IN THE SUPREME COURT OF NEW ZEALAND SC CRI 14/2004

IN THE MATTER of a Criminal Appeal

BETWEEN **AERENGAROA TIMOTI**

Appellant

AND **THE QUEEN**

Respondent

Hearing 17 March 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel G King, A Shaw and C Milnes for appellant
J C Pike and F Guy for respondent

CRIMINAL APPEAL

10.01 am

King If it pleases the Court I appear together with my learned friends Mr Shaw and Ms Milnes.

Elias CJ Thank you Mr King, Mr Shaw, Ms Milnes.

Pike May it please the Court, I appear for the respondent (away from microphone).

Elias CJ Thank you Mr Pike. Yes Mr King.

King Yes thank you Your Honour. Can I perhaps start by making a couple of preliminary points which in my submission are highly significant in this case. The first one, and it may well be apparent from the written

material but it's in my submission important, that the appellant was charged with murder at his trial, simply specified under s.167 of the Crimes Act. The indictment doesn't seek to specify which particular subsection under which s.167 murder was committed. When the case was summed up to the jury it was summed up on the basis of the s.167C or alternatively a 167D murder.

Tipping J C is just the transfer.

King Transferred malice.

Tipping J Transferred from A or B or both?

King One suspects from A.

Tipping J From A.

King Yes, one suspects simply A. Which of course I think the point is would involve the same mens rea requirement for the attempted murder charges of mother and step-father.

Tipping J Yes.

King And it was really because the accused was acquitted of the charges of attempted murder of mother and step-father that this case has proceeded in the Court of Appeal on the basis that he must have been convicted for murder under 167D because of course, as lawyers analysing the proceedings, that would seem to be the logical way to reconcile the appellant being acquitted on the attempted murder charges.

Tipping J Let's just get this entirely clear. You say it was summed up on the basis of A through C.

King No, no Sir, of C and D.

Tipping J But C.

King So not A and B.

Tipping J C isn't a category of murder in itself. It only allows A or B to relate to the wrong person.

King Correct.

Tipping J So you'd have to have for C either A or B.

King Yes.

Tipping J As well.

Blanchard J Well C has actually got them in it.

Tipping J Yeah.

King Yes.

Blanchard J So you would sum up just on C.

King Yes, no it wasn't summed up that there was a direct intention to kill Mr Ruarau. It was summed up that there was a direct intention to kill either mother or step-father.

Tipping J Oh I see.

King Allied with that were attempted murder charges in respect of both of those persons. So C, the argument was that he intended to kill his mother, intended to kill his step-father and by accident or mistake kills Mr Ruarau. Therefore transferred malice, therefore s.167C of the Crimes Act.

Blanchard J It wasn't I assume seriously suggested that if he didn't mean to cause death, nevertheless he meant to cause bodily injury?

King It wasn't seriously suggested. It was raised.

Blanchard J Yes.

King But the Judge even said to the jury.

Blanchard J We can really disregard that as any plausible scenario?

King Yes, correct. In my submission that's correct. Now where that takes us is, because I submit that this Court needs to perhaps take a step back before concluding that he must have been found guilty under 167D and not C. In my submission, although as lawyers and jurists looking at it, that would seem to be the way to reconcile the appellant being acquitted of attempted murder charges, it's not necessarily the case that all 12 members of the jury convicted the appellant for murder under s.167D. It may well be a case in my submission where some found him guilty under 167C, others under D. Alternatively a perfectly understandable compromise verdict, a jury saying, well we think he did intend to kill his mother and it was an accident or mistake that he killed Mr Ruarau. But we're not going to find him guilty of both the attempted murder and the murder using the same mens rea of the intent to kill mum. In my submission it's a perfectly plausible approach for a jury as lay people to take in this case.

Elias CJ Well are you really making the submission that we shouldn't enter into speculation as to the basis upon which the conviction was entered?

King In my submission one needs to speculate but one needs to do it in a somewhat guarded fashion and cannot conclude unequivocally that the jury must have found him guilty under 167D.

Gault J Is this a different basis from which it was argued in the Court of Appeal?

King No, no in my submission it wasn't. It was held that the jury could have convicted under either section. The Court of Appeal certainly concluded very strongly that he must have been convicted under 167D because of the acquittal on the attempted murder charges.

Keith J No, they record you Mr King don't they as saying that you agreed with that?

King Oh well I agreed with the logic behind it but I certainly didn't concede the point.

Keith J The only rational possibility, they say in paragraph [9] of the Judgment.

King Yes and in my submission that's not entirely the case.

Keith J So, but you're saying then that some of the jury may have been willing to convict on attempted murder and therefore they could have been convicting in respect of Mr Ruarau under C rather than D.

King Yes.

Keith J But then wouldn't there have been a hung jury under the attempted murder?

King Well and that's why I put forward the hypothesis Sir of the compromise verdict being reached.

Blanchard J An irrational possibility.

King Sorry Sir?

Blanchard J An irrational possibility.

King Well in my submission not. It might be irrational from the cold light of lawyers discussing and interpreting it but 12 people in a room looking at whether it was murder, whether it was attempted murder and so on. In my submission it's simply overstating the position to say it must have been 167D, 12 members of the jury must have found 167D and 167C can be put completely out of the equation.

And perhaps if I can illustrate that by putting it the other way. If a re-trial were ordered, in my submission there would be no impediment to the Crown alleging murder at the re-trial under 167C and 167D. There could not be a case that they were statute barred because of the apparent finding by the Court of Appeal that he must have been convicted under 167D.

Blanchard J Wouldn't it be an abuse given the acquittals of attempted murder where intent to kill had to be an element?

King It would be an argument Sir but in my submission the rules in that are very tight about the double jeopardy rules.

Tipping J If the jury were not satisfied of an intent to kill the parents?

King Yes.

Tipping J How could he be re-tried?

King Under 167C transferred malice?

Tipping J Yes.

King Primarily because it's a different section and double jeopardy is very specifically in light. I accept Your Honour.

Tipping J Well this is why I challenge as to whether it is substantively. It's arranged simply so as to bring in transferred malice.

King Yes.

Tipping J But anyway I don't want to prolong this.

King No it's simply a preliminary point that I raise. But in my submission, subject to an abuse of process argument, the Crown would be able to challenge or to allege murder under 167C and D. Now where it becomes important I submit is because it's accepted by everyone, as I submit it properly needs to be, that provocation has historically been applied to transferred malice cases under 167C. So to take it to its logical conclusion, if the Court were to conclude on the facts of this case that provocation was not available to the appellant under a 167D murder then it would face the strange situation I submit of saying, but nevertheless he was charged under 167C and provocation can apply to a 167C murder so what would have been appropriate is for the trial Judge to have directed the jury on provocation if they were to find under 167C. But to disavow and say it cannot apply if they find murder committed under 167D. And I simply make the point that that would result in further complexity, further cumbersome, and in my submission difficult, submissions in a notoriously troublesome area of law.

Elias CJ That submission doesn't have to be based on speculation as to what the jury did in this particular case. It's based on a submission that s.169 applies to murder generally.

King Murder, yes.

Elias CJ That in cases in which this might arise, the Crown might be proceeding under the different types of murder and the complexity.

King Is added to the murder.

Elias CJ Would be large. So it doesn't actually depend on the particular case.

King No I accept that.

Elias CJ This argument.

King It does, but in my submission most cases where felony murder is charged, it is very rare to find a case where there are not alternative sections. And there is that interaction between the various provisions of 167A which also, I submit, needs to be borne in mind. So that's really the first preliminary point.

The second one that I raise is a jurisdictional issue. And that is really based on several factors. The first of those is that leave has been granted to the appellant to advance certain grounds of appeal. The Rules of this Court, particularly Rule 20 subs (4) of the Supreme Court Rules, makes it clear that if the respondent is intending to uphold the finding of the Court of Appeal but on grounds that were either not advanced or alternatively were rejected by the Court of Appeal, then they need to give leave to do that. Rule 24, if a respondent does not wish the judgment appealed from to be varied but intends to support it on another ground (being a ground that the Court appealed from did not decide or decided erroneously) the respondent must give notice of that intention in the respondent's written submissions. Now that's written submissions on the leave application and not as on the substantive appeal. What I submit the situation is here is that leave has been granted to the appellant. There's been no written application by the respondent to seek to uphold the verdict on grounds that the Court of Appeal didn't agree with and yet we're in a situation where with respect that seems to be what the respondent is advocating. The respondent clearly and directly submitted and argued in the Court of Appeal that provocation can never apply to a felony murder under 167D. That proposition was fairly and squarely before the Court of Appeal and it was fairly and squarely rejected by the Court of Appeal in paragraph [21] of the judgment. In my submission then, we're in a situation where the Court needs to consider whether it is appropriate for the respondent to now rehash arguments clearly rejected without going through the formal procedure.

Tipping J Do you have any recollection Mr King, I have a faint recollection that this point was raised during the leave hearing as to whether the Crown was intending to revisit that issue and I have the faintest of recollections that it was left, at least in my mind, not absolutely clear but the impression that they weren't. But I may be building more out of memory than, we'd have to look at the transcript.

King Mm, I was probably slightly overwhelmed by the occasion Sir and I confess that I don't really, but I don't want to.

Keith J Even if you're right, I mean, it's difficult isn't it though for us to avoid the wider Crown argument?

King That may well be the case and I certainly don't want to be interpreted as shying away from.

Elias CJ And what possible prejudice?

Keith J And you've addressed it haven't you?

King From the findings.

Tipping J We could give leave anyway.

Elias CJ Yeah, and what possible prejudice have you suffered?

King I'm not saying I've suffered prejudice Ma'am but I'm saying that this Court has been very diligent in setting down the procedure to be followed. I accept that we don't have anything new, we're simply re-traversing in effect the arguments which were traversed and subsequently rejected by the Court of Appeal. But in my submission it's a matter for the Court to give consideration to.

Gault J What could we do if we, in the course of considering the argument on D and provocation, came to the view clearly that there was a full incompatibility between the sections? We couldn't just say, well it's something we can't look at.

King Well with respect Sir that's a matter for the Court. All I'm doing is drawing together the Court's process. I know this is one of the very early criminal appeals and it might be a case where the Court wants to assert that its Rules are going to be complied with and followed. But I don't take it any further. But in my submission it's proper and appropriate to raise it.

Keith J The ground that Justice Tipping and I approved in A was about whether the Court of Appeal had erred when it determined that the defence was untenable and that means I suppose it's got to be read into

that, in the particular circumstances. But it also, I mean that wording is actually quite general isn't it?

Tipping J The wording untenable comes from the Court of Appeal judgment.

King Specifically on the factual.

Tipping J On the facts.

Keith J I realise that but.

King But I simply raise that matter.

Tipping J I'd be against (laughter).

Blanchard J Mr King I think you're to be applauded for raising this point because it shows that you were listening when you had the unfortunate experience of three times hearing me thrashing through them at the seminars.

King I've got my … as the bible on that Sir.

Blanchard J You're quite right technically.

King But I just simply raise it because it's a matter there.

Blanchard J Mm.

King But the next two jurisdictional points that I raise in my submission are much more significant. And the first of these is the concession that was made at the appellant's trial and accepted by the Crown that the death of Mr Ruarau was as a result of accident or mistake. Now that was a formal concession that was made in the course of the trial. It's referred to in paragraph 43 of my submissions from page 18. At the appellant's trial the defence formally admitted certain matters. These admissions were accepted by the Crown and are set out in the course of the summing up to the jury and the reference is there. The admissions included (c) that the accused by accident or mistake killed Mr Ruarau, an element under s.167C.

Tipping J But that doesn't amount to any acceptance on anyone's part that it was an accident or mistake for the purposes of s.169.

King Well in my submission it's going very very close to that accident or mistake.

Tipping J Yeah but if we're going to be technical Mr King, let us be precise.

King Well if we're going to be technical Sir, defence Counsel faced with that admission, obviously carefully made and with the acceptance of that by the Crown, in my submission Sir is not therefore going to explore in

the evidence the concepts of accident and or mistake in any detail. Because it has been formally conceded and accepted. In other words, I submit Sir it's no longer a live issue at the trial.

Tipping J But there couldn't possibly be any more evidence on the point. It's a point of law.

King Well.

Tipping J Deriving from.

King The evidence which could have been explored and perhaps wasn't was the appellant's knowledge of Mr Ruarau's presence at the address and his knowledge of whether or not Mr Ruarau was affected by alcohol. Now there is no evidence in the trial that the appellant was actually aware that Mr Ruarau had returned home. Certainly there's no evidence that he was the worse for wear from alcohol. Now that is really an argument by a negative rather than a positive. And if that concession had not been formally made.

Gault J That would be much stronger if this had said 167D because knowledge of the kind you're referring to for evidential purposes is an element under that.

King In my submission Sir it's a flow-on effect because 167C and 167D certainly are similar in that regard. And obviously there's a flow-on effect into 169(6) which repeats the phrase verbatim, accident or mistake. But in my submission a Counsel faced with that acceptance by the Crown that it's not going to be pursued is therefore unlikely to traverse in evidence factors which may well have demonstrated accident and mistake on a stronger basis. This simply was not a live issue at the trial.

Tipping J When you say the Crown accepted the admission, is there actually provision in the legislation for that? I thought the rule was that it was over to the accused as to what facts he would admit and I'm not sure there's any provision for the Crown to be bound collaterally by that acceptance. Are you able to point to the section which?

King No, well I don't think there's a statutory section as such Sir, but the way the case proceeded, it seems.

Tipping J Isn't there something in the Act that talks about admitting facts?

King No I don't, my friend's going to.

Blanchard J How did the Crown put it to the jury?

King They ran a transferred malice argument.

Blanchard J But did they accept that it was an accident or mistake when addressing the jury?

King Well in my submission there's nothing in the record to indicate that they didn't. And the fact that the Judge repeated that and therefore said, and therefore no formal evidence is required on those matters, shows that the Crown must have been a party to that or at least acquiesced to that admission.

Tipping J When you say the Judge, did he direct the jury that it was common ground that this killing was by accident or mistake?

King Well.

Blanchard J I think the admissions, the formal admissions were in the material given to the jury.

Elias CJ Which we don't have.

Keith J I do have a copy, it may be worth copying it. It's one advantage of my holding onto paper longer than I ought to. So I was mystified that it wasn't in the record because the Judge keeps referring to it doesn't he?

King Yes well we sought it and we were provided with really just pages 6 onwards.

Keith J Well the whole lot was in the Court of Appeal bundle. Because I took this out of the bundle we were given at the leave hearing.

Gault J I don't immediately see the.

King Page 180 Sir.

Gault J Concessions in there.

King Page 180, it's Tab F in the case on appeal. And this may.

Elias CJ I think some of us have the admissions.

King The admissions, yes.

Elias CJ And some of us do not.

King But how His Honour summed it up to the jury in my submission says a lot in itself. I now turn to Count 4 of page 4 of the leaflet. Certain matters have been formally admitted by the defence and accordingly do not require proof.

Keith J Page 11 of the summing up?

King Those matters are set out at the top of page 4. So the question on this Count comes down to, is it murder as the Crown contends or is it manslaughter as the defendant contends?

Tipping J Isn't the substance of the admission, yes I killed Mr Ruarau, and I contend that it was by accident or mistake? I can't see how you can have an admission of this kind binding the Crown unless that's the way it was closed to the Crown. I killed him, yes I agree I killed him, the fact of causing the death. But what I say is it was by accident or mistake.

King Yes, well how I submit the Crown closed, which is part and parcel of this admission, is that it was never suggested at all that the appellant intended to kill or to cause harm to the deceased. That was accepted. And that's how the Crown closed. No-one suggested anything to the contrary. And in my submission that position adopted by the Crown really flows on from the formal admission. So there is acquiescence I submit to that concession that it was accident or mistake.

Gault J In the instructions to the jury, the matters admitted under the heading Count 4.

King Yes Sir.

Gault J That's the Count charging what?

Keith J Mr Ruarau isn't it?

King Yes, that's the Count charging murder.

Gault J And under D which is the admission, C is the admission you refer to, it specifies section 167C?

King Yes.

Gault J The next two admissions specify 167D?

King Correct. And none of those admissions of course refer to 169.

Keith J No.

King Now the phrase accident or mistake is a phrase which is peculiar to 167C, it is not part of 167D but it is also a phrase which is repeated in 169(6), accident or mistake. So in my submission it was perfectly reasonable to conclude that the concession that was made was accident or mistake for the whole purposes of the trial.

Elias CJ Was the concession a fact?

King Yes. Yes.

Blanchard J Well I'm not sure.

King But where I say the appellant could be seen to have been prejudiced.

Tipping J The question is not what the accused conceded surely but what the Crown is bound to. You're building as I understand it.

King Not bound to Sir but how the case was presented. What I submit, and I'm not trying to say that the Crown cannot now raise that argument.

Tipping J Oh I see.

King What I'm saying is that had this argument been fairly and squarely flagged to the appellant at his trial, then Counsel would have been in a position to explore accident or mistake. As it was conceded and no further evidence was required as the Judge says.

Tipping J But if your client succeeds on his appeal, is this an argument to try and stop a re-trial?

King No. No, not at all. No, this is to say that, I suppose it's a substantial miscarriage of justice type ground.

Blanchard J A proviso point?

King Possibly. We could certainly come within that.

Tipping J A counter-proviso point?

King But the Court of Appeal concluded on the, let me try and articulate it in this way if I may. The Court of Appeal concluded that on the facts of this case the defence of proviso was untenable, the reason being that because Mr Ruarau's death cannot be categorised as an accident or mistake. In a nutshell that's what the Court of Appeal concluded. What I'm submitting is that the Court of Appeal, on making that assessment, are using a transcript of evidence and evidence that was given at a trial where that point was conceded and admitted by the defence. Now had the appellant been aware that this was going to somehow remain or become a live issue, then the accident or mistake aspect of the case could have been explored and traversed in much greater detail. And I submit that there was a proper basis for doing so because there is no evidence that the accused knew that Mr Ruarau had returned home. There is no evidence that the accused knew that Mr Ruarau was affected by alcohol. A further aspect of that of course is that there is no evidence regarding the disability that Mr Ruarau suffered regarding his hip which may have been an impediment to him escaping.

Now in a case where accident and mistake is an evidential issue, those matters could have been explored to see whether his death could properly be classified in fact as a mistake or as an accident. And it's on that basis that I raise the matter.

Tipping J You're presumably saying are you that this is an independent ground for a new trial?

King No.

Tipping J Why do you need this point? If you get a re-trial anyway?

King Yes.

Tipping J You get a re-trial.

King There's no bar to.

Tipping J If you don't get a re-trial because we're with the Crown, how does the point help you?

King Well because in my submission it needs to be viewed in the context of, was the Court of Appeal correct in holding that this, on the facts of this case, it was untenable. Now that is a factual question about the facts in a case where accident and mistake are being accepted.

Tipping J But they're saying that they consider that on those facts it's untenable that it's an accident or mistake.

King On those facts, facts where accident and mistake was conceded, where if they'd not been conceded then there could be more evidence before the Court now to reassess them.

Tipping J Therefore you should have a new trial?

King No I don't argue it as a separate ground.

Tipping J Alright, I'm sorry, I'm.

Gault J I have a bit of difficulty about this anyway. Perhaps it depends upon what he had knowledge of the likelihood of.

King Yes.

Gault J Was it the likelihood that there were people other than the provokers in the house who might be killed?

King Yes.

Gault J Or that this specific person was in the house who might be killed?

King Yes. And that's.

Gault J And I would have thought it probably the former isn't it?

