it so it's something just for social media and so forth. So the basis of it was to demonstrate access to a firearm of the kind used in the killing. Does that answer your Honour's question?

WINKELMANN CJ:

Yes, I suppose, and then you close. You didn't close on the basis that it was his firearm?

MS WALKER:

No, from memory the Crown kept its submissions to this evidence proves access to firearms of the kind and that was because the murder weapon was never recovered and there was no spent shot shell at the scene from which analysis could be carried out with other weapons that the police had found.

WILLIAMS J:

Was there other evidence in relation to Viliami or Falala?

MS WALKER:

Yes, that was from Havea as well. Yes, so for Viliami and Falala together it was evidence from Havea that they had brought back the long, single-barrelled

shotgun and a sawn-off, and in relation to Falala there were some agreed facts in relation to propensity for possessing firearms and discharging one in his car.

Does that assist the Court?

WINKELMANN CJ:
Thank you. Ms Hogan.

MS HOGAN KC:
I have a catalogue of points. I'm going to be as succinct and focused as possible.

WINKELMANN CJ:
How many do you have?

WILLIAMS J:
How many things are there in your catalogue?

MS HOGAN KC:
I'm going to say five, aspirationally.

WINKELMANN CJ:
That's all right. That's okay.

MS HOGAN KC:
I may have misunderstood my friend's argument but in the context of my position that there's this vanishing availability of manslaughter in relation to Manu Iongi and this case and the discussion that was entered into I think with you, Justice Williams, about the concession made that the shooter would not have a manslaughter availability, I may have misunderstood my friend's argument but to the extent the Bench may have similarly misunderstood her to be suggesting Manu participated in a different plan or a lesser plan than the murderer, she mentioned a retaliatory shot plan or a warning shot plan, that was not the Crown case at trial. The Crown case at trial was, and always was,

that the one plan that all three men were members of was to fire a shot at a person, fire a shotgun at a person.

WILLIAMS J:

I guess at that stage there was – was it not – it was not sufficiently clear enough who had the gun and who was the shooter?

MS HOGAN KC:

It was never clear. So, but the fact that it was taken away as a live question, manslaughter, for the principal, my argument was then and is now it should have been taken away as a live option for everyone as a participant in that plan, manslaughter should have been taken off the table.

WILLIAMS J:

Big gamble.

MS HOGAN KC:

Wasn't a gamble but logically coherent and that's the important thing. Now relatedly, my friend emphasised –

WINKELMANN CJ:

But you didn't argue that at trial.

MS HOGAN KC:

Not to the jury.

WINKELMANN CJ:

No, in the discussion of other question –

MS HOGAN KC:

I did. I did argue it, and so to the extent my learned friend said counsel were content with the question trail, in my submission that's misrepresented to them. The argument was made and admittedly a ruling was not sought.

WINKELMANN CJ:

I'm sure not suggesting there was an intentional misrepresentation, just…

MS HOGAN KC:

Of course, but in terms of – no, of course, but in terms of – to the extent counsel did not seek a ruling on the issue, there is a level of contentedness indicated, but that is the extent of it. The argument was strongly made both at the section 147 stage and at the question trail stage. It had been rejected, opposed by the Crown, rejected by the Judge. The Judge was very firm in his views. So counsel did not consent, but counsel had no control other than seeking a ruling over the content of the question trail nor the section 147 outcome, and, as this Court confirmed in *W v R* (**citation** 15:44:43), it's the trial Judge's duty to ensure a fair trial, not counsel in their views.

1545

Another topic that was raised with my learned friend was the issue with the two-tier defence and I just want to ensure that this Bench understands there was no joint tactic to run a two-tier defence.

At the first trial, Havea's evidence was un – no, actually prior to Havea's evidence getting under way, Viliami's counsel launched significant attacks in respect of police improprieties in gathering a number of Crown witnesses' evidence. All these young men associated with the Crips were questioned extensively on the topic of police impropriety and that topic grew legs. The Judge, the trial Judge, also Justice Powell at the first trial, became sufficiently engaged with that issue to the extent it took over the trial and the trial couldn't be completed. The trial was aborted after four weeks.

There was then a two-week pre-trial hearing on this issue of police impropriety and whether the evidence they had obtained effectively by – and I'm simplifying things – arresting these young men on unrelated charges to bring them into the station and question them about the murder was an impropriety.

Havea's evidence was tested in that pre-trial. It emerged and I am being extremely simplistic and presenting things in summary here, but it is all in the Court of Appeal judgment, that the third time Havea was brought into the police station on unrelated allegations and unrelated arrest, he was questioned for nine hours in a video interview room without the video on and with no substantive notebook entries taken. The only result of that interaction was a 16-page statement inculpating the three defendants.

