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

SC 108/2025
[2026] NZSC Trans 12

JULIUS TE HIVAKA

Appellant

v

THE KING

Respondent

Hearing: 14 July 2026

Court: Winkelmann CJ
Ellen France J
Williams J
Miller J
Cooke J

Counsel: R M Mansfield KC and J N Olsen for the Appellant
M F Laracy and R G Buckman for the Respondent

CRIMINAL APPEAL

MR MANSFIELD KC:

Good morning, may it please the Court, counsel's name is Mansfield and I appear together with Mr Olsen for Mr Te Hivaka.

WINKELMANN CJ:

5 Tēnā kōrua.

MS LARACY:

Tēnā koutou. E Ngā Kaiwhakawā. Ko Ms Laracy māua ko Ms Buckman, e tū nei mō te Karauna. May it please the Court, I appear with Ms Buckman for the Crown.

10 **WINKELMANN CJ:**

Tēnā kōrua. Mr Mansfield.

MR MANSFIELD KC:

Thank you. No community good is achieved by wrongfully holding others accountable for the sole wrong of the individual and that really is the crux of what this appeal is about. It's an appeal against the conviction of a young man who, it is accepted, had an association with the primary offender Mr Dodds but did not know on his case that a firearm was present in the vehicle or to be used in what the jury must have accepted was a robbery.

20 Before we hold someone accountable it is commonplace, of course, that they must be culpable. Firstly, there must be a lawful route to their conviction and, secondly, there must be evidence that supports that. These, in essence, are the first two grounds that I seek to advance on behalf of Mr Te Hivaka.

25 Mr Olsen will address the remaining two grounds, the requirement for foresight of death and the foresight of the principal's intention, and if the Court minds we would divide the argument in that way.

WINKELMANN CJ:

Yes, that's fine, Mr Mansfield.

MR MANSFIELD KC:

Thank you. I thought it might be helpful just to move quite quickly through the position which was taken at the trial and I wonder if I could just refer the Court to volume 2 which is the Court of Appeal casebook and, firstly, just look at the way in which the Crown opened its case.

Now, the Crown opening starts at page 74 and the first paragraph I propose to take you to from the record is at paragraph 5 of that. The Crown said: "Mr Dodds and Mr Te Hivaka lured Mr McIntosh," who is the deceased, "a small time drug dealer, to the Harold Moody Park under the pretence of carrying out a drug deal" and that is not in dispute. "The Crown says that the truth was they lured him there to rob him of cash and his drugs, at gun point."

Now, we know from the evidence that Mr McIntosh had won on the pokies approximately \$800 sometime earlier and the proposed drug deal was in relation to one gram. So, neither of those two items are worthy, in my submission, of an elaborate plan to rob someone with a firearm. Nonetheless, that's the way in which it was put.

The agreement was further set out by the Crown in opening at paragraph 57 so that's on page 83: "For example, if you conclude," this is towards the end, "for example, if you conclude that Mr Dodds and Mr Te Hivaka approached Mr McIntosh's car with a gun while he was sitting unarmed in the front passenger, in the front driver's seat and fired once towards his head, as part of their plan to rob him of drugs" –

WINKELMANN CJ:

What paragraph are you at, sorry?

MR MANSFIELD KC:

Paragraph 57, Ma'am, the end of: "That tells you a lot about their intention." And then, finally, in relation to a point which will be elaborated on in relation to the evidence on page 79, paragraph 37, where the Crown is talking about the footage, the Crown simply assert: "Footage from earlier in the night shows

Mr Dodds and Mr Te Hivaka in possession of a black duffel bag. Approximately 20 minutes after the shooting, Mr Dodds exits the dark Ford Territory at his and his mother's home," and then the address, "in possession of a black duffel bag."

5 So, in opening, the Crown refrains from referring to how Mr Te Hivaka had knowledge of the firearm in the presence of Mr Dodds. It simply refers in opening that both were in possession of a black duffel bag and that's more easily understood as the cross-examination of Mr Dodds by the Crown continues, and I'll take you to that shortly by way of reference to the case on
10 appeal, the evidence volume, which is volume 3, and I'm going to take you to some passages just briefly just to really make this point.

And the point I endeavour to make is that the theory of the Crown case was very much developing during the course of it. So, we don't see a clear
15 identifiable theory developed by the Crown as to how Mr Te Hivaka must have known that Mr Dodds had a firearm and the reference to the duffel bag appears simply to be a reference to one bag.

Now, obviously Mr Dodds gave evidence at trial and he asserted that when they
20 got back to his address he went into a room, he got his firearm and he sought to unload it, then he placed it back in his bag together with clothing, having removed old clothing, put new clothing in and then that is the bag that contained the firearm that went to the vehicle. Now, obviously the Crown's position at trial was that no one could accept the evidence of Mr Dodds but certainly that's the
25 way in which it was put. So, he puts the firearm in the black bag.

1010

Now, when he was cross-examined in relation to whether in fact he had done this or not, and again this is volume 3 and we go to page 638 and it's at the very
30 bottom of that page, line 30 the Crown puts its proposition to him in this way: "You already had the firearm with you, you and Mr Te Hivaka, when you arrived home, didn't you?" "Nope." "And you'd been carrying it in your bag?" "Nope. No. I think I've explained this before, where I was and where the firearm was, too," referring to his evidence-in-chief.

So the Crown position was that Mr Dodds had taken the firearm and it was in the vehicle and that he had it in the vehicle much earlier in time and prior to Mr Te Hivaka getting in the vehicle, hence, in my submission, explaining what you can see in the CCTV footage that we'll soon look at.

WINKELMANN CJ:

So, your point is that the Crown position was that the firearm was in the vehicle which gave an easy narrative that Mr Te Hivaka knew about it, that's the –

MR MANSFIELD KC:

On the basis that he must have seen it in the vehicle.

WINKELMANN CJ:

Yes.

MR MANSFIELD KC:

But the problem for the Crown which I think it would've identified during the course of the trial was that Mr Dodds had placed the firearm in a black bag and that was simply in the vehicle. So, unless there was discussion about it, it wouldn't have been obvious to Mr Te Hivaka who himself had a bag of his own clothing in the car. So, there was simply no evidence in the communications, or no evidence from any witness regarding the firearm and when it got into the vehicle bar for the CCTV footage and the evidence of the two accused at trial.

But what the Crown was suggesting, based on the CCTV footage that we will soon watch with the leave of the Court, is that Mr Dodds had placed a black bag in the car much earlier in time and prior to Mr Te Hivaka being there or present with him.

And then later on at page 655 of the notes of evidence we see the Crown again putting its case and this is at line 7: "And both you and Mr Te Hivaka had carried that gun in the bag –" "No." "– during the early hours of the morning, hadn't you?" "No." "So he knew about the gun didn't he?" "No."

So, again, it's put on the basis to Mr Dodds that the firearm is in the bag earlier in the vehicle, so consistent with the cross-examination.

WINKELMANN CJ:

5 But not put to him that Mr Te Hivaka had carried it?

MR MANSFIELD KC:

Correct. The only occasion arises that it is put into the evidence that in fact Mr Te Hivaka had carried the bag containing the firearm to the car, and this is important because it's the only plank upon which any inference can be drawn
10 of his knowledge, was when they were leaving the address to go and meet up with Mr McIntosh once they knew that Mr McIntosh was there. That's because, as we'll see in the CCTV footage, the only person that takes a bag to the car is Mr Te Hivaka, having taken his bag earlier into the address.

15 Now, Mr Te Hivaka gave evidence that that simply contained his clothing and nothing else. But what's important is that when we look at the CCTV footage, after Mr Dodds places the black bag that she says contains the firearm into the vehicle in the CCTV footage, you don't see that coming out again until after the fatal shooting. After the fatal shooting you see the same bag being carried by
20 Mr Dodds back to his residence.

The important point is that there are two bags, quite dissimilar. So there's what's said to be a black Nike bag which is Mr Dodds, but there is also another bag in the vehicle which belongs to Mr Te Hivaka which contains his items.

25 **WINKELMANN CJ:**

And you can see two different bags?

MR MANSFIELD KC:

You can and look, I wonder whether, if I just take you to the way in which it was put to Mr Te Hivaka and I'm sure the Court has read it, but just to ensure,
30 page 744 and it's at line 16: "Question: And then Mrs Dodds and Mr Shackley

arrived to pick you up, is that right?" "Yes down, around that area." "So you and Mr Dodds had the firearm with you at that point, didn't you"? "No we did not." "Well was it your intention to go back to Mr Dodds house to collect the firearm?" "I wasn't aware of a firearm." So the Crown is still putting to him that

5 the firearm was already in the vehicle when it was picked up. But then in the alternative it's put, did you then go back to the address to pick it up? And he denies that.

ELLEN FRANCE J:

Sorry, why is it you say at that point it's still proceeding on the basis it's in the

10 car?

MR MANSFIELD KC:

Because the earlier questions re timing are related to an earlier point in the evening.

WINKELMANN CJ:

15 Can we just take, the scroll was putting text over the next bit. Okay, so this is before the trip to Mr Dodds' house. Where are we at this point? "You didn't go back to her house?" "We weren't inside." "Just outside?" "We got picked up around that area."

MR MANSFIELD KC:

20 As I understand from reading the evidence it's earlier in the morning, rather than at the key point. But it's later put again at page 745 at the top: "So you came back from Whangārei and you went to the pokies, you said earlier in your evidence, is that right?" "Yes." "And you also saw Mr Dodds at the pokies, is that right?" "No he was, he was with me." "He was with you at the pokies?" "In

25 the car." And at that time, when you were in the car, is it your evidence that you never discussed the fact that he had a firearm?" "Yes." So it's still being suggested that earlier in the evening the firearm's in the vehicle with them.

But then the position changes through the very last questioning of Mr Te Hivaka

30 by the Crown at page 763, at the top of the page: "When you left Mr Dodds'

place, you carried the bag with the firearm in it to the vehicle. Do you agree with that?" "No." "And you knew that Mr Dodds – or you both had that firearm to use, didn't you?" "No." So for the very first time in the trial it's now being alleged that Mr Te Hivaka carried the bag containing the firearm, the Crown would say knowingly, to the vehicle before they left to meet up with Mr McIntosh.

The reason I took you through that evidence is that you can see the developing Crown narrative in relation to its case. In the first instance it suggests that the firearm was in the vehicle much earlier on and presumably remained in the vehicle, it didn't come out, and if so it appears plain, given the evidence of Mr Dodds, that it was in his black bag inside the vehicle. From that you cannot infer without some other evidence that Mr Te Hivaka knew of that item within the black bag and there appears to be no reason why he might know. But what developed from there is the Crown suggestion that Mr Te Hivaka had in fact taken the firearm from Mr Dodds' address to the car.

WINKELMANN CJ:

Well, are they reconcilable, that it had been in the car, Mr Dodds will take it in –

MR MANSFIELD KC:

20 No.

WINKELMANN CJ:

Why are they not reconcilable?

MR MANSFIELD KC:

Well, unless they had swapped it from one bag into another bag in the vehicle, which we do not know. So there's no evidence either by either of the accused or any other evidence to suggest that the firearm may have been swapped from one bag to another bag. The evidence on that would be completely silent nor was it suggested. It just became the Crown theory at the very end of the cross-examination of Mr Te Hivaka –

WILLIAMS J:

Where does Mr Dodds say he got the gun from?

MR MANSFIELD KC:

He got it from his bedroom under the bed.

5 **WILLIAMS J:**

In Hillsborough?

MR MANSFIELD KC:

Yes, so when they went back to the address he says he went into his room, shut the door, got the firearm out, checked that it was unloaded, packed it in his
10 black bag with clothing, but he talks about taking a black bag in and taking a black bag out but the CCTV footage doesn't support that. So either he's lied or, alternatively –

WILLIAMS J:

Or it's in Mr Te Hivaka's bag.

15 **MR MANSFIELD KC:**

No, well that's if Mr Dodds is telling the truth regarding getting the firearm at that point at which there is no independent evidence to support that. So on the one hand the Crown –

WILLIAMS J:

20 Well the jury might've just decided to believe him on that point and nothing else.

MR MANSFIELD KC:

Might have, but there would be no logical basis to do that.

WINKELMANN CJ:

I've just lost my – lost the thread about what you're saying, Mr Mansfield.

25 **MR MANSFIELD KC:**

In which regard, Ma'am?

WINKELMANN CJ:

Well, you and Justice Williams seem to be understanding each other, but I'm not understanding what you're saying. So you're saying on your case the gun was in Mr Dodds' bedroom all along?

5 **MR MANSFIELD KC:**

No, no I'm not saying that.

WINKELMANN CJ:

So what are you saying?

MR MANSFIELD KC:

10 Mr Te Hivaka doesn't know that, but that's what Mr Dodds claimed.
1020

WINKELMANN CJ:

Oh, so you are saying that – are you saying it's unknown or are you saying the gun was in a bag in the car all along?

15 **MR MANSFIELD KC:**

I'm saying that the reasonable inference on the evidence is that the firearm is in a black bag in the vehicle all along and that is not known by Mr Te Hivaka until it enters Mr McIntosh's vehicle, or at least that's an available inference on the evidence.

20

And really you need to see the CCTV footage because that puts a lie to the suggestion that Mr Dodds has taken a black bag out containing a firearm to the vehicle and –

MILLER J:

25 But you do accept that he must have known of the gun at the point where it entered the victim's car?

MR MANSFIELD KC:

Mr Te Hivaka, yes. He saw it when it was presented to Mr McIntosh and he acknowledged that. It's at that point he says the expletive: "What the fuck?" And then exits the vehicle, but the discharge occurs approximately at the same
5 time.

COOKE J:

So does the CCTV footage not show Mr Dodds carrying his bag to the house?

MR MANSFIELD KC:

No, not in nor out.

10 **COOKE J:**

Right.

MR MANSFIELD KC:

And we can see that now, I wonder if we just play it, and what we've done is just highlighted up in the corner is the bag, so you can see the difference of the
15 bags. So this is on the 2nd of June at 11.31 am and Dodds and another associate puts the bag in the car and it's the black bag which is clearly attributable to him. So, we say on the evidence that's the black bag, if it contains a firearm, going into the vehicle.

20 And then the next video is on the 3rd, so the next day at 4.40 am and there you see Mr Te Hivaka carrying his bag, which is a different bag, into the house and you see –

WINKELMANN CJ:

How can we see it's different?

25 **MR MANSFIELD KC:**

Because the reason why we have highlighted and you see the base at the bottom of the bag is lighter and where the branding on the bag is, is also different. Mr Dodds' is a black bag with only a Nike branding on the middle on

the side and Mr Te Hivaka's bag is different, he gave it a brand name, but I can't quite remember now what it is?

WILLIAMS J:

Castles and Crooks, or Crooks and Castles.

5 **MR MANSFIELD KC:**

Oh, thank you, yes, it's a brand –

WILLIAMS J:

I'm not sure which order.

MR MANSFIELD KC:

10 A brand unknown to me, but that's it.

WILLIAMS J:

Me too.

MR MANSFIELD KC:

Yes, but in any event, a different bag and then we see him carrying that back
15 out to the car.

WINKELMANN CJ:

So you're saying the natural inference is that the gun stayed in the bag in the car?

MR MANSFIELD KC:

20 Correct. Certainly it's an available inference and it wouldn't be seen by Mr Te Hivaka in the bag, in the car, with other bags in the back of the car. There is no evidence in the communications or any other evidence of any discussions regarding the robbery, let alone a robbery that might involve the use of a firearm.

25

Then the next video is on 3 June at 5.18 am.

WILLIAMS J:

Can you just tell me, does Mr Dodds indicate when he retrieved?

MR MANSFIELD KC:

He was never asked. He wasn't asked by the – oh, sorry, when he retrieved?

5 **WILLIAMS J:**

The gun.

MR MANSFIELD KC:

From?

WILLIAMS J:

10 From Hillsborough.

MR MANSFIELD KC:

Yes, he said that when they went back to the address, he went into his room, got it at that point.

WILLIAMS J:

15 So at 4.40 am?

MR MANSFIELD KC:

Yes, he says, he denies that it was in the vehicle prior to that.

WILLIAMS J:

Right.

20 **MR MANSFIELD KC:**

I thought you were going to ask me, and I shouldn't have jumped ahead and I apologise, was he asked how he got his bag with the firearm to the car, despite the absence of any CCTV footage showing it? No, not by his accounts and he wasn't cross-examined on it either by the Crown.

WINKELMANN CJ:

And the CCTV, the footage is continuous?

MR MANSFIELD KC:

5 Yes. What we have is available continuous CCTV footage. I think it might be motion activated, but I don't think there's any suggestion that if they were going to the vehicle it wouldn't have activated the motion, because on each occasion it seems to have done that.

WINKELMANN CJ:

10 So he wasn't asked when he managed to somehow get this bag into the house without it going on CCTV.

MR MANSFIELD KC:

No and primarily, presumably, because it wasn't really part of the Crown theory at that point.

COOKE J:

15 Well, isn't the ultimate thing about this that you can't – there's nothing conclusive about where the gun was before the shooting?

MR MANSFIELD KC:

20 I couldn't agree more but that's quite important when we get to the second ground because the Crown say it can be inferred from the fact that he carried his bag which the Crown say contained the firearm to the car. The Crown say that from that you can infer he knew that there was a firearm present, because without that there is absolutely no evidence that he was aware there was a firearm until Mr Dodds gets in the car after him with the firearm and presents it. And really –

25 **WINKELMANN CJ:**

You say that he carried the gun into the car at that 11.30 earlier time, is there anything that suggests to support that apart from his own account?

MR MANSFIELD KC:

When you say his own account, are you referring to Mr Dodds?

WINKELMANN CJ:

Yes.

5 **MR MANSFIELD KC:**

Well, Mr Dodds denies having the vehicle until they leave –

WILLIAMS J:

Having the gun?

MR MANSFIELD KC:

10 Sorry, the firearm, until they leave –

WINKELMANN CJ:

So, what's your evidence that the gun's in the car, in the bag, at that time?

MR MANSFIELD KC:

Sorry, Ma'am.

15 **WINKELMANN CJ:**

What's your evidence, sorry, what's your evidence that the gun's in the bag at that time at 11.30? What are you pointing to?

MR MANSFIELD KC:

Oh, earlier in the – when he leaves?

20 **WINKELMANN CJ:**

Yes, it's about 11.30, isn't it?

MR MANSFIELD KC:

Well, that's the only time that black bag goes to the vehicle. As to whether it contains the firearm or not, there's no evidence beyond what Mr Dodds says he
25 did, but at a later time, regarding putting the firearm in a bag and in that bag.

WINKELMANN CJ:

Okay, so it's based on the fact he says he takes the bag, the car – the gun into the car in his black bag and the time that the black bag goes into the car is in the morning of the previous day?

5 **MR MANSFIELD KC:**

Thank you, Ma'am.

WILLIAMS J:

So, given that Dodds says Te Hivaka doesn't know about the gun, why would he say that it was a 4.40 pickup and not an 11.14 pickup which would have
10 attributed it more closely to him?

MR MANSFIELD KC:

I have no idea why he would do that. I have no –

WILLIAMS J:

Well, if the whole story was contrived, which is what the jury thought, then the
15 failure to contrive that bit makes it sound more likely to be true than less.

MR MANSFIELD KC:

Well, I'm often bewildered by –

WILLIAMS J:

Fair enough.

20 **MR MANSFIELD KC:**

– by what other accused say that doesn't seem to fit what appears to be the objective forensic evidence. But on what Mr Dodds asserts, there's no forensic evidence of him taking his bag to the car, or having even retrieved it from the car. The only reliable evidence we've got is that we see it go in on that time
25 that we've identified and then soon we'll see him carrying that same bag with what we know is the firearm, and we know it has to be in the bag at that point because that's after the shooting and he's found eventually with the firearm in

his possession and the only time he can take it from the vehicle is when he's dropped off and, in fact, he says that also. So, he says: "I get out of the vehicle driven by Mr Te Hivaka. I've got my black bag and in my black bag is the firearm I used to shoot Mr McIntosh." And we know that must be right because he's

5 later found with the firearm and there's no other real opportunity for the firearm to be returned to him, or any reason why he might claim that if it wasn't so. But we see that black bag coming out of the car being carried by him and I wonder if we just go to –

WINKELMANN CJ:

10 Can I just ask, the later narrative does not suit better his account of taking the bullets out, does it?

MR MANSFIELD KC:

Well, there's no reason – this is what bewilders me –

WINKELMANN CJ:

15 He could have done it either time.

MR MANSFIELD KC:

– there's no reason why he couldn't say look much earlier and unrelated to the proposed visit with Mr McIntosh I made sure that firearm didn't have ammunition in it and I must have made a mistake. I then stuck, then I stuck it in my bag and

20 I took it with me because I was rather transient, because both these two men were individually transient although they'd met up over these days, so that's why they were carrying possessions with them, because they were going from address to address independently. So, there's no good reason why he might not have said that and simply shown the jury him taking the bag containing the

25 firearm to the car at the time, I say, the evidence shows it went into the car. But I can't explain why he might not have done that other than the Crown say he was lying throughout.

WILLIAMS J:

Mr Olsen, are you in charge of this thing?

MR OLSEN:

Yes, Sir.

WILLIAMS J:

Can you go back to the 4.40 am.

5 **WINKELMANN CJ:**

Wasn't it 11?

WILLIAMS J:

Thank you. Is there any footage of Mr Dodds?

MR MANSFIELD KC:

10 Not at this stage because this is a different address. So, this is showing our client in possession of the relevant bag which is his bag.

WILLIAMS J:

So, the footage of Mr Dodds at the Hillsborough address?
1030

15 **MR MANSFIELD KC:**

You want to go back to that? That's at the very start, I think.

WILLIAMS J:

Not the 11 am one but there must be footage of him early that morning at his mother's address?

20 **WINKELMANN CJ:**

Do you mean getting into the car?

MR MANSFIELD KC:

That's this. That's them leaving with him – got the black bag over his shoulder –

WILLIAMS J:

25 But that's the day before?

MR MANSFIELD KC:

Yes, that's when the black bag – the only other opportunity we've seen of the black bag going into the car.

WILLIAMS J:

5 Yes, no, no, sorry, you're not –

WINKELMANN CJ:

Mr Mansfield, Justice Williams is asking you when he – what's the footage of Mr Dodds getting into the car on the next morning at the time that Mr Te Hivaka –

10 **WILLIAMS J:**

At the time Mr Te Hivaka is bringing his bag in?

MR MANSFIELD KC:

15 Yes, no, no, that's in fact later on when they're at the Hillsborough address. So here they are arriving. We might just go back if that's all right, Mr Olsen, just to the very start of that.

WILLIAMS J:

So who's who in that?

MR MANSFIELD KC:

That's Mr Te Hivaka getting his bag out, as I understand it.

20 **WILLIAMS J:**

Is that Mr Dodds?

MR MANSFIELD KC:

He's one of the other two men but neither of them take a bag in. I actually can't tell from this now. I think it might have been him walking in first.

25 **WILLIAMS J:**

Yes. So he's wearing a t-shirt?

MR MANSFIELD KC:

Correct, and a cap.

WILLIAMS J:

So he can't have been – he can't have had the gun hidden on his body?

5 **MR MANSFIELD KC:**

No, nor is he obviously carrying the bag in.