King Well that's where it gets, it does get difficult. And one suspects that that was behind the judgment of the, the example given by the Court of Appeal. Whereas if I am provoked and set fire to this courtroom with the intention of killing the people in it, but everybody in the courtroom actually escapes, but unbeknown to us a very diligent law student wanting peak position is hiding under the desk, then we're in a situation where those that we know to be likely to be killed by the act have all escaped and not died. Does that, do we have a doctrine of transferred malice? I knew that they were likely to die which can be transferred to someone who I did not per se, know to be likely to die. And that's, I think the Court of Appeal were correct when they say it's a difficult area and with respect it is.

But here we have a case where it's quite clear that the target as it were of the fire, and I use that in a neutral, not a mens rea sense, but the people that the appellant says he was wanting to get back at were his mother and his step-father. Obviously there is more than mother and step-father staying at the house. And to that extent there is a wider knowledge of likelihood of persons being harmed. But Mr Ruarau, does he come within that class? Can we apply a doctrine of transferred malice to saying that although he may not have known he was there, he may not have known if he was there, that he was affected by alcohol and therefore was probably less likely to be able to effect escape and where you can add to that he had some hip problems which may have prevented him from effecting his escape as well.

Gault J Well that's taking foresight to the kind of detail that becomes almost intentional murder rather than anything transferred. I just don't think the law would ever get that far. I think it would be directed to persons likely to be killed. There were people in the house, whoever they might be.

King Well then the scenario where the person in the house is a burglar or a tramp sleeping rough under the house, the examples given by the Court of Appeal.

Gault J As is said in the written submissions, that would probably be charged in some other way.

King Yeah, that's my submission. And my point is simply that the actual factual scenario that we were presented with is perhaps not a million miles from that. The difference is I suppose that there is knowledge that some people were in the house and there is obviously, if one accepts the verdict as we must, there is recognition that their deaths are likely as a result of the unlawful object. But does that necessarily

transfer into the actual deceased who may not have been in that category?

Tipping J Mr King just before we leave this, this all seems to be factual.

King Yes.

Tipping J Or legal. But you introduce this as a jurisdictional point?

King Yes, no the jurisdictional point relates to the concession that was made at the trial as to accident or mistake. And really, I'm sorry, but it's gone slightly off course on the basis of saying, well where is the evidence that accident or mistake could have been thrashed out better than it actually was? And in my submission the points that I've just raised are examples of how the evidence could have been explored in a direction which may have well bordered factually within the accident or mistake concession. But of course, because of that concession, that was not done at trial.

Now the second jurisdictional, or I suppose the third one that I'm raising really, is.

Elias CJ I'm making it four on mine. But however.

King Four, okay, well I'll go with four Your Honour. The fourth point is that in the argument on provocation and whether it should be left to the jury, it was stated by the Crown to His Honour Justice Chambers, the trial Judge, that there was no prospect of the point being sought to be, whether provocation should be left to the jury or sought to be reserved and left to the Court of Appeal. Now that was a formal concession by the Crown.

Elias CJ The Crown didn't seek to reserve the point?

King They didn't and they said to His Honour, and it's recorded in his judgment, that there is no possibility that they would seek to have the matter revisited. And I've set that out in my written submissions, I believe at paragraph 16. Yep, paragraph 18 sorry, page 12 of my submissions. His Honour ruled that provocation should be left to the jury and recorded at paragraph [8] of his Ruling that the Crown prosecutor advised that there was no possibility of the Crown wishing to reserve a point of law for the Court of Appeal's opinion.

Tipping J If you're saying we shouldn't consider it because it's sort of outside our jurisdiction or something, shouldn't you have raised this on the leave hearing?

King No I'm not saying you shouldn't consider it, but I'm saying that it is again a factor which should properly be taken into account on either the proviso, if we get to that point.

Tipping J We're supposed to be considering high level issues of law.

King Yes.

Tipping J And in my respectful view the sooner we get onto them the better.

King Okay. Well I raise those matters because again.

Elias CJ Mr King if you're correct in your submission, I can't see any prospect of the proviso being applied.

King Yes, well.

Elias CJ So if you're raising all of these points against that possibility, surely you can keep it for reply.

King Yes. I emphasise these matters now because my friend is very clear on the second limb of the leave applications, clearly arguing that the proviso should apply. So.

Tipping J We seem to have gone right to the end of the exercise before we've even started.

King Sorry, let me go right to the beginning then Sir. The factual basis of course that was before the jury is well traversed in paragraphs 5 to 8 of the written submissions. It's perhaps encapsulated as best as anywhere else in this entire case in His Honour's judgment paragraphs [9] and so on, which is paragraph 9 of the appellant's written submissions. Page 7, paragraph 9. This was in the context of the Ruling at the conclusion of the Crown case at least. I think it was also before the evidence of Mr Chaplowe but I'm not 100% sure on that as I'm on my feet. But certainly it's at the conclusion of the Crown evidence when the Crown submitted that there was an insufficient evidential basis for provocation to be left to the jury. It's set out there fully. The Crown of course argued, and continue to argue to this day, that any provocation that was proffered to the appellant was minimal. That was the submission that was made to the jury and summarised by His Honour in the summing up, repeated in the Court of Appeal and indeed repeated by the respondent in this case. Well, with the greatest of respect, there are many many cases where what viewed objectively must be much lesser provocation than this has successfully found a defence. We have here provocation at, to put it neutrally I submit, a reasonable level. The provocation in the particular case of course must be viewed as having been significantly amplified by virtue of the appellant's particular characteristics as testified to by Dr Chaplowe.

Tipping J Is Mr Pike arguing against you that provided provocation applies to paragraph D murder which, say he's wrong on that, that his submission is wrong and it does apply?

King Yes.

Tipping J Is there any argument against you that there was insufficient evidence for it to be left to the jury?

King Well certainly that's, … my friend's, I think he described it as a rather barren basis for provocation to be.

Tipping J Rather barren may be a hope at submission. But I don't think, is it argued against you, assuming you win on the law?

King Well I thought it was being argued against me Sir but I stand to be corrected and my friend's indicated that it isn't.

Tipping J Right, so you've got to concentrate on the law. If you win on the law you're at least halfway there.

King Yes, thank you. Well then the issue becomes, I'm sorry it's taken us 35 minutes to get there, about whether or how provocation can be said to apply to a 167D murder. Now in the written submissions this really commences the discussion. At paragraph 11 on page 9 the section is set out. I make the point there that it wasn't particularly clear which section was being relied on by the Crown. I do submit that s.167D is a full mens rea offence in the sense that it requires actual intention to commit an unlawful object. The word unlawful means of course that it must be intentionally unlawful. And secondly that the offender must actually know that death is likely. So I submit that perhaps to be contrasted with felony murder, so-called in some other jurisdictions where there is a did know or ought to have known rider which means it's an objective test, that we have a purely subjective full mens rea offence - knew that death was likely, intending to commit an unlawful object. Now to that extent I submit that 167D.

Tipping J That's not the sole mens rea is it, at paragraph D? The intentionality of the unlawful act?

King And knowledge of death.

Tipping J Yeah but the key mens rea is foresight of likelihood of death.

King Yes, no they're both full, both elements of it.

Tipping J Oh of course. But the key one is knowledge of likelihood of death isn't it?

King Yes, no I would accept that. And to that extent Sir I submit that it is almost identical really mens rea. It's just perhaps wider than 167B murder. 167B is that the offender means to cause to the person killed any bodily injury. So that's your intent. I intend to cause bodily

injury. Now that with respect can be directly compared to meaning to commit an unlawful object. It's just a particular type of unlawful object. And the foresight is that death may well ensue. And then there's the reckless whether death does in fact ensue. But reckless doesn't really add anything. So really I submit the 167D mens rea can be directly compared and is almost identical to the 167B mens rea.

Elias CJ Well I find that very hard to accept Mr King and it seems to, it's quite different. There has to be an intention to cause bodily injury.

King Bodily injury, correct.

Elias CJ I mean that's a substantial hurdle which isn't there in D.

King No, no, D is wider because the intention is to commit an unlawful object. But intending to cause someone bodily injury is of course an example of an unlawful object. So in my submission a 167B murder would automatically qualify under a 167D murder as well. So, but I submit that the mens rea, and one, clearly Your Honour's absolutely correct, it's to intend to cause bodily injury. In D it's to intend to commit an unlawful object.

Elias CJ Which in this case was burning down the house.

King Correct. Now in both cases however, going beyond that, there is the knowledge, the foresight that death is likely as a consequence. So really I submit that there's not a lot of difference between someone saying I'm going to burn a house down and I foresee that people are likely to die as a result of that and someone who says I am going to kick someone in the head and I know that death is likely to result from that. In both cases the foresight is the same. The unlawful object is different but really I submit that's a factual distinction rather than a legal distinction.

Elias CJ What was the defence to subsection D? Was it simply provocation? Or was it really suggested that burning down a house, knowing that there were people in it, was unlikely to cause death?

King It was both, is how it was closed to the jury. It was said that the accused was simply intending to give them a scare, that he had no idea the fire was going to spread as rapidly as it actually did.

Elias CJ But that's about actual intent to kill.

King Yeah, no that's about not foresight of death to people. That he didn't foresee it as being likely.

Elias CJ He didn't foresee it?

King Yes, and that of course again must be compared I submit with a 167A or 167B classic murder case.

Keith J He thought it would be a small fire.

Elias CJ Oh yes.

King Yes, so it's an intent argument, or an intent argument to the extent of lack of foresight of likely death.

Keith J And that was.

King And if that was rejected, provocation.

Keith J That was one way of trying to explain the hose wasn't it? That he.

King Yeah, and of course that was a bit of a two-edged sword.

Keith J But the argument there for the defence was that hiding the hose was an indication, or putting the hose away.

King That he thought it was going to be a small fire.

Keith J That he thought it was going to be a small fire, yes, yes.

King Well capable of being put out with a hose.

Elias CJ But the concession as I understand it was that the unlawful object was burning the house down.

King Correct.

Elias CJ That's the admission that was made.

King Yeah, that's, well that the accused's act in lighting the petrol was an act done for an unlawful object, namely burning the house.

Elias CJ Oh burning the house.

King Burning the house.

Keith J "Down" wasn't in it?

Elias CJ The "down" wasn't in it.

King No "down".

Elias CJ Sorry, thank you. Burning the house.

King Very subtle distinction Your Honour.

Elias CJ Scorching the house?

King Yes. That was what he'd said in his video interview, that he just wanted to give them a scare. That the fire was much bigger than he thought it was. Afterwards he rang up his cousin to find out whether things had gone as bad. He ran away in shock swearing at himself. So there is an argument there. I know it's typical murder trial stuff. I didn't mean to do it. If I did mean to do it, I was provoked. If I did mean to do it and I was provoked then I'm sorry. And I don't think sorry's a defence yet but the Law Commission might be looking at it.

Tipping J Mr King, can I, in the interests of sort of advancing the matter?

King Yes Sir.

Tipping J The key first question surely is whether provocation applies to paragraph D murder.

King Correct.

Tipping J And may I suggest to you with respect that your best starting point is in the terms of s.169(1)?

King That which would otherwise be murder?

Tipping J Yeah. Which in its plain terms appears to cover all forms of culpable homicide.

King Correct.

Tipping J The question is, is there anything which can properly lead us to read that down?

King It is precluded. Yes. And what the Crown argue of course is that, despite those very specific, clear, precise opening words, that 167(6) is somehow used to read that down. Now I submit that that's incorrect. What I submit the purpose of 169(6) was was to make it clear that the doctrine of transferred malice also can attract the partial defence of provocation. There was debate about that for many many years. My friend has very impressively set out the common law and historical context and the way that it came to be accepted. My friend of course has made the formal concession that it's well accepted now, because of 169(6), that the doctrine of transferred malice does not preclude a defence of provocation. Now the words in 169(6) repeat the phrase "accident or mistake" under the transferred malice provision of 167C. 167C, intend to kill one person, by accident or mistake kill another. I submit that the purpose of 169(6) was to make it abundantly clear that that scenario does not mean provocation cannot apply. I submit that it was not intended to go further than that. It was not intended to be used

as a bar to provocation applying to 167D murders. And to interpret accident or mistake as somehow placing limitations on provocation to 167D murders is, I submit, simply not right. It's inconsistent with the opening words that Your Honour has alluded to Sir. And.

Tipping J Is there some support for that argument by the fact that the word accident is far more apt for a paragraph D murder?

King Well that's.

Tipping J Than any of the other species of murder?

King That's my argument Sir. So we were left in a scenario, if we draw back to the particular facts of this case by way of illustration, the fire goes, targeted at mum, or step-father, fire burns, mum and/or step-father die as a result. In that situation, whether it was 167A or 167B, provocation would be available to this appellant as a defence. We then take it to the next step. Appellant intends to kill mum, or intends to kill step-father and burns house down with that intention. Instead of either of them dying, an innocent third party in the house dies. Clearly and unequivocally a s.167C murder scenario. Provocation applies. The doctrine of transferred malice under 167C incorporated into provocation by 169(6), accepted by the Crown, provocation applies.

Gault J Whether there was knowledge that the person was present or not?

King Transferred malice, yes, yes it would be Sir, that's absolutely correct.

Gault J Mm.

King Then we get to the scenario which is actual, if we accept that it was 167D, you might.

Blanchard J The least morally culpable?

King The least, yeah precisely. So we're in a situation where if I kill mum, provocation is at least able to be presented. It might be rejected but it's at least available. If I mean to kill mum and kill C, provocation is available, transferred malice. But if I mean to kill neither of them, but I recognise that death is likely, and an innocent party who it is accepted I bore no ill will against, that I really intended to achieve this without killing any person, that that somehow means that it's not an accident or a mistake. And in my submission that's really the nub of what the Court of Appeal have concluded.

Tipping J Well they, as I read them, justified that by saying that if you foresee something, it can't be an accident. Now if you intend.

King Pretty much yes.

Tipping J If you intend to cause death, it's obviously not an accident.

King Yes.

Tipping J But if you foresee death but don't want it to happen.

King Yes.

Tipping J It's very debatable as to whether you can say that's not an accident.

King No and what I submit the, that's absolutely how the Court of Appeal saw it. And they make the point that intention or foresight, I think is the word they use, does not exist in the abstract or in a vacuum. But in my submission that is really the nub of where I submit the Court of Appeal got it wrong. Because accident or mistake, I submit, needs to be looked at very clearly and subjectively from the perspective of the offender. It cannot, I submit be looked at on an objective basis. Support for that comes from 167C. Again, I know, I keep harping on about that, but there is case law which accepts that when I mean to kill mum and in fact I kill C, that the death of C is an accident or mistake from the offender's perspective. The intention was to kill mum, accident or mistake killed C. My friend's accepted that in written submissions under 167C.

Keith J So your attack on this Mr King, is it essentially paragraph 24 is it of the, page 33?

King Yes. Precisely.

Keith J And as my brother Tipping was just saying, if it's envisaged, if the risk is envisaged, then that couldn't have been an accident or mistake?

King Yes.

Keith J So each time I drive I envisage.

King That's the example I give.

Keith J You know that there's the possibility of an accident that might kill somebody. That's not an accident.

King Exactly. And that's, and of course.

Tipping J Your driving would have to be such that it was a known risk that it's going to kill someone.

Keith J Well there's a known, there is actually a known statistical risk of driving on the roads. Fortunately it's only half of what it was 20 years ago.

King Yes.

Gault J There's a difference between possibility and likelihood.

Keith J Yeah, sure, sure.

King Yeah, likelihood is. But with respect.

Keith J This is just envisaging the risk, is the language that.

King That's right but the difficulty is, when we read into that an objective type requirement, almost a social policy recklessness. You've taken a risk. You might have desired that that risk not eventuate but it was such a bad risk to take, so obvious a risk to take that therefore you're deemed to be guilty. Now that of course must be accepted as being the policy behind 167D felony murder in New Zealand. But to then use that again to preclude a defence of provocation by saying that, because you were reckless it therefore cannot be categorised as an accident or mistake, I submit it is an unnecessarily cumbersome and unjustified limitation when the reality is there will be plenty of factual limitations in such a scenario. Juries, as the conscience of the community, are far less likely to excuse on the basis of provocation a homicide committed in such circumstances than where the death obviously involved the actual provoker. Now that philosophically may not be the appropriate basis to approach it but that's the reality. Simple, factual, honest to goodness jury reality.

Elias CJ But it does strike me that almost your best point is that under 167D, if the person who died had been mum, that provocation would have been available.

King Yes.

Elias CJ And what's the policy reason for the difference?

King For excluding it from this. And that's absolutely correct Your Honour. And I think His Honour Justice Blanchard, as he said that the moral culpability is probably less in a person under 167D than it is under 167A. Now that is debatable. My friend debates it. But in my submission that, on normal reasoning, will be the case.

Blanchard J If you put that together with the fact that in 169(1) there is no qualification.

Keith J No.

King Correct. And 167(6) has a particular purpose to incorporate provocation under the doctrine of transferred malice. And should not therefore be interpreted as a back door mechanism to preclude the availability of the defence to 167D by really stretching the concepts of

saying accident or mistake do not exist in a vacuum. Bad. And I accept that. No-one's saying it's entitled acquittal. But the point is simply a person who is provoked sufficiently to lose his or her power of self-control and thereby commits murder by intentionally killing a person, is not really materially different to a person who by virtue of the same power of self-control, the same level or degree of provocation, loses his or her power of control and commits an arson. With the knowledge.

Gault J Does it follow as a matter of logic, if you are right, that this death is by accident, then similarly under paragraph B of 167 in each case the death is by accident?

King Mm. That must be correct Sir. Because you do not.

Gault J It's reckless. But it is by accident.

King In a, yes, but the law recognises it is running an unacceptable risk. But clearly if you intend to kill a person, the death of the person cannot be an accident.

Gault J Oh quite.

King But if you only intend to cause the person bodily injury, even though you recognise that death could well ensue and that person dies, then certainly that from the offender's perspective is an undesired consequence. Very reckless. Very bad mens rea, recognised in social policy by calling that murder as a starting point, subject to provocation. But nevertheless I submit that must be regarded as an unintended consequence. And of course it's stronger in 167D because we actually have the final sentence of 167D saying though he may have desired that his object should be effected without hurting anyone. And that, in my submission, must be the case here where there was no suggestion Timoti bore any ill will against the deceased. From all accounts they got on well.

Tipping J Before the blurring by the House of Lords in the mid-50's of the concept which has now been dealt to.

King Yes.

Tipping J The concepts of foresight and intention were discrete. And we've managed to separate them out again after that unfortunate period.

King Correct. **Caldwell** recklessness and all those, yes (**R v Caldwell** [1982] AC 341). Yes.

Tipping J And it seems to me with great respect that the Court of Appeal haven't made that distinction.

King Gone back. Yes.

Tipping J Sufficiently for present purposes.

King Yes.

Tipping J That the policy here is that you be regarded as culpable.

King Yes.

Tipping J Up to the point of manslaughter.

King Yes.

Tipping J As a result of the foresight.

King Yes.

Tipping J But that doesn't negate the fact that the provocation is available as an accident.

King Yes.

Tipping J If it's only foresight, but obviously, as you've just said to my brother Gault, not if it's intention.

King Yes.

Tipping J So I think there is, with great respect, arguably, and I'll be very interested to hear what Mr Pike has to say on this, they've let the guard down and they've equated foresight and intention.

King Yes. That's right.

Tipping J Where it's clear policy to keep them distinguished.

King Correct. And what they've done in that process I submit is blurred the distinction between objective and subjective culpability. What they have said is that foresight doesn't exist in a vacuum or in the abstract. Now where it does exist is in the actual offender's head. It must be the offender's actual intention I submit. Because we are dealing with the most serious crime in the Crimes Act, then the full mens rea requirement needs to be very specifically looked at. Under 167C we know that accident or mistake is purely from the offender's perspective. And my friend seeks to limit that by saying the accident or mistake goes only to the identity of the person who was actually killed. I mean to kill A, in fact by accident or mistake or poor shot or whatever, I kill B. But it is looked at as accident or mistake from the offender's perspective. And that is the case whether or not there is, it is pretty obvious from an objective perspective that by doing this you

run the very real risk that B is going to die instead of A. There's no, we don't seek to limit that in any way and we apply provocation to that. Now I submit there's no rationale to go against the same type of thing.