So the issue regarding the reliability of Havea's evidence loomed large throughout those early stages of the proceeding. It wasn't a joint tactic issue. It was once we had the impropriety ruling and then, of course, the evidence was balanced in.

The Court of Appeal declined leave to hear that prior to trial, the second trial, on appeal.

We had this large issue regarding reliability of Havea's evidence. Havea's evidence was the only evidence bringing Manu Iongi into this case. So, yes, there was a two-tier defence, but it wasn't a joint tactic. It didn't emerge or it didn't – its inception wasn't a joint tactic but it was an obvious and important defence for Manu Iongi that Havea's evidence was not reliable.

The second stage of the defence, which is why we are here today, was at all times clearly communicated to the Court through cross-examination of every relevant witness and through counsel's closing address.

MILLER J:

To be fair, I wasn't suggesting otherwise when I put that point.

MS HOGAN KC:

I am grateful, your Honour, I am not, I just wanted –

MILLER J:

Simply that it's a question of emphasis in the initial defence is, “I wasn’t there at all”.

MS HOGAN KC:

I am grateful, your Honour.

MILLER J:

And it did, it is in a sense a point for your client, in that it must be – it looks as though it must have become apparent as the case went on that the car could be linked to the two principal defendants, the car had been in Calthorp Close, and so there is a need to look to the second defence, but the two other people got in the witness box and said: “We were never there,” and he was never there.

MS HOGAN KC:

Well, more complicated than that, they got into the witness box and said they were there for a different purpose. Not at Calthorp Close –

MILLER J:

Not at Calthorp.

MS HOGAN KC:

– but they were, so there was a very unexpected turn of events, unexpected to all.

MILLER J:

At the point where the jury says, actually, they were in Calthorp Close, then there’s a problem for him, for Manu, isn't there.

MS HOGAN KC:

Yes, but –

MILLER J:

Because there is no other account which the record leaves open to which you can point as...

MS HOGAN KC:

I beg to differ and I will get to that point. Related to that two-tier defence argument, the submission was made that it was enough for the Judge in dealing with the two-tier defence situation to take the jury through the question trail for Manu Iongi, that that was sufficient to discharge the Judge's obligations.

1550

First of all, I don't concede that point. I don't think that's consistent with the authorities and the Bench Book. But here, he did not even do that. He did not take the jury through the question trail in relation to Manu. He took the jury through the question trail in relation to Falala and the passive bystander point, whilst it was accredited to me, was made in relation to the case against Falala in the Judge's summing up. It was not – there was no reference to Manu Iongi at that point in time. The Judge only took the jury through Falala's questions and then said: "And the same for the others." He did not take the jury through the question trail for Manu Iongi.

Very briefly, submissions and discussion regarding the probative value of Manu Iongi's familiarity with guns and ammunition. I maintain that that evidence took the Crown nowhere. It was not probative of any of the elements under consideration for the murder and manslaughter charges. That argument was made pre-trial unsuccessfully but it was, of course, still made throughout the trial and questions were directed to that end. The notes of evidence reference for, I think it was Mr Miller's evidence, about how common blue Eley 12 shotgun shells are, is the case on appeal volume 4, page 973. Question: "Are they also common, blue Eley 12 shotgun shells?" Answer: "They are, yes, they are."

The TikTok video I maintain is not relevant to a trial issue. I address that at length in my closing to the jury. In summary, it was downloaded onto a handset in December 2019, but the evidence showed that prior to being downloaded onto that handset it had been a video recorded by someone, then published on Facebook, located on Facebook by a witness called Ms Naea who turned it into a TikTok video. She then sent it to the handset in question which was attributed

to Manu Iongi and it was downloaded onto the handset in December. So the Crown's evidence is not that it was made in December. The video was downloaded to that handset in December. It could have been made any time prior to that.

It shows Manu posing in a video, created for and published to social media. My submission to the jury was that it had no logical bearing on whether he joined a plan to shoot anyone on the 15th of January. Significant arguments were made as to why the gun in the video was not the gun described by Havea and Ruta, Havea's partner, as being at their house on the 15th of January. I have put them in writing but effectively Havea and Ruta confirmed the gun they received was a sawn-off shotgun. Havea referenced a lever-arch folder. It's not clear from the notes whether it was open or closed at the time. Ruta expressly said it was the length of a 30-centimetre ruler. When Mr Miller was questioned about the TikTok video he conceded it looked like a long shotgun, roughly a metre. In the video there was no screwdriver in the mechanism, contrary to what Havea and Ruta received, and whilst Havea said to police that's the exact same shotgun, the video – wrapped in the – it's the exact same shotgun and towel, or something of that nature, in the video it's clearly a white piece of clothing wrapped around the shotgun and the evidence in relation to the gun received, it was wrapped in a towel, Havea said white, Ruta said blue. So in my submission it's very low probity if any, that TikTok video, and it is particularly prejudicial. That was the reason for the pre-trial objection to its admissibility. Of course, since then we've had this Court's observation in *Kuru* regarding the risk of prejudicial evidence in gang cases, and that's at paragraph 60 of *Kuru*. 1555