WILLIAMS J:

That's right.

MR MANSFIELD KC:

10 Yes.

WILLIAMS J:

Okay.

MR MANSFIELD KC:

Yes. And he's only suspicious about Mr Te Hivaka having his bag because we
15 know that he had his bag earlier and he has his possessions in it.

COOKE J:

And you're about to show us them getting back in the car, is that right?

MR MANSFIELD KC:

Yes. That's Mr Te Hivaka with his bag, swinging it around, and then we're right
20 at the very end, so this is after the shooting, where Mr Dodds gets dropped off
and there he is with his black bag with the firearm in it, which is a Nike bag
which is a different bag, and here he is in a bit of a rush to get away.

WINKELMANN CJ:

And he's found with the gun?

MR MANSFIELD KC:

He's found with the gun when he's apprehended.

WINKELMANN CJ:

That's a pretty important part of the puzzle, Mr Mansfield, because it means
5 that the gun's in the black bag.

MR MANSFIELD KC:

Correct. That's my point earlier.

WILLIAMS J:

It doesn't, well, it gets you – it's a little helpful for you but it doesn't really matter.
10 The question is, where's the gun before the shooting, not after it.

WINKELMANN CJ:

Well, he'd have to have swapped bags.

WILLIAMS J:

Because if, according to the Crown's theory, Mr Te Hivaka brought the gun into
15 the car in his bag, and it was obviously Mr Dodds' gun, it's going to go back to
him in Mr Dodds' bag to be carried away, because it's his gun.

MR MANSFIELD KC:

Well, that's why the Crown rely heavily on this assertion that when Mr Te Hivaka
carries his bag back out of the address, having taken it in there, that it must
20 contain the firearm, because it suits it because Mr Te Hivaka would then be
carrying the firearm and it could say, as it did, it can be inferred that he had
knowledge of the firearm prior to the introduction of the firearm into the vehicle
because he carried it from the house to the car. But that relies entirely on the
evidence that the Crown says is unreliable, that evidence of Mr Dodds, that he
25 put the firearm in his own bag, not that bag, in his own bag before they left the
address. So if –

WILLIAMS J:

Well, he could well have been just mistaken about that, that he actually put it in Mr Te Hivaka's bag –

MR MANSFIELD KC:

5 Well, none of that was put.

WILLIAMS J:

– because his bag was in his car.

MR MANSFIELD KC:

Well, none of that was put, nor suggested to him. So this is why I mean the
10 theory was being developed as it went along, but this evidence that Mr Te Hivaka must have carried the firearm back out into the address in his bag is significant because it's the only evidence that the Crown can point to, to infer he had knowledge of the firearm ahead of the shooting.

WILLIAMS J:

15 Yes.

MR MANSFIELD KC:

And my learned friend talks about strands of inference, strands of evidence that this inference can be drawn, but there isn't many strands. There's a sole piece of evidence from which the Crown ask the jury to infer he had knowledge,
20 namely that he carried that firearm in that bag. And what I endeavoured to establish through this evidence is that the evidence doesn't establish that at all, and even for the Crown to make that submission it's now relying on the evidence of Mr Dodds, which it earlier said was not to be relied on, and it's entirely inconsistent with what it put to Mr Dodds, namely that the firearm was in the
25 vehicle all along, in his black bag presumably, the Crown having seen the earlier footage of that black bag going to the car at the very start of this video sequence.

So, the Crown theory changed after Mr Dodds had given evidence and at the very end of Mr Te Hivaka's evidence but, ironically, it still turns on Mr Dodds telling the truth regarding him having the firearm at that point and putting it in a bag, albeit a different bag.

5 **WINKELMANN CJ:**

And what do you say about the significance of the comments by Justice Lang in his directions to the jury, because he effectively says you could not really be satisfied that Mr Te Hivaka was carrying that bag, the gun in that bag and my reading of the sentencing notes was that he proceeds on the basis that

10 Mr Dodds carried the gun in his bag?

MR MANSFIELD KC:

The sentencing notes doesn't – I think I can take you to the sentencing notes, but I'm not so confident that it does actually say that. I think it simply refers to him having knowledge of it.

15 **WINKELMANN CJ:**

It refers to him carrying that out in his bag. The question in the sentencing notes is when he's talking about, I think.

MR MANSFIELD KC:

Look, the point being is that it's accepted that the Judge did, and this is at

20 paragraph 83, suggest to the jury: "And you might think that a critical element here in considering this question for Mr Te Hivaka is whether he knew that Mr Dodds was taking a firearm with him if you conclude that they decided to rob ..." So that's the way in which he put it in his oral directions to the jury. It's not a direction. It's a suggestion to them and, in my submission, there is a

25 distinction.

He also refers to the question trail and the question trail doesn't include what we call a weapons direction, so you would need to be sure that Mr Te Hivaka knew that the plan to rob included –

WINKELMANN CJ:

My question about the summing up in the sentence was that it seems to help you because the Judge seemed to discount the possibility of Mr Te Hivaka carrying the gun in his bag.

5 **MR MANSFIELD KC:**

Yes. I just wonder if I can just take you to the sentencing remarks because I've highlighted that part. So, at paragraph 12.

COOKE J:

Isn't it paragraph 9 that you want to look at?

10 **MR MANSFIELD KC:**

Paragraph 9, yes, sorry, thank you, there's further references later on: "Mr Dodds was carrying a bag as he got into a vehicle owned by his brother. This bag contained a .22 calibre firearm." So, the only time that Mr Dodds does that is earlier, as I have shown. He doesn't carry a bag, so either the Judge is
15 mistaken or he's referring to that earlier occasion.

WINKELMANN CJ:

Well, that's my understanding that when you read the Judge's summing up and that, it appears that the Judge is proceeding upon the Crown's initial theory of the case that Mr Dodds carried the gun in earlier and it was in the vehicle.

20 **MR MANSFIELD KC:**

Correct, and that's what Mr Dodds claimed, albeit at a later point in time.

At paragraph 11 of the sentencing notes he does confirm that Mr Te Hivaka had taken nothing from Mr McIntosh's vehicle which, in my submission, is entirely
25 consistent with him being surprised by what Mr Dodds did. If they were there to do a robbery and he was sitting right beside Mr Dodds with the closest access to any money or any drugs that he had in his possession, he certainly didn't take them.

And at paragraph 12 it reads: "At trial, the Crown alleged that you and Mr Dodds had formulated a plan to rob Mr McIntosh of money and drugs and that you lured him to the park for that purpose. Mr Dodds then fatally wounded Mr McIntosh during the robbery." So, he doesn't go into any detail there.

5

But at paragraph 13, he returns to it. He, partway through that paragraph, he says: "The jury's verdict makes it clear, however, that you knew that Mr Dodds was taking a firearm with him to the park and that you were party to a plan with Mr Dodds to rob Mr McIntosh of cash and drugs ..." So he's putting it on the basis that the jury's verdict makes it clear because of course, as far as he's concerned, that would be an essential element of the offence even though the question trail doesn't make that clear. His direction suggests that that would be an important facet for the jury's consideration of the evidence, but he doesn't direct that they would need to be sure that Mr Te Hivaka knew that a firearm was to be involved.

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MILLER J:

You've been focusing, and I'll just take you back a bit now, because you've been focusing on this question of knowledge of the gun in the bag and when it was put in the car. The Judge, as I read his summing up at 119, he's really telling the jury that there's just not a lot of room to suggest that Mr Te Hivaka took the gun to the car. He's basically telling the jury you can discount all of that.

20

MR MANSFIELD KC:

25 Correct.

MILLER J:

So the knowledge of the firearm has to come from him being party to this agreement to rob.

MR MANSFIELD KC:

Correct and I was just about to take the Court to that paragraph in his summing up, because despite the Crown assertion, he was all but suggesting to the jury, not by way of a direction, that the evidence that the Crown sought to rely on,
 5 that Mr Te Hivaka must have known, so this inference that my learned friends persist with, because he carried the firearm in the bag, had been disproved by the very video in evidence that we've just watched.

MILLER J:

That's right, yes.

10 **MR MANSFIELD KC:**

And that they should accept that. But obviously it's a matter for them. They could obviously go on a frolic of their own and disregard that, but certainly absent that evidence, as we see from the Crown's submissions in this appeal, there is no other evidence available to the Crown to show that Mr Te Hivaka
 15 was aware of a firearm in the car and it's very plausible that they might have sought to rob, because obviously the jury concluded that there was a robbery by way of a stand-over, or threats, or some form of violence that excluded the use of a weapon, let alone a firearm. It does seem remarkable that you would take a firearm to such an occasion, to stand-over somebody on their own for
 20 drugs and a small amount of cash, let alone that that would turn into an intentional or reckless killing.

Now, there is clear evidence that the Crown also refer to of Mr Dodds having his own bone to pick with Mr McIntosh, because it seems soon after this
 25 shooting Mr Dodds and Ms Baker form a relationship. They go effectively away together and there's no doubt that they were then in a relationship.

So it seems, one would expect, Mr Dodds might have had an interest in Ms Baker earlier and in communications between Mr McIntosh and Ms Baker
 30 he's making a complaint regarding her then-boyfriend, which is obviously a reference to Mr Dodds, seeking to stand-over him and then some kind of sly remark regarding he would need to do a better job on the next occasion.

So it's equally available that after Mr Te Hivaka gets in the motor vehicle with Mr McIntosh, Mr Dodds decides on his own account, as he says he did, to take a firearm to the vehicle in order to intimidate Mr McIntosh and that that need
5 not include any knowledge or involvement of Mr Te Hivaka.

The Crown also seek to rely on events afterwards and a particular strain by way of one message left by Mr Te Hivaka on another individual's phone where he's simply seeking to collect a debt for Mr Dodds. But it needs to be borne in mind
10 at that time Mr Dodds was on the run, because he was the only one that went on the run which is also indicative of who might be at fault.

Mr Dodds was going on the run. Mr Te Hivaka wasn't. Mr Te Hivaka was at home, he hadn't got rid of his phone or anything that he was found with,
15 connection to what occurred, and he's simply calling in a debt for Mr Dodds who would need money while he was on the run.

Nothing can be inferred from that communication regarding the prior knowledge of Mr Te Hivaka of Mr Dodds's intention to take a firearm to that vehicle.
20

There really is no other evidence. The entire Crown case on did Mr Te Hivaka know or not has to have turned on this theory, this unsupported theory that the Judge himself discounted, that this Mr Te Hivaka carried the firearm to the car in his own bag and it's only on that basis that the Crown could responsibly ask
25 the jury, or the jury could seek to convict Mr Te Hivaka on the basis of knowledge. So –

WILLIAMS J:

So does the, help me here, does the Crown tumble to the problem and close on the basis that it must have gone in, in Mr Te Hivaka's bag?

30 **MR MANSFIELD KC:**

Yes, correct, it does.

WILLIAMS J:

So that was an available narrative for the jury, even if the Judge didn't agree with it?

MR MANSFIELD KC:

- 5 It was a narrative put by the Crown and available to them, yes, but unsupported by the evidence, in my submission, as we've just seen, as the Judge himself accepted, and the Judge of course, as we've just looked at, also determined that Mr Dodds had taken the firearm.

WILLIAMS J:

- 10 But maybe the Judge was taken by the two-bag theory and had been convinced by that, but that that theory was false.

MR MANSFIELD KC:

- Well the beautiful thing about the theory is that it's supported by evidence. The very unattractive proposition put by the Crown, its theory, was that it was
15 entirely unsupported by reliable evidence. So, whilst I acknowledge the Crown can promote a theory, it should be based on evidence.

WILLIAMS J:

- Well I mean to be fair it is based on evidence, it's based on the evidence of Mr Dodds reframed to deal with the reality that Mr Dodds doesn't bring his bag
20 into the car at that time and so it must have been Mr Te Hivaka. It's an available strand.

MR MANSFIELD KC:

- Well it's based on evidence that the Crown itself assert in fact to the jury that Mr Dodds' evidence is entirely unreliable and should be disregarded as
25 self-serving.

WILLIAMS J:

Yes but, as you know, can believe some and not believe others, other bits.

MR MANSFIELD KC:

Well, you would be entirely speculating here if you just plucked that out conveniently to support liability for Mr Te Hivaka absent any other liability. There would be no reliable evidence to support that. I'm not suggesting it's not
 5 a contention that could be made, but it certainly wasn't one put to Mr Dodds if it was so reliable. Might've been put to the jury as a last brief in order to show an involvement or knowledge by Mr Te Hivaka of the firearm, but it wasn't supported by any reliable evidence.

WILLIAMS J:

10 Well you see the point that could be made is that this particular concession by Mr Dodds is inconsistent with his desire to protect his cousin.

MR MANSFIELD KC:

Well I'm not so sure there was a desire to protect his cousin.

WILLIAMS J:

15 Well he made it very clear that his cousin didn't know about the gun.

MR MANSFIELD KC:

And to be fair there was no other evidence to suggest he did, so that –

WILLIAMS J:

Well that's a different point but if – on one view of it Mr Dodds was doing the
 20 right thing by his cousin, this little piece of evidence counts against that and if he were – and so suggests it might be reliable even if everything else isn't.

MR MANSFIELD KC:

I understand what your Honour says but the problem with this for the Crown is that Mr Dodds wasn't cross-examined on, okay well how did the bag containing
 25 the firearm at that point get into the car? He wasn't even asked, nor was it suggested, that Mr Te Hivaka had taken it in his own bag. So if it was to be a Crown theory it should have been put, and it should've been put to Mr Dodds. It was put, belatedly, after other suggestions to Mr Te Hivaka.

The other important point here, which I don't think we touched on in our submission, is his Honour was quite clear that it was his suggestion to the jury that this evidence did not appear reliable that Mr Te Hivaka had taken the
 5 firearm in the bag to the car, so that was a suggestion he made to the jury. If the jury have convicted Mr Te Hivaka on that theory, then they have disregarded that suggestion which was equally firmly put to the earlier suggestion to the jury regarding they would need to be satisfied that Mr Te Hivaka knew of the firearm, you might think, before they could convict
 10 him.

So, two equally-put suggestions, one we know was disregarded by the jury, and I suggest we can't be confident that the other wasn't disregarded either because certainly their focus, by the learned trial Judge, was on the question trail and
 15 the question trail didn't include the requirement that the intention to rob include with a firearm.

WINKELMANN CJ:

He didn't really say it was unreliable evidence, didn't he say it really wasn't there?

20 **MR MANSFIELD KC:**

Well, yes, thank you. I think that strengthens the position I was promoting rather than weakens it, but thank you.

MILLER J:

The whole premise of your argument is that it's not enough for the jury to rely
 25 on this agreement to rob between two guys who were very close, just the two of them.

1050

I've been listening to you, I've been reflecting on a case we heard a little while
 30 ago called *Longi v R* [2025] NZSC 191, [2025] 1 NZLR 900 where someone who was kind of on the fringes, a younger guy, was brought along and the Crown

case really rested on the theory that during that journey in the car across Auckland they had to be talking about what was going to happen, the shooting, and then there was some knowledge afterwards.

- 5 That situation was different from this. This guy is not a mere passenger. This is two of them, full participants in an agreement to rob.

MR MANSFIELD KC:

Correct and the jury must have been satisfied –

MILLER J:

- 10 So the question is whether the jury could draw the inference from all of these circumstances, including Mr Dodds' enthusiastic evidence in favour of his cousin, that they must have known what was going to happen.

MR MANSFIELD KC:

- 15 Well, not necessarily, because Mr Dodds has given evidence that for reasons of his own he decided to take the firearm to the vehicle and there's no reason to exclude the fact that whether it would be because Mr McIntosh had frightened somebody else or whether there had been this earlier disagreement between him and Mr McIntosh that he would take the firearm and look like the tough guy.

MILLER J:

- 20 Let's separate two things. The first is whether he knew of the gun and what I'm suggesting to you is that the jury could infer that he did. It may be a separate question whether he had sufficient knowledge of the risk that Mr Dodds would use it and that may be informed by Mr Dodds' personal animus against the victim.

- 25 **MR MANSFIELD KC:**

Well, the personal disagreement between Mr Dodds and Mr McIntosh wasn't really explored in great detail by the Crown as a theory as to why for such a robbery you would take a firearm along with you and the problem, in my submission, is that there was no need for a weapon to be used at all in a robbery

for a small amount of methamphetamine and a very small amount of money. So the circumstances of what was proposed, two men and one in a vehicle, didn't need to include taking a firearm, let alone a loaded one. It's just not logical to conclude from the fact that they were prepared to do a stand-over or to
 5 threaten this man in order to get the drug and maybe any money he had left over, that that would have to include and did include a firearm.

MILLER J:

But consistent with this Crown theory is that the gun is there, exposed, when they both get into the victim's car.

10 **MR MANSFIELD KC:**

They get in independently. So, on the evidence, which the Crown appeared to accept, Mr Te Hivaka gets in on his own and then Mr Dodds approaches the vehicle after that, knocks on the vehicle because the back doors are locked. He says that Mr McIntosh unlocks the door and he gets in the back with the
 15 firearm, and he says that he hides the firearm between the two vehicles as he moves.

MILLER J:

Right until that point, okay.

MR MANSFIELD KC:

20 Yes, that's what he says. So they didn't get in together.

WINKELMANN CJ:

If the gun was in the house for the time that they were there concocting their plan, that's a far stronger basis for a jury to infer knowledge, isn't it, than if it's been sitting quietly in the car in a black bag?

25 **MR MANSFIELD KC:**

Yes, I would accept, as long as it's in full sight of Mr Te Hivaka. If he sees, even if there is no discussion, the firearm or is aware that it is in the possession of Mr Dodds and Mr Dodds proposes to take it to what was to be a pretty

low-level robbery, then that would be sufficient, I would accept, or if the Judge had framed the question to the jury that the plan was to commit an aggravated robbery, so a robbery associated with the use of a weapon such as a firearm.

- 5 But it was put by the Judge as simply a plan to rob, and to be fair to the Judge whilst the Crown in opening referred to a plan to rob with a firearm, frequently throughout the cross-examination of the two accused at trial, lead counsel for the Crown simply referred to a plan to rob. So it's perhaps not surprising that when the Judge came to the question trail he just had to rob.

10 **COOKE J:**

But their case on liability was that taking a loaded firearm to the robbery led to the inference that he knew it may well happen that it will be used.

MR MANSFIELD KC:

- Correct, so it does all hinge, I accept, on his knowledge of a firearm. I could
15 say loaded firearm, but knowledge of a firearm would be one step that we don't have, but he would – there has to be evidence that he did know the firearm was there and was to be used.

WINKELMANN CJ:

- And so on your narrative, the gun's been in the car since early in the morning
20 the proceeding day, sitting in a black bag wherever, we don't know where it is, but in the car.

MR MANSFIELD KC:

With Mr Dodd's other possessions, yes.

WINKELMANN CJ:

- 25 And it's not in the house with them when they're cooking up this plan. Then they get into the car and it's still sitting there in the black bag. They drive to the place. Mr Te Hivaka gets out, goes across to the victim's car, gets in and then Mr Dodds concealing the weapon, which is a logical thing that he would do as he's approaching the car, gets into the back seat with the weapon.

MR MANSFIELD KC:

And then presents it.

WINKELMANN CJ:

And on that narrative you say there's two possible inferences. One is that
5 Mr Te Hivaka knew nothing about it, it's a surprise to him. The other is that they
were in the house discussing it and it was part of their plan and you say there's
no evidence to support that.

MR MANSFIELD KC:

No. There's evidence to support what Mr Te Hivaka says, because both
10 accused said that, but there's no evidence to support the Crown alternative
proposition that the discussion in the house, of which there's no evidence as to
its nature, included the use of a firearm.

WINKELMANN CJ:

What about the cross-examination of the defendants in relation to their
15 knowledge of the firearm?

MR MANSFIELD KC:

It was put that Mr Te Hivaka had knowledge earlier that the firearm was there
and then at the very end, as I've shown, it was put to him that he took the firearm
in the bag to the car which became the Crown theory in closing. So two
20 scenarios were put to him: that it was in the car all along in the bag and there
must have been discussion about it, which he and Mr Dodds denied and there
was no reason why there would need to be a discussion about it on the
evidence; but secondly, it was put that he did carry it out but, again, as we have
shown, it doesn't appear to be well supported by the evidence.

25 **MILLER J:**

What's Mr Te Hivaka's account of what passed between them and Mr McIntosh
in the car after Mr Dodds got in with the gun and until Mr Dodds [*sic*] was shot?

MR MANSFIELD KC:

Well, it happened very quickly, so I think on both accounts he effectively presents the firearm in the car. Mr Te Hivaka says he goes “what the fuck” and then exits the car and at around that time the firearm discharges so –

5 **MILLER J:**

So there's no actual attempt to rob at all?

MR MANSFIELD KC:

No. Nothing, nothing –

MILLER J:

10 No stand-over.

MR MANSFIELD KC:

Nothing is said to have been threatened at that point at all.

COOKE J:

Well, his evidence was there was no plan to rob at all, was there?

15 **MR MANSFIELD KC:**

Mr Te Hivaka's evidence was that they went there, he went there to acquire drugs but obviously the jury didn't accept that and accepted that there was a plan to rob, because that's what was required in the question trail. Whether that included that plan, a threat to cause GBH or something else, or that there was to be a weapon, that wasn't part of the question trail itself as we've seen. So, I accept the jury can be taken as having disregarded his evidence in relation to I just went there to score some drugs and I was going to pay for it, even though there was no evidence that he couldn't pay for one gram of drug, and there was no evidence as to how much money Mr McIntosh may have still had from winning at the pokies, and there's no evidence as to why he would have more than one gram in his car, or at least he may have had not much more given that he went specifically to this location which he chose, so that's Mr McIntosh, Mr McIntosh chose for the drug transaction.

20

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COOKE J:

If you accept that there was sufficient evidence for the jury to conclude that this was a planned robbery, don't you also have to accept that it will be open for the jury to accept that that plan encompassed what happened in that robbery?

5 **MR MANSFIELD KC:**

Not without some evidence that – not without evidence that Mr Te Hivaka had knowledge of that. So, in my submission, it was a requirement that Mr Te Hivaka know that Mr Dodds had a firearm and that that would be utilised in the robbery.

10 **COOKE J:**

The jury will be able to take into account all the circumstances, the extent of the planning, the relationship between the two men, the behaviour of the two men after the robbery and draw inferences from all of those circumstances to decide whether they were sure he knew that there was going to be a gun used in this robbery.

1100

MR MANSFIELD KC:

Well, none of that tells you anything more than there was to be a robbery. It doesn't tell you whether a firearm was to be used within the robbery. None of that points to that at all and we kind of talk about planning as if substantial planning was required or involved. There's no evidence of that. It was simply organising to acquire drugs from Mr McIntosh, proposing to stand-over and rob him of the drugs. That was the Crown theory and the evidence regarding planning is absent. There is no evidence regarding the nature and extent of the planning or where it took place or who was involved.