Tipping J Well the classic transferred malice is meaning to kill A but killing B. Now from your point of view it's a terrible accident or a terrible mistake that you've killed B.

King Horribly reckless.

Tipping J Because your mind was directed to A.

King Yes.

Tipping J Now it seems to me to be overly subtle to water that down.

King Yes.

Tipping J When you come to the paragraph D situation.

King Yes. And that's precisely my point Sir. That's my submission Sir, is that to say it doesn't exist in an abstract is really to say, you were reckless, you took a risk, you knew that someone could die, someone dies, you pay the price. Now that is the basis for felony murder. But in my submission it doesn't need to be further restricted by the application of provocation. Now clearly a 167D type murder to which provocation applies is going to be in one of the worst cases of manslaughter. There's no doubt about it. And that is the appropriate forum I submit for actual assessment of culpability and that's where social policy, the need to prevent people from taking objectively, or even subjectively, extremely bad risks, that's where it can be taken into account. But I submit that it should not, and there is no logical basis for precluding provocation to 167D. Just as there is no logical justification for precluding it from 167A, 167B or 167C. My friend, I think he adds in, and I don't know if it was an aside, but he says the same logic that would preclude provocation from 167B murders would also preclude provocation from 168 murders. Which is another derivative perhaps of the felony murder rule. But I submit that the impediments that may exist to the application of the defence are factual ones. Not legal ones. And in a case where multiple counts of murder or murder is advanced under multiple headings, then it becomes extremely cumbersome to try and direct a jury to consider provocation under A, B or C but not under D. Unless one says it like that I suppose.

Now the argument, I've gone through that and I've tried to, and I think with respect in the discussion the points are grasped by the Court. The example I give of the person driving down an icy road may well foresee that they can slide off the road and have an accident. Don't

intend it. But they foresee it. Objectively reckless to even drive in those circumstances. But nevertheless an accident or mistake. Accident or mistake I submit is a purely subjective phenomenon that must be viewed purely from the perspective of the offender and social policy cannot in any way make that an objective test. Recklessness does not constitute.

Elias CJ Well isn't that just making it a bit more complicated than you need to? Isn't your submission that non-intentional killing is an accident or mistake?

King From the offender's perspective.

Elias CJ Well.

King I'm saying yes, no, yes you're right. Now I've made a dreadful typo in paragraph 26.

Blanchard J Third line.

King Yes. "Cannot" should be "can".

Blanchard J Mm, mm.

King My wife spotted that with horror.

Tipping J I gave you the benefit of the doubt when I read that.

King Yes, no, I'm grateful for that Sir. So that sort of takes the wind out of my sails somewhat when you say exactly the opposite proposition. It started with far too many double negatives, tried to take out, took out one too many and of course made it a positive. And then I go through and say that, in the facts of the present case, the unintended, undesired death of Mr Ruarau whom the accused or the appellant may not even have been aware was present, certainly there's no evidence to suggest that he was aware that the deceased was worse for wear for alcohol consumption, can only be classified I submit as an accident or a mistake from the appellant's perspective.

I've quoted in paragraph 29 the ACC traditional definition of accident which in my submission is entirely consistent with an unintended consequence.

I point out in paragraph 31 the obvious legislative intent of 6 was to make it clear that the transferred malice provision of s.167C murders were not precluded from consideration of provocation. And then go on to discuss some of the policy arguments.

Paragraph 36 I again, the Crown relied on s.167C or D, I think it's recorded there as B, it should be D. Again I apologise for that.

Again refer back in the submission to the Ruling that His Honour gave regarding provocation and take pot-shots at the Crown's submission to call this provocation minimal. And so on through to page 19 where I commence my discussion and analysis of the second limb of the leave application. So I submit that provocation is properly available to a person who commits murder under 167D, just as it's available under all other heads of murder. And that the facts of this case were such that the death can only be classified as an accident or a mistake. An undesired, unintended consequence. Reckless yes. Intended no.

That's all I'd seek to say unless there are any further questions on the first aspect of the case.

Elias CJ No, thank you Mr King.

King Yes. The second issue of course relates to the directions that were given to the jury in this particular case. The Court of Appeal went on to consider, having ruled that provocation was untenable in the appellant's case, the Court nevertheless went on to consider whether or not the directions that were in fact given passed muster. And they ruled, I submit with some reservation, that they would pass muster and I submit that that finding was wrong.

I set out at paragraph 46 the particular issues that were advanced regarding the directions on provocation. Leave of course is restricted to the question of proportionality. But I submit that when considering proportionality there are two aspects. They're absolutely related and really one flows on from the other. The first one is, can it be said that the response, the appellant's response or any reasonable whatever, in proportion to the level of provocation that was advanced. That's the classic **Campbell** type proportionality direction or the direction that was discussed in **Campbell** (**R v Campbell** [1997] 1 NZLR 16).

The second aspect however is, can it be said that the appellant's actual loss of self-control and the way that that manifested itself, in other words the extent to which the appellant actually lost self-control, has to be measured against how an ordinary person would be expected to lose his or her self-control. And that basis, its proportionality, was it proportionate to the provocation, was it proportionate to how you would expect an ordinary person to lose his or her power of self-control.

Tipping J This introduces the concept doesn't it of degrees of loss of self-control?

King Exactly. Degrees of loss of self-control. And that's when it's, yes it does, that's precisely what it does. And you'll see I elaborate on it in some detail. It's something which I wish I argued in **Rongonui** frankly (**R v Rongonui** [2000] 2 NZLR 385). But it didn't occur to me until fairly recently. But I don't know if it would have changed anything.

Elias CJ Well it occurred to me.

King Yes, no it did with respect … I don't know if it changes anything. Certainly it's, if I can just summarise it. **Rongonui** talked about the power of self-control being the threshold, the measure. The provocation can simply go to the gravity of the provocation. Recognising on the Richter scale level that was given that there is a point when even ordinary, reasonable people will lose their power of self-control. That point may be if we say at level 10. Now the particular provocation meted out to an offender might only be at level 5. And there one looks at it and says level 5, you'd be angry but you wouldn't lose your power of self-control. An ordinary person wouldn't in any event, therefore provocation fails. But because you've got a particular characteristic, the provocation to you was not a level 5 as it would be to an ordinary person but was a level 10. Therefore you and the ordinary person would both have lost your power of self-control at that level. You can advance, go past go, don't collect $200.00, you move onto the next hurdle.

Now in my submission the characteristic of the particular individual can also be relevant at the next step of saying, of measuring the extent of the loss of power of self-control. An ordinary person who loses his or her power of self-control may simply slam a door, throw a glass, punch someone in the face, whatever. Everybody may be deemed to lose their power of self-control in different ways to different extents. But a person with a particular characteristic, when they lose their power of self-control, it may manifest itself in an entirely different, more amplified manner.

Elias CJ What a dangerous argument you're making here.

King Well no, I submit it isn't Your Honour. Because you've still got, you've still got the threshold of the loss of power of self-control.

Gault J What does that mean? Control over what?

King Master of your own mind. But when you lose your power of self-control you by definition have no control over your actions. In some people that will manifest itself in different ways to others. And a characteristic you have may mean that when you lose your power of self-control that one that.

Gault J Is it control over the ability to withhold a murderous intent?

King Yes, however that's defined, whether under A, B, C or D, I submit. But you see in my submission that's where it, and perhaps I should go through it in the way, because I'm getting a bit ahead, I'm just trying to summarise the situations.

Elias CJ I thought you were actually running a proportionality argument?

King I am Your Honour.

Elias CJ Oh.

King But I say there are two limbs to proportionality. And the one we've just been discussing is the second limb. But if I perhaps try and do it in a logical way Your Honour.

Elias CJ Right.

King Page 19 I commenced on it. I set out there what I submit are the two limbs of proportionality at paragraph 48. The first limb is the **Campbell** type proportionality, set out the directions. That the trial Judge directed the jury that, and it's set out, the emphasis is given, you must consider as a weighty factor whether the accused's acts leading to Mr Ruarau's death bear any proper or reasonable relationship to the sort of provocation said to have been given by the accused's mother or Mr Willetai. The extent of loss of self-control has to be considered in proportion to the alleged provocation. Now in my submission that is clearly a **Campbell** type direction. A jury hearing that direction would have considered it was a legal requirement for them to consider. In other words a mandatory requirement. The words, you must consider, and it has to be considered, and it must be considered as a weighty factor, can lead the jury to no other conclusion I submit than to say we must consider that, that it's a weighty factor and we have to bear it in mind. And the corollary of course, if we don't find there to be a reasonable proportion, the defence of provocation must fail. That in my submission is the only sense a jury could have taken from that direction. Reinforced in the summary when His Honour says, again it's in paragraph 50 of my written submissions, His Honour summarised the position to the jury, to sum up on this aspect, there are a number of factors you need to consider. Sorry that's unduly emphasised in my recitation. Whether the provocation was such as to provide this partial defence. The nature of the act of provocation, just how serious or challenging or distressing, were the words used. Were they bad enough provocation to cause the kind of reaction. Clearly in my submission a jury on the totality of the summing up would have considered due proportion was required. If it wasn't there, provocation must fail.

Elias CJ Is your submission the kind of reaction and extent of loss of self-control earlier relate to the setting fire to the house?

King Yes. And whether that bore any proper relationship to a struggle.

Elias CJ Yes.

King Now, and I set out paragraph 51, and it gets a little bit I suppose slightly esoteric here. That the Crown argued that the provocation in the present case was minimal. That of course was a jury question but it's important to note that there was no concession by the Crown that the provocation, if it did exist at all, was anything other than minimal and certainly they say, and I've got the quote there from the summing up, that the provocation was certainly not sufficient for an ordinary person to have lost his or her power of self-control.

I go on in paragraphs 52 onwards to compare that direction to the type given in **Campbell** and make the point that **Campbell** was concerned not simply with the proportionality direction being given, although recognised it wasn't helpful in that particular case and would best not have been said. But they said it would have looked to the jury like it was a mandatory or a legal requirement. And in my submission, in that regard, that is absolutely on all fours with the directions that were given to the jury in the present case.

I go on and talk about some of the policy considerations, really a recitation of the rationale behind **Campbell**. And **Campbell** of course was not an isolated case. It followed on from a very long line of authority making it clear that proportionality was not a matter of law in New Zealand. And indeed with respect a line of authority which seems to have been adopted and accepted from around the whole world. I don't think anyone argues it any more.

The effects of it I've set out from paragraph 57 onwards. That we have a person who has a particular set of characteristics which means that he is very susceptible to rejection, very vulnerable to the type of provocation, exactly the type of provocation. So we've got the **Rongonui** sufficiently connected to nexis I submit is abundantly apparent. We've got a person with his various personality disorders which make him prone and vulnerable to exactly the types of rejection and physical assaults and so on that he was undoubtedly subjected to. And we have a characteristic which means that when he responds to a slight, he can do so in a grand manner. And I make the point, and I submit it's important, that in this particular case the Crown were permitted to adduce evidence for precisely the purpose of demonstrating that, even in the face of relatively trivial provocation, this appellant could respond in an over-the- top manner.

And that was recognised by His Honour Justice Randerson in the course of the pre-trial Ruling which is set out in Tab D page (lvi) where the Crown sought to adduce evidence that the appellant, three years before the fire, had got into a heated altercation with his mother that resulted in him stabbing her with a knife because apparently someone had eaten his piece of chicken. Extreme over-reaction. No doubt about it. Now the Crown are permitted to adduce that evidence despite the fact it's three years before. Despite the fact it must have been just so illegitimately prejudicial in terms of character of the

accused and so on. But it did have a relevance the Court held because it indicated that the accused is capable of an extreme over-reaction to relatively trivial incidents.

So we've got the argument then that's able to be put forward by the Crown that (a) the provocation in this particular case was minimal; (b) we've got a person who we know anyway reacts to trivial provocation in an extreme and over-the-top way; and (3) we've got directions to the jury that unless there is a proper and reasonable relationship between the provocation offered and the appellant's response, then the defence fails.

So I submit that it can be starkly contrasted with **Campbell** in that we've got this double whammy approach. Effectively the Crown is permitted to adduce discrete conduct evidence precisely to demonstrate that his reaction was over-the-top and was disproportionate. And in my submission in combination, that evidence being adduced with those directions on a proportionate response being required, with the Crown position that the provocation in the present case was minimal, then in combination, this appellant was precluded from having a jury properly consider his defence of provocation.

Tipping J Mr King there's a collateral issue that I'd like you to address at some stage. It seems to me to be arguable that one of the problems with this mode of direction is that it didn't invite the jury discretely in relation to this question of proportionality.

King Yes.

Tipping J To consider the two necessary steps: (1) did he lose his self-control?

King Yes.

Tipping J And secondly, should he have?

King Yes.

Tipping J Putting it very colloquially.

King Would a normal person have, yes.

Tipping J Now on the "did he".

King Yes.

Tipping J The question of proportionality may or may not have evidentiary significance according to the circumstances.

King Yes.

Tipping J And indeed an extreme overreaction may demonstrate, if the jury take this view, that there was in fact a loss of self-control.

King Correct, correct.

Tipping J Now as I read the summing up, and you'll be able to correct me, it didn't seem to me that the proportionality direction in any way focused on the two discrete issues.

King No.

Tipping J It was a sort of rolled up direction.

King It was rolled up. And if there was any doubt about that then the summary of factors that you must consider at the conclusion of the summing up removes any doubt. It was simply, if there was an extreme overreaction, provocation fails. I submit Sir, and it's really that passage which I've set out at paragraph 50.

Tipping J Well you needn't go through that again. But you.

King No, I totally agree it wasn't. I mean this case was pre-**Rongonui**. And so it wasn't a case where the directions were tailored in accordance with the six steps that Your Honour set out.

Tipping J But most of the authorities on provocation, and specifically proportionality.

King Yes.

Tipping J Do they not suggest that the logical first step for a jury, in spite of the way the section is arranged?

King Yes, it's the first one.

Tipping J Is to consider the factual issue first, the evaluative issue follows.

King Did the accused actually lose his power of self-control? Yes. Absolutely.

Tipping J Should he have?

King He definitely should have and that's why I say that the jury in this case were not told that this is a factual matter and not a legal matter that was rolled into one. And that really is at the heart of the deprecated comments in **Campbell**, that the jury, that it was not divided in the way that Your Honour has identified in saying it may be relevant to a factual consideration of whether it was actually the provocation which caused this appellant to lose his or her power of self-control.

Tipping J Well it's also relevant to the second question but it's relevant at least potentially in a different way because that question is evaluative rather than purely factual.

King Yes, no I do. And that I suppose flows into my second limb proportionality argument, the extent of the loss of self-control I suppose in an oblique sort of way.

But no that's in my submission, the jury considering Mr Timoti's case would have concluded, if his reaction was over-the-top, that's it, there's no provocation. It was not refined any more precisely than that. It was not saying, well traditionally proportionality might be something you look at to decide whether in fact the provocation did cause this accused to lose his or her power of self-control as a reasonable possibility. Or whether it in fact it was something else. But would an ordinary person have lost it and so on. And so, no, I certainly adopt that position. And in my submission that's really inherent in what's being said, that it was all grouped into one. The jury were left thinking it's a legal, it's a mandatory consideration, not an evidential type assessment.

Tipping J And it's important too I suggest, or for consideration, that in the factual question under s.169 the question is, did it in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

King Act of homicide being the unlawful object of lighting the fire.

Tipping J Well no, if the act for the unlawful purpose.

King Yes, yes.

Tipping J So the proportionality issue has, from the point of view of actual loss of self-control, has to be linked with the actual conduct.

King Correct.

Tipping J Of the accused.

King Yes.

Tipping J And it's a very interesting question as to whether act of homicide actually implicitly incorporates the mental state necessary for homicide.

King Mm. It is. One instinctively would say yes but I don't know if I could.

Elias CJ Well it's the act of killing.

King The act of killing. The physical act of killing.

Elias CJ On the, well it seems well open, on the wording of the section.

King Yes.

Elias CJ The act of homicide. Homicide is unlawful killing.

King The unlawful, well no it's not.

Keith J No, it's just killing.

Elias CJ Oh, it's killing, sorry yes, killing.

Tipping J So it doesn't say the act of culpable homicide.

King No, the act of homicide, no that's an interesting point. Because this clearly was homicide.

Tipping J Yes.

King It clearly was an act that led to it.

Tipping J Well it really means, colloquially, did it in fact cause him to lose it.

King And light the fire.

Tipping J And light the fire, as a result of having lost it.

King Yes, that's my submission Sir.

Keith J You'd think it would mean, in terms of your instinctive reaction a moment ago Mr King, it would mean a culpable act wouldn't it?

King Yes.

Keith J With the appropriate intent?

King Well probably, you probably don't get to the point of considering provocation of course because you do it at the end.

Keith J No.

King You've already got to the point of saying it was culpable homicide.

Keith J So the act of homicide, yeah, the act of homicide here is really the culpable homicide that would otherwise be murder.

King Yes.

Keith J In the first line probably isn't it?

King The act encapsulated by 167D.

Keith J Yes, or, but I was going back to the point that my brother Blanchard made earlier just about the opening phrase of 169(1).

King Yes. It's very wide.

Keith J Yes, and that's really isn't it what is being talked about at the end of 2(b)?

Blanchard J I think we've got to be very careful that we don't read too much either in or out of the language here.

King Yes.

Blanchard J Given that juries are given these sections.

King The sections. Yes.

Blanchard J I think it's important to think about what the instinctive reaction of the jury to the words is going to be when it sees them in their particular context.

King Indeed. And that's the danger of course of getting too legalistic, attaching policy interpretations on.

Blanchard J It's dangerous to get too refined. It's very refined anyway. If you add further refinements it just deepens the morass.

King In the last couple of trials where I've had to try and convince a jury that an act has been provocation for murder, I've really tried to urge upon the Court to avoid the general, give them the legislation, take them through it but give the directions on fact specific scenarios. I don't know if that would meet it but it's the way. You can ask the question, did Mr Timoti, did his mother and step-father's act actually cause Mr Timoti to lose his power of self-control.

Blanchard J Mm, mm.

King And really tailor it directly to the case.

Blanchard J Mm.

King And I think that's the course inherent.

Tipping J That's to be applauded.

King Yes.

Tipping J If people would do that it would be much easier than just sort of doing an abstract.

King Yeah, a dissertation on the law which as of course we, I was going to say we understand, with respect I don't think I really do. It is a complicated, and I think you know everyone's been saying for a long long time, it really does require some sort of legislative refinement.

Blanchard J Well the Court said that in **Rongonui**.

King Yeah and I think they said it in **Campbell** as well actually.

Blanchard J It's proving quite difficult.

King We're working on it. I'm on certain committees which are trying to put forward suggestions with the Ministry of Justice and so on but it looks with respect like it's still a way off. Well they're wanting, need to abolish it completely now and just have it as a mitigating circumstance of course.

Blanchard J Yes.

King Which I've never been in a case yet where provocation has been conceded. Like this one's a classic example. We'd be now arguing if it was a trial where there was no provocation, a guilty plea of murder, wanting a slightly lesser sentence, we'd have the Crown standing up and saying the provocation was minimal. And the defence would be saying it was horrendous. And Dr Chaplowe would be coming along and it would, yeah.

Elias CJ Can you just take me to, if you can quickly, to where the Judge in his summing up brought the loss of self-control into the act of homicide did he? I just can't remember whether he did not.

King Yes.

Elias CJ Or whether he simply spoke about the loss of self-control.

King He really.

Tipping J In reality in almost, I know of no real case where the link is arguably not there. I was drawing attention to it simply from an interpretative point of view. But I'm not wanting to distract you from the Chief Justice's question.