There's been some submissions made about what can we make of Falala and Viliami lying to the jury about Manu Iongi's presence in the car that night. They said he wasn't in the car that night. The jury has found that not to be true by its verdict. In my submission any lie by Falala and Viliami cannot be used adversely against Manu. I do, however, submit it can be used for him. Falala and Viliami saying to the jury that he was not in the car is a circumstance

indicative of their consideration that he was innocent of or lacked involvement in their activities that evening.

WINKELMANN CJ:

Well, that's still a long bow to draw, isn't it? It's a fearless defence submission.

MS HOGAN KC:

It is, but if, I mean, why would they have said that otherwise?

MILLER J:

It's a natural trade-off. He had another defence, "I was there but I didn't know what they were going to do".

WINKELMANN CJ:

They said it to look, lots of reasons they said it, to look after their younger cousin.

MILLER J:

So we'll get in the witness box and tell you, we'll tell them you weren't there at all, it's a trade-off.

MS HOGAN KC:

Fortunately, I don't have to –

MILLER J:

I'm not suggesting that agreement was reached, but one can (**inaudible** 15:55:51) there are in fact incentives to behave in the way that they did and he did.

WINKELMANN CJ:

Including just being family.

MILLER J:

Just being family, perhaps, yes.

MS HOGAN KC:

Well, fortunately I don't have to prove my arguments beyond reasonable doubt.

WINKELMANN CJ:

No.

MILLER J:

No, you don't.

MS HOGAN KC:

I can make them, I say, it's a reasonable possibility.

WINKELMANN CJ:

Well, yes, fearless defence argument, we'll leave it at that.

MS HOGAN KC:

Fundamentally the Crown case boils down to, today, as it did in 2023, Manu Iongi wouldn't be in the car unless he was aware of the plan. I submit that this is a classic case of an unsafe potentially compromised verdict because of the risk of guilt by association in the context of a very prejudicial background.

The Crown came close to inverting the burden of standard in its submission that unlike *Kuru*, the jury had no alternative narrative to consider and a submission was made that a distinguishing factor was that Kuru gave evidence at trial. He did not. The Court of Appeal decision, *Kuru v R* [2023] NZCA 150 at 26, Mr Kuru did not give evidence. He told the police, however, that he had nothing to do with Mr Ratana's death and that he was on his way to meet a teacher at his son's school when he heard the shots that were fired.

WINKELMANN CJ:

But he did give a narrative.

MS HOGAN KC:

He gave a narrative but no more of a narrative – well, first of all, the latter contention that he was on the way to meet a teacher at his son's school when he heard the shots that were fired did not hold water, as Justice Glazebrook found or recorded in *Kuru*, and the first –

WILLIAMS J:

What didn't hold water?

MS HOGAN KC:

That he was on his way to meet a teacher at his son's school when he heard the shots.

WINKELMANN CJ:

It was 20 minutes too early.

MS HOGAN KC:

It was too early, it was potentially suspicious.

WILLIAMS J:

Yes, I recall that, but I don't think that was the general view of the Court.

MS HOGAN KC:

I can take your Honour to the point in her decision.

WILLIAMS J:

Okay, I'm might be wrong, yes, okay.

MS HOGAN KC:

Where she says that it was suspicious but insufficient.

WILLIAMS J:

Was she writing for –

MS HOGAN KC:

I don't believe anyone –

WINKELMANN CJ:

No, I was right here.

WILLIAMS J:

Yes, that's right, what did you say?

ELLEN FRANCE J:

On the question of unreasonable verdict.

WINKELMANN CJ:

Yes. I think we might have been on agreement with her on that point.

MS HOGAN KC:

That's my reading of it, but I…

KÓS J:

I think we all agreed on that point.

WINKELMANN CJ:

I do think that there was a timing issue for his explanation because the school was just basically right there and he was out the door 20 minutes or half an hour early, I think, for it.

MS HOGAN KC:

The other thing he told police, he had nothing to do with Mr Ratana's death and in my submission telling police he had nothing to do with the death is no more probative than Manu Iongi entering a not guilty plea. So there wasn't, in my submission, an alternative narrative available in *Kuru* such as there was in distinction to this case.

And the final point –

WILLIAMS J:

Sorry, what, an alternative narrative?