Ironically, the Crown say Ms Baker was involved in the planning and knew of the proposed plan, hence why she was sending updates as to where Mr McIntosh was, which could also be entirely consistent with it being a legitimate drug transaction, ie, this is where he is, he's not far from me now, or I accept it could be a basis to infer that they had a plan in place. But she was

never charged with murder on the basis that the Crown accept they couldn't show that she knew that a firearm was to be involved. So beyond that, there is no evidence of any other planning having taken –

MILLER J:

- 5 Well, when you say planning, you're contemplating something prior and what I was suggesting to you earlier is it might be enough that Mr Te Hivaka participates at the scene in the stand-over knowing of the weapon.

MR MANSFIELD KC:

Once presented.

- 10 **MILLER J:**

Yes.

MR MANSFIELD KC:

It might do but at that point we're talking about seconds.

MILLER J:

- 15 It could be, that could be enough.

MR MANSFIELD KC:

- Well, it certainly wasn't the way in which the Crown put its case and/or the Judge directed them, so if they were to conclude that, they were off again on a frolic of their own and it does appear, as I've said, that they were at least
20 disregarding some of the suggestions made by the trial Judge in his summing up to them. In my submission, when you look at –

MILLER J:

- This is an unusual case and the defendants are giving evidence and the jury get to see and hear them and decide if they're both lying through their teeth, at
25 least in some respects, aren't they?

MR MANSFIELD KC:

Well, the jury must have concluded that –

MILLER J:

The question is, how far you can take that finding?

MR MANSFIELD KC:

I have to say, when I sat down after Mr Te Hivaka's evidence, I didn't think that
5 but that matters little, unfortunately. But it's not as though –

COOKE J:

You don't get to make the choice though.

MR MANSFIELD KC:

No. It would be so much easier if I could. Or, I suppose, write what they are
10 going to say. But, I suppose, the point is that there is just no evidence at all
regarding Mr Te Hivaka having knowledge of the firearm and it's equally
applicable that, knowing he has a firearm in the car, Mr Dodds decides to take
it with him to that vehicle and to have it out, for whatever reason, even if he just
wanted to involve it in the robbery and Mr Te Hivaka gets a fright, as reflected
15 by his evidence, and decamps the vehicle without anything, and you might think
if there was a plan to rob Mr McIntosh and it was to involve a firearm, then
Mr Te Hivaka would have the sense to actually take the drugs and the money
but the evidence reveals he takes nothing with him. He just gets out of the car,
goes back to that vehicle and he decamps.

20 **MILLER J:**

So they get to this meeting place, the gun isn't just sitting there in Mr Dodds'
lap, he's got to go to the back of the car and open up a bag, extract the gun, so
what does Mr Te Hivaka think he's doing?

MR MANSFIELD KC:

25 No, no, well Mr Dodds says that he decides to take the firearm and gets into
the bag after Mr Te Hivaka's left the vehicle. So Mr Te Hivaka goes to the
vehicle, gets in it and then Mr Dodds says he retrieves the firearm from his black
bag.

MILLER J:

So that's quite a lot of hanging about waiting for Mr Dodds to turn up to this planned robbery.

MR MANSFIELD KC:

- 5 I don't think that would take very long to zip open one of those bags and pull out the firearm.

ELLEN FRANCE J:

Does your case, in terms of the evidence, turn on it, on the jury accepting that when the bag was put in the car at 11.31 that that was the bag with the gun?

- 10 **MR MANSFIELD KC:**

Well, that's an inference that's available given the evidence of Mr Dodds that he put it in his black bag. There's no other evidence as to how it got in the vehicle.

ELLEN FRANCE J:

- 15 Well, yes, but if that's not the case and the jury concludes it's in Mr Te Hivaka's bag, why is that not an available inference for them?

MR MANSFIELD KC:

- 20 Because there's no evidential basis for it. There's no evidential basis other than Mr Te Hivaka takes a bag back out to the car that he took into the house in the first instance.

ELLEN FRANCE J:

Well, that's why I'm asking you isn't your argument dependent on them accepting that the gun was in the bag at the 11.30 time?

MR MANSFIELD KC:

- 25 Oh, yes. That's the Crown case, as I understand it.

WINKELMANN CJ:

And your argument is they couldn't reasonably infer the more prejudicial case for Mr Te Hivaka?

MR MANSFIELD KC:

5 Correct, and the Judge is in fact –

WINKELMANN CJ:

Especially in light of the Judge's comments.

MR MANSFIELD KC:

Correct, if they're following it.

10 **ELLEN FRANCE J:**

But on that approach, there are in fact two available tracks for the jury.

MR MANSFIELD KC:

Yes.

ELLEN FRANCE J:

15 They've just accepted the one the Judge was not convinced about, isn't that right?

MR MANSFIELD KC:

20 Well, there's an inference by way of submission put to them, but it's not an inference that's based on any evidence at all. So, Mr Dodds doesn't suggest it's in that bag. Mr Te Hivaka doesn't suggest it's in that bag. There's no evidence at all that the firearm was in that bag. The same bag goes in and out.

ELLEN FRANCE J:

But isn't the Crown case that no other bag is seen going into the car at the requisite time, therefore –

MR MANSFIELD KC:

It doesn't need to go in at that point in time at all. It just needs to be in the vehicle when they drive off and there's –

ELLEN FRANCE J:

5 Well, on Mr Dodds' evidence, it isn't in the car earlier.

MR MANSFIELD KC:

Correct.

ELLEN FRANCE J:

10 So, if they accept that part of Mr Dodds' evidence and then there's only one bag going into the car, why can't they accept that it's gone in in the appellant's bag?

MR MANSFIELD KC:

Well, they're very careful what they select and what they don't select, if that's so, so as to –

ELLEN FRANCE J:

15 Well, that's not the test, is it?

MR MANSFIELD KC:

But, well, coincidentally, it accords with a theory that Mr Te Hivaka knew and carried the firearm in the bag but they disregard everything else that they're told by the same individual and by Mr Te Hivaka and there's no evidence.

20 **ELLEN FRANCE J:**

Well, in terms of – as I read the Crown closing, they're not saying all of Mr Dodds' evidence is unreliable. The prosecutor is focusing on particular aspects.

MR MANSFIELD KC:

25 Well, in my submission, it has been put at the start when the lead counsel talks about Mr Dodds. He basically says he's not to be relied on very clearly. I can –

WINKELMANN CJ:

So, the Judge placed emphasis on the fact that it was not put to Mr Dodds that Mr Te Hivaka had carried the bag containing the firearm to the vehicle.

MR MANSFIELD KC:

- 5 Yes, the Crown haven't put that to Mr Dodds, no. In fact, there was no real dispute in relation to his evidence that he took it in a bag to the car. There's just no independent support from the CCTV footage of that.

WINKELMANN CJ:

- 10 So, in your submission, would that preclude the Crown from making that submission when they've failed to put it to a key witness?

MR MANSFIELD KC:

Yes. That's why earlier I referred to the developing nature of the Crown case and the fact it wasn't put. In fact, something quite contrary was put.

WILLIAMS J:

- 15 The Crown case is developing because the defence case is developing, isn't it?

MR MANSFIELD KC:

- 20 Well, Mr Dodds had already given evidence, so the Crown was cross-examining Mr Dodds on the evidence he'd just given. So nothing that remarkable about that. If it needed time to think about what was to be its theory, it could've taken time. It didn't.

- 25 It put two theories to him. Firstly, that it was already in the car and had been for quite some time and then it didn't move from that other than just rejecting his evidence. It was only when Mr Te Hivaka gave evidence that the Crown suggested, after putting to him perhaps the bag was in the vehicle – sorry, that the firearm was in the vehicle earlier, at the very last question it puts to him that he, in fact, carried it, or that suggestion, and that became its case from that point on, despite the evidence I've taken you to regarding the different bags.

Because I would've thought it seems clear that the Crown thought there was only one black bag and perhaps why it thought that was the more significant theory to be able to advance, here's a bag going in, here's a bag going out just
 5 before they leave, we can say that contained the firearm even though there was no evidence of that at all.
 1110

WILLIAMS J:

Where does Mr – where in the car does Mr Te Hivaka put his bag?

10 **MR MANSFIELD KC:**

Recollection, in the back.

WILLIAMS J:

Back seat or boot?

MR MANSFIELD KC:

15 Back seat, I think, we might just have to have a look at the footage for that, because I can't recall exactly. Can we go to it?

WINKELMANN CJ:

And where does Mr – well, he could have moved it, we don't know that, do we.

MR MANSFIELD KC:

20 Here he goes.

ELLEN FRANCE J:

It's a bit hard to see.

MR MANSFIELD KC:

I think it looks like it's heading to the back door, so the back seat of the vehicle.

COOKE J:

In a case which is where what the jury is going to have to assess is the defence case that this shooting happened quite by surprise, an unexpected development in a robbery and, in fact, a fatal shooting, do you accept that the
5 behaviour of the defendants after the event is a material consideration in terms of drawing inferences?

MR MANSFIELD KC:

Yes, I do. But the inference has to be available and here we would be looking at whether he knew a firearm was involved or to be involved in a robbery before
10 it occurred and none of the actions afterwards would support that inference being drawn from the conduct afterwards. It would support the contention that there was a robbery, I think it's available to support that, but it wouldn't be available to support that a firearm had been used.

COOKE J:

15 But the conduct isn't really consistent with Mr Dodds having done something quite unexpected in killing someone.

MR MANSFIELD KC:

Well, unless you want Mr Te Hivaka to be overly theatrical, there wasn't really an opportunity. There's simply communications between him and another
20 where he is seeking to collect a debt for Mr Dodds who, by now, is on the run.

If anything, the conduct afterwards from Mr Te Hivaka shows he wasn't involved. He doesn't take anything, we know that. He leaves in the vehicle that is said to be associated with the offending. He's the one that's meant to be
25 receiving the updates from Ms Baker regarding what they would do at that address. He doesn't get rid of his phone. When the police attend he still has his phone and he provides them with the PIN code so they can get in and get the evidence of the communications. So, he stays at home.

30 What does Mr Dodds do? We see what he does. He gets back to the address, the firearm is put in the back of a car, his family help him and they depart. He's

found with the firearm later on. All his conduct is entirely consistent with a man who cares little about the loss of life and takes off and he doesn't take off with Mr Te Hivaka, Mr Te Hivaka stays behind.

- 5 If he was truly concerned about his liability in a planned robbery with a firearm, then his conduct afterwards is remarkable because it suggests he's either very confident he won't be apprehended, which seems silly because he's got the vehicle, or associated with the vehicle, but he's also got his phone. It all tends to suggest he didn't know and he didn't feel that he liability for what occurred.

10 **WILLIAMS J:**

That may be because he hadn't read section 66(2).

MR MANSFIELD KC:

- Well, I have no doubt he hadn't read that section, Sir, but in my submission, if these two were involved with a robbery and with a firearm and it had gone right or it had gone wrong, and one was leaving and you might expect them both to leave together, and certainly you wouldn't expect that Mr Te Hivaka was cocky enough to remain behind to be apprehended that he would have a phone on him which contained the evidence of the meeting up with Mr McIntosh, including the communications with Ms Baker still on it and he gave the police access to it.

- 20 So there really isn't anything afterwards, bar for that one communication I am sure my learned friend will take you to where he is seeking to collect the debt and he talks about being "active as fuck". That doesn't help us with whether he knew a firearm was meant to be involved prior to it or that he was happy or unhappy about a firearm being used, but I do accept that he's seeking to collect a debt for Mr Dodds and I do accept there's communications afterwards where Mr Dodds is suggesting to him you better meet up with me now or I'll use your half, but that doesn't help us with whether a firearm was intended to be used or not.

- 30 It does seem remarkable that when Mr Dodds gets out of the car he takes everything with him, leaves nothing, even a share, for Mr Te Hivaka, if it's the

Crown's suggestion that Mr Te Hivaka was involved and he was going to stay behind. Why wouldn't Mr Te Hivaka already have his share?

5 But in any event, there's just nothing afterwards that helps us with whether Mr Te Hivaka knew about the involvement of a firearm prior to it.

WILLIAMS J:

There's no answer, re the half share, from Mr Te Hivaka?

MR MANSFIELD KC:

10 No, because that would just be entirely consistent with what the jury must have accepted was a plan to take the drugs in the first instance.

WILLIAMS J:

No, but it does, it might have counted as something, if Te Hivaka had said I don't want this anymore.

MR MANSFIELD KC:

15 Yes, that would have been helpful but the absence of it isn't unhelpful, in my submission.

WILLIAMS J:

Sure.

MR MANSFIELD KC:

20 But I do acknowledge that point.

MR MANSFIELD KC:

25 So really, I've dealt with I suppose, or in ground 2, ground 1 is a straightforward one which is articulated in our submission and that's simply that the question trail didn't include a weapon direction. So either it needed to be, you needed to be sure that the plan was an aggravated robbery or alternatively if it was just to be a plan to rob there needed to be a separate question in the question trail

that the jury were sure that Mr Te Hivaka knew that if the plan would include the carriage of a firearm.

WINKELMANN CJ:

This is a – ground 2 is a reasonable verdict one, is it?

5 **MR MANSFIELD KC:**

Yes.

WINKELMANN CJ:

And you say that the – you would accept the proposition that if there is any deficiency in the question trail, which obviously not desirable if there is, a clear
10 direction from the Judge as to how it's to be used can fix that?

MR MANSFIELD KC:

It could if it was a direction rather than a suggestion, and why I've drawn the analogy with the other suggestion regarding the evidence not being reliable, that Mr Te Hivaka had carried the firearm to the car, must be that the jury
15 disregarded that very same strong suggestion from him. So it's not a direction to them, it's a suggestion made in those terms.

In any event, as this Court has accepted in *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493, the question trail is part of the direction, equally part of it, so even
20 in the oral direction, even if the Court was to conclude that this suggestion was in fact a direction or could be taken as akin to one, given the focus on the question trail, and this is by the Judge at the very end when he's looking at prejudice and sympathy, tells them just to rely on the question trail and the questions within it, the question trail itself doesn't include that requirement.

25 **WINKELMANN CJ:**

Well perhaps you better take us to that because you could read his direction as, his suggestion as crossing over to direction in substance, so can we just look at that?

MR MANSFIELD KC:

The direction?

ELLEN FRANCE J:

Yes, I was going to ask you in relation to that, at the end of paragraph 84 –
5 paragraph 83 sorry –

MR MANSFIELD KC:

Yes.

ELLEN FRANCE J:

– which you are calling a suggestion: “So I suggest to you that if you get this
10 far, a key element is whether you are sure ...” And then at 84: “Now, if you’re
not sure on that element ...” Why is the element referred to, ie, that he knew
that Mr Dodds had taken the firearm?

MR MANSFIELD KC:

Well, I accept that it is, but I’m not accepting that it was a direction, nor would
15 be seen by the jury as a direction, and it certainly didn’t make its way to the
question trail.

WINKELMANN CJ:

Well, is there –

ELLEN FRANCE J:

20 Well –

WINKELMANN CJ:

Can I just ask, on that element is he talking about knowledge or is he talking
about, what’s the word, he’s not talking about the questions, he’s talking about
the knowledge?

25 **MR MANSFIELD KC:**

At paragraph 83 he says: “And you might think that a critical element here in
considering this question ...” And above that’s Question 4, I think.

COOKE J:

Hence the may well happen question.

MR MANSFIELD KC:

Yes.

5 **WINKELMANN CJ:**

So why is that not enough?

MR MANSFIELD KC:

Because it's not earlier, in my submission, regarding what the plan was. So the plan needed to include the involvement of a firearm, either by reference to it
10 being a robbery with a firearm or an aggravated robbery with it being so defined, or a separate question that you must be sure that Mr Te Hivaka knew that Mr Dodds was to involve a firearm in the robbery.

COOKE J:

So it can either be part of the plan, or if it's not part of the plan it has to be
15 something that may well happen as a consequence of the plan and that's how the Judge is treating that alternative element.

MR MANSFIELD KC:

Yes, in my submission, consistent with *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1, it should be earlier on and at this point in relation to that question which
20 I think Mr Olsen will seek to further direct – further make submissions to you on. So, in –
1120

WINKELMANN CJ:

So, Mr Olsen is going to handle this part. Are we taking you into ground that
25 you are not...

MR MANSFIELD KC:

Oh, no, I'm comfortable to talk about it, but in my submission, it's not a direction or a requirement put as such to the jury.

WINKELMANN CJ:

- 5 Because the gap between those things is that if you're not – the point made in *Burke* is that if it's not part of the plan, then it's unlikely that a jury – the gap between the plan and the evidence becomes too great. That's just not putting it very well, but why are you saying it has to be a part of the plan?

MR MANSFIELD KC:

- 10 The plan, it doesn't necessarily need to be part of the plan, namely, it could have been are you sure that they planned to rob Mr McIntosh? Then a separate question, are you sure that Mr Te Hivaka knew that that plan would involve a firearm? So, it needed to be there and then it needed to be at Question 4 at a minimum.

15 **COOKE J:**

Well then, it's whether are you sure that shooting him with murderous intent was something that may well happen, and it's at that very stage that the Judge says the critical element of that is knowledge of the weapon.

MR MANSFIELD KC:

- 20 Correct, but he doesn't direct. He suggests to them that they might think that, so capable of being disregarded by them, and that's why I made the point earlier in relation to a very similar suggestion he made to them, as he was entitled, regarding what the evidence regarding the bags and the firearm actually revealed for them to have formed the view that Mr Te Hivaka knew that the
25 firearm was to be involved and that turned on that bag and the firearm being in that bag and they must have disregarded that. So, it's hard to see why we would have any confidence that they might see this as a direction to them that they have to comply with rather than a mere suggestion.

ELLEN FRANCE J:

Well, that does seem to me to require you reading that first sentence of paragraph 84 as talking about some other element.

MR MANSFIELD KC:

- 5 Well, that's talking about Question 4 because he then talks about going on to Question 5.

ELLEN FRANCE J:

- Well, but they only do that if they are sure that what he's described as a key element, "whether you are sure that Mr Te Hivaka knew that Mr Dodds had
10 taken the firearm with him for the purposes", et cetera.

MR MANSFIELD KC:

- He's making a suggestion to the jury rather than giving a direction that this is required. He's making a suggestion to them. I'm suggesting he's – I'm accepting that he's putting it in relatively strong terms, but he has given an
15 equally strong direction regarding the evidence and what he made of the evidence regarding the firearm being in the bag and they must have disregarded that. So, why would we have any confidence that they would place great weight on this, and what do they take into the jury room with them? They don't take this. They take the question trail and the question trail has no such
20 reference to it and at the very end of his summing up, I think it is at the very end where he talks about prejudice and sympathy, he tells them just to focus on the question trail.

WINKELMANN CJ:

- Are you saying that element could be read there? So, if you're not sure of
25 Question 4, read as Question 4, you're going to go to Question 5?

MR MANSFIELD KC:

That's what he says at paragraph 84: "Now, if you're not sure on that element, you're going to go to Question 5."

WINKELMANN CJ:

So “element” could be question?

ELLEN FRANCE J:

Why?

5 **MR MANSFIELD KC:**

Question 4, he’s earlier talking about Question 4 in paragraph 82.

WINKELMANN CJ:

An element was knowledge.

COOKE J:

10 So you’re saying element means different things in those two sentences?

MR MANSFIELD KC:

Well, it’s difficult to know exactly what he was intending but he’s talking about the questions that they would need to answer, because he’s going through the question trail with them. So, in my submission, he’s referring to Question 4
15 rather than a required element of the offence, albeit. So he’s really just referring to the question above, as I understand it.

But there’s no way of getting away from the fact that he’s making a suggestion to the jury in relatively strong terms as to what they might want to focus on and
20 I don’t criticise that. The problem is it’s not a direction and it doesn’t make its way into the question trail itself which he asked the jury to concentrate on for the purposes of their deliberations.

COOKE J:

Well, he also says they have to be sure about it in the last sentence: “... a key
25 element is whether you are sure that Mr Te Hivaka knew that Mr Dodds had taken the firearm with him ...”

MR MANSFIELD KC:

Yes, we are talking about his oral direction in these paragraphs. Yes, I don't disagree with that but when it comes to the question trail, the very questions that the jury are asked to answer in order to get to a verdict of guilty doesn't

5 include that, and on more than one occasion he's directed the jury's attention to the question trail which, of course, is a document that they take into the jury room with them and, as this Court held in *Ahsin*, contrary to what the learned Court of Appeal has found, it's not just an aid, it's part of the direction and the Court needs to look at both the oral direction and the written directions and/or

10 instructions given to the jury and they're at odds. So, when the jury are working through their deliberations, that requirement is not present and it would be entirely relevant –

MILLER J:

Yes, consistent with your argument is the two sentences towards the end of 83

15 when he says: "Then it would be very difficult for the Crown to prove that he knew that there was going to be a reckless killing..." This is in circumstances where it was just threats or fists or something like that but he does seem to be – he's not telling the jury that's not enough. He's just saying it would be very difficult, so he's leaving them the, as I read it anyway, he's leaving them the

20 option, the choice to rely on something less. That was how I read his paragraph.

MR MANSFIELD KC:

No, no, correct and that's, I suppose, my position on it. This was a classic case, in my submission, much like *Burke*, where there needed to be a specific

25 direction if the Crown was going to rely on a plan to rob, that Mr Te Hivaka knew that a weapon, in this case a firearm, would be involved, and they would need to be sure of that, and it should have been both in the oral directions put as such but also in the question trail and it wasn't. So that allowed the jury to simply be satisfied that an intention to rob, which they must have been, was

30 sufficient if this then occurred during the said robbery, and when you get to Question 4, it doesn't specifically talk about an intentional shooting either.

So if we look at the question trail itself, and it's Option A, and can I just deal with this point because the Crown say a number of times in their submissions, well, there's no complaint about any other option, and that's because the Judge at sentencing accepted, given the jury's question, that that is the way in which they convicted Mr Te Hivaka, so it matters not. But if we get to Question 4 on the question trail: "Are you sure that" – so it's on page 198: "Are you sure that Mr Te Hivaka knew either (a) that the reckless killing of Mr McIntosh; or (b) that the intentional infliction of grievous bodily injury on Mr McIntosh for the purpose of committing the offence of robbery were probable consequences of carrying out the agreement to rob Mr McIntosh?" So even at this point it doesn't include intentional shooting.

COOKE J:

But there was no other scenario apart from that, that that was alive in the case. That's the only way that the reckless killing or intentional infliction of grievous bodily injury was going to occur.

MR MANSFIELD KC:

In the case, yes, but that's not the way in which the Crown has framed its case, nor the Judge has framed the question trail. If it had, that might have dealt with this particular issue. So the jury were quite able to accept there was a robbery that would involve at least threats to harm, threats of harm in order to get the drugs and the money, it must of, and then they get to Question 4 and it's just are you sure that Mr Te Hivaka knew either that the intentional infliction of grievous bodily injury on Mr McIntosh for the purpose of committing the offence of robbery was a probable consequence so something far less than what in fact happened and not necessarily involving a firearm.

1130

But in any event the focus is really up above at Question 2. Question 2 should have said are you sure that Mr Te Hivaka agreed to assist Mr Dodds to rob him. You could say that but there would need to be a separate question that Mr Te Hivaka was sure that that plan would involve a firearm, or alternatively, Question 2 could have been worded as an aggravated robbery with the Judge

explaining that here an aggravated robbery would be threats of violence or actual violence with a firearm.

WINKELMANN CJ:

Okay, so morning adjournment Mr Mansfield.