King Yes.

Tipping J But I don't think there was any specific direction on the inducing element.

King No.

Tipping J Which is usually self-evident.

Keith J Yes, yes.

King Yes.

Keith J Well it's implicit in the reference to self-control.

King Yes.

Tipping J Mm, it is.

Keith J That that has led to something.

Tipping J Mm.

King Yes we really start to get into it at page 185 of the summing up which is the passage I've set out.

Elias CJ Yes.

King And we go through it and we've got the Crown submission, we've got. And again it is actually very fact tailored.

Keith J Mm, mm.

King Which is to be applauded. It says provocation was minimal and certainly not to be regarded as sufficient to deprive an ordinary person of self-control. The defence on the other hand says it was extreme. Lucky jury.

Gault J Yes, it's at the bottom of 189.

King Yes.

Elias CJ Was it? Yes.

King And then we go through to the next page with that summing up, to sum up on this aspect. A number of factors that you need to consider. And then we go back to the general proportionality type direction which is not distinguished between. In fact I think I make the criticism or the point in the Court of Appeal that the final summary of course doesn't even mention anything about the characteristics of the appellant. And of course if this case was post-**Rongonui**, then some of these factual questions that were left to the jury about Dr Chaplowe's evidence would have been determined by the Judge. The Judge decides whether or not it is a qualifying characteristic. Here the Judge left it to the jury to decide whether (a) it existed; and (b) whether it could be a

qualifying characteristic. And in my submission that's a deficiency, but an expected deficiency because of course this was pre-**Rongonui**.

Now that really concludes what I would seek to say on the first limb of proportionality. I'm conscious of the time and I would just seek just 10 minutes after the morning adjournment perhaps to address the second issue and respond obviously to any questions the Court may have.

Elias CJ I would be assisted if you can tell me why you say these are two limbs.

King Yes. Two limbs?

Elias CJ Yes. I have some difficulty understanding why it was elaborated in that step.

King Well proportionality, what is a proportional response can be assessed in two separate ways. Both of them probably requiring the same type of consideration but articulated in different ways. The first one is, someone provokes me in way (a), I respond in way (b). Was (b) proportionate to (a). Was my reaction proportionate to the provocation that was offered? Now in many people of course, the only way you would make that assessment is to go to what I've called limb 2 and that is to say, well would an ordinary person faced with provocation (a) have responded in the way that the appellant actually did. So it's the same proportionality, it's just the different approaches to the same issue. Now where it becomes relevant is that in the particular case.

Blanchard J Does (a) exist?

Elias CJ Yes, that's my question.

Blanchard J I've got a real question about that. And I noticed, and this is something for you to think about over the morning adjournment.

King Yes Sir.

Blanchard J You contrast the New Zealand provision with the New South Wales provision.

King With the New South Wales provision. Yes.

Blanchard J I'm not sure that that contrast exists.

King Yes, well I think that's a very live issue with respect.

Blanchard J And I think, it'll be for the Chief Justice to say whether she meant it or not, but when I concurred in part of her judgment in **Rongonui**.

Elias CJ The wrong part.

Blanchard J When I was wise enough to concur, I think what I was concurring in was something that looks rather like the New South Wales approach.

King Yes, it is and of course it struck me in a murder trial I did last year, late last year, when the Judge directed them, and it was a horrible pitchfork killing of an unfortunate inmate, and the Judge directed the jury initially to, would a normal person have reacted in the way that this accused apparently did? And of course that's really what brought it home to me is, is that correct?

Blanchard J Which is what the Homicide Act requires in England.

King The 1957 Homicide Act, correct. That's what the New South Wales provision was.

Blanchard J And I think.

King And I've really raised the issue because it just seemed to me as a way of watering down with respect the harshness of the objective component of provocation.

Blanchard J Well degrees of loss of self-control are incompatible with the proposition that if you lose your self-control you're not the master of your mind.

King Not degrees but the way it manifests itself. Someone losing their power of self-control, there's a lot of factors in my submission which will lead to how that actually manifests itself. The simple fact is you've got no control over what you're doing. Someone with a particular characteristic to respond in a grand way is likely, viewed objectively, to lose their power of self-control in a much more grand and extreme way.

Tipping J One of the worries I've got with this direction is the fact that it gives the impression that if you lose your self-control you should only just lose it in response to certain levels of provocation and if the provocation is at a higher level, you're entitled to lose it completely. If you follow me.

King No, no, you see in my submission that's the first limb of proportionality, that's where the problem arises. But the threshold is, would an ordinary person have lost his or her self-control.

Tipping J If that's the case I'm equally lost with other members as to subdividing it into these two limbs.

King Okay, sorry Sir. Yes.

Elias CJ Alright, well perhaps we'll take the adjournment now and you can reconsider.

King As the Court pleases.

Court adjourns 11.31 am
Court resumes 11.51

Elias CJ Yes Mr King.

King Yes if it pleases the Court. Just briefly on what I've termed the second limb of proportionality which in reality is no more than a different way of looking at the first limb. And it's perhaps not so material in the present ground because clearly it's the first limb which is the critical **Campbell** type misdirection that's contended for here. But if I can just contrast the New Zealand legislation because I submit that it is an issue that should properly be considered and confronted head-on. And that is the extent to which an ordinary person loses his or her self-control. Our s.169(2)(a) simply talks about, was the provocation in the case sufficient to deprive a person, an ordinary person, of the power of self-control. It doesn't refine it further than that. And it's that plain wording of the legislation which is contrasted with the, I think as Justice Blanchard said, with the New South Wales position which is set out in my paragraph 71 on page 26 of the submissions.

Tipping J Really, your point is really very neatly, if I may say so, encapsulated in your paragraph 70 isn't it?

King Yes it is Sir. That's the sum of it. And I've set out the New South Wales which clearly requires the ordinary person to have not just lost self-control but to have done it to the extent of forming a murderous mens rea shall we say. Now my learned friend in his written submissions has set out a quote from Lord Diplock in **R v Phillips** ([1969] AC 130, 137) in paragraph 47 of his written submissions. One of the most influential expressions, it's described, is Lord Diplock. Counsel for the appellant contended that once a reasonable man had lost his self-control, his actions ceased to be those of a reasonable man and he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute. There is no immediate stage between icy detachment and going berserk. This premise must be based on human experience and is in their Lordship's view false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon. Now that is a recognition I submit that people can lose their self-control in different ways. And it simply encapsulates what is obvious in the sentiment that once you've lost your self-control you are no longer in control.

Now the question, and it's really a question which is simply posed, is does the New Zealand law require that a jury be directed that

provocation is only a flyer if you consider as a reasonable possibility that an ordinary person faced with the same level of provocation would have reacted in the same way or a similar way to how the appellant actually, or how the offender actually reacted.

Now it's my submission that that was really how the Judge directed the jury in this present case. And I've set out the quotes from the Judge. And I submit that the way that His Honour directed the jury was more in accord with the New South Wales statutory wording of their provocation defence than it was with the plain wording of s.169(2)(a) which simply says, would an ordinary person have lost his or her power of self-control.

Blanchard J When we talk in 169 of loss of self-control, surely it doesn't just mean any loss of self-control.

King No.

Blanchard J I could lose my self-control and start swearing furiously and thumping the table and maybe even punching someone around. But surely s.169 is talking about loss of self-control to a point which involves the formation of what can loosely be called murderous intent.

King Mm.

Blanchard J And I'm intending my murderous intent to catch all of the ways in which you can be charged with murder under 167.

King Yes. Now that is one interpretation. But in my submission that is not necessarily the only interpretation open on the plain wording of the statute. And one of the concerns of course with the objective/subjective type distinction to the loss of self-control is that the objective test, the loss of self-control of an ordinary person, doesn't take into account a particular characteristic which lowers the actual offender's loss of self-control. So the offender is measured against a standard which, because of a particular characteristic, that offender may not be able to adhere to. An offender, because of a characteristic, may have a lower self-control threshold. Now that really is the objection that one takes to what has been raised in much of the literature and many of the judgments on provocation. The objective component is that it may be requiring an offender to live up to a standard that they're simply not able to live up to. Now in my submission that can be ameliorated slightly by recognising the power of self-control is the daton, the level upon which an appellant is expected to require. But can be slightly watered down, and that's all, by saying once an ordinary person has lost his or her self-control, that can manifest itself in numerous different ways. But where you have a particular characteristic of an offender such as I submit was the case here, that the loss of the power of self-control was likely to result in a grand manner type reaction or outburst, then I submit that the loss, the

extent to which self-control from an offender with a characteristic prone to outbursts, should not be measured against an ordinary person who, because they do not have that characteristic, may respond in a less grand, less extreme way.

Now that's the argument. In my submission on the facts of this case, it's not perhaps determinative of the appeal except that the Court did seemingly direct the jury clearly that they were to reject provocation unless an ordinary person would have reacted in a way broadly similar to how the offender actually did react.

Now really, and it's simply a question that's posed because our statute does appear to be quite differently worded to the New South Wales one. It's also, I submit, on a policy based argument, and one can see it goes both ways, and I know probably the Court are thinking, are we simply allowing in the irrationability or the low fuse threshold by a back door method, but in my submission it could be properly interpreted as ameliorating slightly the so-called harshness of the objective portion of the test for provocation and yet ensuring truth to the wording of the statute so that the standard of the power of self-control is deemed to be that of an ordinary person and that is not able to be adjusted. But the way that that loss is manifested or extent to which it's lost, I don't know if degrees is the proper term with respect because degrees implies a controlled loss of self-control. And loss of self-control is loss of self-control per se. But some people will react in different ways in those circumstances. And in my submission this is really simply recognition of that.

Elias CJ It does really go back to the difficulties with the objective and subjective limbs of the test. And if you don't ameliorate in the way you suggest and on the text of the statute, it may be difficult to get to that position. But if you don't, it means that special characteristics never, never go to the power of self-control. They're only ever relevant to.

King Degree of provocation.

Elias CJ To the provocation.

King Absolutely and of course I submit that it's inherent in **Campbell** to recognise that the characteristic that Mr Campbell had, the flashbacks and so on that he experienced, was not simply relevant to his disproportionate response to what objectively viewed was relatively trivial provocation but it was also an evidential explanation that he did actually lose his power of self-control. So it is recognition of that duality as it were.

Now there might be good social reasons to say you're opening it up too wide. You're incorporating diminished responsibility into the law and all those things. But in my submission the way that the statute is read

does not require the ordinary person to lose his or her power of self-control to the same extent that the appellant actually did. And as I say, I know that there's two sides to that argument but I do contrast the position in New Zealand law with the New South Wales law. And as I say, I've probably laboured long and hard.

Gault J It's a very subtle re-argument of **Rongonui** to my mind.

King Yes. Well it's an extension Sir.

Gault J Can I take you back a little bit Mr King?

King Yes Sir.

Gault J And get some help from you in principle on this issue of proportionality. It seems to me that apart from the subjective test of whether the person actually lost self-control, there are the two issues. One is whether the particular insult was sufficiently grave taking account of characteristics, and the other is whether in the face of that, an ordinary person would lose self-control.

King Yes Sir.

Gault J On each of those arms I cannot see what relevance the act of retaliation has. They are two straightforward questions. What was the gravity in the circumstances of the particular insult? It has nothing to do with the retaliation. And what would be the power of self-control of the ordinary person in the face of that?

King Yes Sir.

Gault J And that has nothing to do with retaliation.

King Correct.

Gault J So what's proportionality of retaliation got to do with it?

King Well nothing in my submission. And that's precisely why juries should not be told as a matter of law.

Gault J Well you keep reading in the cases that it might be relevant or something but I cannot see that it is relevant.

King No because it requires, I mean if we take it right back to basic level, it requires if you incorporate some sort of proportionality of response a loss of self-control in a measured and controlled manner.

Gault J It might have some evidence relevant to whether actual self-control was lost.

King That's right.

Gault J Wholly disproportionate conduct might suggest a loss of self-control or it might equally suggest rage or something else, so it's not much help even there.

King No it's not, no.

Gault J So it just seems to me that this concept is just better right out of it.

King Yes and with respect that was seemingly the view of the Court in **Campbell** and in earlier cases. And certainly of course it was the view of the Court in I submit **Rongonui** which embraced, all the Judges embraced the **Campbell** direction in that regard. Proportionality is a concept best avoided. **Campbell** probably restricted that to saying, best avoided in a case involving characteristics because you might per se get a disproportionate response because of the characteristic.

Keith J Well you take account of that just directly through the characteristic element don't you?

King Yes, precisely.

Keith J So you're really saying, it's a straight linear connection between the insult and the fact control was lost, self-control was lost.

King Yes, yes. And one can understand with respect, and I totally agree with that Sir. And one can understand how we've got the position where 200 years later, when considering the issue of provocation, people still think proportionality because the historical links going back to, I think my friend quotes a case from 1727, that talked about the need for a proportionate response. Really a social policy. And because it was so entrenched in base human behaviour, based on almost a premise that the deceased was the author of his or her own misfortune, got what they deserved, the just desserts type rationale.

Keith J Mm.

King Now with respect in the 200 years and more since then, we've come to recognise, certainly in New Zealand law I submit, that provocation is more focused on the human frailties of the offender than it is on the actions of the deceased.

Blanchard J Hasn't it come in because the common law and the English statute required the jury to do a comparison between the provocation offered and the particular reaction?

King Yes.

Blanchard J And this is **Rongonui**'s case, the 150 stab wounds.

King Yes. Precisely. And in **Campbell**'s case the touching on the.

Blanchard J And our Act doesn't require that.

King No.

Gault J Well the English statute talks about what caused the ordinary person to do what the accused did.

King As the New South Wales statute does as well. Whereas ours doesn't.

Tipping J I don't understand the New South Wales. I think that's different.

Blanchard J No I don't think so at all.

Gault J The English statute says that.

King Yes.

Gault J And so necessarily it invokes a comparison.

King Yes.

Gault J I don't think it's relevant here.

King No I don't.

Blanchard J I think the New South Wales statute is ameliorating that situation.

King Yes.

Blanchard J The question is whether our statute is ameliorating it in the same way.

King Yes.

Blanchard J You would say it's ameliorating it to an even greater extent.

King Yes I do. Just on the plain wording of the statute. And is a way to ameliorate the harshness of the objective person.

Keith J I haven't looked at the other sections of the New South Wales Act, but I assumed when I read those words you emphasised, they were just picking up the equivalence of 167's paragraphs. Because.

King I think it's actually, we've set it out in.

Keith J Yeah, it's in your paragraph 71. No the whole thing. Oh that's right.

King There's a detailed paper which was very helpful.

Blanchard J Yes.

King Which discusses all the defences available including diminished responsibility.

Keith J But it's not saying **Rongonui** turns the reference to the 150 stabbings does it? That's a reference to the particular legal head under which the indictment is proceeding.

King That's right Sir. Yes. So those are the submissions. I've set them out there. I think with respect my paragraph 70 probably sets out in writing as well as I can do it any other way.

The only other aspects that I've addressed, and it may be that you don't need to hear from me further on those matters, from 77 onwards, when I submit that if the Court is in a situation of considering the effect of the directions on proportionality, then I submit that that should not be done in isolation and should be looked at in the context of other directions given. And I've particularly identified the time element. That was a relevant factor I submit in this particular case because of the appellant's characteristic described as a brooder. When His Honour did emphasise, did make the point that it wasn't a matter of law but it is still a matter of great importance. And then repeated in the final summary again as being a matter that needed to be considered, the time element. But I really just tacked that on in the end by saying.

Gault J I'd be helped also by any submissions you can offer on the aspect of the prejudice to this accused of the reference to proportionality in this case, bearing in mind that the basis for the defence raised of provocation was lighting a small fire, not intending to hurt anybody, expecting that everyone would get out. This is not a case of a hugely disproportionate response like your sudden stabbing, shootings and what. It's rather at the other end of the scale one would have thought. And so what do you say, where is the prejudice in inviting the jury to consider disproportionality.

King Yes. Well I submit that this was by any measure an extreme overreaction, first and foremost. That the proposition that the appellant had simply intended a small fire, not intending to kill anyone and just wanting to get back at them was probably the first limb of the appellant's defence advanced at trial and was, I submit in all likelihood, well must have been rejected by the jury. And there was a sufficient evidential foundation for that to be rejected. To say that he didn't intend a small fire, he didn't intend that no-one be harmed or at least did not foresee that, that was an issue about whether he foresaw death as a likely consequence first and foremost. It was on the basis that the jury rejected that, held that he did an unlawful act that he knew to be likely to cause death, that it's only at that point that we get to considering provocation. So although the defence ran it, that's no

different to any type of normal murder trial where you argue accused didn't intend to kill under 167A but if they did intend, they were provoked. That's stock standard. It's not many cases where you only run provocation. So I submit Sir that it needs to be viewed in the context that the jury concluded he lit a fire in the dead of night in a house containing at least five occupants including his eight year old sister and his mother and step-father who were locked in a room. Without trying to turn it into an aggravation, that's quite chilling the account that he gave of doing that. He had the can of petrol in his room. He'd had that my friend says for no legitimate purpose. He told the psychiatrist and the police that he had it there because he was intending to kill himself. But needless to say he had it. The allegation was that he knew that the bedroom that his step-father, stepmother and eight year old sister were in were asleep. That he poured quietly, he poured petrol up the hallway. Stood outside their doorway and continued to pour petrol so that it flowed under the doorway and into the bedroom. And then set it alight. And in my submission Sir it was entirely open to a jury to conclude that this was a disproportionate and extreme overreaction to really any level of provocation that had been offered.

Blanchard J You should be a prosecutor. You made a pretty good case.

King I'm very conscious of that Sir. I'm not trying to make it sound less than it is. But I do certainly take the point that this was how it was presented to the jury.

Tipping J Well there's also the point you made earlier that the Crown seemed to be intent on painting him as a serial over-reactor.

King A serial over-reactor. Yes. And the provocation was minimal so therefore any reaction was disproportionate. It's my submission Sir, and I've set it out in the submissions, that because of really what I've called the double whammy approach, the Crown saying this actual provocation was minimal, whether it was or not of course was a matter for the jury to decide. But if they accepted the defence, it was probably more than some cases. If they accepted the Crown, it was only minimal. In either case I submit it was open to them to conclude, look even faced with that, this was a pretty extreme over-reaction.

Tipping J Well presumably in the light of the interesting obtaining of a Ruling to let that other evidence in, the Crown's case before the jury was, look this was trivial provocation and the fellow just went mad.

King Yes exactly.

Tipping J The dynamics of the trial were presumably along those lines.

King Yes. And I feel slightly aggrieved really with the way that that issue was dealt with in the Court of Appeal because this point was advanced

then. And the Court of Appeal held, well there was no illegitimate prejudice extended to the appellant. Well there was but it had no effect because he was acquitted of the attempted murder charges of the mother. So the fact that he had stabbed his mother three years earlier over a piece of chicken really had no effect. But in my submission that misses the point that the effect of that evidence was to demonstrate that this man was a serial over-reactor and thereby to rebut provocation. So I don't know if that answers your question Sir but in my submission the proportionality directions in this case were just as fatal to the defence being considered as it were in a different factual matrix in the **Campbell** case. Worse so, because of the discrete conduct evidence allowed in precisely for the purpose of showing him as an extreme over-reactor.

Gault J Thank you.

King (Away from microphone) Mr Justice Keith asked about the New South Wales provisions Sir. We've set out a detailed Law Commission paper.

Keith J Mm, so it's at the beginning of Tab 5.

King Tab 5 page 9 to 11 really sets out I suspect what you need.

Keith J Thanks.

King Again I just emphasise the time element direction in this case is, in my submission, also something that can properly be taken into account if it gets to that point. Unless the Court has any further queries, those would conclude my submissions.

