IN THE SUPREME COURT OF NEW ZEALAND SC 28/2009

AARON MARK WI

Appellant

v

THE QUEEN

Respondent

Hearing:	18 August 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	G J King with C J Milnes for the Appellant J C Pike with N P Chisnall for the Respondent

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CRIMINAL APPEAL

MR KING:

If it pleases Your Honours. King appearing together with my learned friend Ms Milnes for the appellant.

ELIAS CJ:

Thank you Mr King, Ms Milnes.

MR PIKE:

As Your Honour pleases, I appear together with Mr Chisnall for the respondent.

ELIAS CJ:

Thank you Mr Pike, Mr Chisnall. Right, Mr King.

MR KING:

If it pleases the Court, the primary issue for determination in this appeal is a matter which has caused something of a crisis in the criminal defence bar. It is an issue which has received very extensive publicity. The matter being, of course, that the Court of Appeal now in these two cases in *Kant* and backed up in this particular case, *R v Wi*, have held that it is no longer open as a matter of routine for a defendant to be able to introduce evidence that he or she has no relevant previous convictions. It is the appellant's position that that result, which is acknowledged in both of the courts as being somewhat tentative and requiring further analysis, is incorrect and that it could not have been the intention of Parliament to, without any specific reference, do away with the age old practice of a defendant adducing evidence that he or she has no previous convictions.

The appellant's fundamental position is that an absence of previous convictions is in no way prejudicial to the proceedings. It doesn't in any way impact on the Crown's ability to properly and fairly prosecute a case. On the other hand it is probative as both propensity and veracity evidence as defined under the Evidence Act but more fundamentally it's also plainly relevant because of the natural tendency of a jury to speculate on whether or not a person appearing in the Court has previous convictions or not. That is an issue that has received very extensive publicity and has been the subject of comment at all levels and in my submission it's a proper context to recognise that a jury will naturally speculate as to whether or not an accused person has previously been in trouble.

It is the appellant's position that the adducing of such evidence, which is traditionally done obviously through cross-examination of a suitable police officer who has had access to the accused's previous conviction list, cross-examination is likely to take something in the order of 30 seconds to

complete so it is not something that is going to needlessly prolong the proceedings.

So with that introduction it is submitted that there are a number of discrete sub-issues that arise for consideration. I have set those out in the appellant's written submissions at page 7 under paragraph 20. The first of those is does evidence of a lack of previous convictions amount to propensity and/or veracity evidence in terms of the Evidence Act 2006? Secondly, if it does not amount to propensity or veracity evidence is it nevertheless admissible as being generally relevant, as that term is defined in section 7 of the Act. If it is not admissible as generally relevant, in what circumstances does it become admissible in the particular circumstances of the case. And of course the fallback position in this case is that even if one is to take the general rule that such evidence can no longer be admitted, it is the appellant's submission that in the particular way in which the case against him was presented, that he was entitled, in fact the Bill of Rights Act right to present a defence to the charges alleged really compel the conclusion that he was entitled to adduce evidence that he had not previously been convicted of any relevant offence.

Of course, part of the difficulty that we have, in my submission, is that all of the cases on the issue seem to deal with this flip side of the coin as it were, the judicial directions which accompany evidence of a lack of previous convictions. There doesn't seem to be any authority beyond *Kant* and *Wi* saying that such is not admissible. The question has always been in the cases, certainly from the overseas jurisdictions, well the evidence is there, what do we make of it, what directions are required. As we can see from the English positions in *Vye* and in *Aziz* there has been a great deal of consideration and debate to whether a propensity direction alone is required or whether a credibility direction alone is required or whether both are required and that seems certainly, in my submission, to be the general proposition in the United Kingdom, that unless it would be an insult to common sense, directions on both credibility and propensity are required. But the problem is, I suppose, is that none of these other jurisdictions have ever, it seems, at least counsel for the appellant suggested that evidence of a lack of previous

convictions simply cannot be admitted. It has always been addressing what directions should properly accompany that. So that has been identified as question 4 in the issues arising on the appeal.