5 **MR MANSFIELD KC:**

I have to say, unless you've got any questions, I'm probably at the end but perhaps we take the morning adjournment to see, make sure – Mr Olsen will tell me whether I've missed anything out that I think I need to address you on but otherwise that would be my point and then Mr Olsen –

10 **WINKELMANN CJ:**

And how long does Mr Olsen anticipate he'll be.

MR OLSEN:

I can be half an hour, Ma'am.

WINKELMANN CJ:

15 Okay, thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MR MANSFIELD KC:

Just before I conclude, in our written submissions at paragraph 74, page 16,
20 we talk about inferences and the inferences directions by way of reference to *longi* and what was required there, which we set out at paragraph 75 and 76 which, in my submission, was absent in the Judge's direction to the jury and given the importance being placed on inferences in relation to Mr Te Hivaka's knowledge, in my submission, that's something that needs to be also taken into
25 account.

So that's all I propose at this point, unless the Court have any questions of me on the first two grounds, otherwise I propose to hand over to Mr Olsen.

1150

WINKELMANN CJ:

5 I think we've questioned you quite enough, Mr Mansfield.

MR MANSFIELD KC:

Sorry, Ma'am?

WINKELMANN CJ:

I think we've questioned you quite enough.

10 **MR MANSFIELD KC:**

Thank you. May it please the Court.

MR OLSEN:

May it please your Honours. The issue that I wanted to start with that arises across both grounds 1 and 4, which Mr Mansfield was just addressing you on
15 and I will shortly come to, is where in the question trail the question about or the issue about a weapon should have been positioned and our position is squarely that it should have come before the third question, at least.

And in the discussion that the Court's just had with Mr Mansfield was in relation
20 to the Judge's comments at Question 4, but it's important that the question comes before the question in relation to the murder itself, and that's Question 3, and that arises out of what this Court said in *Burke* and there the Court said that, and this is paragraph 75 of *Burke*, that: "If the jury had been told the correct interpretation was 'part of the process of implementing', and they considered
25 Mr Burke did not know about the knife, they may have found that the stabbing was, in the words of *Edmonds*, 'such a departure from the common purpose ...'"

And the way that Question 3 reads and there was no further amplification by the learned Judge when he went through the directions with the jury on this

question, is simply that the shooting occurred at the same time or whilst they were trying to rob him, but it's not pitched as being part of the robbery itself.

WINKELMANN CJ:

Can you just read what, sorry, have we got that – we haven't got that up on the
5 screen, have we, *Burke*?

MR OLSEN:

The *Burke* part?

WINKELMANN CJ:

Or sorry, I'm sure we've just taken Mr Mansfield past his competence.

10 **MR MANSFIELD KC:**

You well and truly have. I don't have a laptop either.

MR OLSEN:

I have got it up here, Ma'am, I can take your Honour's to it. It's page 130 of the
appellant's bundle, starting at 75 and this is the majority and what the Court
15 said at the bottom of page 130 over to 131 is that: "That, in turn, means the jury
needed to be told that they had to decide whether they were satisfied that
Mr Burke knew about the knife before addressing whether the *stabbing* was in
the prosecution of Mr Webber's and Mr Burke's common purpose of *inflicting a
physical beating or 'hiding'...*" and the Court goes on at paragraph 77 to say that
20 they would allow the appeal on that basis alone, and then come on to address
the other issue which they would have also allowed the appeal on the basis of.

But the point here is that the question trail, as it simply reads and as it was
directed to the Judge, if I can take the Court there, is just a temporal connection
25 between the shooting occurring whilst the robbing, the robbery was going on.
It's not that the shooting was in prosecution or in the process of implementing
the robbery, which is an important distinction, which if there had of been a
question, either Question 1 or 2 framed as robbery with a firearm, or as the
Court suggested in *Burke* a specific question before, in our case, Question 3

about a firearm, it would have directed the jury's attention to that issue of knowledge of the firearm.

WINKELMANN CJ:

5 So your point is that because it wasn't put as part of the common purpose, it meant that the jury was not adequately focused – or even directed? I'm not sure – to consider whether the shooting was a departure from the common purpose.

MR OLSEN:

10 Yes and that's available on the evidence because Mr Dodds' account, if the jury was to accept that, around the timing of the bags was that he had taken the firearm merely to scare Decoy, as the deceased was known, because he had shot at an address a few days earlier and he explains that in his evidence at page –

WINKELMANN CJ:

15 Well, no, isn't that not your, it's –

MR OLSEN:

That's not our case.

WINKELMANN CJ:

20 That's not your case. Your case is that it was a departure from the common purpose because Mr Te Hivaka didn't know?

MR OLSEN:

25 Didn't know about the firearm, yes, but even on the Crown's narrative, relying on aspects of Mr Dodds' account, his own account was that the common purpose never included a firearm either and that the reason he'd taken the firearm to the event was entirely unrelated to any suggestion of a robbery. Of course, both of them didn't accept there was a robbery at all to begin with. But the fundamental proposition is that the jury accepting that it was a robbery, as a matter of fact the shooting did take place in the course of that and the problem

with Question 3 is that it doesn't adequately direct the jury to the issue of whether that was actually part of the common purpose.

5 So then when the jury come on to questions 4 and (a) or (b) the jury are seeing that through the lens of just simply a temporal connection between the shooting and the robbery, as opposed to that being part of the common purpose and/or a departure from it.

WINKELMANN CJ:

10 And what about the Judge's directions on that issue about whether the gun was a departure from – taking the gun was a surprise and a departure from the common purpose?

MR OLSEN:

15 The Judge's directions in that regard were at the point of Question 4, not at the point of Question 3 and that's why we say, as the Court said in *Burke*, that the question or the issue should have been pitched before what we have as Question 3 in this case.

WINKELMANN CJ:

Well, what does he say? Because –

MR OLSEN:

20 On that point, Ma'am, he says, this is at 82: "That is that you're sure that Mr Te Hivaka agreed to assist Mr Dodds to rob Mr McIntosh. If you're not so sure, you'll go to Option B. But if you are sure, you'll go to Question 3. And this is a question you will have already answered for Mr Dodds. If you found, if you've got that far in the Question Trail to him. 'Are you sure that Mr McIntosh
25 died after being intentionally shot while Mr Te Hivaka and Mr Dodds were trying to rob?' If you're not sure you'll again go to Question B. If you are sure, you'll go to Question 4." And that's all the Judge said on the point before immediately moving on to Question 4.

MILLER J:

It must be enough, mustn't it though, in circumstances where Question 4 required that they be sure he knew a reckless or intentional killing, that's with intention to cause grievous bodily harm, was a probable consequence. I mean,
5 *Burke* is a manslaughter case, this is murder.

MR OLSEN:

Yes, I accept that Sir, but the problem –

MILLER J:

It seems to me a point without significance in this case.

10 **MR OLSEN:**

The point that we make here, Sir, is that –

MILLER J:

It's not just a temporal thing. This is about his knowledge.

MR OLSEN:

15 Yes but the jury weren't – there was his knowledge but there wasn't the focus both on whether the murder occurred in the course of the common purpose but then later what was his actual foresight of the events that did, in fact, occur and this is the confusion that we have in this case.

20 The other point here is that the Judge uniquely pressed to the jury at two points in his summing up that the jury needed to stay explicitly to the questions of the specific accused in the specific option available so as not to be influenced by prejudicial material and this arises at both paras 23 and 25 of the summing up. The first one at 23 was that: "The easiest way to ensure that you only take into
25 account evidence relevant to the defendant you are considering is to completely put to one side the question trails relating to the other two defendants."

WILLIAMS J:

That's also to do with inadmissibility, cross-admissibility of evidence, isn't it?

MILLER J:

Mhm, that's right.

MR OLSEN:

Yes. No, I accept that, Ma'am, but what the Judge is doing right at the outset
5 is saying just focus very squarely on the questions that I will give you in the
question trail and nothing else other answering those questions.

WINKELMANN CJ:

Yes, so Mr Olsen, the question that was asking you though.

MR OLSEN:

10 Sorry.

WINKELMANN CJ:

Is where does, because of course the defence was, well, this wasn't, there was
no common purpose to rob at all and the Crown case was there was a common
purpose to rob with a gun, a firearm, where does the Judge crystalise the issue
15 as to whether the firearm is not known by Mr Te Hivaka and, therefore, and the
jury has to consider whether it's outside the common purpose?

MR OLSEN:

He does that later on in the summing up when addressing the points raised by
Mr Mansfield. I'll just find that for your Honour. That's at 119, so it's after all of
20 these directions on page 181 of the – where he addresses what inferences
might be drawn from the footage around the bag. So that's after he's gone
through the question trail with the jury and it's simply addressing Mr Mansfield's
case.

1200

25 **WINKELMANN CJ:**

Well, all right, but I'm asking you about whether the Judge has put it in terms of
the elements. Okay, I understand that this is all you can point me to.

MR OLSEN:

Yes, and so far as he addresses it, it's just what we've just been going over at paragraph 83 and 84, or what you were going over with Mr Mansfield.

5 Moving from this point then to ground 3, which is whether or not for liability under section 168, section 66(2) joint enterprise felony homicide, the jury needed to be satisfied that Mr Te Hivaka foresaw death. That's the issue in ground 3, and obviously, this Court by majority in *Burke* found that for manslaughter that's not required, but the appellant here asks the Court to draw
10 a distinction between the liability for an appellant or a defendant in a manslaughter case under section 66(2) vis-à-vis a defendant in a murder case under section 66(2). The same discussion necessarily applies but some of the principles that underpin the rationale for the Court's decision in *Burke* don't follow in other jurisdictions.

15

The majority in *Burke* relied heavily on the decision of *R v Rapira* [2003] 3 NZLR 794 (CA) which I'll take the Court to. The Court considered, at least for a manslaughter case and they say this at paragraph 172 of *Burke* the majority that: "It is true that a killing is an element of the offence of manslaughter, but
20 foresight of death is not required of the principal offender and should not be required of the secondary party either." And the Court then ties it on to saying that: "This approach aligns with the Canadian approach in *R v Jackson* [and] s 168 cases ..." and that's squarely what we're asking the Court to deal with here is section 168 which the Court hasn't addressed.

25

In *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 the Court specifically left the issue open and here the Court is only dealing with it in an obiter fashion and there is a distinction between murder and manslaughter that's taken in the Canadian jurisprudence which is acknowledged in *R v Jackson* [1993] 4 SCR
30 573. Before *Jackson*, in *R v Martineau* [1990] 2 SCR 633, the Supreme Court ruled – the Supreme Court of Canada ruled relying on the Canadian Charter of Rights and Freedoms that there did need to be foresight of death but the Court in *Jackson* distinguishes that for manslaughter and obviously the majority in *Burke* relied on that distinguishing factor.

But what the Court said in *Martineau* is important, in my submission, for understanding the context of why there is a difference, and I accept that this isn't in the bundle, but if I can take the Court to that decision, that is referred to

5 in the footnotes, and this is the relevant passage which is from the majority decision that was written by the Chief Justice, Chief Justice Lamer where he said and I'm not sure how easy that is to read: "A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the

10 stigma attached to a conviction for murder, and the available penalties, a mens rea reflecting the particular nature of that crime." And they said: "The effect of section 213," which is the equivalent of our section 168, "is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility*,

15 the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally." And that's really the principle that the appellant relies on to say that there should be a distinction drawn by this Court in the interpretation of section 66(2) as to what elements of the offence must be proved in a murder

20 case as opposed to a manslaughter case.

And the Court or the majority accepts, at least implicitly, in my submission, that it is possible that the Court could reason, in the way that the Chief Justice in dissent reasoned, but considered given the way they had answered the first

25 question or the second ground of the appeal, meant that they didn't need to address the policy concerns that arose and that's at paragraph 171.

But what we say here is where a murder occurs, as here as a secondary party, a person is liable to life imprisonment sentence with the minimum period of

30 imprisonment of 10 years as Mr Te Hivaka received in this case, and that is significant and a factor that the Court should take into account on whether or not it reads down the elements of the offence in a section 66(2) murder case under section 168.

The appellant relies –

MILLER J:

Section 168 does not require that the principal appreciate that death is a likely result.

5 **MR OLSEN:**

Yes, and we would draw the distinction between what the principal is required to appreciate for mens rea under section 168 as opposed to what the party needs to understand for the physical elements of the offence.

ELLEN FRANCE J:

10 That seems a bit counter-intuitive. What's the reasoning behind that?

MR OLSEN:

The reason for that, Ma'am, is that like an attempted offence where the law defines what an attempt party needs to have, so for an attempted murder, the Crown cannot rely on a partial, or someone not dying but having one of the
15 other mens rea elements such as recklessness or felony homicide under section 168. Under section 72 of the Crimes Act 1961 for an attempted murder, for example, the intent is spelt out in that section as the intent to commit the offence that doesn't eventuate, the inchoate offence.

20 And what we say here is that drawing on that line of authorities and that line of reasoning is that in section 66(2) the party must understand that the offence charged is a probable consequence, and the offence charged must include homicide and certainly a culpable homicide. That is, as the Court acknowledges in *Burke*, an element of the offence. But the Court in *Burke* reads
25 that down because they say it would draw a distinction between the principal and the secondary party.

But we say that there is no distinction between the principal and the secondary party – sorry, we say there is a distinction and the reason we say so is that the
30 principal is the one that actually undertakes the unlawful act. They do the

unlawful act that results in the death. They, under a section 168, must mean to cause grievous bodily harm. That's their personal intention in the course of, as in this case, a robbery.

WINKELMANN CJ:

5 So, your argument is a statutory interpretation one.

MR OLSEN:

Yes.

WINKELMANN CJ:

10 That a person has to foresee the offence charged. An element of the section 168 offence is a culpable homicide.

MR OLSEN:

Yes.

WINKELMANN CJ:

Which includes the killing of someone.

15 **MR OLSEN:**

Yes.

WINKELMANN CJ:

20 And it's just a simple statutory interpretation and that was what might have been said in *Burke*, but what about – why is there a distinction between murder and manslaughter in that statutory interpretation argument? Is it what the Chief Justice Lamer said, if that's how you say...

MR OLSEN:

I'm not sure, Ma'am, how you pronounce his name.

WINKELMANN CJ:

25 I'm not either. Is that because when it's to do with most significant, you take a more rights-consistent reading, or?

MR OLSEN:

Yes, we would say that what the Court is effectively doing is reading down what an offence is required for section 66(2) by not requiring it to include foresight of possible death.

5

It's already, the provision is, or liability under section 66(2), I accept it's there statutorily and England has removed it through the common law in *Regina v Jogee* [2016] UKSC 8, [2017] AC 387 and Canada has removed it through the Canadian Charter of Rights and Freedoms, but, section 66(2) is there but the bulwark of the defence for the accused is that they must foresee the offence that actually occurs. And if we remove the aspect of death resulting, then really all we're asking the accused to foresee is the possibility of death occurring as opposed – or the possibility of a inchoate offence is the possibility of foreseeing the actual offence, which is death.

10

15

And it may in practice be potentially a distinction without a difference, because a jury may readily move from finding that they accepted there was a probable consequence that death would occur and they accept it is a probable consequence that the offender means to cause grievous bodily harm. But the point is there will be cases where the two may not coalesce together and the accused facing the most serious charge on the criminal calendar shouldn't be subjected to a less-significant interpretation. The most generous interpretation should be given.

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Yes, if Parliament removes for the principal foresight of death, but that is not to say that Parliament was seeking to amend section 66(2) so as to edit it also for the party, we say that section 168, the caveat of not foreseeing death for the principal follows through in the mens rea element, because for the mens rea component of a section 168, or a section 168, section 66(2), all you would need to establish is that the offender, the secondary party, saw it as a reasonable probability or probable consequence that the principal would mean to commit grievous bodily harm in the course of the robbery. In that way, you're not asking

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the secondary party to foresee death as it occurs in section 167(b) reckless killing where you need to foresee –

WILLIAMS J:

If principal would?

5 **MR OLSEN:**

Sorry, Sir?

WILLIAMS J:

Give me the rest of that sentence? That the principal would?

WINKELMANN CJ:

10 That does not mean that the principal would – what?

MR OLSEN:

Yes, so the section 168 does follow through in the mens rea for, because the principal –

WILLIAMS J:

15 No, I just want you to finish the sentence, because I wasn't typing fast enough.

MR OLSEN:

Sorry. The principal, the secondary party knew it was a probable consequence that the principal "means to cause grievous bodily [harm]" in the course of a robbery, which is the statutory wording of section 168, the Crown doesn't need
20 to prove, consistent with section 168, that the secondary party foresaw or saw it as a probable consequence that the principal would foresee death. That's obviously a requirement of a reckless homicide, that the principal foresees the possibility of death and runs the risk anyway, but that is explicitly not following through for the principal in section 168.

25

But we say the Court can delineate the mens rea component from the actus rea because, yes, there is an unlawful act which would in this case be the shooting

and but the condition of murder as the actus reus is also the result and we say that you must see as a probable consequence the result of death.

WILLIAMS J:

Yes, you need a death.

5 **MR OLSEN:**

Yes.

WILLIAMS J:

There is no doubt about that, but wouldn't that also be the death knell of *Burke*?

MR OLSEN:

10 It would potentially mean that the Court would revisit its reasoning in *Burke*.

WILLIAMS J:

That wasn't that long ago.

MR OLSEN:

I appreciate that, Sir, but the Canadian jurisprudence in the case of *Jackson*
 15 does draw a distinction so the Court and I accept that we don't have the section 7 of the charter that Canada does, which allowed the Court to reason that these provisions were unconstitutional and read in these extra mens rea requirements, I accept that, but the Court in Canada was willing to find a differentiation between a manslaughter and a murder and this Court could do
 20 so as well, because while it's not as academically as attractive as it might be, it does fall, in my submission, to be decided on what punishment follows. In a manslaughter case, the Judge has the ability to fix a sentence proportionate to the crime, whereas in a murder case the law says you can only fix life imprisonment unless it would be manifestly unjust to do so and we don't see in
 25 a case, for example, like this, a section 66(2) case, where that exemption is being used and so –

WILLIAMS J:

Perhaps that's where your guns should be aimed. Sorry, bad analogy.

MR OLSEN:

Yes and maybe that is the case, but why should someone be subject to the
 5 most serious conviction and simply say, well, all I do then is pray in aid of a
 more favourable sentence outcome, when really the law should, we ask the law
 to uphold what the actual wording of section 66(2) is which is to see "a probable
 consequence" of a death occurring as part of the actus reus and that's
 already a –

10 **MILLER J:**

It's a probable consequence of the offence, is it not?

MR OLSEN:

Yes.

MILLER J:

15 Yes and the offence, in this case, is simply one of intentionally causing grievous
 bodily harm for the purpose of a robbery. Death must result, as a matter of fact.

MR OLSEN:

In death, but when we're looking at a secondary party, they're not the person
 pulling the trigger, they're not causing the unlawful act. In a case of
 20 section 66(2) liability, unlike section 66(1), the secondary party –

MILLER J:

No, I understand that.

MR OLSEN:

Yes.

25 **MILLER J:**

But it seems to me the legislature has established the policy, what you call
 felony murder, presumably for good reason. This kind of group attack, one

person commits the offence but they're all party to it. Why should they not be equally liable? It seems to be the question that section 168 answers and section 66(2).

MR OLSEN:

- 5 In my respectful submission, Parliament would have needed to go further and say that they specifically say that death is not foreseeable as the actus reus under – or culpable homicide is not, doesn't need to be foreseen for the secondary party. That section is confined, the exception in section 168, is confined only to section 168. It doesn't seek to expand its definition on to the
- 10 definition of homicide or culpable homicide in a section 168 case. It is simply confined to that explanation of the mens rea for murder in that circumstance and in our submission Parliament would need to use very clear words to oust what is found in section 66(2).
- 15 Otherwise, if we did that the same approach in an attempted murder case, for example, we would be asking or the Crown would effectively be saying, well, we should read down what is said in section 72 of an attempt.

WINKELMANN CJ:

- Well, your difficulty is that Justice Glazebrook and I both said the plain wording
- 20 of section 66(2) is "offence" and the offence is culpable homicide and for a secondary, and that includes death. But the majority rejected that argument and really you're, really as Justice Williams says, trying get us to revert, to revisit it.

MR OLSEN:

- 25 Not –

WINKELMANN CJ:

Although you say we could, on the basis of *Martineau*, draw a distinction between murder and manslaughter?

MR OLSEN:

Yes, that comes through in the *Jackson* case where – *Jackson* was subsequent to *Martineau*, where the Supreme Court wasn't willing to hold that principle over to manslaughter and the Court in *Burke* relied heavily on that, as well as the

5 *Rapira* decision, and I accept there is difficulty in trying to make a distinction between murder and manslaughter when both effectively come from the same actus reus, but the courts overseas have been willing to do so and it's available to the Court here to do so as well, as it is simply a matter of statutory interpretation to hold that as the Court interprets section 66(2) for a murder

10 offence, they would interpret it slightly differently.

The developments we've had since the *Rapira* decision is that Parliament, and I accept that this development was available in *Burke*, your Honour Chief Justice refers to it, is that Parliament have removed the definition of

15 offence, which probably doesn't take us too far, but in the Crimes Act at the point of *Rapira* it defined what an offence was and the then Chief Justice writing for the Court of Appeal relied on that definition as part of upholding the line of authorities that her Honour did, focusing on the act as opposed to what results from the offence.

20

But the equal line of authorities to the opposite effect is what his Honour Justice Cooke was saying in *R v Tomkins* [1985] 2 NZLR 253 (CA), which was that – and he had the same definition of offence there: "... we think the act constituting the offence for the purposes of s 66 is rightly to be seen, simply and broadly,

25 as culpable homicide." And so this Court hasn't had to confront, and I accept that *Burke* is a sidewind, that it does address by sidewind section 168, but this Court hasn't confronted section 168 and section 66(2)'s intersection before.

And in *Edmonds*, Justice William Young, writing for the Court unanimously,

30 said, and this is at paragraph 27 of the decision, I'll take the Court there, on 94 of the bundle, it says that – and this is what my learned friends point to, but they leave out the last sentence which in my respectful submission is important. Starting here it says: "It certainly is where the principal has been found guilty of murder under s 168 but the practice in other culpable homicide cases has been

to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose. As we have said, it is arguable whether this is correct, but it is unnecessary for us to address this further in these reasons.”

5 **WINKELMANN CJ:**

What is the footnote? What is he footnoting there, Mr Olsen?

MR OLSEN:

There he footnotes, the footnote is 27, he refers to *Rapira, R v Curtis* [1988] 1 NZLR 734 (CA) which was a Court of Appeal decision in this jurisdiction,
 10 *R v Barlow* (1997) 188 CLR 1 in the High Court of Australia, and *Jackson* in the Supreme Court of Canada, and *Jackson* is the manslaughter case on which the majority in *Burke* places some reliance.

COOKE J:

Just to understand where this takes us in this case –
 15 1220

MR OLSEN:

Yes, so where this takes us in this case, Sir, is the jury were presented, and this is really then coming onto my fourth ground, with a reasonably complex, or it was tried – I can appreciate that the learned Judge who is an experienced
 20 High Court judge was trying to make things as simple as possible for the jury, but each defendant had three pathways to murder and in this pathway, for example, which is the section 66(2) pathway, the Judge gives at paragraph 4 two alternative paths the jury could take to finding section 66(2) proved, either the reckless killing, and then at note 1 it asks them to refer to paragraph 3 of
 25 Option C, or they say “the intentional infliction of grievous bodily injury on Mr McIntosh for the purpose of committing the offence of robbery”.