Elias CJ I'm still a little troubled by why you say the evidence that he was a serial over-reactor didn't assist the defence case.

King Yes, it's something I've thought about because obviously it was consistent on one level with Dr Chaplowe's evidence.

Elias CJ Yes.

King And it tended to show it. Where the concern was, was that it obviously carried with it a great deal, I submit, of illegitimate provocation of just concluding he's just a bad person. And he is a danger and we need to lock him up. And I think that type of approach. But also when the evidence was given and it was summed up on, there was no link whatsoever with the provocation side of it. If it had been tied in and said, well Dr Chaplowe has said he's a person capable of grand over-reaction.

Elias CJ And he'd had the indication of.

King And you may well think that, we've heard the evidence about that and you may well give it support. But instead how it's presented, it's really the Crown having their cake and eating it as well. It's presented in a way which makes, and the Judge says, he's dangerous. He overreacts. That is disproportionate. And there's no linking in it at all. And when we get with Dr Chaplowe's evidence on characteristics, when we get to talk about Dr Chaplowe's evidence, we get, well it's a matter for you to accept whether, it's a matter for you to say whether the evidence satisfies you bearing in mind he didn't give evidence, bearing in mind Dr Chaplowe's relying on hearsay, bearing in mind Dr Chaplowe hasn't given a firm diagnosis. Really waters it down.

Tipping J Well would this be another possible way of looking at it Mr King? That although, as has been suggested, it could have been helpful to you, what help it might have been to you was rather diminished by the Judge saying, to have provocation you mustn't overreact.

King Yes. And so evidence that he did overreact, at one level corroborative of Dr Chaplowe's evidence. But then of course we're in a situation where Dr Chaplowe's evidence is used against him. Because Dr Chaplowe is consistent with the overreaction.

Gault J Yes. Dr Chaplowe's.

Elias CJ Well I.

King Well Dr Chaplowe said this is a man prone, vulnerable to this type of provocation. Classic characteristic stuff.

Elias CJ Mm.

Gault J Yes and that was relied on, this potential to overreact is a characteristic going to his power of self-control.

King No, no not to his power of self-control. To the level of the provocation.

Elias CJ Yes.

King He's vulnerable to rejection, he's vulnerable to, I think the doctor uses a phrase of exaggerated ambivalence. I don't quite know how that ties it in. But he's clearly got these personality disorders. And he really, I suppose it would come as no surprise to anyone, especially juries hearing the evidence, that he is prone to this over-reaction in this way.

So, and as I say, in that context Dr Chaplowe really became a prosecution witness as opposed to a defence one. Supported the Crown proposition that he's a disproportionate reactor and disproportionality means no provocation.

Elias CJ Well it really does go back to whether the special characteristic bears on the loss of self-control.

King No not the loss of self-control Ma'am, but the level of the.

Elias CJ Well there's no difference. But I've said it before.

King Yes, no exactly. And you know you've got my support on that Your Honour. But even on the other approach that this was a person who was particularly vulnerable, particularly susceptible to rejection. He'd had maternal rejection his whole life and he'd had a hypersensitivity to it. So him being rejected is a level 10 provocation in my submission. Whereas to a normal person, someone like me who's used to coming to Court and having arguments rejected all their lives, probably got a thicker skin and wouldn't think twice about it.

(Laughter)

Keith J I thought you were going to tell us about your relationship with your mother.

(Laughter)

Gault J That's rather why the Court of Appeal emphasised his susceptibility to rejection rather than his potential to overreact.

King Yes. But of course I suppose I've tried to rekindle that aspect to say that his potential to overreact could well be an explanation why his loss of self-control manifested itself in such an extreme manner. So I suppose I'm trying to have a double whammy. As the Court pleases.

Elias CJ Thank you Mr King.

12.19 pm

Elias CJ Yes Mr Pike.

Pike Yes may it please the Court. The two issues for adjudication here relate to the proportionate, the second limb of the proportionate argument. The first is the much more fundamental legal issue of whether or not the defence of provocation really fits with 167D homicide. And it was the Crown case, or the Crown case is that it supports the Court of Appeal in its determination that on the facts of this case, that is the accident or mistake, the narrow rule, the Court supports the determination that because of that finding provocation ought not to have been left. And that's the sense we would say that provocation ought not to have been left. Not on any question of proportionality or level of provocation but simply supporting the Court of Appeal's approach to the case.

Tipping J Do you accept then Mr Pike that it is possible for provocation to run in a paragraph D case? I thought your argument was that it wasn't possible.

Pike That's part of it. That's the wider part, yes it is. But that has been subject 'til now to a protest flag under the Rules in the sense that Counsel had seen that argument, it's not quite so independent a ground from the Court of Appeal's determination that it was supporting the Judgment on another basis as those words are often understood certainly in the civil jurisdiction in the Court of Appeal.

Elias CJ I think we'd like to hear you on the point Mr Pike.

Pike Well very well Your Honour. Most certainly. I apologise if I got it wrong and unfortunately being away didn't help just to get matters into a proper order. However that said, the Crown does persist with, or advance a proposition on two fronts: the one that failed to impress the Court of Appeal, which was the wider one; and the narrower one where the Court of Appeal did come to its own conclusion. The Crown does advance that as well, as a subset of the wider proposition.

Tipping J Is this in effect saying, it's not on at all but if it is on, there was no accident or mistake?

Pike Yes it is. That those words don't apply to the killing of the victim in this particular case because they were not, for the reasons the Court of Appeal said, they were not the product of any accident or mistake. We're really talking more, well in both senses, we're talking of those words, in a particular statutory context. Not necessarily accident compensation legislation or other areas. But very much honed to the values incorporated in 167C and 169(6) where the words occur. So accordingly what the Crown does advance on the wider front, and for the reasons in its submissions, is that there's an almost linguistic and logical incompatibility, if it can be put that way, between the idea of a person losing self-control and the idea of a person covered by D which is really the remnants of the very harsh felony murder rule, as it appears all Counsel are agreed, which has it that a person who does something for an unlawful object will be guilty of murder if in the course of bringing about his intended unlawful object, bringing that to fruition, he kills some other person or he kills anybody in circumstances where, subjectively of course, the death is seen as a likely product of his unlawful mission, whether or not he desired the death. And so it's that classic **Barrett** (**R v Desmond Barrett and Ors** (Times Report 28.4.1868)) sort of case of people wanting to free prisoners or wanting to blow up banks and so on, who lay explosives, knowing full well that their object may be achieved at the cost of someone else's life. But they nevertheless persist in doing it.

And of course the policy of the law here, it is submitted, is crystal clear. Stripped of its antecedent harshness, it is to deter and signal as utterly unacceptable the conduct of persons who plainly will have their minds on the job from going ahead with effecting a criminal object or an unlawful object which is almost inevitably to be seen as another criminal offence. It's best to just look at it that way in the context of this case, here arson, or it might be a bank robbery, it may be any sort of violent crime. But to deter with the idea that if you go in and act dangerously in effecting your unlawful object in circumstances where you know that death is a likely by-product of your intent, you will be guilty of murder.

Blanchard J In the vast majority of those cases of course there won't be any element of provocation. Bank robbery for example.

Pike There won't except of course with fees (laughter).

Blanchard J Where there is an element of provocation.

Keith J Special characteristics about bank fees.

Blanchard J Where there is an element of provocation. Why should the policy considerations which have put provocation into the law as a partial defence not override the policy that you're talking about?

Pike I submit Your Honour that the difficulty comes with the mental element required by D and by no other section. It's not like B. I disagree with respect with my learned friend. It's nothing like B. In B you want to kill, you want to seriously harm someone and you don't care if they die or not. If they do die, it's suggested that's accident and under B if they do die well you say well that's just life, or death in this case. You don't mourn it as an accident as you might under D. But what the proposition is, or the policy is with respect, that a person who is acting under D is per se in a situation where they are making judgements about what they're going to do for a limited unlawful purpose, knowing that they're likely to kill somebody and not wanting to kill somebody. Now it's a very.

Blanchard J But that may simply mean that they're not provoked at all.

Pike Well they're not, well it means with respect that if the motivation for what they're doing is provocation, they're nevertheless acting under the most peculiar sort of provocation imaginable. And that is that they do not desire to hurt anybody. That's the difficulty. When you're provoked and lose your self-control, the very thing you want to do and the law allows amelioration, is to kill or to seriously harm somebody, not caring whether they live or die. No doubt being perfectly content with either outcome. And certainly not troubled by the fact of death.

Tipping J But you desire to hurt them in a non-physical sense in this case. So.

Pike Sorry, in which case, in D?

Tipping J In the present case.

Pike In the present case, the appellant in the present case gave a description of his state of mind that was quite unerringly in accordance with D itself. He wanted to scare people but did not want to hurt anybody.

Elias CJ But he did that without the benefit of legal advice.

Tipping J You're not suggesting he was coached are you?

Pike No indeed, quite the opposite. Often the best evidence is obtained by legal advice Your Honours.

Elias CJ Yes.

Pike It was a candid expression I would submit of his.

Tipping J The nub of this case Mr Pike it seems to me is, on what principle basis can be read down 169(1).

Pike Well I'm not at all sure that the Court would be reading it down Sir.

Tipping J Well what was it on its terms applies to any form of culpable homicide.

Pike It does in its terms but the starting point is that, or the submission that is made, is that the starting point at 169, with all its attendant difficulties, is not a complete codification of the law of provocation. And 167 itself, while a complete codification of the law of murder, is one which has several historic peculiarities to it which really require a Court to look at it with a historical focus. For instance 167C on one view of it ought not to be in the section at all. I think if drafted again it wouldn't be. It's a causation, it's an issue of transferred malice. It simply says that if you intend to kill A or cause grievous bodily or serious harm to A and A dies, well intending to do that to A and B dies by accident or mistake because that person was mistaken for A or something of that nature, you are equally guilty of murder. But it is not a definition of murder as such. It is simply to say there, if you kill anybody, anybody at all with a state of mind in A or B by accident or mistake, you are guilty of murder. You have caused that death with the transferred intent. Now that's just simply picked up the doctrine of transferred intent from, well it's ancient but it was expressed, the factum refers to a case called **Latimer** (**R v Latimer** (1886) 17 QBD 359) which is the law student's hardy perennial on that, although it's not a very significant case in itself, but it explains it the best perhaps.

But the submission is made simply on the policy grounds for a moment, this is Justice Blanchard's point, there are two points. One is

the illogicality in linguistics. And the other is public policy. And the public policy here must be that the appellant, because of the state of mind that he described himself as having, was perfectly in a position to say, I shouldn't do this, this is wrong, I can't do this, people are going to die.

Gault J Mr Pike, when you talk about policy or illogicality, how do you deal with the scenario that if both the mother and the deceased had died from this one act, would the act constitute murder in respect of one and manslaughter in respect of the other? That must be illogical.

Pike Well it's a product. I would not with respect accept it be illogical. The person would have lost self-control to the point where they killed their intended victim. Had it been found that they intended to kill the mother, and that's the nub of this case, had it been found that he intended to kill his mother, then of course, and he killed the poor uncle instead, then it would have been a case where he would have been able to, he would have been guilty under 167B by transferred malice. The difficulty was he.

Gault J That's really not addressing the point I was trying to get to.

Pike Yes sorry Sir, I was just taking longer than I should have.

Gault J That we assume that the situation is that there is sufficient provocation from the mother, he does exactly what he did, and as a result both the mother and the uncle die in the fire. Now he can rely on the provocation in respect of the death of the mother. But not in respect of the death of the uncle, on your argument, and so the same act, the same conduct results in murder in one respect and manslaughter in the other.

Pike Well I was trying to answer that with respect Sir by saying that if he had intended to kill his mother and had done so by burning the house down, and that was, and provocation and all other things being equal, he would have been guilty of manslaughter of the mother if the jury had found he'd lost self-control and all of the rest followed. He also would have been found guilty of the manslaughter I would submit of his uncle. Because he was then by accident or mistake killed as well. I.e. he intended the kill the mother.

Blanchard J It would be under C, not D.

Keith J C not D.

Pike Under C yes. Oh yes.

Elias CJ Which you say should really be dropped from the legislation anyway?

Pike Well no, by reference to wherever a C might be found to exist it would be by reference to C that he would also be, he would, sorry by reference to C.

Tipping J C wouldn't apply then. You've killed your intended victim and you've killed an off-course substitute as well. It's not transferred malice. It's additional.

Pike Yes that's right if he kills A meaning to kill A and accidentally with the shotgun blast kills B standing beside A then both will be, and if he's provoked to kill A, then by reference to, if he's provoked, then by reference to 169(6) he will have also been provoked to kill B.

Tipping J Is there no simple answer to the point Justice Gault put to you?

Keith J Well your answer is it's C not D.

Tipping J It can't be.

Pike Yes, acting under D. The answer to Justice Gault's question as best Counsel can make it, is that if he had killed the mother intending to kill her.

Gault J That's not the proposition is it? What it is is that he does an unlawful act as a result of which his mother dies.

Pike Yes.

Gault J Now it seems on the section that provocation is available.

Tipping J Because it comes from.

Gault J Now you argued that for the wider proposition. We're talking about accident or mistake now.

Pike Yes. I argue no, it's not because 169(6) is the case where a person kills by intending to kill. That's the difference in our cases of course. Intending to kill or seriously harm or whatever and does kill.

Elias CJ Sorry, which section, 1-6?

Pike 169(6) is it, by accident or mistake kills another.

Gault J Well we're getting crossed purposes I'm afraid Mr Pike. Putting aside your wider argument.

Pike Yes.

Gault J That D cannot apply. And focusing on the fallback position of the Court of Appeal that this cannot be accident or mistake in respect of the uncle.

Pike Yes.

Gault J Because it was foreseen. If that is the position, would it not be the case that if he did the same thing intending to scare the mother, sets fire without intending to hurt anybody, but both the mother and the uncle die, the uncle is not an accident, the mother is not an accident but one is murder and the other is manslaughter. And it's the very same act.

Pike Yes it is the very same act because the, as I say, the two don't lie happily side by side for a number of reasons. But the submission is that if, on the fallback position of the Court of Appeal as Your Honour calls it, where acting under provocation there is the killing of the mother, then of course there is, and without an intent to kill the mother, but the mother nevertheless dies, as Your Honour says correctly, there is no, the death of the mother would not be by accident or mistake kills another. Because the word another is critical here. Would not by accident or mistake kills another. In other words kills a person. And so on the Court of Appeal's analysis there would not be an application of the mistake or accident rule to the mother. The difficulty is with respect, it comes back to the fact that in Counsel's argument, the argument as to D is clearly one which is to be decided on more fundamental principle than the accident or mistake rule. Part perhaps of the Court of Appeal narrowing it has been that very point Your Honour makes, is that you do get inconsistencies or at least quite difficult logical arguments. And to say that Mr Wuatai, sorry that was the father, the mother's death would not have been accident or mistake. The death of another by accident or mistake. It simply would have been a manslaughter death unless 167D made it murder.

Blanchard J Well are you supporting the Court of Appeal's view or not?

Pike Well I do support it because for all practical intents it works. The underlying policy is simply this, that where we are dealing with unintended deaths, that's the difficulty here, we're dealing with provocation which is never, no-one has managed to advance an authority yet for provocation applying to a case where the person intended no harm at all to any person including the provoker. That's the difficulty. And the logical difficulty in the case is that all of our provocation cases for hundreds of years have been where the person has done, has acted very much to cause harm with loss of self-control to kill or inevitably to kill, because otherwise they don't get before the Courts. So that is the essential difficulty with the case. That here we are positing a situation, to come back to the first proposition, where the person is seeking to control a situation which he unlawfully creates, i.e. he wants to obtain an objective, in this case it might be blowing a bank wall down or a safe, and you kill the night watchman. That's

murder. You are in control of the situation. You know there are night watchmen. You take that risk. You're a murderer if you kill.

And in this case it's not quite so stark. But what it is here is that the appellant wants to frighten, to scare his parents. He's had enough. They've been fighting for a good long time it seems. They plainly dislike each other with a certain ferocity. They had fought on the night. His own explanation was, having sat in his bedroom with his can of petrol, packed his case, hid the hose, made the fire starter, dribbled the petrol around when everyone was asleep in the early hours of the morning, that his explanation for this is, I just want to scare them, I'm leaving this house and I want to give my parents a fright. So he sets up a dangerous situation and controls it or purports to control it. But he is wrong. He kills his uncle. Now the difficulty is or the proposition in law is, it is submitted, is a matter of pure policy. And that in those circumstances none of the language of what he did fits the language in the concept of provocation. And the underlying submission to that is that provocation cannot be understood by reference alone to the Crimes Act because it does not purport to wholly codify all of the propositions of provocation. For instance we still talk about, and this is jumping ahead, cooling and proportionality even although the Crimes Act doesn't mention them. We still see them in this country, increasingly less so it would seem, as part of the common law of provocation.

But the difficulty, why the Crown advances what it does advance, is that the essence of provocation was that a person loses self-control due to an insult, due to something done by the dead person. Something done or said. And reacts, usually it is thought to be on the sudden transport of passion, whatever the phrase, with loss of self-control and kills that person. It has with respect never been seen. And the underlying policy there is that they are not for that moment capable of applying the commandments of the law that you don't kill people. It's a serious, a very very serious thing to do. They are not fully able to adjust their reaction in the light of the laws commands.

But under 167D it's all upside down with respect. You are, the law says yes, you are able to conform yourself with the laws commands. You are acting in a way which is very, you have a purpose, it's deliberative, you want to achieve an unlawful object, you think about that unlawful object, you chose it, you chose how it will be done, you chose not to harm anybody but you take the risk. You think about the risk of harming and you say, well I'll run that risk. The law says if you act like that, think like that and create such dangerous situations that people die through your unlawful object, you are guilty of murder.

Now the difficulty is how on earth can one fit in the concept of loss of self-control in any guise, it is submitted, into the linguistics and the policy of 167D. That's why Counsel has made the submission that there seems to be a gulf between A and B and D.

Tipping J Can you not reconcile it by the fact that Parliament implicitly is saying you aren't able to control yourself from running the risk that is inherent in a paragraph B killing, a paragraph D killing sorry?

Pike Mm. Well with respect Sir no I don't. I don't think Parliament would have seen that. Put 167D at the bottom and it was put D, the proposition that killing in 167 as part of the law of murder, it could equally have been in 168. There's a part of 168. It's where perhaps it has it's more, it's greater spiritual home because that is clear, the plain felony murders in 168. I think with respect that looking at the statute, in just the straight drafting terms of the statute and deciding important policy points by that may not necessarily lead to the right conclusions in this case. It's an unusual case and that is why Counsel has taken some little time to just simply draw some historic threads to the Court's attention as to how all this might fit together.

Tipping J But if as a matter of policy you can mitigate an intentional killing.

Pike Yes.

Tipping J Why can't you mitigate an unintentional killing? You'd have thought the latter was a fortiori the former.

Pike Yes there is that argument Your Honour. The difficulty, or a part of the history difficulty there is that of course, as the Court well knows, initially provocation did negate intent.

Tipping J Yes.

Pike Because we talked about malice aforethought.

Tipping J It negated malice traditionally yes.

Pike That's right and people got hanged and the law saw that as too harsh even years, centuries ago where people acted on the sudden insults and what have you. But the law has dropped any reference to malice aforethought and has come to say that intention requires no malice aforethought. But the point with provocation with respect is that in substance in effect the person is intended to react impulsively, suddenly in a way.

Tipping J I'm sorry, with great respect I don't, unless you've got a very long build-up to the answer to my question, I don't think you're anywhere near it at the moment.

Pike It is a long build-up but I'll try and shorten it.

Tipping J Alright.

Pike The proposition with respect is that killing with loss of self-control somebody who has caused an insult, given you an insult sufficient to do that, is a less heinous act obviously than contemplating doing an unlawful act where you put innocent lives at risk of what you are doing and you indeed do kill them. I don't with respect see that 167A or B murder is necessarily more heinous than 167D. In many cases it won't be.