MS HOGAN KC:

So the Crown submitted that *Kuru*, unlike – that in *Kuru*, the jury had a benefit of an alternative narrative which they don't have here and the Crown suggested that was through Mr Kuru giving evidence. It wasn't. It was those bald contentions made to a police officer recounted to the Court. The first, he had nothing to do with Mr Ratana's death, is no more probative, in my submission, than Manu Iongi's not guilty plea and –

WILLIAMS J:

Well, the counter-narrative was that he was trying to reduce the temperature by engaging with, I think, the Hamilton Chapter or whatever it is, the leadership of the Hamilton Chapter to stop this turning into a big shootout, so...

MS HOGAN KC:

Well, that must have come through defence submissions, or maybe other defendants.

WILLIAMS J:

I think it was in a, yes, I don't recall, but it was certainly there.

1600

MS HOGAN KC:

So like in *Kuru* and like in any inferences case, the defence can use Crown evidence as circumstances for innocent explanations and in my written submissions at paragraph 4.3, I set out a myriad of innocent explanations as to why Manu Iongi got in that car on that night.

Possibly he did not know of or foresee any actions by Falala or Viliami at 73 Calthorp Close that night. Possibly he just jumped in for a joy ride, or possibly he only jumped in the car with the knowledge or foresight that Falala and Viliami were going to inflict property damage, or possibly he jumped in the

car because he knew or foresaw Falala and Viliami were going to intimidate Mr Fisi'ihoi, or that they were going to use violence less than a shooting, or they were going to use violence less than a shooting at a person, or that they would only carry out a shooting in self-defence and not as murder or manslaughter.

Now, all those inferences are rooted and available on the Crown evidence, evidence led by the Crown, and they are all more reasonable – not that the defence has to prove that, in my submission – than the Crown's theory and the reason why they are all more reasonable are set out in paragraph 2.14 of my submissions. I am conscious I am one minute over time, but if I can very briefly run through them.

WINKELMANN CJ:
That's all right.

MS HOGAN KC:
Firstly, Manu had no animus with Mr Fisi'ihoi or any of the Fisi'ihois, he was not known to them.

At Havea's house, Manu was in the front passenger seat which indicates he was there also at Calthorp Close, so he was not the getaway driver. The handbrake was activated at Calthorp Close which may indicate the driver exited the vehicle.

Those who approached the house were apparently familiar with it, there was knocking, there was a calling out in the right vicinity for Stephen Fisi'ihoi.

Something that is not in my written submissions, but the shooting itself may have been panicked. The unilateral action of the shooter and as her Honour Justice Glazebrook noted in *Kuru* at times events happen spontaneously. That observation appears at both pages 21 and 62 of the decision. So there's that indication, given the way Mrs Fisi'ihoi was shot and also the way Falala and Viliami were acting afterwards, that this was a panicked shooting, a unilateral action by the shooter.

At Havea's house, Manu did not associate with the firearm. At Havea's house, unlike Falala and Viliami, who were fidgety and looking behind themselves, Manu was uncharacteristically quiet. This is a significant evidential distinction or a wedge, if you like, between the behaviour of two of the three and not Manu. Them acting fidgety, looking behind them, is consistent with them having intimate knowledge that a person was shot and possibly the wrong person was shot, or likely the wrong person was shot.

That possibility that it was they who were at the address, they who knew the person had been shot, they who knew the wrong person who had been shot, they who sped out of the area, they who acted the way they did at Havea's house, is consistent with your Honour Justice Winkelmann's proposition that the jury verdict rationally indicates a finding that they were the two who approached the house, the murder verdicts handed down to them enforces that submission. They knew what had happened.

KÓS J:

They would have been able to see the body, too, through the window.

MS HOGAN KC:

Yes, yes.

KÓS J:

Because the body held the curtain open.

MS HOGAN KC:

Yes. There was quite a bit of Crown evidence on that point, that the person would have been visible at the time of the shooting, the Crown wanted that evidence to support murderous mens rea.

And finally, of course, we know Manu made no inculpatory statements at all, let alone statements relevant to knowledge or intention and the only statement he made was exculpatory.

These were clear arguments, carefully made on the evidence led by the Crown. They were a number of circumstances that needed to be emphasised to the jury and in those circumstances no fact-finder could exclude the reasonable possibility that Manu Iongi is an innocent man.

Unless the Court has any questions.

WINKELMANN CJ:
No, thank you, Ms Hogan.

Well, thank you all, thank all counsel for your excellent assistance today and we will reserve our decision.

MS HOGAN KC:
As your Honours please.

WINKELMANN CJ:
And now retire.

COURT ADJOURNS: 4.05 PM