And so the jury had – well the jury were available under either option to decide the case. And so, while the Judge found in sentencing that the jury must have
 30 decided it on a section 66(2) reckless killing, it was still available to the jury, or

at least some of the jurors, to have found that on the basis of a section 66(2), section 168 homicide, felony murder and –

COOKE J:

But how do you say that should have been changed? Should it have been the intentional infliction of grievous bodily injury causing death, or do you just delete (b)?

MR OLSEN:

Yes, I mean, it should –

WINKELMANN CJ:

He would've had to – are you saying he failed to direct the requirement of knowledge that death was a likely result?

MR OLSEN:

Or he saw death as a probable consequence.

WINKELMANN CJ:

Yes.

MR OLSEN:

And I think it falls under both elements because the foreseeability of death is part of the actus reus, so it arises whether it is a section 167(b) reckless killing or a section 168 felony homicide. But it would have been more advantageous if the Judge actually set both questions out in full in the single question trail rather than jumping the jury around. I would have suggested it read: "Are you sure that Mr Te Hivaka knew that it was a probable consequence of carrying out the agreement to rob?" I would have that bottom bit up top and then that death, yes, that death was a probable consequence and –

WINKELMANN CJ:

Is it killing?

MR OLSEN:

Or killing, it could be killing.

WINKELMANN CJ:

Oh, hang on, no, so the intentional – so it's (b) though that you have a problem
5 with?

MR OLSEN:

Yes.

COOKE J:

It's just do you add "causing death".

10 **WILLIAMS J:**

It's the section 168.

COOKE J:

You just add that in?

MR OLSEN:

15 Yes, we would add that in beforehand, yes.

WINKELMANN CJ:

That's what you're saying, I think?

MR OLSEN:

Yes.

20 **COOKE J:**

After the words: "Grievous bodily injury causing death."

MR OLSEN:

Yes. As I say, and my learned friend for the Crown may probably make this
point, that it may seem as potentially a distinction without a difference, but when
25 we are convicting someone as a secondary party under a common purpose of

murder, we should be careful to ensure that they are actually being convicted at the right standard and with full knowledge of the offence with which they were meant to have a probable – know as a probable consequence of their common plan.

5 **MILLER J:**

It is a non-issue in this case though, isn't it, because there was only one way in which this offence was going to be carried out on the Crown theory using the gun, that's why knowledge of it mattered and if he knew that Mr Dodds was going to shoot in the knowledge of death, sufficient risk of death is there, isn't it?

MR OLSEN:

Potentially. It may fall to where the shot was fired. If he knew that Mr Dodds was to shoot him in the foot, he may not foresee –

WINKELMANN CJ:

15 But hang on, there's no suggestion that he knew that he was going to shoot him, so what are we –

MR OLSEN:

I know, but I'm just responding to the question from the Court, is that you can have the two questions in there. It's not –

20 **MILLER J:**

It's not realistic in this case, is what I'm suggesting to you.

COOKE J:

Because there is no other grievous bodily harm in issue.

MR OLSEN:

25 In issue, yes.

MILLER J:

True.

COOKE J:

But you're trying to develop a –

MILLER J:

5 It's grievous bodily harm involving a shooting with a rifle, which would seem to carry with it sufficient risk of death.

MR OLSEN:

Yes. But we're saying that the jury should have to also be satisfied that he saw death as a probable – or killing as a probable consequence as a requirement to establish the offence of murder.

10 **WINKELMANN CJ:**

So what was the Crown case on section 168 then? Did they say that they went there planning to shoot him?

MR OLSEN:

15 Not that I can recall from reading the casebook. Mr Mansfield tells me no, so I don't –

WINKELMANN CJ:

So, what was the intentional infliction?

MR OLSEN:

20 There was no evidence that Mr Dodds meant to cause grievous bodily harm in the course of the robbery.

WINKELMANN CJ:

Probable consequences, right.

MR OLSEN:

There wasn't evidence of that. But nonetheless –

25 **COOKE J:**

But it's something that may well happen?

MR OLSEN:

Yes. Well certainly that was given as an option to the jury and so because it was available to them, it was important that they were correctly directed on it.

COOKE J:

- 5 You're, it may not be of much significance in this particular case, but you're saying as a matter of principle this Court should –

MR OLSEN:

Yes.

COOKE J:

- 10 – adjust the law to reflect the difference between manslaughter and murder in a party case?

MR OLSEN:

- Yes and in this case the Court has – in the other cases the Court has seen on a section 66(2) basis, of us and *Edmonds* and *Burke*, the Court hasn't needed
15 to address section 168. The Court has that opportunity to do so here and even if the Court, well, the Court should address that issue here even if it doesn't strictly speaking arise on the facts as we know they fell at the trial. It was certainly put to the jury and it shouldn't be left just simply as that that is an appropriate course and that –

- 20 **WINKELMANN CJ:**

Well, is your point that we can't be sure that the – which basis, because a judge said, look, you can get, some of you, can get all the way on one path and the others can get all the way on another path, so we couldn't confidently say what basis on which your client was convicted.

- 25 **MR OLSEN:**

Yes, I mean, this ground hinges on the Court rejecting the earlier two grounds that Mr Mansfield has argued. So if the Court gets to that point, our submission

is that this was an available option that some of the jurors could have taken as a pathway. Whether they, in fact, did we just don't know.

WILLIAMS J:

But the problem with that is that if Mr Mansfield hasn't got through on his,
5 particularly his second ground, it's probably not going to help you, as Justice Miller suggested to you, because there's a gun.

MR OLSEN:

Yes. But there is, if we don't succeed there, then yes potentially there is a gun, or there is at least the inference of a gun if the Court accepts that inference is
10 available to the jury, but the question in the question trail on this particular issue should have been correct in law and that should have included reference to a requirement that he foresee death as a probable consequence, as well as he foresaw that Mr Dodds would mean to inflict grievous bodily harm in the course of committing the robbery, or effectively for the purpose of committing the
15 robbery is probably a better way to put it, because we know that it was, in fact, in the course of the robbery temporally, but the entire point of this is that it must be for the purpose of the robbery itself.

COOKE J:

So if you persuaded us on the law.

20 **MR OLSEN:**

Yes.

COOKE J:

We'd have to then consider whether adding the words causing death in Question 4(b) would have made any difference in this case.

25 **MR OLSEN:**

Yes and we just simply don't know how the jury have arrived at that verdict and if the Court has not accepted Mr Mansfield's grounds on one and two, the evidence is still very tenuous about Mr Te Hivaka's knowledge of a firearm and

on that basis, and the jury not being properly directed on this point, there was the reasonable possibility that had they been directed on this point they might have returned a different verdict.

- 5 The fourth ground which I can deal with reasonably swiftly really relates to how, regardless of my argument on Question 4, it relates to how Question 4(b) is framed and the issue here is simply the focus in section 168, or the “offence” in section 168 is there because Mr Dodds would mean to cause grievous bodily harm in the course of the robbery and so the probable consequence that
- 10 Mr Te Hivaka had to know was that that was a probable consequence and the way that this question reads and there was no elaboration on the question by the Judge, it is simply just recorded as part of his general directions on Question 4, may leave the jury misunderstanding what the purpose of this question was, which is that this pathway under section 66(2) requires that
- 15 Mr Te Hivaka had to know it was a probable consequence that Mr Dodds would mean to cause grievous bodily harm.

It's not just there is a possibility of a shooting but that he actually mean to cause it as part of the robbery and that specific wording tying it to the principal,

20 because there is no – this isn't tied to the principal in the way that the question trail or the Judge's directions read, is required in the case law that goes against me on my point 3 and those cases include *R v Hardiman* [1995] 2 NZLR 650 (CA) and *R v Tuhoro* [1998] 3 NZLR 568 (CA) where the Court says that, and this is page 245 of the bundle, here this is the *Tuhoro* decision of the Court of

25 Appeal referring to its earlier decision in *Hardiman* and the Court says, just down here at line 45: “In passing we note that in referring to the accused knowing that the principal offender was going to inflict grievous bodily harm, the Court must have been using the shorthand for knowing it was probable that such injury would be caused.”

30 1230

But the point is that the infliction and the intention to do so is clearly linked to the principal offender and what we see when the Judge goes on to the later question trails is that he does, in fact, link it when he addresses Option B. He

says at Question 3 Mr Te Hivaka knew that Mr Dodds intended to cause Mr McIntosh grievous bodily harm and the absence of explanation and the way the question is worded could lead the jury to be satisfied, on the basis of a lower threshold, just of the intentional discharge of a firearm causing grievous bodily harm, as opposed to Mr Dodds knowing that he was going to do so as part of a robbery and that's really the concern that arises in ground 4 which relates to the 4(b) question.

COOKE J:

But in the questions they were asked, it is still an intentional infliction of grievous bodily injury, the probable consequence of carrying out the agreement to rob.

MR OLSEN:

Yes. I think the difficulty here is just there's not as much linkage between the facts and the law on that particular proposition. The two are bundled together by the Judge. I acknowledge, as Mr Mansfield does, that at this point the Judge is talking about the firearm in his directions, but for that to be a foreseeable or a probable consequence, Mr Te Hivaka would have had to know that there was a gun and know that it was loaded and know that it was a possibility that it would, in fact, be used by Mr Dodds in the course of their robbery, or their plan to rob, which is a lot higher threshold than the passage they would need for just a reckless killing. And what we have here is a poorly worded, in my respectful submission, question by the Judge to the jury and with the absence of any linkage between the facts and the legal issue that the jury were to decide. This is an entire basis to convict someone of murder which has very limited explanation in the course of the question trial.

25

In *Ahsin* this Court said that, and this is 162 of *Ahsin* on 49 that: "In cases where the same law is applicable to multiple defendants, it may be appropriate to give a detailed explanation of the law that applies to all before turning to the case against each defendant. It is still, however, necessary to discuss how the law applies to each individual case, making it clear to the jury how the law relates to the particular evidence against each defendant." And in here I would say, because the Judge was addressing two separate routes to murder, quite

30

distinct and different routes, the Judge needed to assemble that evidence that would help the jury decide each of those routes and link it to the legal elements a bit more than what his Honour did and that's really the nub of the fourth ground.

5

Those were the points I wanted to make. I've probably gone a bit over my time estimate but unless I can assist the Court further.

WINKELMANN CJ:

Thank you, Mr Olsen.

10 **MR OLSEN:**

Thank you, Ma'am.

MS LARACY:

May it please the Court. If I could just start by acknowledging the presence in the courtroom of Mr Benjamin McIntosh's father and his stepmother and her partner and there are also family members who I understand are attending online.

Very briefly, two small corrections in our submissions. One is one the Court won't be confused by at all but it's the use of the word "inflection" instead of the word "infliction" which sort of suggests we dictated them using kiwi accents but that's not the case, it was just a typo, but that appears a number of times. And then another one I'll just point out to you is footnote 31, there's a mistake where I'm talking about a piece of CCTV footage. I don't think we need to spend too much time on this footnote but in the footnote I say that it's Mr – you can see Mr Dodds and Ms Dodds briefly going to the car, this is in the morning between 5.18 and 6.15 am. In fact, it's Mr Te Hivaka and Ms Dodds that can be seen in that photo. They don't go into the car but that apparently was an error that my learned friend has –

WINKELMANN CJ:

30 Sorry, where was that?

MS LARACY:

That's at footnote 31. So my learned friend, and I'm taking her better knowledge of the evidence at face value on this, has identified in this part of the submissions that we have a mistake. It's Mr Te Hivaka and Ms Dodds that can
5 be seen in that bit of the footage going out to the car.

WILLIAMS J:

That's the small hours of the 3rd, is it?

MS LARACY:

Yes. It's between 5.18 and 6.15. It's at 5.23 and she advises me you can tell
10 it's Mr Te Hivaka, not Mr Dodds, because he's wearing the same clothes seen elsewhere in the CCTV, shorts and a jacket, you can also see his hair. So I don't think anything turns on that but just to be accurate.

WINKELMANN CJ:

So is it somewhere else narrated in this way that then showed Mr Dodds and
15 Mr Te Hivaka leaving at 6.15 am?

MS LARACY:

The CCTV then, yes –

WINKELMANN CJ:

I mean, between this, so –

20 **MS LARACY:**

– shows Mr Dodds and Mr Te Hivaka leaving the Hillsborough address at 6.15 am.

WINKELMANN CJ:

And that's correct?

25 **MS LARACY:**

That is correct.

WINKELMANN CJ:

But footnote 31 is wrong?

MS LARACY:

Footnote 31, to the extent it refers to two key bits of CCTV evidence at the
 5 house prior to them leaving, we said in the footnote it's Mr Dodds and his mother
 Ms Dodds briefly going to the car. That's a mistake. It's Mr Te Hivaka and
 Ms Dodds.

If I can start with the Crown's case. The Crown's case, from the outset here,
 10 was that there was a plan to rob and that plan did involve the use of a gun to
 threaten, as is required by robbery, and that both men knew about the gun and
 that was the plan. It was a plan to rob and the threat element as a matter of
 evidence was proved on the Crown case by both men having knowledge of the
 gun as a matter of evidence but the scope of the plan, as consistently put by
 15 the Crown and the Judge in the summing up at numerous points, was that there
 was a plan to rob.

And the Crown case in the opening, of course, is a light coverage of what the
 jury are going to hear in the evidence and the essential elements of the Crown
 20 case and at that point, of course, the defence hadn't opened and neither men
 had given evidence. The Crown case was that because of the time they had
 spent together and pieces of circumstantial evidence that the jury were going
 to hear, the context of this careful plan and the time together prior to the
 shooting, meant that Mr Te Hivaka must have known about the gun because it
 25 was in the car with them and being carried around for hours prior to going to
 the park.

Now, the Crown, of course, would be wrong to be bound by what it says in its
 opening once the Crown has heard the defence case. It must develop it. There
 30 is no criticism of the Crown when it develops evidential points based on the
 evidence that it and the jury has heard. And the Crown adapted what it
 considered to be, it would seem, the more likely theory of the case as to how
 Mr Te Hivaka knew about the gun based on putting to the jury, well, you have

heard Mr Dodds say very clearly I'm the only one who knew about the gun, it was a complete surprise, Mr Te Hivaka my close mate, who I'd spent all this time with, had no knowledge of the gun at all, I carried the gun to the car.

1240

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So, it was open to the jury, regardless of the way the Crown submitted to them about what the better view of that evidence was and regardless of the Judge's view about the facts, to find, if it accepted certain pieces of the circumstantial evidence to a certain threshold, that Mr Te Hivaka knew about the gun because it had been with them for hours in the lead-up to getting to and leaving the Hillsborough house and then in the car with them from the Hillsborough house to the park. Remembering, that was an hour and a half in the car immediately before the shooting, just the two men, with the gun. That's from 6.15 until 7.45 when the shooting happens.

15

So it was open to the jury to consider all the evidence and find on either basis, regardless of what the Crown tendered by the end to suggest was the better theory, or what the Judge's facts was, that Mr Te Hivaka knew about the gun and, of course, knowledge of the gun, as I have emphasised in my written submissions, with respect to this first element that needs to be proven which is a criminal plan in which they agree, knowledge of the gun wasn't an element of that as put.

20

25

The Crown, as this Court has reinforced in *Edmonds* and more recently in *longi*, it is for the Crown to frame the scope of the plan. But if the plan is framed in fairly generic or spartan terms, the Crown may have to do more when it comes to the second key element in proving to the jury beyond reasonable doubt that what, in fact, happened was contemplated, in terms of the offence that happened, was within contemplation of the defendant. That it occurred within the course of that plan and that it was recognised by the party to be a probable consequence, subjectively recognised. Not on an objective must have known, but subjectively recognised to be within the scope of the plan.

30

WINKELMANN CJ:

But the Crown here did put, it was, the Crown's case was that the plan was to take the gun.

MS LARACY:

- 5 The Crown, yes, the Crown's case was that there was going to be a robbery which is a taking by violence or threats of violence and just to remind the Court that pitching the plan at the level of robbery is perfectly acceptable. Indeed, it's consistent with the specific offence that section 168 identifies.

WINKELMANN CJ:

- 10 I don't know why you're spending so much time on this, because I thought it was quite clear, but I might be wrong about this, that the Crown's case was that the plan was to rob him using a gun?

MS LARACY:

- 15 That's right. But the question is, was the gun pitched by the Crown essentially as an element that needed to be proved as part of the plan? No. But if it wasn't proved as part of the plan, that wasn't going to save the Crown. It needed to be proved then that Mr Te Hivaka knew a shooting could well happen as part of the plan. In this case, it really, it almost doesn't matter, because the two, it's one pretty confined course of events.

20

- The Crown case was that this isn't a situation where Mr Te Hivaka might have been surprised at the last minute and seen Mr Dodds pull out a gun at the Harold Moody Park and that's the first he knew of it. Instead, for hours, at least back to the Hillsborough house, on the Crown's case even earlier, they planned
- 25 a robbery with a gun and so the gun either can come in, if the Crown framed it this way, as an essential part of the plan to rob and we say the Crown did put it that way, but the presence of the gun was a matter of evidential significance, but in that case legally what has to be proven is that beyond reasonable doubt the presentation of a loaded firearm at Harold Moody Park by one of the men,
- 30 in this case Mr Dodds has admitted it was him, was recognised as being exactly the sort of thing that Mr Te Hivaka knew could well happen.

WINKELMANN CJ:

Well, that sounds quite complicated, Ms Laracy, and I still don't understand why it's so complicated when it seemed to me, when I read the documents, the Crown was pitching that this was a robbery with a gun and that was the plan.

5 **MS LARACY:**

The Crown did and I can take the Court to that. The point is that if the Crown said and if the Judge directed, based on the Crown's framing of the case, that the Crown says to you that this was a plan to rob with a gun and the Crown says to you that all of that plan it can prove beyond reasonable doubt, then if it
10 had been framed like that then the directions it might not have made a difference in terms of miscarriage but you would expect, as my learned friends say, that if it gets incorporated that way into the plan then it might almost seem to be a legal requirement. But my point is to be very –

WILLIAMS J:

15 Are you talking about the kind of robbery this was pitched as in legal terms?

MS LARACY:

Yes.

WILLIAMS J:

In the multiple classes of robbery this wasn't a gun robbery, it was a
20 multiple-robber robbery with the gun being evidential.

MS LARACY:

It was a multiple-robber robbery with a gun, they were armed with a gun. But the point is that the criticism that has been made is of the question trail, and this argument that I am making goes to the validity of the way the question trail has
25 been framed. The question trail says, was there a plan as defined by the Crown and that plan was a plan to rob? The second key part of the question trail is, as part of that plan are you satisfied beyond reasonable doubt that Mr Te Hivaka knew that in the course of carrying out that plan a shooting could well happen? And that's where specifically, and as a matter of legal

requirements, the knowledge of the gun comes in and must be proven beyond reasonable doubt.

5 But evidentially, in this case, the jury must have been satisfied also, in the context of being satisfied that there was a plan to rob, they must have also been satisfied that that was a plan with a gun, because that's the only way it was ever put. It was never put that there was a plan to go and rob with fists or with no weapon at all.

10 So, it's a matter of distinguishing between what as a matter of law needs to be in the question trail, which in this case the Judge has made, in my submission, a very judicious judgment that what goes into the question trail is just what we call the legal facts, the pure legal elements, and the evidence is dealt with in the directions in the summing up. They both have to be read together and the
15 sufficiency of the directions requires an assessment of the two of them read together, but I don't accept that the question trail was defective for not requiring the Crown to prove at Question 2, which is the plan, that the jury must be satisfied beyond reasonable doubt that he had knowledge of a gun.

20 As a matter of evidence that was going to be required, but it wasn't necessary as a matter of law, however, if it's not there as a matter of law it does need to come in later on, and that's where my submission that questions 3 and 4 which talk about the jury needing to be satisfied beyond reasonable doubt that there was an intentional shooting, that's Question 3, and Question 4, an intentional
25 infliction of grievous bodily injury. Those questions, which are pitched at the legal element level, they would require the jury to be satisfied beyond reasonable doubt that an intentional shooting occurred and of course that means they must be satisfied that there was a gun.

30 So it's the –

MILLER J:

They must be sure that there was a gun.

MS LARACY:

Sorry, your Honour?

MILLER J:

They must be sure that there was a gun.

5 **MS LARACY:**

Must be sure. Must be sure, must be sure to the beyond reasonable doubt standard and that's where –

WINKELMANN CJ:

10 Sure that the plan was that there was a gun, because unless it's part of the plan it's outside the plan and it doesn't meet the requirements of section 66(2), does it?
1250

MS LARACY:

15 That's right. So the plan is – that's right, that's the risk for the Crown. If it just said there's a plan to rob, then it's going to have to do the work of proving that it was within the scope of that plan that there could well be a shooting under the probable consequences limb. The alternative, which could have happened, is for the Crown to put the – to frame a more extended plan that essentially as a critical factual element in the way it articulated the plan required, beyond
20 reasonable doubt, knowledge of a gun.

WINKELMANN CJ:

It seems to me the Crown did put it as a plan to take the gun. The risk of not putting it in there is that the jury gets confused as to whether they need, because it is a legal element, that it has to be something that could reasonably
25 be foreseen as arising as a consequence of the plan.

MS LARACY:

So, what needs to be foreseen as a probable consequence is the words in section – we're talking about section 168 here obviously, is the words in

section 168 which is the intentional infliction of “grievous bodily injury” and in this case, the way the Judge dealt with that was by referring in questions 3 and 4 to an intentional shooting.

COOKE J:

- 5 They didn’t use that in Question 4 though. It might have been better if Question 4 had used – Question 3 talks about “intentional shot”. If Question 4 had referred to shooting, that would have been preferable, wouldn’t it?

MS LARACY:

- 10 So, Question 3 refers to, and as this case was presented and remembering that by the time the jury is looking at Mr Te Hivaka’s question trail the Judge has already gone through Mr Dodds’ question trail which is mutatis mutandis identical, so Question 3 has – Question 3, it has an intentional: “... after being intentionally shot ...” so that captures the mens rea of the shooter. This has to be an intentional and that goes to the jury must acquit if there wasn’t an intentional shooting here, and that goes to the heart of Mr Dodds’ case.

- 20 His case is that I went there, knew about the gun, I took the gun, I wasn’t going to rob, but I took the gun and there was an accidental shooting. I went to great lengths to make sure the gun was empty. It was really just to wave it around and give him a fright. So, the jury here, if they find that there’s an intentional shooting that’s consistent with the Crown case, and of course they have to find each of these things beyond reasonable doubt, so the intentionality of the shooter is the mens rea captured there.

- 25 And then in Question 4, building on that: “If Yes, go to Question 4. Are you sure that Mr Te Hivaka knew,” I will just leave the “either” aside at the moment, “(b) that the intentional infliction of grievous bodily injury,” that is, the intentional shooting by the shooter, “on Mr McIntosh for the purpose of committing the offence of robbery,” again, that’s how the Crown framed it, just robbery, albeit
30 evidentially with a gun, “were probable consequences of carrying out the agreement to rob Mr McIntosh?”