Tipping J I'm not suggesting more or less, I'm just treating them as equivalents. Why as a matter of policy would you have it applying with an intentional killing but not to an inadvertent killing?

Pike Well the inadvertent, what's said to be the inadvertent killing, the risk-taking killing is because D strikes at criminal acts outside of homicide and deters them. Seeks to deter them. Especially so if you're likely to cause death in what you are doing. D isn't about homicide as such. It's about committing other offences, for whatever reason you might have to commit them, risking innocent life as you do so. B and A are killing people directly which may or may not be more heinous than D. And I can imagine Ds more heinous than A.

Tipping J But the actus in B for example is causing bodily injury.

Pike Yes.

Tipping J The actus reas.

Pike That's right.

Tipping J That actus reas in D is lighting the fire. In each case you foresee death. Now why should it all turn on whether the actus reas involves unlawfulness in the form of bodily injury as opposed to unlawfulness in the form of lighting a fire?

Pike Well with respect Your Honour the only answer I can give you is the laws. There is the remnants of the laws extreme disapproval of people committing lateral criminal acts that cause death for their personal gain or for some other personal motive. It may seem odd in one sense. But there are cases where for instance if you want to blow up an aeroplane and hope that everyone's got parachutes or some such silly observation such as that, you.

Tipping J Well no-one could believe it. I mean that's just.

Elias CJ Well if that were right, why would s.169 start with the words in the first sentence of paragraph 1? It's plainly not what's intended.

Pike Well, it must stay consistent with the criminal drafting, the Crimes Act drafting all the way through. And so it says anybody who causes, a person who causes the death of another is the way that homicide has

been defined all through the Crimes Act. But it is also intermingled with the word, who kills that person. But it starts, 169 starts with the proposition, culpable homicide which would otherwise be murder may be reduced if the person who caused the death did so under provocation. Now the point is that all of our, all of the drafting through s.167 talks about causing death. It is simply to retain consistently that consistency. 167A.

Tipping J Well if causing death is the first step, i.e. the homicide.

Pike Yes.

Tipping J To make it you've got to have a homicide before you can be culpable.

Pike Yes.

Tipping J I think this Act is actually quite precisely and carefully drafted.

Pike Well it certainly is precisely, I certainly have no quibble with that at all Your Honour.

Tipping J Well frankly the elegance and simplicity but precision of this drafting leads me to think that subs(1) should be construed to mean exactly what it says.

Pike Well indeed that is the argument which has been put to you.

Tipping J You're really saying that there are certain sort of common law throw-backs, that you say it's not a full code and there's certain common law throw-backs that should induce us to read down subs (1). Have I got your argument fairly Mr Pike?

Pike Well the argument of s.169 is not completely, is not a complete description of the law of provocation in New Zealand yes.

Blanchard J But it is modifying the common law?

Pike It modifies it only to, the only thing it does with the common law, really the only significant change from 1908 where it got rid of cooling and left those propositions out, was, oh sorry, on the sudden and heat of passion phraseology, and changed the language, the biggest change in 169, the only significant one was to put in the special characteristics, was to overrule, to get around better. Because at that time, as we've heard for many years now, those who drafted the Crimes Act saw **Bedder** (**Bedder v Director of Public Prosecutions** [1954] 1 WLR 1119) as the high water mark of an oppressive criminal law regime which, assuming Bedder had spoken truthfully, he was to be hanged in those days for killing somebody in circumstances where a just outcome was a very serious manslaughter. That's how our legislators saw it. Now the difficulty is 169(6) itself does pick up, go back to the old

proposition that seems to point the other way. It applies where provocation was given by the person killed and where the offender, under provocation given by one person, by accident or mistake killed another person rather seems to be unnecessary perhaps if 169(1) just did the job, that the person who caused death did so under provocation. You wouldn't need (6). They just caused death under provocation. So why (6)?

Tipping J Well it's probably for the avoidance of any doubt about transfer of malice I would have thought.

Pike Well it's either that or simply the recognition with respect that 167C uses exactly the same language. So what the Crimes Act is doing, and this is where it is specific, is saying alright, provocation which we understand to be someone losing self-control and killing another person as a product of that self-control, meaning to kill, must apply to cases where the intention to kill is transferred by 167C. It would be a complete injustice if the law was left at, you intended to kill A because A had provoked you sorely to such a degree the law said that killing A would have been manslaughter but by some accident or mistake you kill B, for whatever reason that might be, you have no defence, you are guilty of murder of killing B. You would have been guilty of manslaughter killing A. So (6) comes in, 169(6) comes in simply to tie together the transferred malice murder from 167C into the law of provocation to say, yes we do recognise that provocation will apply if you have killed by, if you are guilty of murder via 167C.

Elias CJ What's the policy of permitting s.169(6) to apply to 167C and not D?

Pike Well I would submit that nobody, it simply isn't plausible to suggest that drafters would have contemplated anyone acting in 167D terms while acting under provocation. That's the initial proposal. That it is simply incompatible. They are two incompatible sets of propositions to say that you contemplate what you must under D but you can still have been in loss of self-control.

Keith J But you can be provoked into an unlawful act on the spot can't you Mr Pike? Just as you can be provoked to cause death. I mean why does D require more planning or more deliberation or whatever? And anyway, isn't that an argument that would arise on the facts, that even although D is presumptively applicable, it's just not available here because of all the careful planning and because he stowed the hose away and because he kept pouring the petrol around and so on and so on. That kind of argument can arise in the context of the concrete case can't it?

Pike It can and I think that's the nub of the issue Your Honour. 167D really comes from the **Barrett** line of territory. But it can apply to cases where you're close to, much closer to the act, the unlawful object and the death are much more closely linked. I.e. you're really intending to, you're aiming your conduct at some person. Here of course is where

we are on that land because the appellant was aiming his conduct in a way at a particular person.

Keith J Well that was the Crown argument in respect of the attempted murders too.

Pike Exactly.

Keith J So it really goes back to the point my brother Gault was making that exactly the same action applies to all the paragraphs in this case doesn't it, if they're potentially applicable? And it's the same sudden or not, planned or not action. Aren't they all capable of being subject to a limited provocation?

Pike Well of course my position would have to be seen as absolute as to what he might say. To say that yes, that 167D covers a spectrum of offending from blowing holes in bank walls knowing full well that the night watchman's probably nearby, and you kill the night watchman, then you're guilty of murder, to cases where you're really, to this particular one which is probably the paradigm of the issue before the Court, to this particular one where you're really aiming conduct of a sort at somebody you dislike intensely but you want to frighten them but not kill them or harm them in any way. Now my argument has to be of course that simply because the spectrum goes to that, can be divided, or goes to that limit, is neither here nor there in the sense of the broader policy that merely because a case can be brought within it at one end does not mean that the policy of 167 or that no legislators or indeed Courts to date have seen 167D homicides as being able to be palliated by reference to provocation in terms of why you committed the unlawful act in the first place. That's the difficulty. And I think it is. And that's an argument which is capable of being come at from two angles. And as I say, Counsel's one is that history/policy with absolutism. The Court's one is, I respectfully see it to be, is to say that in certain cases, of which this may be one, the facts are so closely aligned as between 167B murder and D that it would be unjust to deny the appellant a defence of provocation. And the answer, as I say, the answer to that, which is usually one that is difficult to sustain, is that yes there may be cases where that could be seen as so but that does not undermine the proposition that no legislator or legislation nor Court to date has seen 167D felony murder as being susceptible to a defence of provocation. And the argument is that mostly they will be cases where they are conduct which is discretely criminal, i.e. the bank robberies and, you know, getaways, speeding away through a crowd in a getaway car or whatever you do, risking innocent life. No matter what sort of provocation made you commit the unlawful act, the Courts will unlikely be sympathetic to it.

Tipping J Doesn't your argument really support the view that successful provocation pleas will be rare under this paragraph, paragraph D? But I don't see how it supports the absolutist position you're taking.

Pike Well the only support I can point to is that policy argument. Which, like all policy arguments, will not be concrete. It's not impregnable and I certainly accept if at one end of it it has weaknesses. But I submit that the weaknesses are greater the other way by simply saying on a case by case basis that we can apply something which the Crimes Act in all probability never contemplated as applying, hence 169(6) itself. Never saw provocation as going to a case where you did not intend to cause any harm to any person at all. But you ended up doing that because you calculatingly did another unlawful act. Because you were provoked to lose some degree of self-control into doing that act.

Tipping J What's wrong with a very simple reading of subs (6)? Under provocation from the parents, the accused by accident killed the deceased.

Pike Well certainly. But the, as I say, my case on (6) is that its words are carefully chosen to be the mirror, the image, the complete image of 167C. That's its only purpose. It is not to extend any idea of the ambit of provocation but to certainly ensure that intentional killings under provocation where sadly, and there's certainly cases where this has happened, where somebody has mistaken who yelled the insult and so they rush out and kill them. And the case where a motorist was mistaken as to who in a crowd had run over and killed their child, they killed an onlooker rather than the actual motorist. The Courts have held that that was manslaughter. Because the malice was transferred.

Tipping J Is your argument really this - that accident or mistake must mean the same thing in 167 and 169? In 167 the context suggests that it cannot be the sort of accident as per the example I've just given you. Therefore it cannot be, equally cannot be in 169.

Pike Well to an extent there would have to be a consequence of my argument and I would accept, yes.

Elias CJ Your argument is more absolutist than that. Your argument is that 169(6) is directed only at 167D, C I mean.

Pike Yes that's it's only purpose, yes.

Elias CJ Because if it was simply the same meaning, the meaning in 167C is non-intentional killing. And so you could therefore use non-intentional killing in 169(6).

Pike Yes, 167C I have to say obviously must apply, can only apply to A and B, intentional killings and not cases where there's no intention to harm at all, much less kill. So yes certainly that is the position.

Tipping J Because I thought you were trying to bring across the inherent limitations from paragraph C to the subs (6) scenario. In other words,

whereas the concept of accident and mistake must be limited by its context in 167, you'd seek the same limitation in 169(6).

Pike Oh that's, I'm sorry Your Honour, yes that is, I would accept that.

Tipping J That's really what you're arguing isn't it?

Pike But it's a different way of coming at the same thing.

Tipping J Yes, yes.

Pike I think it just shades quite, is subtly different from the Chief Justice's proposition.

Elias CJ I think I'll have to ponder the subtlety over lunch Mr Pike. We'll take the luncheon adjournment now thank you.

Court adjourns 1.02 pm
Court resumes 2.17 pm

Elias CJ Yes Mr Pike.

Pike Yes may it please the Court, to recap as it were very quickly on the matters where they were reached just before the adjournment. The submission from Counsel was that whilst the argument is not impregnable, as few are in the law it would seem, as to the wider proposition that 167D does not bear, or murder cannot bear a provocation defence, the concluding points to be made is that we simply have no cases on the books it seems where 167D has been seen as able to bear that. And after so many centuries it's perhaps odd that that hasn't happened. But equally the explanation it's suggested may lie in the fact that as I think **Barton** (**R v Barton** [1977] 1 NZLR 295), I'll come back to that, as some of the authorities make it clear. Nowadays provocation arises only if an intention to kill has been established. And there seems to be no authority to the contrary to that proposition.

Tipping J That can't be right Mr Pike. I mean frankly I don't want to prolong the agony. But provocation applies to a paragraph B murder. There's no intention to kill there.

Pike Well it's in the sense that the statutory to kill is included.

Tipping J Statutory intention to kill?

Pike Well yes, what B covers is an intention, is seen as an intention sufficient to be an intention to kill. A, they're both, A and B are both intent to kill.

Keith J Well it's bodily injury.

Pike A talks about means to kill. And B talks about means to cause, intends to cause bodily harm and is reckless as to whether or not death ensues. That is an intention to kill. And it's by statute. But it can be seen.

Tipping J Well it's equated with for culpability purposes but it's not. I don't want to be pedantic Mr Pike but we've really got to be fairly sharp in our thinking on these issues haven't we?

Pike Yes indeed Your Honour we do. And I'm submitting that I wasn't using A, the intention to kill other than in the rubric of that intention covering A and B. But if it's easier for the Court obviously to follow the point I talk about in provocation has been applied hitherto as a common law defence only where there has been an intentional killing. It once served to negate intent and that's an important part of the history. 169 has done nothing to affect the common law, the hundreds of years of development of the common law that provocation is a defence to an intentional killing. It once negated the intent where that was described as malice aforethought. It now does not, is not seen as negating intent but excusing an intent which is formed by reason of sufficient provocation.

And we make the point that the law has steadfastly refused to, and this is policy, legislative policy, not the Courts of course, entirely has refused to advance the defence to attempted murder provocation for obvious reasons because the person isn't dead. But one point talks to the incongruities in the law of provocation. That is yet another of them. Because here a person is found guilty of attempted murder even if they were under the most extreme provocation but failed in their objective, the law does not allow them or has not fashioned any separate description of that offending. It remains attempted murder and that's what's on their criminal record. If however they succeed in their objective, sorry if in this case we had one where nobody was to be harmed at all and yet the offence there can be palliated to manslaughter. And I simply point out that that is part of the incongruities that will always be around in the law of provocation.

Blanchard J What was the penalty for attempted murder in the 18th century for example? I'm just wondering whether it had something to do with whether it was a capital offence or not.

Pike I don't want to be, I believe it was up until the 1700's or later.

Elias CJ Almost everything was in the 18th century so it would be surprising if it wasn't.

Blanchard J That would have led to a pretty tough situation wouldn't it?

Pike It would have. You could avoid hanging if you actually killed them but if somehow they miraculously stayed alive, you could hang.

Keith J Which alone is a sort of perverse incentive.

Elias CJ Might as well be hanged for a sheep as a lamb.

Pike It is indeed. Well there was simply no logic to the defence. I mean that's the difficulty. Its historic antecedents, such as they can be determined. Essentially it was to palliate cases where juries were, against their oath it was thought by commentators such as East and others, were finding provocation, or extenuating circumstances in cases where none at all existed and the law slowly recognised that there needed to be something to conform the law to juries' ideas of justice. Certainly one of them, the main one was that of killing another person where there was something that the juries, or jury or juror thought would have been exactly the same reaction as that juror might have had in the same circumstances ought to have been manslaughter and not murder.

Blanchard J Could the reason for not having provocation as a partial defence to an attempt to murder have simply been that it can all be sorted out by the Judge at sentencing? Whereas with murder, there was until recently only one penalty. And even now for the vast majority of cases a pretty hefty minimum penalty.

Pike That's certainly the current, and for many years now that would be the rationale.

Blanchard J So there's been no need for them?

Pike No there wouldn't be particular pressures. Save for the awkward fact that somebody who, had they killed, would have been found guilty of manslaughter which the actual record would bear the word manslaughter which can cover a variety, a huge range of culpabilities. Whereas the person who fails in their objective has still got the word murder, albeit attempted, on their record. That they were attempting to murder X, not attempting to manslaughter X as it were. Which is an oddness about the thing. And there has been comment on that. Back in **Noel** (**R v Noel** [1960] NZLR 212) in the early 1960's the Court finally concluded that there was no defence, that provocation was not a defence to attempted murder. There were some cases that were, not sound, argued to the contrary. But certainly I just point, I simply raise the point not as somehow something's pivotal on it to the Crown's argument. But there are incongruities aplenty. They arise out of the Crown's argument. They with respect arise also out of the appellant's argument. And because that is the nature of the law of provocation. It could not unfairly be seen in some ways as an unspeakable mess in some of the.

Elias CJ I was going to say that you're demonstrating quite a lot of hostility towards provocation Mr Pike in these submissions.

Pike Well Your Honour I hope that it seems as balanced as one can be. So far as hostility is concerned, there are two major issues with provocation. If one is talking from perhaps a Crown verses a more dispassionate academic objective and that is that in most cases, and this is not one of them, the major difficulty is the Crown's onus. This is difficult to establish in many cases in such events as these because the accused has killed the only witness usually that there might be. So there's a certain defensiveness. Now this isn't such a case. But certainly with respect to the extent Counsel exhibits an attitude towards provocation, certainly I would have to immediately plead guilty to the proposition that there are cases where provocation has been advanced that are unsettling from a Crown perspective.

Elias CJ Yes.

Pike And where it has in fact succeeded that are unsettling. And I think that's even on a wider, more public interest basis.

Elias CJ But is your submission in fact that s.169 has to be given a restricted meaning?

Pike Yes and it was never intended to, it was never intended to change the common law save as to the characteristics argument. That's the only significant change it's made. Now there's been drafting differences that probably needn't come into them. But the only real significant changes were the characteristics rule, the **McGregor** issue in 1961 (**R v McGregor** [1962] NZLR 1069). But the common law of provocation was always that it applied if, and only if, a person A intentionally killed B. There's never been an instance where it's applied elsewhere than that. It also required sudden loss of, the loss of self-control was critical in the common law and that was seen as the second major factor. But nothing has changed, it is submitted, in the common law with respect to the Crimes Act approach to it save characteristics.

Accordingly, if it is accepted that there is no validation at common law of a proposition that provocation may apply to palliate a constructive murder charge, then the Crimes Act hasn't changed it, nor did it intend to. If the common law was different then obviously Mr King's argument would succeed. But in my submission there's no, the common law never sought to do that. And there's no instance or even suggestion that it might.

And that accordingly the Crimes Act simply superimposes and modified the common law to a limited extent and certainly it hasn't intentionally added a dimension to take a case where a person has lost self-control but only to the extent that they want to do something unlawful, not wishing to harm any other person in any way at all, is still nevertheless, if the untoward event of death occurs, guilty only of

manslaughter. It would never, it would be seen as incompatible I would submit with the felony murder rule. Or at least the policy that Parliament still adheres to as to felony or so-called unlawful act killings.

Keith J Well didn't we lose that in 1893? In part at least?

Pike In part, oh certainly it's been, I mean the.

Keith J In large part. And when you read through the structure of those provisions, it's after all what Stephen and co were trying to do and what the people were doing in the 50's. They were saying weren't they that there's homicide, some of it is culpable. If it's culpable, it's murder or it's manslaughter or infanticide I suppose. And if it's murder then you get the two murder sections, 168 and 167 and then you get 169 saying it isn't murder if. It's reduced if.

Pike Well indeed.

Keith J And so it would mean that that structure (muffled) wouldn't it. But you would say that distortion is in accordance with, or it's just reflecting the previous mess of the common law, or the previous principle of the common law, whichever way you want to put it.

Pike Yes certainly the submission is that the Crimes Act has certainly, has codified those elements that you said and what is constructive murder and what was always accepted as murder. It has mitigated felony murder from Stephens onwards. And Stephens, as your honour of course well knows, was the primary component of getting rid of the felony murder rule in strictness which is.

Tipping J Before we leave this subject, the closest criminal code that I'm aware of to ours is the Canadian in this respect. And their code, s.232 says, culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. And *Colburn* in his commentary says amongst other things, the defence is theoretically available whatever the mode of murder but normally confined to intentional or reckless killings. Now if that is the view in Canada and there's no citation in support of the text in relation to the theoretically available proposition, if that is the position in Canada there would be no logical reason for it to be different in New Zealand would there? Because their statute is, although there are differences of wording in that they've retained the sudden and the heat of passion which we dropped, but in essence it's the same. If you commit culpable homicide under provocation or by sudden provocation, you're allowed manslaughter.

Pike Well indeed that is the commentator's view of the logic. And that's of course Mr King's argument.

Tipping J Well yes but I just point out to you that that seems to be the position in Canada and you're often quite interested in the Canadian position Mr Pike.

Pike Yes.

Tipping J Is that helpful to your argument or not?