My submission, Sir, is that no doubt there are other ways of wording this, but legally, my submission is that this is unimpeachable and to the extent it can be improved upon, it has to be remembered that there were three defendants. These cases are inherently complicated to sum up on. This Court and other
5 courts have, as well as recognising those complexities, have encouraged trial judges as much as possible to keep it as simple as possible and it is my submission this is accurate and adequate.

WINKELMANN CJ:

So, the issue that I think arises on one of the grounds of the appeal is whether
10 the Judge adequately directed that they had to be sure that Mr Te Hivaka knew that there was a weapon.

MS LARACY:

Yes.

WINKELMANN CJ:

15 And you accept that the jury should have been directed that they had to be satisfied that Mr Te Hivaka knew that there was a weapon?

MS LARACY:

Yes, and specifically where that comes in on this case –

WINKELMANN CJ:

20 You say doesn't matter?

MS LARACY:

I say it doesn't matter, in that it could have been done differently, it could have been pitched quite differently, but in the end the Crown case required knowledge of a weapon both at the plan stage as a matter of evidence and
25 legally it required it here. But that's right and so there's the words in –

WINKELMANN CJ:

Can I just ask.

MS LARACY:

Yes.

WINKELMANN CJ:

Have your submissions really been addressing Mr Olsen's point that it came
5 too late, that it should have been up the top?

MS LARACY:

I'm about to get there briefly, your Honour.

WINKELMANN CJ:

Okay.

10 **MS LARACY:**

My submission really is that on the adequacy of the directions, of course we
need to look at the summing up and the question trail together. Justice France
has, in my submission, rightly focused on the need to read the language of
paragraph 83 of the summing up with paragraph 84. Of course, the way it's
15 written, they're two separate things, there's paragraph 83 and paragraph 84.
The way the jury would have heard it is, this is what you need to know, when
you are looking at this bit of the question trail you cannot move on beyond
Question 3 to Question 4 unless you're satisfied that there was an intentional
shooting and that means, in this case, an intentional shooting by Mr Dodds.

20

Now, all of that evidential direction is put, in this case, in the summing up. There
is nothing to do with the evidence, almost at all, in the question trail. In my
submission, that's because the Judge, quite rightly, decided question trails are
increasingly, in complex cases, just for the legal elements.

25 **WINKELMANN CJ:**

Well, that's a development backwards, isn't it?

MS LARACY:

Well, not really.

MILLER J:

It's very difficult to sum up purely on the facts in a complicated case like this.

MS LARACY:

Yes.

5 **MILLER J:**

And I think the Court of Appeal has long said fact-based question trails are desirable, just isn't always feasible.

MS LARACY:

10 And then it also means that what everyone says about the evidence, the Judge and both counsel, is dealt with in the oral directions and the oral directions feed into the legal elements. But the facts and the evidence are in the summing up and they are for the, they are very much, for the Judge to make what they will of.

15 But so my point is that there is that language, particularly in paragraph 84 of that you must be sure you move on, but of course, working through this, which is what the jury had when they retired, the jury can't move on from Question 2 to Question 3 unless they are sure that the agreement as expressed has been proven beyond reasonable doubt. From Question 3, they can't move on, in the express terms of this question trail, to Question 4 unless they are sure.

20

25 So, the conditionality, to the extent that that's the language that's been used to describe the Judge's directions in paragraph 83, is partly the conditionality of talking about evidence and what it might mean for the legal elements but it also has to be seen in light of paragraph 84 and then the accurate and repeated emphasis in this on the logical steps of being certain beyond reasonable – being sure beyond reasonable doubt before the jury moves on to the next legal issue.

And the only other thing, because I'm very conscious time is running tight, I just –

WINKELMANN CJ:

Well, look, you, I mean, you've had a very short time. We're not going to be finished at lunchtime, Ms Laracy.

MS LARACY:

- 5 I appreciate that, Ma'am. But just while we're looking at the question trail, there was a reference by my learned friend that, I think I understood his point, it wasn't a major point but it was a point he made, that Question 4(a) essentially needed to be developed and I just want to point the Court, so that's that a reckless killing of, that Mr Te Hivaka knew that the reckless killing of Mr McIntosh might occur
- 10 and, as I understood it, the concern there was that there wasn't a focus on an intentional shooting, but if I just draw the Court's attention to note 1 which says if you are looking at that, you need to go and look at the definition of reckless killing in paragraph 3 of Option C and we turn over to Option C on page 201 and paragraph 3 there deals with the legal requirements correctly again in terms
- 15 of being a section 66(2) party to a section 167(b) murder: "Are you sure that, when Mr Te Hivaka assisted or encouraged Mr Dodds to shoot Mr McIntosh, Mr Te Hivaka knew that Mr" – sorry, when he did that – "Mr Te Hivaka knew that Mr Dodds: (i) intended to cause Mr McIntosh bodily injury; AND (ii) Mr Dodds [as the shooter] (ie, actually appreciated) that the bodily injury could
- 20 cause Mr McIntosh's death;"

So my submissions, the focus as it has largely been presented is on section 168 and I'll come back to that.

- 25 I'll come back to that after the break, is that a convenient place to end?

WINKELMANN CJ:

Yes, thanks, Ms Laracy.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Ms Laracy.

5 **MS LARACY:**

Thank you, Ma'am. I can assure the Court I will endeavour to be as speedy as I can while –

WILLIAMS J:

As we let you.

10 **WINKELMANN CJ:**

You be as speedy as you can but don't feel rushed.

MS LARACY:

Thank you. I propose to cover four topics: one, some comments briefly on the topic of how the gun got into the car; two, the sequencing of the direction relating to knowledge of the gun; three, the sufficiency of evidence going to knowledge of the gun and, in the context of that, commenting on the role of the bag as a matter of evidence; and four, deal with section 168 and any questions the Court has about those matters.

WINKELMANN CJ:

20 We've already covered quite a bit of this probably, do you think? Perhaps. Maybe not. The sequencing of direction re knowledge of the gun we have, haven't we? Maybe not. Maybe you've got other things you want to say.

MS LARACY:

I don't intend to dwell on the first two. I will have a few more comments to make on the third which is sufficiency of the knowledge of the gun evidence, that's the point of the reasonableness of the finding on that, whether it could be proven

beyond reasonable doubt. Then section 168 I feel I'm likely to be in the Court's hands as to whether I can assist with anything there.

5 So, in terms of my few comments on how the gun got into the car, the first point I just wish to emphasise is that as this Court has recently emphasised in the, I'll call it the Red Fox decision for simplicity's sake, but the minority judgment, but in my understanding on the topics of the legal analysis, there's no significant, there's no divergence –

WINKELMANN CJ:

10 Are you talking about Justice Glazebrook's judgment?

MS LARACY:

Justice Glazebrook –

WINKELMANN CJ:

Yes.

15 **MS LARACY:**

– sets out very clearly what has to be proven beyond reasonable doubt which is the offence itself and the specific elements, the legal ingredients, but she is rightly very clear that what does not have to be proven are all the intermediate and sort of sub-facts and individual inferences that go towards that. It's an
20 extraordinary case where facts have to be proven beyond reasonable doubt.

So how the gun got into the car is not a matter that needs to be proven beyond reasonable doubt. Its legal role in this case is that knowledge of the gun in the car is a proxy for knowledge that a shooting could well happen and it's the
25 sufficiency of knowledge of a shooting which is obviously that element that has to be proved beyond reasonable doubt.

So any routes that were available for the jury, having regard to all of the evidence in the case that supported a finding that the gun was in the car prior
30 to the shooting and that Mr Te Hivaka knew it was there, any routes in the

evidence that allow the jury to get there will be sufficient and the jury can pick and choose.

1420

- 5 They can take bits of Mr Dodds' evidence. They can take – they can draw an inference from earlier in the night and the time spent together. They can reject other parts of that evidence and no one fact, or inference, or bit of that evidence needs to be proven beyond reasonable doubt including that the CCTV footage necessarily shows that it was Mr Te Hivaka carrying the gun to the car –

10 **WINKELMANN CJ:**

So long as there's a permissible line of evidential reasoning.

MS LARACY:

- That's right. That a reasonable jury applying the correct directions could use to be satisfied that Mr Te Hivaka had knowledge prior to the shooting. Now,
 15 there's an interesting point, which is a little similar to the scenario in *Burke* that my learned friend Justice Miller raised, which is what would the situation be if Mr Te Hivaka only, in this case, learnt of the gun at the moment that Mr Dodds pulled it out at the park? And the answer to that would be, on the context of this case, would be that fortunately that's not the way the Crown put the case.
 20 So we would say, if the evidence only supported knowledge by Mr Te Hivaka in the minutes before that gun was produced in the car, then the Crown has not met the burden on it.

WINKELMANN CJ:

- You mean if he only knew about it once he's in the car and it's produced? I
 25 mean you certainly –

MS LARACY:

Once he's got into Mr –

WINKELMANN CJ:

Yes, certainly because if he knew about it in their own car and then carried on that would be a problem for him.

MS LARACY:

- 5 That's right. I'm talking about when he got into Mr McIntosh's car, so the Crown – it seemed that they pulled up at the park, Mr Te Hivaka got into the car first, into the front passenger seat next to the victim, and then Mr Dodds got in the back.

ELLEN FRANCE J:

- 10 And is that really just because of the way the Crown put its case? So if, for example, I suppose if the facts were different and they'd been in the car for quite a period of time, you might have had a different case in any event but...

MS LARACY:

- 15 If that was the first he knew about the gun, then the plan would implicitly have been up to that – if that was the first he knew, then the plan up to that point would have had to have been a plan to rob, to take with violence or threats of violence, but evidentially it would have been very different. They would have had to have been verbal threats of violence or some other unknown weapon or fists but on –

20 WILLIAMS J:

It's going to be arguable that's evidence of a change of plan.

MS LARACY:

That's right. It would take it out of the prosecution of the common purpose, in my submission.

25 WILLIAMS J:

Well, no, I mean the common purpose can change.

MS LARACY:

It can.

WILLIAMS J:

So if they're sitting in the car for half an hour, the argument would be, I would
5 have thought, the common purpose has changed and he hasn't pulled out.

WINKELMANN CJ:

But that's not the situation we're dealing with here.

WILLIAMS J:

No, that's not the situation here. So the point is they're in the car for a very
10 short period of time.

MS LARACY:

That's right.

WINKELMANN CJ:

So there's no credible evidence on which you could – if that was the case, there
15 would be no credible evidence on which you could conclude there was a plan
to use the gun because it's happened so quickly.

MS LARACY:

That's right, and all of the – all of the circumstantial case that is prior to that,
driving around that night, spending time together, texting, sharing the live
20 locations of each other and Mr McIntosh, all of that would essentially be
irrelevant if the first hint of a plan to shoot happened immediately before the
shooting. So it could theoretically have happened that way but it's not the case
that the Crown, it's not the case that the Crown put up here.

WINKELMANN CJ:

25 Can you clarify one factual matter. The whole time from when they arrive at the
place until when they leave, how long is that? It's a matter of moments, isn't it?

MS LARACY:

Well, they, and my learned friend Ms Buckman will help me if I get anything wrong, they get there about 20 minutes before Mr McIntosh and Mr McIntosh arrives at 7.45 and leaves – and the defendants leave, having shot him, at 7.47
 5 so it's two minutes. And prior to that period they were either waiting there for 20 minutes for him to turn up or they were sitting in the car somewhere together, but bearing in mind that they left Hillsborough at about 6.15 and then the shooting is at 7.45.

WINKELMANN CJ:

10 So when he arrives, so it's from when he drives in all – because that's quite a narrow timeframe, isn't it? I thought it was two minutes so it does seem like a very narrow timeframe. In that time a car parks, Mr Te Hivaka gets out, walks over, sits in the passenger seat, Mr Dodds gets out, walks across, sits in the back seat, the shooting occurs, they run away, they get in a car and drive away
 15 and that's approximately a two-minute window.

MS LARACY:

Two minutes. And another indicator of how quick everything happened is the fact that the victim hadn't turned his engine off or the lights on. When the police come the car is still running, the lights are still on, so it's very quick.

20 **MILLER J:**

Who took the money and the drugs?

MS LARACY:

Mr Dodds is found with – no, he's not found with the bag. Mr McIntosh's strap bag in which he had the money, that's gone and is never found. My learned
 25 friend has just added that Mr Dodds in his evidence said he took it.

So how the gun got into the car, my point was that's a matter of fact, doesn't have to be proved beyond reasonable doubt, different routes to that as the Crown had acknowledged. But, more importantly, the complaint is made that it
 30 wasn't squarely put to Mr Dodds and there's a suggestion that this is somehow

a bit unfair on the part of the Crown and I do wish to address that. Legally there was no duty to put to Mr Dodds that Mr Te Hivaka carried the car – carried the gun to the car and the reason for that is that Mr Dodds had given evidence that to the effect that it was him who put it in the car. So his positive evidence, which

5 the Crown is entitled to accept, is that it was him who put it in the car before they left.

WINKELMANN CJ:

Can I just short-circuit all of this, perhaps. Isn't it the case that the Crown says that whether the car – gun was in the car all along, or it was carried into the car

10 by Mr Te Hivaka, there's sufficient there for the jury to be satisfied that he knew about the gun, because it's either there all along and they're driving around and this all occurs so quickly that it's obviously part of the plan for that gun to be at the ready.

MS LARACY:

15 That's right.

WINKELMANN CJ:

That's one narrative and the other narrative is it's all cooked up inside the house and is carried into the car.

MS LARACY:

20 That's right, and on either of those scenarios, it was with them in the car for an hour and a half earlier.

WINKELMANN CJ:

Because I'm just anxious about the trial Judge, having seen the evidence, says to the jury, look, it's just an implausible narrative but it's in the – he effectively

25 says, it's not the words, but you'll no doubt find that it's not Mr Te Hivaka carrying that gun into the car.

MS LARACY:

But that does seem to be the Judge expressing a view in line with my learned friend's submission to the jury that they can't find that that CCTV evidence shows what the Crown says it shows. Of course, that's not right, they can and

5 they can for a number of reasons.

WINKELMANN CJ:

Well, he's not saying they can't but he's saying –

MS LARACY:

No, that's right. But the Judge does also – the Court may or may not put any weight on this, the Judge does seem to have got a little bit confused about the

10 CCTV evidence and the reason I say that is in the sentencing remarks, my learned friend can give me the passage, the Judge wrongly, it's plainly incorrect, says, talking about that CCTV footage of 6.15, 6.18, says that Mr Dodds can be seen in that putting the gun in the car. Now, that's not right. It's just not

15 right.

WINKELMANN CJ:

It's not. It's a little bit imprecise in the sentencing notes as to when he's saying that.

MS LARACY:

20 So, that's a submission that was –

WINKELMANN CJ:

I mean as to what point in time he's saying that in relation to.

MS LARACY:

That's right. So that was the submission that was being made but, of course, it

25 was open to the jury and they could put some and, indeed, I would say substantial weight on the fact that the CCTV footage at the time shows what it shows. In the hour prior to that, since the two men were at the house from 5.15 until 6.15, nobody, and it's a motion-captured activated CCTV camera,

nobody is seen putting anything in the car until Mr Te Hivaka puts that black bag in the car.

1430

- 5 There is the earlier trip out to the car and back inside which is what footnote 31 which I started off with my correction refers to, but the car wasn't open, nothing was put in the car.

10 So then the jury can make of that what it likes and it can add to that Mr Dodds' evidence that only I knew about the gun, I had spent an hour or so in my bedroom on my own preparing the gun prior to this. And it is put to him in his evidence-in-chief at 564 that the question is, you know, when you leave do you have it with you? And he says that – the answer is to the effect that they have a gun, we have the gun with us.

15

That's at 564, but he's obviously only referring to himself, because his whole case is, I was the only one who knew about the gun, and that's what supports his theory that this was an accident, it was never a plan. He didn't have a plan, to have to share any plan to rob with Mr Te Hivaka, because he was just taking the gun along for his own jaunt and it was just an accident. He went to all lengths to empty the gun of the bullets and it was just there to frighten Mr McIntosh. That was his theory, so he didn't – his whole case is that I was the one who got it into the car, if that's when it got put into the car.

- 20
- 25 It is then put to him in cross-examination, and this is at 655, "... you and Mr Te Hivaka had carried that gun [in the] early hours of the morning ..." and the answer is: "No." And of course, that's not talking about any specific time but it is consistent with Mr Dodds' evidence that Mr Te Hivaka never carried the gun and knew nothing about it but –

30 **WINKELMANN CJ:**

So what is the –

MS LARACY:

But so the point is is that Mr Dodds' evidence, which the jury can accept bits of, is that he knew about the gun and it got put in the car in that critical period otherwise it was already in the car, and then if it got put in the car in that critical

5 period there is reliable evidence that the only thing that got put in the car in that critical period is Mr Te Hivaka putting the gun in the car. That was the only thing that got taken out there and he's the only person who did it.

Then there's other evidence, all of which I won't go into but it's summarised in

10 our submissions, about the weight of the bag which the Crown said is inconsistent with a bag of Mr Te Hivaka's clothes, the gun was 2.-something-odd kilograms.

WILLIAMS J:

46.

15 **MS LARACY:**

2.46 kilograms, thank you your Honour. So and then the rule in *Browne v Dunn* (1893) 6 R. 67 (H.L.) obviously requires that where an adverse proposition, or a proposition that's adverse to the interests of an affected witness is going to be put, or a submission is going to be made about it, then that evidence, or that

20 proposition needs to be put to that witness in cross-examination and the Crown did that here and it's acknowledged in my learned friend's submissions that the person this needed to be put to, that they carried the gun to the car, was Mr Te Hivaka and that was squarely put by the Crown at 763 of the notes of evidence. So that's all I wanted to say on that, sorry that took a little longer

25 than I intended.

In terms of, just briefly, the point that is made about the sequence of the knowledge of the weapon direction. In my submission, that's an important one for the Court to spend a little bit of time on, because the same – there is a risk

30 that because this was in issue in the *Burke* case, that it is being seen as something where the Supreme Court was setting down a rule, a requirement that the point in a question trail, in a homicide case of these types, where this

direction needs to be given is some sort of rigid rule of law and that's not the case. That argument is made here and it's also made in a case we've referred to in our submissions called *Ford v R* [2024] NZCA 239 which is in the Court of Appeal.

5

But the Supreme Court in *Burke*, when discussing this question of the order of the directions, they were responding to something very particular that arose on the facts and on the nature of the directions in that case and an inconsistency in the jury's verdict where, as I've dealt with in my submissions and I don't want to go over what's in my written submissions, but there was a real risk that the jury hadn't, or that the jury had, in fact, ruled out knowledge of a weapon at a prior point and in that case the sequencing of the question trail ended up being, it was problematic, because if the knowledge of the knife only occurred during sort of the course of the melee then Mr Burke, that there was a real question about whether that type of assault could ever have been contemplated as being part of the plan to beat up the victim. If the knowledge of the weapon had only crystallised so late in the execution of the plan, then there was a question as to whether it had ever been part of the plan.

But that's different from *Burke* and in this case, and in *Burke* at 73 and also in *Edmonds* this point is raised about the correct interpretation of "in the course of the plan" and the Court acknowledges that in most cases it will be obvious, where the knowledge of the weapon is there as part of the evidential matrix of the plan from the start it won't need to be put earlier in the question trail, but it did on the facts of *Burke*. So in most cases it will be obvious. So that's 74 of *Burke* and 17 of *Edmonds*.

COOKE J:

So are you saying this case is different because the Crown did not contend that its contention of the purpose was just a robbery, not an armed robbery?

30 **MS LARACY:**

That's right. It was a robbery and in *Ford*, which also involved use of a gun, three men going to a house with a gun, and the purpose there was to, the plan

there was to intimidate and part of the evidence of the plan to intimidate was the presence of a gun. The plan here was the robbery with the gun being of evidential value to threats of violence, violence or threats of violence, that's right, but in both cases the direction that the parties, all of the parties, needed to know about the gun came in the second stage which is was the use of the gun a known probable consequence.

COOKE J:

But the issue does still emerge that *Burke*, the majority in *Burke*, does seem to say that there were two separate errors: one was addressing the sequencing error and then the second error was not requiring knowledge of the weapon.

MS LARACY:

Yes, that's right, and in that case that was an error for a number of reasons. One, is that the way the common purpose had been put was variously expressed between the Crown, the summing up and the question trail.

COOKE J:

And it was wrong.

MS LARACY:

It hadn't been – if it had, as we read *Burke*, if it – that's right, if it had been pitched consistently at the common purpose was to deliver a beating with very serious violence, if that had been pitched consistently throughout, then the use of – the knowledge that a knife specifically might be used might not have been required but it –

WILLIAMS J:

Well, I'm not sure that that's right. This was a – it was a particular – I'm sure *Burke* says somewhere that the death occurs in the way it occurred.

MS LARACY:

Burke also, you're right, Sir, but I do submit that that part, that *Burke* is obviously also responding to the facts before it and *Burke* also endorses *Edmonds* where, of course, Justice William Young makes the point that what's important as a

5 matter of policy in these cases and also what's reflected in the English cases is that where what actually happened is substantially more serious and substantially different in terms of the type of violence, particularly at the sort of question of whether a life-threatening form of violence is, in fact, used and something lesser was contemplated, that's the issue as opposed to necessarily

10 in every case knowing –

WILLIAMS J:

Yes, but even the question in *Burke*, the question that was suggested by Justice O'Regan in the end is the correct question, was did they agree to deliver to the victim a mean hiding?

15 **MS LARACY:**

Yes.

WILLIAMS J:

And even then a weapons direction was going to be required.

MS LARACY:

20 Yes, and I accept that, but I would also say that on the facts of *Burke* and the way it was directed on and presented by the Crown, what was meant by a "mean hiding". The Court obviously wasn't satisfied that the jury could be sure beyond reasonable doubt that a mean hiding meant the type of hiding that could well result in use of lethal violence –

25 **WILLIAMS J:**

Yes.

MS LARACY:

– and I haven't got *Burke* open in front of me but one of the –

COOKE J:

I mean one way of describing it is to say that although it's described as two separate errors they, really, they're two sides of the same coin. It's basically the same error that manifests in two ways in *Burke*.

5 **MS LARACY:**

Yes. Yes, I do accept that and in most cases "in the course of", that question of "in the course of" doesn't – is unlikely to be capturing something that happens quite late in the prosecution of joint activity in cases like *Ford* and this case where you've got quite an extended period of planning. You're not talking about
10 something that's slightly more sort of spontaneous violence where you've got that period of planning in the course of will, as a matter of the evidence, is more likely to mean that there's – that as long as the plan is adequately characterised you don't have the concern that "in the course of" means at the same time as the lethal weapon is produced. It's a longer –

15 **WINKELMANN CJ:**

Is the big problem with not having the gun in the common purpose, just as it was in *Burke*, the problem with not having a weapon in the common purpose, that that requires more careful direction on what – whether the weapon was used in the course of common purpose? And I think that was the point the
20 Court made in *Burke*, because then it, you know, was this really outside what Mr Burke had expected? Was this really outside what Mr Te Hivaka had expected? And it brings in, it needs sort of a laser-like focus on that, whereas if you put it up front in the common purpose, then it's there and the jury has to turn their mind squarely to it.

25 **MS LARACY:**

Certainly –

WINKELMANN CJ:

And actually I think the Court says that at, I think, it's 74? Is it 74, or maybe earlier?

COOKE J:

I think your point is, if you don't put it in the common purpose, the Crown has got a bit of work to do to secure the conviction later in the question trail.

MS LARACY:

5 That's right.

COOKE J:

And there can't be any ambiguity about it.

MS LARACY:

No.

10 **COOKE J:**

You've got to squarely identify that the presence of the weapon and its potential use may well happen as a consequence of this common purpose.

WINKELMANN CJ:

See, the question I had for Mr Olsen was, whether the Judge had adequately
 15 focused on that issue, which in fairness to him I don't know if it was squarely part of the defence, because of how the defence was run, which wouldn't absolve them of the need to direct on it, though, as to whether the gun was outside the common purpose. And when you don't have a common purpose including a weapon, that requires specific direction and I think that's what the
 20 Court was saying. It said it before under the heading: "*Guidance on 'in the prosecution of common purpose' was required in this case*" because the common purpose didn't include, as put, did not include the weapon.

MS LARACY:

A couple of points on that. Certainly the framing of the common purpose needs
 25 to be clear and it's for the Crown to frame it and, as your Honour Justice Cooke said, if the common purpose itself doesn't specify the offence that ultimately occurs or capture key elements of that, then more work will have to be done at the second stage.

So, both elements of the offence have to be carefully framed and properly directed on but, in cases like *Ford* and this case, where the common purpose is framed reasonably broadly, or certainly in a fairly open way, then there has to be a very clear direction to the jury that they have to be sure that there was going to be intentional violence of the type that could well happen.

WINKELMANN CJ:

Well, hang on, but that – you’ve just skipped the question.

MS LARACY:

10 An intentional offence.

WINKELMANN CJ:

Yes, you’ve just skipped the question about they also have to be satisfied that the use of the weapon was in the common – was in the course of the common purpose, was in the prosecution the common purpose, and that’s the defence that was, you know, the defence that was implicit in the circumstance. If the defence failed on their account that it was just a standard drug transaction and there was, in fact, a robbery planned, you can do a robbery just with fists, can’t you?

MS LARACY:

20 That’s right.

WINKELMANN CJ:

And there was an available defence, which I think was run for Mr Te Hivaka, that even though it was a robbery, he didn’t know about the gun and therefore the jury need to be satisfied that the gun was used in the prosecution of the common purpose?

MS LARACY:

That’s right and here, the direction on being sure of that came, as it could quite appropriately do, in the probable consequences section. The legal direction on

that did not come in the earlier part of the directions where the Judge is dealing with the scope of the plan. As a matter of law, it didn't need to; however, the evidential matrix, this is why in both *Ford* and in this case, it almost doesn't make a difference. The evidential matrix and the way the Crown described its plan was that, consistently, this is a plan to rob and evidentially what you can rely on for that is knowledge of a weapon.

And *Edmonds*, you know, knowledge of a weapon is relevant in three ways in these cases. One, evidentially relevant to what the plan was. In this case, a plan to rob, the gun being evidence of threats of violence. So, it's relevant to a plan to rob. It's relevant to what – it's critical to what could well happen, which is an intentional infliction of grievous bodily injury which in this case we can shorten to an intentional shooting. So, it's so much a proxy on that point for the legal element that you have to be sure beyond reasonable doubt that there was a gun as part of it and Mr Te Hivaka knew because otherwise –

WINKELMANN CJ:

Yes, but there's a problem in that account which is it's not just relevant to reasonable foreseeability. His culpability actually turns on whether it was part of the common purpose and I suppose I'm just anxious to know whether that was squarely put, because it's possible you could see a jury slipping around on something like this. Like, they might think oh well, he saw the gun in the car and therefore, you know, so, is – I asked Mr Olsen to take me to the part of the summing up where the Judge says squarely, you know, and the issue for you is whether this use of the gun was outside the common purpose, or whether it's simply always just put on reasonable foreseeability grounds.

MS LARACY:

I haven't got all of the passages to hand, but I assure the Court that both the Crown in its closing and the Judge was very clear as a matter of evidence that the gun was part of the plan. I've got a few passages that come to hand, however. So this is in the summing up at paragraph 56: "So the unlawful purpose that the Crown alleges here is an agreement between Mr Dodds and

Mr Te Hivaka to rob Mr McIntosh – that will be plain to you from what you’ve already heard.”

5 And then if you just go down a few lines: “And of course the Crown says here they agreed that they would take along a firearm and the presentation of a firearm amounts of itself to a threat of violence, so anything stolen using such a threat would amount in law to a robbery.”
1450

10 Now that language, that way of putting the plan, is repeated at numerous, well, a good number of points in the summing up. I can give the Court a few more paragraphs.

COOKE J:

Well, other references talk about a loaded gun, too.

15 **MS LARACY:**

A loaded gun, yes. Paragraph 63, but talking here about probable consequence, the second bit: “And, so, the Crown would say that if you take a loaded firearm to a place where you know ...” So that’s a reference back to the plan: “... if you take [it] to a place where you know you’re going to rob someone
20 ... then a reckless killing or an attempt to hurt the person ... [is exactly the sort] of thing that could well happen when you take such a firearm to a robbery.”

Other passages I won’t take the Court to, but I’ve written in my notes paragraphs 122, 124, 132.

25

So, I don’t think there is any question here that as a matter of evidence as in *Ford* the presence of a firearm was a critical part of the Crown’s factual matrix. The Crown doesn’t shy away from that. The only reason that I have laboured this and tried to distinguish it from *Burke* is that the criticism is made in this case
30 that the directions were fatally flawed for not having required this as a matter of law in the question trail to have come in as a legal element at an earlier point. My submission is that it was a matter of evidence. It was adequately dealt with

in the summing up and, in terms of it being a proxy for an element in the question trail, namely, knowledge of the gun in this case is essential to have knowledge of an intentional shooting could well happen, the intentional shooting is squarely dealt with beyond reasonable doubt as an element in two points in
5 the question trail.

So that's how all that fits together, and the problem with *Burke*, in my submission, the fundamental problem is that it was much more unclear as a matter of evidence what the common purpose was in terms of the plan and
10 particularly in terms of the inherent lethality, if that is a word, of the violence.

And, I probably don't need to go there today, but we don't read the Crown as saying that in every case there needs to be knowledge of a weapon. That's not the English law and, indeed, the English law has moved away from suggesting
15 that that's an element of any of these cases, murder or manslaughter, because it actually risks going against defendant's interests by knowledge of the weapon substituting for what the jury really need to focus on, which is the specific mens rea. Knowledge of the weapon will take you a long way towards proving an essential element, namely, the nature of what was foreseen.

20

So, and again, I won't dwell on it, but in *Ford*, the Court similarly found that there was no miscarriage. It really didn't matter at what point the knowledge of the weapon direction was given there. It distinguished it, in my submission, rightly from *Burke*. It's essentially on all fours with this case but I would go so far as
25 to say that the Court was probably unnecessarily exacting in saying that, ideally, the knowledge of the weapon direction, in that case, should have come earlier. As a matter of law, it didn't need to, as in this case.

As in this case, as long as, if it wasn't part of the common purpose, the jury
30 needed to be sure that the way in which the harm was – that the offence that was committed was something that was squarely contemplated as being within the scope of a slightly non-specific common purpose, in that case, to intimidate.

WINKELMANN CJ:

Sorry, so which case are you saying the jury?

MS LARACY:

That's *Ford*.

5 **WINKELMANN CJ:**

Ford, right.

MS LARACY:

So, I rely on *Ford* as being a useful examination of these principles and making the same argument that's raised here. I suggest, although the Court doesn't
 10 need to engage with this, that as is consistent with my submission, the Court of Appeal was perhaps a bit hard on the directions in that case in saying that ideally, because of *Burke*, the knowledge of the weapon direction should have come earlier but the Court was, in any event, right to say it didn't matter. It was always part of the factual matrix of the case that there was knowledge by the
 15 three men of a gun. That was the plan to intimidate, legally the element, to intimidate evidentially with a gun, that was squarely before the jury, but where it came critical to have it in the directions was did the shooting that occurred with the gun, was that within the contemplation of the defendants as part of prosecuting the common purpose?

20 **WINKELMANN CJ:**

So, I mean, I'm concerned about that a minimalist approach is not taken to question trails. You're not advocating that that's, question trails, should be in that way, are you? Because that, I mean, they were moved to more fact-based so as to address these kind of issues.

25 **MS LARACY:**

Well, the way the Judge talks about it here is, I think, legally correct. Justice Lang talks to the jury about what you will see in the question trail are the factual issues, which is another way of talking about the legal elements. So

those are the legal questions but they are framed in terms of the legal facts the jury has to find, so –

WINKELMANN CJ:

Well, can I just be clear, why I'm asking this is your submissions seem to be
 5 pitched at the level that the question trail should only be legal elements and it's quite correct to do these things and we don't have to, to accept your arguments, we don't have to say this is a perfect summing up, we just have to say it's good enough to be clear. Because I'm minded to think *Burke* makes it very clear that, and this is before *Burke*, of course, that although as the Court of Appeal said
 10 *Burke* was really simply just restating the law, that the question where a weapon is alleged, the weapon should be placed in the common purpose if the allegation is that it was part of the common purpose.

MS LARACY:

Well –

15 **WINKELMANN CJ:**

I'm not asking you a tricky question.

MS LARACY:

But, yes, your Honour might not like my argument and it probably opens things up for another day, which is where the Crown suggests it probably should go,
 20 but the difficulty with taking *Burke* that far is, what about cases where a different weapon is used? And this is what *Edmonds* talks about, something –

WILLIAMS J:

Burke deals with that too. It says that there'll be cases where a weapon direction rather than a knife direction is required and that was I think there was
 25 a discussion of that in the majority judgment so it was an armed assault versus an unarmed assault. That was certainly at the front of the majority's mind.

MS LARACY:

And there will be other scenarios which work their way through the Court, such as where there's the level of violence is plainly put as part of the common purpose and the jury may have been satisfied of that, say, in a gang context, so a stomping or a serious physical beating but no suggestion of weapons and in the course of that someone picks up a ruler or a bar stool. Now, is that an acquittal? We would say no.

We would say that really what the Court was getting at in *Burke* was that it's about where what happened can be seen, where there's real doubt that the level of violence and the nature of the violence and the sort of the consequences, the lethality of the violence, is materially different from what could have been contemplated being part of the common purpose. So we would ask the Court to contemplate that there will be those cases that are a bit different from weapons cases.

WINKELMANN CJ:

Well, *Burke* does cover that, I think, and my concern is that we not be seen to be saying you only have to cover legal elements in a summing up and I don't think you need to say that.

MS LARACY:

I'm not saying that, but I do commend, particularly in a complicated case like this, what the Judge does and what we see is the trend in complicated question trails which is to focus on reframing the elements in terms of what is factually in issue –

1500

WINKELMANN CJ:

Well, that's a standard way.

MS LARACY:

Right.

WINKELMANN CJ:

It's not a trend, it's a practice that has been established for more than 20 years.

MS LARACY:

5 So that's what the Judge did here, but what the Judge didn't do is then put evidence into – and the evidence of the reframing would be talking about the gun. Didn't need to do that here, but instead –

WILLIAMS J:

It would have been better if he did.

COOKE J:

10 Yes. What the common purpose was an armed robbery, would have been – we wouldn't be having all this argument.

WILLIAMS J:

That's right. It disciplines the process, in a way, and removes the loose fit that generates appeals.

15 **MS LARACY:**

Well, argue but it also introduces, as an element, something that's not an element. The element is the intentional, you could say, an intentional shooting or an intentional infliction of grievous bodily injury. That's the legal element. That's what has to be –

20 **WILLIAMS J:**

Yes, but you're giving – your job is to help the jury by taking the law out of their deliberations, not putting it in.

MS LARACY:

25 Right, so that's, I agree, Sir, obviously, and that's where it is important that the summing up, which is the oral explanation, and the directions as the jury work through that question trail are read together and then, of course, the question

on appeal is, is there any chance that this was misunderstood? Is there any chance, any scope for confusion?

WILLIAMS J:

Sure.

5 **WINKELMANN CJ:**

Well, *Burke* seems to be against you on this.

MILLER J:

10 It's a slightly different point, isn't it? I'm sympathetic for your argument that the Court shouldn't be prescriptive, because it cannot foresee all of the particular scenarios and when we look at these cases they all do turn on their facts. This was a very complicated summing up. There's limits to what you can ask of trial judges. But there is this distinction: if you make it an element in the question trail, it's clear that what is said there must be established beyond reasonable doubt. The jury have to be sure before they can move on. Sometimes, and
15 this is one of those cases, if you express it more generally there will be facts that have to be proved beyond reasonable doubt, specific facts, in order for an appellate court to be sure that the verdict is safe, and this is one of those cases, isn't it?

MS LARACY:

20 Yes, yes, I accept that.

MILLER J:

Right, so you could have put knowledge of the gun, the gun as part of the previous question, Question 3, but you didn't have to so long as the Judge told the jury, when it came to Question 4, this means you've got to be sure, and I
25 would say, not only that he had a gun but that the gun was going to be used in the robbery, would you accept that?

MS LARACY:

Yes, and the only addition I would make to your – I accept that that is one perfectly legitimate and perhaps a clearer way of doing it, but the only thing I would add is that in terms of Question 3, it does obviously include as a premise
 5 the jury need to be sure that there was an intentional shooting that caused death. An intentional shooting. So, that is the Judge, to an extent, I mean –

MILLER J:

Sorry, no, it was actually in Question 2. It was, I beg your pardon, it was Question 2.

10 **MS LARACY:**

So, right, Question 2.

MILLER J:

I was looking at the wrong option. So, the common purpose involves a gun, you could put it in that way?

15 **MS LARACY:**

Yes, the common and –

MILLER J:

And then we wouldn't be having this argument. But it was put more broadly, and what the Judge and the Crown had to focus on at that point was what facts
 20 needed to be proved beyond reasonable doubt in order to meet the evidential threshold at the second stage. Had the Judge said, you have to be sure beyond reasonable doubt that he knew there was a gun and that it would be used in the commission of this robbery, it's quite a short step from that to a substantial – to the likelihood that there will be a killing.

25 **MS LARACY:**

I accept that, and I also remind the Court that – I guess the point I tried to start with, that we're talking about the distinction between legal error and what could have been said, and I don't accept that there's any legal error in the way this

was put, and I also submit that there is a logic and sort of a legal purity to having the question trail as closely as possible, without being confusing, focused on reframing the statutory legal elements in terms of the bare legal facts the jury have to find and that means keeping as much of the evidence out of the
 5 question trail, because otherwise it can get very complicated.

So that's what the Judge did here, and what your Honour is suggesting is that there are ways of making that reframing of the statutory elements even more closely directed to the evidence, and I accept that, but I don't accept that it was
 10 an error and, as my learned friends would say, I think there is a risk of taking certain peculiarities and a lack of clarity which lie behind *Burke* and the Court's reasoning in *Burke* and making them a checklist for the point at which a knowledge of the weapon direction needs to be given and the way it needs to be framed in other cases. I don't think that assists judges or the clarity of
 15 developments in the law in this area.

WINKELMANN CJ:

However, *Burke* was addressing a concern that section 66(2) can over-criminalise, if you don't pay close attention to the requirements, and it's not just a problem that's been recognised in New Zealand, it's been recognised
 20 in other jurisdictions as well, and it did provide a pretty simple pathway for judges and, again this case was before *Burke*, it just reminded them of the simple pathway and how – and simply putting the weapon up there and making it clear that it was part of the common purpose, use of the weapon, simplifies everything that flows from there.

25 MS LARACY:

It could have in this case and in *Ford*, I totally accept that, your Honour, and I don't shy away from the fact that the Crown could have framed it like that and, had the Crown framed it like that, the Judge should have put it like that.

WINKELMANN CJ:

30 I mean, I'm just kind of inclined to think that the Crown did frame it like that. You keep on saying it didn't but it seemed to me it did?

MS LARACY:

Well, it framed it like that, isn't it, this is the distinction, again, between is a matter, the legal element and the evidence, it framed it like that as a matter – the legal framing of it was the plan, the plan was a plan to rob and then the

5 Crown had and the Judge had to unpack what robbery means and we're all clear on that.

The Crown was, a plan to rob and the evidence of that and an essential part of the factual matrix was, that it was a plan to rob with a gun. It could have been

10 a plan to rob on different facts with other things, namely threats of violence, angry words, but it wasn't. In this case, it was a plan to rob with a gun. It could have been framed like that, as a matter of law, as the plan.

The Crown didn't frame it like that and nor did, more importantly, that's not how

15 the Judge put it in the question trail and my point is, simply, that's not wrong and *Edmonds* and *Burke* and *Longi* emphasised that it's for the Crown to frame, for the Crown to choose how to frame the common purpose, but if it's not specific enough in the common purpose framing then it will have to do more work at the second stage to show that what happened was the type of thing that

20 was foreseen as being the very thing that could well happen.

WILLIAMS J:

Well, it kind of says you're running a risk. If there isn't a tight fit, between Question 2 and Question 4 in this case, there's a risk.

MS LARACY:

25 There's a risk.

WILLIAMS J:

And you should avoid that if you can.

MS LARACY:

There's a risk but there's not a big gap here, or in *Ford*, and the reason for that

30 is because the way the case is put evidentially, the plan –

WILLIAMS J:

Runs the gun, yes.

MS LARACY:

– from the outset involves knowledge of a weapon.

5 **WILLIAMS J:**

So this is really a case about whether the circumstantial evidence can bear the burden of demonstrating knowledge.

MS LARACY:

Knowledge of a weapon. Knowledge of a weapon, yes.

10 **WILLIAMS J:**

Yes.

COOKE J:

But the real risk you run is this, the Judge here was onto it and gave a what we call a weapons direction.

15 **MS LARACY:**

Yes.

COOKE J:

But actually the Crown's case, as presented, only succeeds because the Judge was onto the fact that he needed to give that particular direction around
20 probable consequence.

MS LARACY:

It also reflects, arguably, I may be speculating, but the Crown case was that the jury could be satisfied beyond reasonable doubt that all three defendants were part of the plan, the plan to rob, the bare plan to rob, but the Crown
25 acknowledged, so that the third person being Ms Baker, who wasn't charged with murder, the Crown acknowledged in its closing that she may not have

known all the details. She wasn't charged with murder, that was nothing the Crown had to explain, but she may not have known all the details. The Crown –
1510

WINKELMANN CJ:

5 Because she wasn't in the car.

MS LARACY:

She wasn't in the car, she wasn't at Hillsborough, she wasn't in the CCTV footage. So the Crown didn't say, we're saying to you, we can prove beyond reasonable doubt, nor did it have to, that she knew about the gun. But it was
10 saying, she was part of the plan to rob and then she was – she and Mr Dodds went off together afterward and were later found with the gun in the car that the two of them were in.

So this is a three defendant enterprise but different offences were committed
15 by different combinations and the Crown case was the plan to rob, just barely put, leaving aside knowledge of a gun, the plan was – involved the three of them but knowing that, as part of that plan, a shooting could well happen, that's an element it could prove in relation to Mr Dodds and in relation to Mr Te Hivaka, but it wasn't going to allege it could do that in relation to Ms Baker. The
20 evidence was different.

And so there may be evidential reasons why it's tidier and reasonable to let the Crown frame it and endeavour to prove beyond reasonable doubt, at the probable consequences stage of the equation, what it can prove was part of the
25 plan. It won't always be the case that logically the Crown ought to put the weapon right up front in the plan.

WILLIAMS J:

So was Ms Baker charged with robbery?

MS LARACY:

30 No, she wasn't charged with robbery. She was –

WILLIAMS J:

She was just accessory after the fact, wasn't she?

MS LARACY:

She was charged with accessory after the fact.

5 **WILLIAMS J:**

But you say she was part of the plan to rob?

MS LARACY:

That's how the Crown talks about her in the opening.

WINKELMANN CJ:

10 I mean, when I look at the Crown closing, I must say I think you might be a bit hard on the Crown, because if I look at page 24 when counsel gets to the essence of the plan he said: "Well, you've heard that there was a lengthy period of time from approximately midnight until 4.30 in the morning, where Mr Dodds, Mr Te Hivaka and Ms Baker were all in each other's company and they all had
15 a role in that plan. Dodds was to ambush with the firearm. Mr Te Hivaka and Ms Baker were able to access Mr McIntosh through their relationships and there was sufficient time to form a plan for it to work. Mr Te Hivaka is seen carrying the bag which the Crown says had the gun and he placed it in the vehicle." So it does seem to be the plan was to ambush with the firearm.

20 **MS LARACY:**

It was, it was. All I'm saying is that the Crown also acknowledges in the closing that the jury – and it sort of doesn't matter, because she wasn't before them as a defendant on this.

WINKELMANN CJ:

25 I'm talking about the case against Mr Te Hivaka and Mr Dodds.

MS LARACY:

Oh, Mr Te Hivaka, right, yes.

COOKE J:

You're just saying that's as a matter of evidence, that's –

MS LARACY:

That's a matter of evidence.

5 **COOKE J:**

Yes.

MS LARACY:

That's a matter of – and a lot of these cases, particularly the gang cases or the sort of spontaneous associations involving violence, the knowledge of the particular – people have got different weapons, or some have got weapons and some haven't – the knowledge of the particular weapon and its inherent, relative to other weapons, the lethal qualities won't be something that the Crown can prove beyond reasonable doubt at the plan stage, therefore it's going to have to do more of that work as the probable consequences stage.

15 **WINKELMANN CJ:**

Well, that's not the case, though, because the whole of the thing is often, in those kind of cases, is that you actually rely upon what happens to show what the plan was. That's part of the evidence that can be taken into account in working out what the plan was. So, people get into a car, when they get out of the car they have a range of weapons with them and they proceed to assault someone on the street and you say, well, it's obvious that at some point before or during that journey they hatched a plan to do this, because you can see them acting, so it's the performance is proof of the plan, so...

MS LARACY:

25 Sometimes, very often, you're right, your Honour, but sometimes the plan is one, it's tacit acknowledgement by the others, of something one of them will have said like, were gonna get him and I'm gonna smash him into the ground. Now, if in the course of that someone, one of them – so that's the plan, okay, and depending on what weapon is used and how it's used and the actual

evidence around that, the way in which that person is killed may or may not be a probable consequence. The Crown will have to prove that it was, in fact, foreseeable that the person, not would be smashed into the ground fatally with a particular weapon, but that the level of violence was of a type consistent with that prior.

WINKELMANN CJ:

I suppose what I keep on coming back to is you started out by saying the Crown hadn't squarely put this as a plan to rob with a gun and I'm not sure why you're saying that, because it seems to me the Crown has squarely put it as a plan to rob with a gun.

MS LARACY:

The Crown has squarely put it. The reason I'm saying that is because it's not a flaw in the Crown's case that the Judge didn't direct, at the plan stage, that the jury –

WINKELMANN CJ:

But that's a different point. That's a different point.

MS LARACY:

So it's the distinction between what the Crown was saying as a matter of law, which was that the plan was a plan to rob, and the way in which it defined that was going to occur, which is a matter of evidence, which is a plan to rob with a gun.