Pike Well no indeed it's not helpful but nor is it the position in Canada where we've seen somebody, as a commentator has indicated, that it would seem on the wording open for murder no matter how committed. Well that's the argument here that we're addressing today. Now as far as I'm aware no Court has said that that is the position. Indeed and Canada has a similar homicide structure.

Tipping J Yes.

Pike It is an academic view and it has a logic to it that cannot be immediately denied. I mean the words on one, call it literal or straightforward, application of the Crimes Act, 169 starts with a proposition, that's where the Court has … … starts with a proposition that culpable homicide can be reduced by reason of provocation. This is a person who kills, causes the death of another, has a defence of provocation. Under 167D you cause the death of another, therefore you have 169 applies. That is the direct route and I have submitted with respect that there is no principle of statutory interpretation that necessarily gets you there, especially since perhaps **Karpavicius** (**R v Karpavicius** [2004] 1 NZLR 156 (PC)). The Privy Council case is indicating that you look at, you don't now look to the most favourable outcome for a person, an accused person. The old strict interpretation rule or obvious interpretation rules that benefit an accused person are really now done away with more or less, or they are by **Karpavicius**. You look at the intent, the statutory setting. And all I can say, and I don't want to take the point any further now because I think I've said all I can say about it, is that the statutory setting in which these words are used or the sections are drafted, was that provocation was a defence only to an intentional murder. It negated intent. That was the whole point of it. It negated intent. Now we've changed the law. We don't negate intent any more. But that doesn't change the reason for having a defence of provocation. We have an excusable intent now but it is an intent to kill, excused by loss of self-control from sufficient provocation. And that is incompatible, is all one can say, with the language, both the language and statutory objectives in D.

And one can make the argument, and one does with respect, that if D, had D been in a section of its own or associated with 168 as 168(1) and it is a series of propositions about felony killing, the argument might look different. It shouldn't by reason of the fact that simply, well D is included in 167 rather than its own section or 168 for that matter.

But those are really the, I think I've said all I can with respect as to policies and taking wider or absolutist views and to why that might be seen, why D ought to be seen as incompatible, a D killing ought to be seen as incompatible. The main reason being that it is a pure policy section. People are guilty of murder because their minds are on the job committing another crime in circumstances where they know they're risking lives and if they kill in those circumstances then that is as heinous as it gets in terms of the criminal activity for the original crime. Now it is constructive in that it's not intentional murder. It's far from it.

And the same arguments apply with respect, or the same rationale assists the Court of Appeal on the second limb, and the narrower approach, accident or mistake.

Tipping J Do you have a common law authority to the effect that provocation did not negative constructive malice as opposed to actual malice?

Pike No.

Tipping J Because that's really your thesis isn't it?

Pike There isn't one either way Your Honour as far as I know. There's no authority either way on.

Tipping J In either way?

Pike On provocation. There's no case saying it doesn't. Otherwise I hope they wouldn't.

Tipping J Well in that case the section is to be construed more in the nature of a common law void than as ratifying a common law position one way or the other surely.

Pike Well the only argument, the argument made in response to that with respect is that one would have expected to have less of a void after two or three hundred years of cases where the common law has always insisted that provocation is a defence to an intentional killing only, and appears to be nothing else. But yes it could be seen as a void, i.e. this is the first time a Court has had to really engage on the point. To that matter, yes there is a gap, it could be seen as a gap. My submission is that it is not so much of a gap but just simply many years of acceptance of provocations limited application. That is of course a matter for debate.

As to the narrower point. With respect the Court of Appeal, whilst having not been at all attracted to the argument as to the so-called wider argument, found that in this particular case that accident or mistake, the 169(6) could not avail the respondent, sorry the appellant,

because he did not kill his uncle by accident or mistake. It was a death within his contemplation. And that in a sense is to be seen as validated by coming back to the very policy of 167D. I would submit it's unavoidable. Here with respect it seems incongruous to look at accident or mistake in the wording of 169(6) as availing the appellant because under that particular proposition the section according to (6) reads, the section applies in any case where the provocation was given by the person killed and also in any case where the offender under provocation given by one person by accident or mistake killed another person. It seems implicit with respect, and it's to take an unduly disembodied reading of 169(6), to say that that does not have inherent in it the proposition that the person, the offender, was trying to kill somebody. He just happened to kill the wrong somebody. The word, acting under provocation given by A he mistakenly or accidentally killed B does not seem to readily fit a case where the person was not trying to kill anybody at all. And indeed any killing in this case according to Mr King would be accident or mistake.

Gault J Can we come to the situation of what if the mother had died? Now isn't the position then, given the scenario we're not discussing where the section applies but it is said no accident or mistake. Now if the mother dies we're not in the accident or mistake, we're in the first limb of the section that the provocation was given by the mother, the mother died. But there you have available provocation even though there was no intention to kill anybody.

Pike Well that's part of the difficulty I think with the Court of Appeal's approach to it.

Gault J The difficulty I see.

Pike Yes.

Gault J It's an illogicality I see in it.

Pike Yes it is. That, as I say, that's why the wider argument has to be advanced because plainly with a 167D killing, if the mother, his mother had died, that would not be defensible by provocation either. Because he didn't intend to kill anybody. So plainly 167D killing, it mattered not on the absolutist theory who died. But of course the difficulty.

Tipping J So he's better off if he intends to kill them than if he has no intent to kill anyone.

Pike Well he gets a defence if he intends to kill her yes. That's true in that sense to say he's better off, yes he is better off. The reason he's better off is that he's lost self-control and intends, and has an excusable homicidal rage in the course of that self-control and kills the source of his homicidal rage. Under D he doesn't have any of those things necessarily. He has a much more limited objective to kill nobody, to

harm nobody, but to simply frighten them or to burn their house down so they have to sleep in a tent for the duration. Or whatever it might be. In those circumstances of course he's simply right back into being a person who is committing a crime of a limited nature for an ulterior purpose, taking risks which make him guilty of murder. It's simply, yes, I mean one can find all sorts of incongruities in the circumstances. And that is because in Counsel's submission at a certain point felony, on the spectrum of I'll call them for shorthand felony murder, on a spectrum of felony murder killings there are the ones where it's completely criminal, bank robbery, right up to where you are aiming to scare or frighten or you're aiming your criminal actions at the person who actually dies. And so we instinctively think of that as, well the person did die even though you didn't want them to. So that's more like B murder than a felony murder. The difficulty is that it is charged and conceptually seen as a felony murder. But the facts make it look close to B, to a B killing, well A or B killing. That's the difficulty and Counsel I hope faces it squarely because it has an element to it which appears in justice terms unpalatable. And I accept that. And I accept the hurdle that that creates. But it is there, it is submitted. So that's the difficulty and coming at it from the Court of Appeal way, with great respect to the Court, does raise the point that Justice Gault mentions, that had the mother died, that in one way of looking at it would not be accident or mistake because she was the source or one of the two sources of the provocation. Poor uncle wasn't.

Tipping J The real problem I see with the Court of Appeal Mr Pike is not that which builds on the example my brother Gault gave, which didn't really, the Court of Appeal wasn't focused on that. The real problem is that they have said if you foresee death as could well happen, you cannot say it was an accident. Clearly if you intend death you cannot say it was an accident but I would need a lot of persuasion that you can't say it's an accident if you foresee it.

Pike Well with respect.

Tipping J That was their rationale wasn't it?

Pike Yes it was and I have to embark on the persuasion now. But accident must be a word that takes its colour from its setting. Certainly under the Accident Compensation Act which my friend refers to it has a certain colour. And a colour for a certain purpose. Social engineering purpose of compensating people for harm that they've suffered. But in the terms of the criminal law I would submit that if I take the case of the bank robber who knows there's a bank full of people but he's going to blow a hole in the wall and get into the safe irrespective, if he contemplates, knows that the people in there are likely to be killed which is what has to be proved for D, and he detonates his explosions and they are killed, it seems impossible to say that the person could then say, well I didn't want them to be, therefore from my point of view it was an accident. What he can say is, from my point of view it

was unwanted. I'd sooner they didn't. But sadly they did. But to say that's an accident and to equate that with unwanted I think is the difficulty.

Gault J — But do you have to equate it to unwanted? I mean this section just says even though they may not have intended. It doesn't mean to say, it doesn't say, even though they definitely intended not to.

Pike — Certainly it says that their desire, they may have desired to harm no-one, that is true. The difficulty is that, or the Court of Appeal I do submit was right to say, that if you establish a set of circumstances you are in control of them. This is the policy argument. This is where accident has its bite in terms of these sections. If you are in charge of the situation, as the appellant was in charge of the situation, if he sets up that situation to effect a certain purpose which he did, if he is then found by the jury to have knowledge that his lesser objective risked killing people in that house, then when they did die, even though he may not have desired their death, could not be seen as an accident in any sense of the words that these sections, to which these sections apply. It was something that was a likelihood. And to say that it was a likelihood at the same time while a likelihood was still an accidental product of somebody who has control of the situation, who has set up a set of circumstances with that likelihood of death, to say that the resultant death was then an accident, whether from his point of view, is neither here nor there with respect. Accident is a neutral word. It is not an accident from his point of view. Because by accident or mistake that is, that describes objectively the conduct that occurred, kills another.

Tipping J — Can I borrow Lord Reid? Say I'm on the golf course and I'm playing my second shot into the green. I have no wish to hit anyone in the crowd though my skill is such that that could well happen. I hit.

Elias CJ — You might have foresight of that.

Tipping J — And I can foresee that that could well happen. But I hit. And I hit someone in the crowd. Can I not call that an accident?

Keith J — Even more if the ball went straight into the hole from there.

Elias CJ — Which you intended.

Tipping J — Yes, yes. My intention is to put it right in the hole. However unlikely that might be. But I'd no wish to hurt anyone. But I actually hurt a spectator. I would never be playing with spectators. But you see it's a very narrow interpretation of accident that you're inviting us to adopt.

Pike — It's a policy loaded again, but the criminal law is just policy, policy and more policy.

Tipping J It's a policy loaded interpretation of accident.

Pike Yes it is because there would be certain ways that one would see. One would not be able to defend such a killing as being accident. If one looked at it you would not say it was accident, that it was an entirely untoward event, neither contemplated nor foreseen by anybody. So the criminal law defence of accident certainly wouldn't apply. But be that as it may, the situation with respect is that the killing is, the section requires proof that the killing or death was a likely outcome of an unlawful act. And it's important with respect to dwell on the unlawful act. If Counsel was playing golf, that would be an unlawful act because of the inherent risk to anybody. But with respect to the analogy, the whole point is that you are engaged in an unlawful act in the first place. So therefore you look at the accident in the context of the law already saying that you are committing a crime from the first instance. In this case the crime of arson. To say that it's an accidental death in committing in the crime of arson, the accused person having known people were in the house, having seen it as likely that one or more than one die, in terms of the criminal law to say that that was an accident, the death was an accidental outcome of that conduct is really to make no sense at all with respect. It isn't an accidental outcome. It is a part of a set of propositions that were likely to occur and did occur. And I with respect do stress that my friend's argument on accident really has more to do with unwanted, or not desired. It was not an accident.

Gault J I wonder whether it is not getting a bit abstract in relating the two statutory provisions. If we could just concentrate on 169(6). That does contemplate provocation flowing from someone. So it might equally then contemplate that the unlawful act with which we are concerned was focused upon a provoker. In that event, in a factual setting that those factors are present, would not the killing of someone else be reasonably described as accidental?

Pike Well in a sense, well that is the purpose of (6), that you're trying to kill, yes you are trying to kill A and you kill B. The bedevilment in this case, or one of many of them, is that our appellant was not trying to kill anybody.

Gault J Well, no, he might be trying to kill or acting recklessly towards somebody and kills someone else. It's B.

Pike Well he wasn't of course. That's the difficulty again. He was plainly to be found guilty only under D. I think that is reasonably to be taken as established. And that's the essential proposition. Certainly if he was aiming anything at his mother, I couldn't and wouldn't try to argue that if he'd been trying to kill his mother with either A or B intent, and was acting under provocation and he'd killed her or even failed to kill her and killed the uncle, or killed them both, they'd all died and perhaps all of the people in the house had died, that in those

circumstances it may be that whether provocation was given by one person, the words fit that he then by accident or mistake killed others because his whole aim was to kill A. If however he did that and contemplated while trying to kill A he contemplated killing all sorts of other people as well, the Court of Appeal would say that it wasn't accident or mistake. It's really where the person, it doesn't cover the situation where the accused A tries to kill B and contemplates that while killing B he might kill C, D and E as well. It wouldn't contemplate that. It does contemplate he's trying to kill A, he either misidentifies A and kills B or thinks that for some other reason, or thinks the provocation came from B when it was really from A all along. Those are the accident or mistake. We're not talking about consequences. We're talking about the people killed.

Tipping J Don't we have to give a different meaning to accident from that given to mistake in this context? Doesn't the common law support that? They're not different ways of saying the same thing.

Pike No they're not. Accident would be where you shoot at A and miss and kill B. That's **Porritt** ([1961] 1 WLR 1372) sort of territory. Mistake would be where you shoot at B thinking that B was A, the person who provoked you. That wouldn't be an accident, that would be a mistake. It could be both possibly. But it would certainly be a mistake. As I said, unfortunately I couldn't remember the name of the case, but I certainly recall one where a motorist, sorry, somebody rushed out of the house and killed a motorist who, or wanted to kill a motorist who'd run over the householder's child in the road and killed the child. And they ran out and in their rage they attacked the bystander thinking that was the motorist. It was a sort of paradigm case where provocation plainly applied.

Tipping J Well you can mistake the identity of the person giving the provocation.

Pike There was a mistake, that was a mistake. By accident I would submit is simply where the **Porritt** sort of case where the aim is astray, that is more described as accident than mistake. You didn't mistakenly make any mistakes in any real sense of the word but you accidentally killed the person, the wrong person. But I do submit those words, accident or mistake kills another, relate to that other person. Nothing to do with the actual killing, it is simply the identity of the person killed. You may get the wrong identity by mistake. You may get the wrong identity by accident. But here with respect, the difficulty here is that when you don't intend to kill anybody at all it seems incongruous to say that (6) would apply so that you have by accident or mistake killed somebody else when you didn't actually want to kill anybody. The concepts just seem to be too contradictory to comfortably sit together. And I do submit that's what was driving the Court of Appeal's determination in the case as to what was meant by accident or mistake. As well as the fact that it cannot be that in terms of s.169(6) that you could accidentally or mistakenly kill or be said to kill somebody who

you are contemplating killing in the first place, even if you don't know their identity. The appellant contemplated killing one or more people in that house because that was the product of his likelihood of death. He didn't want to kill anybody. To say that the killing of the uncle was therefore then in those circumstances an accident or mistake simply with respect doesn't follow from the flow or the wording of the section.

Blanchard J So if you contemplate killing someone because you want to kill them it could be an accident if you get the wrong person. But if you just contemplate killing without the intention of killing someone and someone gets killed, then there's no accident.

Pike No in the sense of 169(6) no, with respect. There may be.

Blanchard J I must say I have difficulty believing that's what the drafter intended.

Pike Well with respect.

Gault J I think you'll accept that you really are in some difficulty if you don't prevail on your absolute argument. That's really what it comes down to isn't it?

Pike Well in more difficulty but the sense in which the Court of Appeal has made its decision must be right, that is the point. The fact that there may be incongruities in it which can be, but Your Honour has identified one and there may well be more, doesn't with respect mean that it's wrong. I think it comes back to the policy that, or comes back to the statutory language in the policy as to say that it is incompatible with ordinary usage, especially in the context of a 167D killing to say that a person is killed by accident or mistake when that person's death is contemplated by a person while in the course of committing another crime. Simply, with respect, it isn't. It is seen as a foreseeable and likely outcome to that person. Therefore cannot be seen as accidental. It isn't an accident. It isn't intended either. But it isn't an accident, it is within a range of contemplated consequences known to that person. And as I say, you can make an argument that none of this makes the slightest bit of sense in an area that has nothing to do with the criminal law and 167D. But this case does have to do with it, and accident or mistake with respect has to come right back to what Parliament would contemplate or the drafters would have contemplated as accident or mistake in relation to the killing. So the difficulty would be then that if that is, if accident or mistake foots the bill, then we're back to the situation where Parliament is condoning the fact that somebody will be guilty of murder under 167D when it is quite happy to accept the co-existing proposition that that person accidentally or mistakenly killed their victim. Now that, with respect, doesn't seem to describe the policy of constructive murder at all. But I think with respect we've.

Elias CJ I think the arguments are well understood thank you Mr Pike.

Pike Now the only difficulty is, or the greater difficulty it would seem, is the second one. Now can I briefly touch on proportionality? The points made about that Your Honour are simply these. That the law of New Zealand as it stands does admit a proportionality and even **Campbell** which was critical, the Court of Appeal in **Campbell** was critical of the use of the concept of proportionality for special reasons, nevertheless reaffirmed quite clearly that proportionality was part of the common law of provocation and did apply in New Zealand. So there was no fundamental error in advancing that notion in the summing up. The real question is whether the error, was whether the Judge in summing up left the jury with a proposition that they must as a matter of law convict the appellant if the jury found that the burning down of the house was disproportionate to the provocation offered. That is the fight and the language in the fight with Mr Wuatai earlier in the evening. And the submission there with respect is that the Judge, in summing up, did not direct the jury in terms of law but the Court of Appeal said that it was, I think used the word infelicitous use of language. And it's a fair comment. That it was a risky use of language to say you must take into account. But the submission is made for the Crown that the Court of Appeal was right to say that in the end the jury would not be left with the impression, which this Court has to find that it was with respect, that the jury was directed to convict if it found that the act of burning down the house in the manner it was done was disproportionate to the insult. Certainly the Judge said it was. You must, you need to, you must, to use imperatives, you must or you need to take into account. But he did say, as a weighty factor, with respect. And the fact he said it was a weighty factor distinguishes it from the case where he said you must take this into account as a matter of law. And if you find disproportionality you must reject the defence of provocation. His Honour did not do anything like that. He used language which is now seen as risky in saying you need to or you ought to. You must. And the Court of Appeal with respect was not wholly wrong, i.e. it was open to the Court to conclude or construe the Judgement or the summing up as one that would not have led the jury in the end to have convicted by reason of a mistaken view of the law that they were obliged to do so if they found the disproportionality.

Tipping J Mr Pike, can you help on this? Immediately after the passage you've been referring to, you must consider as a weighty factor etc, the Judge then goes on and says, the extent of loss of self-control, I'm looking at the top of page 20 of Mr King's submission to find this.

Pike I'm just looking at the summing up.

Tipping J It's immediately after the passage you've just been referring to.

Blanchard J It's on page 185.

Pike 184?

Blanchard J 185.

Pike 185, I have it yes, sorry. The extent, sorry.

Tipping J He says, the Judge says, the extent of loss of self-control has to be considered in proportion to the alleged provocation.

Pike Yes.

Tipping J Now there is an argument here that that in the event may not have caused a miscarriage but can you seek to support that in its dimension of extent of loss of self-control. You either lose your self-control, don't you, or you don't.

Pike Well to start at the beginning. I think the flat out answer, because Your Honours I don't want to hedge this point with a particular response, is no. But I would have to explain that. There are degrees of loss of self-control. I think that is clear. It depends what we mean by loss of self-control. It does not mean becoming temporarily insane or an automaton. **Campbell** I think itself accepted that there could be such things as degrees of loss of self-control. But the importance of the proportionality is that it was explained by numerous commentators into the mists of time as to be an evidential point. That is there was a real concern was this person killed, and to bring it to the case of the appellant, was it the provocation that caused this man to set fire to the house or was it simply that he was sick and tired of his parents, or his step-father and his mother and as a matter of revenge for past, a whole lot of past misconduct from them, he set fire to the house. Now that was the question. And it was a live issue to submit it in the case. But I appreciate the arguments about loss of self-control and they are difficult. But we find it incongruous to say that somebody must on the one hand be shown to have lost self-control, on the other hand they must be also shown, they may be challenged on the basis that they lost it too much.

Tipping J You see the Judge seems to have directed the jury not that this was a factor in deciding whether there had been loss of self-control but more in the evaluative area of whether the provocation was sufficient. Because at the end of the summing up at page 190 he reverted to the topic in his, to sum up on this aspect. And his first point was, after reference to the supposed acts of provocation, were they bad enough provocation to cause the kind of reaction?

Pike Yes.

Tipping J Now I have to say with great respect that I find that quite unconventional.

Pike Yes it has to be said with great respect to the trial Judge that the way loss of self-control, proportionality and cooling were factored into the

summing up were not necessarily a model of precision. It has to be said. And yes there has been a cross-fertilisation of the concept of proportionality into what was actually done as he lost self-control. Rather than confining it to where it should have been, which is whether if it's relevant at all, to ask the jury, in considering the provocation or the loss of self-control, did that come from, was that a product of the provocation on that night from Mr Wuatai and so on or in fact was it not a loss of self-control caused by provocation at all but of a long build-up of resentment and hostility and anger and revenge-seeking, something else. The fact the mode of retaliation may help you in deciding whether it was the action on the night that caused the loss of self-control or something else. If it was something else, of course, then the provocation on the night doesn't avail the appellant. If it was the night, of course it does. The difficulty is it's got into the mix as an idea that it's almost a substantive doctrine and not an evidential one as to how people react.

Gault J You heard my exchange with Mr King on the subject of its relevance at the evaluative stage. Do you disagree with the view expressed? That it's really not relevant either to the severity or gravity of the provocation nor to the loss of the power of self-control of the ordinary person. Can't see how the retaliation is relevant to either of those.

Pike Well no, well certainly Counsel's submission is that where relevant at all.

Gault J It's only relevant to the other point of actual loss of self-control by the accused.

Pike That it was the causation point, an evidential causation point. Did the.

Tipping J There are two points there. There is whether he did in fact and, two, was that loss of self-control caused by the provocation?

Pike Yes. The second one is whether one might bring in proportionality as an evidential tool. Was this a burning resentment from long ago and this incident simply is one now alighted on by an accused person saying, well that's why I did it, I lost self-control? Or is there a different explanation?

Gault J I must say I find it hard to see how the proportionality of the retaliation can help much on that either.

Pike Well there that comes back, with respect, to the theory that the loss of, probably an objective theory and hence it's relative disfavour now, that people react, as was said by Lord Diplock, that people react more or less proportionately to what is done.

Gault J A particular type of retaliation may bear upon causation. But just the proportionality of it, I find rather hard to relate to.

Pike Yes. Well my submission is with respect there that as again, is that nowadays we don't insist on true loss of self-control in any sense of the mind being no longer master of the body as it were. The Courts don't insist on that. They use that language but in fact provocation pleas go to a jury where the person has some ability to regulate their conduct. They're not absolutely out of control and unthinking automatons. And there's no argument with that. That's a reasonable development of the law and how it should be. But I suppose the difficulty is that the Courts recognising that, also recognise that if the person is allowed something less than this manic or automatistic response, that then there's some help to be found by seeing what they did in relation to what was said or done to them. Now that's controversial but that's of course, that is the heartland of what was said by Lord Diplock in Phillips. That was the … view there. It is no longer seen as quite right I have to say with respect. And there is that incongruity.

But it has to be, there is a place for cooling and a place for proportionality. Here it is submitted the proportionality equation has gone wrong in the summing up. And I think the Court of Appeal found as much but saw it as not causative of any, essentially not an error of such to even necessarily raise a proviso argument. That is, it's submitted, because it seems that the real basis of this whole case and this whole debate is that the accused, was he or was he not, had he not lost his self-control when he set fire to the house, and it must be considered that the real issue was cooling, that the three hour time gap and the packing the case and so on, that was the real issue in the case. And I think that's with respect how the Court of Appeal saw it. And if the cooling, if there'd been a really serious mistake in the so-called cooling doctrine then the Court of Appeal wouldn't or couldn't have found what it did. It rather saw proportionality for reasons Your Honour advanced this morning and for other reasons as rather inconsequential, wrong but inconsequential I think.

Tipping J But do you put it then on the basis that the provocation defence you say fell at the first hurdle, namely that they would have not been, they'd have been satisfied that there was no loss of self-control at all.

Pike Yes I do with respect. I think New Zealand juries, if they find loss of self-control, are unlikely to ever convict.

Tipping J Unlikely to convict?

Pike Unlikely to convict.

Tipping J If then the Judge's provocation direction was all rolled up and didn't direct them correctly as to the significance of this proportionality on the first and factual question, doesn't that leave the risk that they might have found no loss of self-control on an erroneous basis.

Pike Well with respect, it's a possibility as whether it's a real risk, or a risk, or real risk. I would submit no because the heart of it, the heart of this case must always have been the position, and I think both Counsel may well agree if on nothing else this, that the difficulty in the case was always the fact that what was done by the appellant was something that he could explain very carefully. It was a limited action, that he waited a certain time, that he made certain calculations and so on. He went through a methodical process and throwing the hose in the garden was probably not really very helpful to him and, whatever can be made of that now, it was explained away. I don't think it can have been, and as Counsel would submit, really what this case turned on was the jury finding that here is a man who has, yes he's been provoked or there's been provocative action, these two hate each other, they've fought for a good long time. Now in the end on this night it's the straw that broke the camel's back sort of thing. They could still have found that he was provoked. I suspect they did. But that in fact by the time he had committed the act of arson, he was acting with some calculation, deliberation and after a time to think about things, getting his little girl out of the house and so on, and that he had acted in a way that was consistent with, sorry inconsistent with any sort of loss of self-control other than that very minimum loss of self-control was that ordinarily I wouldn't do this sort of thing, I'm not that sort of person. But that's not sufficient loss of self-control. And that with respect is what the case was all about. And it was always all about in Counsel's submission.

Elias CJ Of course, and perhaps it's not worth bandying around, but of course on the defence case provocation wasn't spent because he was told he had to remove himself and he intended to take his daughter. So the both of them were homeless and had nowhere to go the next morning. And he was thinking about this during the night so that's the counter argument.

Pike In other words you'd accept that, as there may well have been, that the jury would have accepted that there had been provocation. I imagine that then a fair minded jury would probably find what happened on that night as being provocative. And the difficulty is and possibly they may have also found that the trying to burn the house in circumstances where he didn't want to kill anybody's not necessarily disproportionate. It may well be that the appellant is right.

Elias CJ They should all be homeless.

Pike That he didn't see what was happening as likely to cause, and I think his statement candidly accepted that suddenly he realised when he got out of the house that the contemplated deaths had in fact, or something much worse had happened. And that the jury accepted, found that he contemplated the loss of life in those circumstances. So proportionality was never an issue with them. It was simply I would submit a case where if they'd found he was acting hot-bloodedly when he did these

things, they probably would have said it was manslaughter. Or almost undoubtedly. But they found that it was just too much calculation, too much control going on. And that's probably where the case broke open. And a lot of it could be seen as arcane. But I do accept the Court of Appeal with respect was right to see the proportionality as wrong, it's a very difficult concept, it's just a loaded concept for trial Judges. Regrettably the trial Judge did err in the way he, in the way Justice Tipping's identified. But the Court of Appeal was right to find as it did.

Those really are the submissions Your Honour, the rest's in writing and I've already spent much too long I think in going through it.

Tipping J They said no miscarriage at all. They didn't apply the proviso.

Pike No they didn't apply the proviso.

Tipping J No.

Gault J Wasn't a material misdirection.

Pike Wasn't material to the way they saw the case. As I said, I've no doubt at all they saw the case as being critically on loss, was there real loss of self-control. And on that of course as Your Honour notes, the trial Judge again didn't really focus on that element of was there loss of self-control. That may be a two-edged sword, I'm not so sure about it. But it may have assisted the accused as much as the Crown or neither side. But that seemed to be plainly what was concerning the Court of Appeal.

Gault J I didn't understand the Court of Appeal judgment as really turning on the fact that this was really all about actual loss of self-control but rather the different point that this is not a case where it could be said the jury were induced by the summing up to a conclusion or possible conclusion that so disproportionate was it that provocation had to fail. The Court of Appeal rather said the jury would not have been of any other view than that they did have to consider provocation.

Pike Yes.

Gault J And it was for them of course what they made of it. But the complaint about this proportionality business is that the jury are misled into thinking if it's disproportionate that provocation can't apply.

Pike Yeah they must.

Gault J And whereas the Court of Appeal said they weren't in any doubt that they had to consider provocation in the circumstances. That's what I understood them to be saying.

Pike Yes I take in paragraph [62] and [63] of the Court of Appeal judgment as what I'd really rely on with respect to. Because the Court then did talk about the issue of hot blood. And in [64], the ultimate paragraph, the Court says, in our opinion the jury could not have been misled into thinking that for legal reasons the lapse of time in issues of proportionality precluded the defence. So it was both on cooling. But Your Honour's right in that sense, it is really Counsel's interpretation of the judgment that it was always about cooling, that was the main focus of the trial. But the Court of Appeal, certainly as Your Honour said, that both misdirections did not lead the jury as a matter of law, and that's critical, as a matter of law, to decide against the appellant.

Tipping J Well if he had, then of course he should have withdrawn it. But it's fairly subtle isn't it to say that by leaving it to them he was clearly signalling to them that it was possible. The answer to that is that he was giving with one hand and taking away with the other. I mean they wouldn't know that if it had been a legal thing he would have taken it away. I think my brother Gault's absolutely right as to what motivated the Court of Appeal here but I have to say Mr Pike I don't feel entirely comfortable with it. But it seems rather theoretical rather than the realities of what would likely go on in a trial. I mean to say to them, yes of course you've got to consider it. But you must be satisfied of blah blah blah, is giving and then taking away in a sense.

Pike That is, yes, I certainly can see Your Honour's point. I suspect that part of the issue for the trial Judge was that it may well have been a near run thing as to whether to leave provocation at all. He did obviously leave it. But there may have been doubts as to whether in fact, it might have been one of those more marginal calls and His Honour there felt at the end of the trial necessary to balance up certain issues. And hence proportionality and cooling came into it because they were the two issues which I think troubled His Honour in leaving it. Whereas once upon a time up until the early 1970's a Judge would perhaps safely take it away from the jury on the Judge's perception of cooling. Since the 1970's that's never.

Tipping J Well you don't take it away unless it's absolutely.

Pike Never thought right. So it has to be left and His Honour has possibly balanced, and unfortunately used an equation which has got him to the wrong place. In balancing I accept that. I accept the difficulties. But in the end it's one of those cases where the aphorism of standing back and looking at it, which is what the Court of Appeal has done, is to be satisfied that in the end, having regard to the conduct and the way it was run, one thing the Court was satisfied of and must clearly be right in being satisfied is the jury would not have thought as a matter of law it must find against him but it would have thought that it had to take certain matters into account and given them a really hard look. But it was ultimately for the jury. And that of course, this Court I would submit, must be satisfied that the Court of Appeal was wholly wrong to

come to that conclusion and that in fact the summing up would have led the jury to conclude that as a matter of law it must shut out the defence. But the facts are such that it was obviously a reasonable verdict to say that there was not a loss of self-control or a provoked response here. The killing was a product of something quite different.

Elias CJ I wonder whether it's sufficient though to question whether the defence was effectively precluded. That just doesn't seem to me to be enough because if proportionality is irrelevant to the evaluation, then the Judge's direction was capable impermissibly of effecting the evaluation. It doesn't preclude the defence but it directs the jury as to how it's to weigh the evidence.

Pike Well yes of course Counsel's argument was that proportionality is relevant but unfortunately got into the, perhaps not to the extent of causing a miscarriage, but it got into the wrong part of the summing up as it were. It's certainly relevant to ask the jury, the jurors could ask themselves, well was this, was there a loss of self-control, was this reaction a product of the provocation on that night. Or was it in fact something because this is a person who we think is rather hot-headed and he's had a long history of disputes and so on and this is really just revenge, as he said, I wanted to scare them. And the point is the appellant himself has told the Courts very candidly what he wanted to do. He hasn't said a lot about being out of control really although Mr King would point to contrary passages. What he's really said is that he wanted to scare people. And so ultimately the proportionality is something that is legitimately to be put before a jury. It is something a Judge with respect can say, well you should look at this hard. Because a Judge is entitled to do that if the Judge thinks the evidence requires that sort of hard look at proportionality. What the Judge mustn't do is say it's a question of law. And you must take it away. And the Court of Appeal found that the Judge hadn't said it was a question of law, that everyone I suspect must be at idem at least on the point that the proportionality argument got into the wrong place but it could legitimately have been in a different place and ultimately have not made a great deal of difference to how the jury went about its task.

Tipping J Mr Pike just one final thing. Do you accept that we should approach this on the basis that for it to be not a material misdirection or akin to applying the proviso, that we have to be satisfied that there's no real possibility or reasonable possibility of a different answer had the directions been correct? Would you wish to bat for a better test than that from the Crown's point of view?

Pike Well the proviso test in **McI** [1998] 1 NZKR 696 which we've got, more is to be said in a few weeks time.

Tipping J Well we won't go down that road.

Blanchard J We won't have a rehearsal of that thanks very much.

Tipping J Yes. But on current law, whether this is a proviso or not a material misdirection, wouldn't we have to be satisfied, putting it in slightly different language from **McI**, that there's no real possibility of a different answer had the directions been correct?

Pike He was robbed of a reasonable chance of acquittal of murder.

Tipping J Chance.

Pike By reason of the direction and the Court of Appeal said no, he wasn't. And this Court would have to say it was plainly wrong.

Tipping J I'm asking you whether you wish to say anything upon that proposed approach to the question in principle, never mind what the.

Pike In principle no, that's been long accepted that, across all appellate Courts, that a reasonable chance of acquittal really seems to be the key test. The submission is the Court of Appeal rightly held that and that's the issue here.

Those are the submissions may it please the Court.

Elias CJ Thank you Mr Pike.

3.27 pm

Elias CJ Yes, do you wish to be heard in reply Mr King?

King Just briefly Your Honours. Can I just address the submission that's put forward that in the hundreds of years or however long it is that the common law has recognised a partial defence of provocation, that there's no case that can be identified where provocation has been applied to a so-called felony species of murder. In my submission what we have in this case is perhaps a unique situation because of the acquittals of the appellant on the charges of attempted murder. Now the proposition that was, or the hypothesis that was put forward by His Honour Justice Gault, what would be the scenario if the appellant's mother had died as well as his uncle. In my submission that can be taken to a further step. What if, in this case exactly as it was run, the appellant had been found guilty of attempting to kill his mother and guilty of murder of the deceased? In that situation this Court wouldn't be considering of course felony murder, it would be, everyone would have accepted it was a 167C murder to which provocation would have applied.

Tipping J Can you transfer the malice in an attempt?

King Well attempted murder would show that he had a murderous intent which would therefore come within 167C as a transferred malice of

intent to kill one person when in fact by accident or mistake someone else was murdered, identity being the mistake. So in my submission had this appellant been convicted of attempted murder he would have been, without too much opposition, able to run provocation on the murder. But because he was acquitted of that charge the Crown argument is therefore it must have been a 167D murder, therefore provocation cannot apply. And in my submission that's simply an incongruous outcome. And really he shouldn't lose the benefit of the defence because he's acquitted on a related charge.

The second point I would like to make in response is my friend repeatedly has made the point that the appellant desired that no-one be hurt. In fact whilst that is the position that the defence advances, that is not an element of murder under s.167D. The element of murder is that the offender for any unlawful object does an act that he knows to be likely to cause death and thereby kills any person. Those are the elements of felony murder. The add-on at the end, though he may have desired that no-one be hurt, is not an element. And in my submission we get into an even more incongruous position if we accept the Crown position by saying, if it was a felony murder but he still intended that someone be hurt, provocation is a stronger argument than if he committed a felony murder but desired that no-one be hurt. And essentially of course we will never know whether a jury accepted the defence contention that he desired that no-one be hurt or if they didn't accept that and thought that he wanted to harm someone. Because that latter part is not an element I submit of 167D, it's simply an add-on.

Just finally, my friend has made the repeated point that the distinction between murder under 167D and 167A, B or C is that the offender under 167D is, and I think he used, I made a note of the actual phrase that he used, was under 167D his mind is on the job. Well with respect, many murders committed under A, B or C involve very considerable premeditation where a person does very deliberate acts to bring about the outcome that is not fatal to provocation. And **Campbell** of course stands as testimony to precisely that. The light bulbs were changed, cars were gassed up and it's not an automatistic state. So in my submission it's wrong to say that because a 167D usually involves a person who's mind is on the job, that it cannot also involve a case where a person has lost his or her power of self-control. And just as for A, B or C a person loses his power of self-control, and thereby intentionally sets about to kill someone or the other murderous intent under B, then a person under s.167D can lose his or her power of self-control and be compelled to act in a way that does not involve an intent to kill but involves an intent to commit an unlawful object. In my submission there's simply no basis for drawing the distinction in the way that my friend has done.

And just finally on the point that provocation does not apply to attempted murder and does not apply to arson. In fact the only crime it applies is for murder. With respect the rationale for that is well known.

Until recently there was only one crime (sic) for murder and that was life imprisonment. It's still very much presumptive. For attempted murder and for arson and for just about every other crime where there is a discretionary sentencing regime, provocation can properly be taken into account as a mitigating circumstance and resulting in a lesser sentence. That is not the case or was not the case in 1999 for murder where there was the one sentence. And that's the reason why murder is regarded as a special species whereby provocation applies. And 167D murder is still murder in my submission.

As far as the allegations of loss of self-control, I submit, and I've set it out at paragraph 42 of my written submissions, that there was strong evidence here that the appellant acted whilst he had lost his power of self-control. That is not to say he was in an automatistic state or not able to recall what he did. It's simply that he'd lost his power of self-control and in his video interview to the Police, and I've made a number of references to particular aspects in paragraph 42 of my written submissions, he talks I submit the classic language of the provoked. He talks about the struggle he was under to try and keep his cool and not go berserk. He talks about all the things just coming together and getting to him. He talks about a lot of things just started getting to him at the same time. He talks about things pressuring him. He talks about being stirred up and he talks about all of a sudden. And the references are there. So in my submission it is totally open on a fair view of his video interview, which my friend makes the point was not done with legal advice, it was simply him telling the Police officer what had happened, that this was open to the jury to conclude this was very much the actions of a person who had lost his power of self-control. And that, with respect, was well recognised in the decision of the learned trial Judge in allowing provocation to go to the jury. And I think with respect Madam Chief Justice, you made the point that His Honour recognised that even after the Police had left for the second time, the suggestion was that the taunting had continued to the extent that he was told that if he tried to leave with his daughter in the morning he would be killed by his step-father. Now he says that quite clearly in his video interview and again I've got the references there in my written submissions. So in my submission it was clearly a case where it was open to the jury to conclude that it was loss of self-control. It was clearly a case where provocation should properly have been left to the jury and I submit that with the directions that were given to the jury on both the aspect of proportionality and importantly the cooling off period, and I've referred to that, and the Court of Appeal held that there was misdirection on the issue of cooling off, that the defence was effectively precluded in this case and that as a consequence he was denied the opportunity of an acquittal and thereby a justice miscarriage.

Unless the Court has any questions those are my submissions.

Gault J Just one Mr King. In your written material you seek a substituted verdict rather than a re-trial in the event that the appeal is allowed. Can you really support that?

King Oh that might be in the slightly optimistic realm. No I accept that. I mean I suppose you've got to, if you don't ask you don't get. But I don't know, it's a matter for the Court of course.

Gault J Yes, right thank you.

Elias CJ Yes well thank you Counsel, we'll take time. Thank you for your helpful submissions.

Court adjourns 3.36 pm