COOKE J:

So, in other words, the way that it was charged was just as a robbery, a planned robbery.

MS LARACY:

Yes, yes.

COOKE J:

But it's presented its case on the basis it was a robbery with an armed rifle.

MS LARACY:

That's right.

5 **WINKELMANN CJ:**

But in *Edmonds* it was really effectively, I think, articulated as an issue of law that it should, in fact, if you're going to rely upon the violence, perpetrator with a particular weapon, you should put the weapon in your common purpose, because there would be an error of law on the part of the jury to leap from a
10 common purpose which is low, to someone being killed with a weapon, because there'd be (a) it would be an error of law because there'd be an evidential gap, so it was framed as an error of law in *Edmonds*. So, I'm thinking that it is something – and it's also, the Court has said it in *Burke*, if you're saying that the weapon was contemplated, it should be in your common purpose. Not
15 necessarily specific weapon, but use of weapons if you've got a group situation.

MS LARACY:

The nature of the violence, such that it will capture the offence ultimately that occurs, is going to have to be in your common purpose.

WINKELMANN CJ:

20 Yes.

MS LARACY:

The nature of the violence, the level of it, the intensity of it, the lethality of it is going to have to be capable of capturing what subsequently occurs.

WINKELMANN CJ:

25 And good practice is to put the weapon in there, weapons, you know, the type of weapon or the particular weapon depending on what you say the plan was, because it just avoids levels of nuance between the violence you're alleging, "mean hiding" or whatever, and what was reasonably foreseeable.

MS LARACY:

I don't think I can take the point any further.

WINKELMANN CJ:

Yes.

5 **COOKE J:**

If it had been in the charge, it would have been aggravated robbery. Would that have been the way to do it?

WILLIAMS J:

It's aggravated either way.

10 **MS LARACY:**

Well, so the –

WINKELMANN CJ:

But it's murder.

WILLIAMS J:

15 No, what's aggravating is, you've got two robbers.

MS LARACY:

20 So the charge was, on this one, section 168 and section 66(2), and then section 168 will be engaged when any of those offences are committed in the course of the criminal common purpose, and one of the offences that's identified there is robbery. Aggravated robbery is not identified there, that doesn't, that wouldn't exclude it, but again it's hard to criticise the Crown for putting as the felony offence the very offence as the statute defines it, namely, a taking with violence or threats of violence. So, it's difficult to criticise the Crown for that, but it certainly could have.

25 **WINKELMANN CJ:**

I don't think anybody's criticising them.

MS LARACY:

No. It certainly could, but the point is that flows through into the Judge, rightly, in terms of *Edmonds* and *Burke*, accepted the way the Crown framed the common purpose, accepted that language, made it very clear that an

5 evidentially critical part of that framework, of that matrix, was that this was a robbery with a gun, but legally directed, correctly, in terms of what the jury needed to be satisfied of at the first part of the common purpose, and then what they needed to be satisfied of second.

10 And I don't say *Burke* and *Edmonds* is cutting against that or suggesting it was improper, or really encouraging, and I mean no disrespect to my learned friends, but appellants in cases like *Ford* and in this, to be using *Burke* as some sort of a checklist for what needs to be in the common purpose, or the order in which directions of knowledge of a weapon, if they are relevant in a particular

15 case, and remember they're only necessary if they're essentially a proxy for an element, the sequence at which those directions need to be given. That did take –

WINKELMANN CJ:

So, are we on to your –

20 **MS LARACY:**

That did take the –

WINKELMANN CJ:

– sufficiency of evidence or have we dealt with that? I think we've dealt with sufficiency of evidence, have we?

25 1520

MS LARACY:

I think I'd be –

WINKELMANN CJ:

Because the whole course of the evening is your account of the sufficiency of evidence.

MS LARACY:

- 5 Yes, I feel in the course of what we've just – we've covered, in a roundabout way, I've probably covered that.

WINKELMANN CJ:

Well, just take a moment if you want, Ms Laracy.

MS LARACY:

- 10 I suppose a shorthand way of talking about the sufficiency of evidence is that what has to be – this is relevant to the reasonableness, ie, was there sufficient evidence that a properly-directed jury could have found that Mr Te Hivaka foresaw an intentional shooting could occur. The knowledge of the gun is essential to that and the reasonableness of the jury's finding on that.

15

The bag evidence, upon which my learned friend put so much weight and emphasis both at trial and now, is one part of the complete circumstantial case that goes to knowledge of a gun. It's not the case. The jury identifying Mr Te Hivaka carried, finding that Mr Te Hivaka carried a gun in that bag to the car is nothing that has to be proven beyond reasonable doubt, as I've said. It's one part of the total matrix going to that element of knowledge of an intentional shooting that could well be part of the case.

20

So, the Court has seen the CCTV footage and has already heard what I have to say about Mr Dodds' evidence and the window in which that, on his case, the gun could have been put in the car, and the only thing I will add to that is there is all the other evidence, which I don't need to go into, the Court is aware of it, it's in our submissions, both before and after which adds to the circumstantial reasoning. The totality of the case that was available, that the very thing that happened, including the use of the gun, was the very thing that was planned

25

30

and that Mr Te Hivaka and Mr Dodds were in absolute lockstep on this enterprise from the start to the finish.

And specifically, on the CCTV footage of that critical time at 6.15, just to let the Court know that on our reading of the notes of evidence, the jury were played that seven times in the course of the trial. They had a lot of time to think about that and work out if they put any weight on it, including if they put substantial weight on it, and what they make of it. So, it was played twice during the – by the officer in charge of CCTV footage, it was in Mr Dodds' evidence-in-chief and in his cross-examination, it was played in the Crown and Mr Te Hivaka's closings, and the jury asked for it to be played again. So, they saw that and could make of it what they will and were well-placed to decide that issue, which, in my submission, deals with the submissions on interpretation, really, of the evidence that my learned friend has made. It was a jury issue.

Then section 168. So, the Crown's case on section 168, in short, and this is dealt with in my submissions at paragraphs 80 to 88. Just briefly, by way of a summary statement, the Crown's position is that the text, statutory text of section 168 is determinative of the issue and it is express that death does not have to be foreseen. So, that's the second point, it's express. And third, that in all culpable homicide cases, including section 168, death is a result crime in the sense that death is a matter of causation and not conduct, and I do rely in substantial part on the majority's finding to that effect in *Burke* at paragraph 172, but it also fits squarely with the schema of the Crimes Act in that –

WINKELMANN CJ:

Well, *Burke* depends on section 66(2), not on section 168.

MS LARACY:

Section 66 –

WINKELMANN CJ:

Section 168 defines the –

MS LARACY:

Both cases depend on section 66(2), yes and *Burke* was, from memory, it was section 167(b).

WINKELMANN CJ:

5 Yes.

MS LARACY:

So it's aiding and assisting a reckless killing.

WINKELMANN CJ:

10 It turns on the definition, statutory definition of section – statutory interpretation of section 66(2).

MS LARACY:

And as does this case. As I understand it, it's only under section 66(2) and section 168 grounds that any challenge is made to the directions.

15 It would require a more fulsome submission than I'm in a position to make now, but I do suggest the Court needs to be cautious about accepting statements such as, in England the equivalent of section 66(2) has been abolished, or in Canada it has been abolished. It is certainly –

WINKELMANN CJ:

20 I mean we looked pretty thoroughly at all of that in *Burke*, unless it's changed since then.

MS LARACY:

That's right, it's been reframed in *Jogee* in the context –

WINKELMANN CJ:

25 Well, that postdates – that predates *Burke* by some time.

MS LARACY:

That's right, in the context of murder cases, but there is still an equivalent of a common purpose route to liability, but not in the type of cases in the way it was being used prior to *Jogee*.

5

And section 168, I understand, is what my learned friend was saying, that the Canadians have, they have questioned, or essentially got rid of the equivalent of section 168. But I didn't understand my learned friend to be suggesting they've got rid of common purpose liability under the equivalent of section 66(2).

10 That's not – that wouldn't be correct.

WINKELMANN CJ:

No, he's relying upon *Jackson* and saying that they have drawn a distinction between manslaughter and murder and that kind of liability when it comes to party – common purpose liability.

15 **MS LARACY:**

So, we've got a codified statutory framework both for how someone can be a party to an event and for what the conduct element of offences are, and that obviously means that in the New Zealand context it's a matter of interpreting those, but the scope, as *Edmonds* recognises, for developing or straying too far from the statutory wording is very, very limited.

20

COOKE J:

In *Burke*, the majority at paragraph 172 identifies one of the reasons for not accepting the requirement for manslaughter is: "It avoids the possible disjunct between requirements for s 66(2) liability for manslaughter and s 168 murder."

25 So, is that a reference to not drawing a distinction between murder and manslaughter?

MS LARACY:

Yes. So, *Rapira* was responding to the proposition that on this, as I recall, that on section 168, for a party you needed to foresee death and the Court of Appeal said that's not correct and –

30

COOKE J:

And then the majority is saying here, so we don't want to have that requirement for manslaughter, otherwise there would be a disjunct between murder and manslaughter?

5 **MS LARACY:**

That's right. You would end up needing to see, foresee more for manslaughter.

COOKE J:

Than for murder.

MS LARACY:

10 Than you would for murder.

COOKE J:

So the majority's reasoning is inconsistent with what the appellants invite us to do.

MS LARACY:

15 Yes, yes.

WINKELMANN CJ:

He – Mr Olsen conceded that, I think.

1530

MS LARACY:

20 Yes, and your Honour's judgment, Chief Justice, in *Burke* itself recognises that – I'm just looking for the passage...

WINKELMANN CJ:

I think I recognise it would need revisiting, (inaudible 15:30:29) standard.

MS LARACY:

25 So the argument that section 66(2) homicide liability requires the foresight of death essentially has the flaw that it pays insufficient heed to the difference

between mens rea, mens rea in relation to the base crime, the unlawful conduct element, and to causation, and it introduces a mens rea element into causation, whereas, in fact, the mens rea needs to coincide with the actus reus and the actus reus is the base crime.

5

So in this case, it's an intentional infliction of grievous bodily injury. The principal needs to act with the mens rea to intentionally inflict grievous bodily injury, but they don't need to foresee what the consequence of that would be, and that's what *Burke* is saying.

10

So the mens rea for all homicide offences attaches on to the base crime, the unlawful act which is in – and these are all unlawful act homicides as defined in section 160(2) of the Crimes Act. So, whether it's under section 167(b) or section 168 or manslaughter, there's different actus reus and different mens rea obviously. So just working through those: under section 167(b), foresight, the principal will inflict injury likely to cause death with recklessness; under section 168, foresight, the principal will inflict grievous bodily injury in facilitating the offence; for manslaughter, foresight, the principal will inflict some dangerous harm. And to each of those offences, to make it culpable homicide, you add, and death results.

20

And I don't have anything before you to illustrate this, unfortunately, but I could find examples, but from my reading it's apparent that the definition of manslaughter was reflected in old indictments which used to allege that A assaulted B, because an assault is enough, it's an unlawful act, A assaulted B, thereby committing manslaughter.

25

So that formula, A assaulted B, thereby committing manslaughter, shows in the grammar of that sentence essentially the way the offence works. There's the act –

30

WINKELMANN CJ:

Well, you're not really engaging with all the arguments that are set out in the two dissenting judgments in *Burke*, but you're standing on the majority, aren't you? And that's all you need to do.

5 **MS LARACY:**

I'm standing on the majority, yes, that's right, but also developing, as I have in my written submissions, that these are, which we perhaps didn't assist the Court with as much as we could have in *Burke*, these are what are known as result crimes, or crimes of consequence, and the result is a matter purely of causation.

10 It has to be shown to flow from the unlawful act but the actus reus, properly understood, and the mens rea relate to the unlawful act.

WINKELMANN CJ:

And Mr Olsen would say, against you, that section 66(2) says the offence, and the offence of culpable homicide, an element of which is the person dies, and
15 the liability of the person who is coming in under section 66(2) is that they foresee the offence, and so that meets that point anyway. But you're –

MS LARACY:

It does to a degree, except when the person dies – somebody dying obviously is not criminal and the Crimes Act's very clear about that, that's the distinction
20 between culpable homicide and non-culpable homicide. So the fact that someone died is not what makes any act criminal. What makes it criminal, under section 160(2), is if there's an unlawful act or an unlawful omission or – I haven't got the other provisions in front of me, but all of *Burke*, *Ford*, this case, they're all unlawful act cases, so –

25 **WILLIAMS J:**

So Professor Orchard was wrong?

MS LARACY:

Professor Orchard, in my – yes, was making a policy argument.

WILLIAMS J:

Right.

WINKELMANN CJ:

And Justice Cooke was wrong? Not this Justice Cooke.

5 **MS LARACY:**

Justice Cooke, I think – my submission is that too much weight has been put on *Tomkins*. It was a case where the question of what the word “offence” means was never an issue. There was an amicus assisting in that case. It’s a three-page judgment. It was a litigant in person and nowhere in the judgment
10 is the issue raised as to what the word “offence” in section 66(2) means.

WINKELMANN CJ:

So these are all arguments that were made in *Burke*?

MS LARACY:

Yes, that’s right. So, reverting to *Tomkins* when we’ve had *Edmonds* and we’ve
15 had *Burke* and trying to enliven what was said in the context of that judgment with all the difficulties that must have been caught up in that particular hearing where the issue wasn’t squarely before the Court, in my submission, is a very weak foundation to be trying to read it in at this stage in New Zealand’s legal history. It’s a matter for Parliament if section 66(2) needs revisiting in this
20 context.

Unless there’s anything I haven’t covered, those are my submissions. May it please the Court.

WINKELMANN CJ:

25 Thank you, Ms Laracy. Mr Mansfield, were you proposing to reply?

MR MANSFIELD KC:

Yes, if I could, thank you.

I accept that what my learned friend says regarding the way in which the Crown can frame the common intention is a matter of law for it, and certainly at trial the Crown did frame the common intention being that to rob, and that's why the learned trial Judge adopted that terminology.

5

That said, I accept that at times during the Crown's addresses it referred to the plan including a firearm, but there were plenty of other times during the course of the trial where the Crown reverted to simply referring to "to rob" and the cross-examination, in particular, of the two accused at trial reflects that. The Crown continuously put that the agreement reached between the two men was one to rob.

10

I also accept that if it's framed in a very general way like that, much like in *Burke*, then the Crown has more work to do when it comes to probable consequences, but that is the problem. Here, in this case, there is a lack of that work. That work can simply be a reference to it must be able to refer to evidence to show that an individual knew that there was a probable consequence and, if we look at our submissions on page 18, paragraph 79, we set out the way in which the Crown puts how Mr Te Hivaka could be tied to the murder charge, tied to the issue of knowledge, and the only evidence that the Crown relied on was that he had carried the firearm used to shoot Mr McIntosh from the house to the vehicle.

15

20

It's put in this way, it's at paragraph 79 of our submissions: "Did Mr Dodds and Mr Te Hivaka know about the firearm used to shoot Mr McIntosh? You can be sure that each of them did know about the firearm. They were both seen carrying a bag in CCTV footage that the Crown invites you to infer had the firearm in it which was used to kill Mr McIntosh."

25

That's the only factual premise the Crown promoted to the jury when it's said to be doing more work due to the very low way in which it framed the common intention.

30

Whilst my learned friend has endeavoured to refer to other evidence, both before and after and I will come to that briefly, and in particular after in relation

to being able to infer that Mr Te Hivaka knew, that that evidence does nothing more than establish that there was evidence upon which a jury might conclude that there was a plan to rob, not that the plan would include a firearm. So there is an absence of the Crown doing any work by way of calling and relying on other evidence other than that CCTV footage that we've referred to.

5 1540

My learned friend has also referred to, both in the written material but also orally, extended planning, careful planning and the time they spent together.

10 Those types of claims by my learned friend, or on behalf of the Crown, are also not borne out in the evidence.

The evidence established that over the period of time the two men were together they were socialising, drinking and doing drugs with others. There is absolutely no evidence at all, in the evidence called at trial, of any planning occurring between the two individuals.

15

The Crown ask the Court to infer that there must have been planning and I accept, to a limited extent, there must have been planning, but there's absolutely no evidence of extended or careful planning and the evidence that was led at trial, and I can give you some evidential references, is that there were a number of people with them at various different times including, obviously, Ms Baker, Mr Te Hivaka's sister, a person by the name of Saul, and then I think when they –

20

25 **WINKELMANN CJ:**

Why are all of these people up at these small hours of the morning, or late small hours of the morning?

MR MANSFIELD KC:

Well, they'll say that's the benefit of taking methamphetamine, Ma'am, unfortunately.

30

But in any event when they arrive back at the address at 5.18, and remember they're only there approximately an hour, they arrive back with two other people in the motor vehicle with them and we can see that in the CCTV footage there's a guy by the name of Hamish Shackley and then, of course, Donna Dodds.

5

So there are other people in the vehicle and in the house when they are both back at the house for that one-hour period. So my point is, whilst it's being asserted that there was extended or careful planning, there was no evidence of planning at all, let alone planning that falls within that category.

10

My learned friend also wants to tie this particular appeal to that of *Ford*, which was, of course, a Court of Appeal decision and in *Ford* the Court of Appeal sought to distinguish *Burke* so as not to be required to apply it.

15 But *Ford* was different. There, the jury was specifically and expressly required to be sure that one of the others was armed. Thus, even though asked slightly out of order with a less serious common purpose, the gap was bridged, as the Court then held in the Court of Appeal, but no such bridging occurred in this case, nor could the trial Judge suggestion amount to such a bridge.

20

Now, the same applies to *Burke*. In *Burke* there was a question regarding the knife but the question was out of order. I simply refer the Court to paragraph 76 of that judgment, it's referred to at paragraph 69 in our submissions on page 15, but: "As noted earlier, the question did pose the question to the jury as to
25 whether Mr Burke knew about the knife. But that question came after the question about whether the stabbing occurred in the prosecution of the common purpose. This would have suggested to the jury that whether Mr Burke knew Mr Webber had a knife was not important in answering the question of whether the stabbing was in the prosecution of the common purpose, when in fact it was
30 very important. So, the question as to whether Mr Burke knew about the knife needed to come before the question about whether the stabbing occurred in the prosecution of the common purpose."

Now, we're in a worse position here, because it's not said to be part of the common purpose, nor is an intentional shooting said to be the probable consequence that they are asked to determine. So there's no reference in the question trail to the need for Mr Te Hivaka to know ahead of time that a firearm
 5 was to be utilised in the robbery. It was simply sufficient that there be a robbery and then the rest of the questions proceed but without any express reference to a shooting, intentional or otherwise.

So the position here is quite different to *Ford*. It's, in fact, quite different to
 10 *Burke*. The position here is worse, in my submission, and in relation to *Burke* this Court also held that the fact that defence counsel referred to such matters in their closing address to the jury didn't address the issue as to whether it should have been in the question trail or in the summing up, or, I suppose, a combination of the two seen together.

15 But the importance of the question trail is that that's a document the jury take away, not the full summing up, and the Judge more than once specifically referred the jury to the question trail and endorsed that that's what they should follow, and there is an available route to convict Mr Te Hivaka on murder
 20 without the jury concluding that he did know that a firearm was to be part of the plan to kill, and that is the problem.

Now, my learned friend also referred the Court to the Court's summing up and somehow I've managed to lose my tab that I had available to me for this so I
 25 didn't waste the Court's valuable time...

WINKELMANN CJ:

What part is it, Mr Mansfield?

MR MANSFIELD KC:

It's the part where there was a reference to the plan including – the robbery
 30 including the use of a firearm, and I just want to –

WINKELMANN CJ:

Is that around paragraph 84? Is that the part – is that the knowledge part?

MR MANSFIELD KC:

Yes it is, thank you, that's exactly I think where it is.

5 **COOKE J:**

Well, Ms Laracy referred to a number of paragraphs.

MR MANSFIELD KC:

No –

COOKE J:

10 Paragraphs 50, 56, 122, 124, 132.

MR MANSFIELD KC:

Is your Honour referring to the small page number or the large?

COOKE J:

Paragraph numbers.

15 **MR MANSFIELD KC:**

Don't I love when this happens. I apologise. Here we go. Sorry, at the bottom of – the Court's probably on it already – on the bottom of page 163, top of page 164 is the quote that –

WINKELMANN CJ:

20 What's the paragraph number?

WILLIAMS J:

Paragraph 56.

MR MANSFIELD KC:

25 Paragraph 56, thank you. But his Honour goes on further, and I've already marked these up, anticipating that the Crown might refer to that particular

paragraph as somehow saving the day, but it doesn't. If you read on, paragraph 57, 59, 60 in particular all just revert back to "rob". So, paragraph 57 at the very end of that: "... when their real aim and objective was to get him there so that they could rob him of his cash and drugs." Paragraph 59: "So, the

5 first issue you're going to need to decide is whether there was a plan to rob Mr McIntosh as the Crown suggests." And then end of that paragraph "was a plan to rob Mr McIntosh". And then paragraph 60: "... agreed to assist or help each other in carrying out the robbery."

COOKE J:

10 But that – it's against the background, paragraph 56, the Judge saying what "to rob" means, which is: "... to steal property using violence or threats of violence ... And of course the Crown says here they agreed [to] take along a firearm".

MR MANSFIELD KC:

Correct.

15 **COOKE J:**

So he's defined what "to rob" means.

MR MANSFIELD KC:

But "to rob" doesn't include the need for a firearm to be present, just threats of violence or actual violence. This is not the kind of crime where you can simply

20 infer that those who would do it would necessarily take a weapon or even a firearm, say for example a bank job where robbers of a bank routinely take a firearm.

So, in my submission, simply referring back to robbery just provided the means

25 for a jury to determine that he agreed to take part in a robbery that might include threats of violence or actual violence, and that was sufficient. I think that is all I really wanted to say in reply, albeit quite briefly.

The point I do want to stress regarding planning, because there has been some

30 discussion throughout the day regarding evidence of planning and what the jury

can infer from that, is really quite an important one because there was no evidence of any planning and the time that they had together necessarily involved other people being present, so it's not a situation where you've got two men spending time planning in a detailed fashion what they're about to do

5 at home or any evidence of that at all.

1550

So unless the Court has any questions, that's probably all I have by way of reply.

10 **WINKELMANN CJ:**

Thank you, Mr Mansfield. Well, the Court will take time to consider its decision but before we do retire I wanted to mark the occasion because today is Justice Miller's final sitting. Mr Mansfield, if you wanted to remain standing.

MR MANSFIELD KC:

15 Sorry, your Honour.

WINKELMANN CJ:

Today is Justice Miller's final sitting and because he's not having a valedictory sitting and, in keeping with his typical humility, there won't be an opportunity for words to be said, so I thought I would just briefly acknowledge, therefore, the

20 fact that he is retiring after 22 years judicial service both in the Wellington High Court for part of the time during which he was the Executive Judge in that Court, then 10 years in the Court of Appeal, and most recently his time in this Court in which he's been a valued colleague and contributed to the jurisprudence of the Court. So, I just wished to acknowledge the occasion.

25 **MR MANSFIELD KC:**

Thank you, Ma'am. As your Honour pleases.

COURT ADJOURNS: 3.51 PM