Five, I suppose, really follows on from that is what is the relationship between evidence of a lack of previous convictions and evidence of good character. It is the appellant's position that really the hallmark of good character is an absence of previous relevant convictions. Good character evidence, of course, is one of those strange areas of the law where the normal rules don't seem to apply because it's really only admissible traditionally, and indeed under the Evidence Act, as a person's general reputation in the community. So unlike every other facet of the law one can't be specific, if one applies the rule literally, so one is dealing with typical hearsay and opinion evidence, a person's reputation in the community. That is traditionally regarded as amounting to evidence of good character but if a person adduces that and has previous convictions then that will come in as night follows day, as a means of challenging that. But, in my submission, the absence of previous convictions is typically regarded, certainly very specifically regarded on the UK authorities, as being evidence of good character, and certainly that's the appellant's position.

It is also submitted that specifically in the context of this case the issue arises, and I confront it head on, that the appellant does have a subsequent conviction for assault on a female. The position was that at his first and second trials the Crown agreed not to adduce that evidence on the basis of the explanation that was proffered, that as a result of being charged with these matters his life really spiralled out of control for a long period of time and the domestic assault occurred in that context, but the reality is he does have a subsequent conviction. I suppose when we're talking about propensity, if we've got an event after the time of conviction, then that needs to be confronted head on. The appellant's position to that is that the approach taken by the Crown in agreeing not to adduce evidence of the subsequent assault on a female conviction was open to them and was the correct and fair decision to make. It did not mean, it is submitted, that an untrue or unfair

picture was placed before the jury. However, if the Court is of the view that you can't have it both ways and that the subsequent conviction is relevant, then it would undoubtedly and is the appellant's position that he would rather his whole criminal conviction history including that subsequent conviction for assault, was before the jury than that nothing was before them.

TIPPING J:

Mr King, are you going to come and develop the proposition that you should be entitled to lead evidence in order to head off speculation?

MR KING:

Yes Sir.

TIPPING J:

Yes all right, well we'll leave it until then.

MR KING:

That's, I suppose, the fallback position. The appellant's primary position is that the evidence can properly be regarded as –

TIPPING J:

Yes, I understand.

MR KING:

– veracity and propensity but even if that isn't so, then it's nevertheless relevant.

TIPPING J:

Well the question really is, isn't it, it has to be relevant before it's admissible at all.

MR KING:

Yes, of course.

TIPPING J:

So the relevance issue, in some senses, comes first, doesn't it?

MR KING:

It does. Well it can be relevant because it's propensity evidence. It can be relevant because it's veracity evidence or it can be relevant on a general basis for rebutting speculation by the jury that this is a person who has previous convictions. So in a sense whilst that's absolutely correct, the relevancy is defined by –

TIPPING J:

I suppose if you could fit it within the rubric of either veracity or propensity then, ex hypothesi, it's relevant?

MR KING:

That's exactly right Sir, yes. It's only relevant if it's veracity evidence, it's only relevant if it's propensity evidence on those headings but –

McGRATH J:

So you say those are the first enquiries before you can make a decision on relevance?

MR KING:

Logically, yes, in my submission. Although, as I say, there is the fallback position that even if it isn't veracity, even if it's not propensity, it's nevertheless relevant as rebutting speculation by the jury.

ELIAS CJ:

Are you going to develop the relationship between section 7 and sections 38 and 41?

MR KING:

Yes.

ELIAS CJ:

Because it does seem to me arguable that sections 38 and 41 make this evidence admissible, flatly.

MR KING:

Yes.

ELIAS CJ:

Because it's quite telling as a matter of statutory construction perhaps that it's only when the prosecution, for example, wants to call veracity evidence that the Judge is directed to ascertain the extent –

MR KING:

To give leave.

ELIAS CJ:

– to which it bears on the issues.

MR KING:

Indeed.

ELIAS CJ:

And they don't seem to, the statements in the first subsections are not qualified.

MR KING:

Indeed and in my submission when one looks back at the, certainly the Law Commission discussion papers, the extracts which are included in the appellant's bundle, that was clearly the focus that the legislation was directed towards, the prosecution seek to lead propensity or veracity evidence against an accused person. There was really, in my submission, no express consideration given to prohibiting an accused person from adducing evidence of a good propensity or good veracity and indeed the wording of the section, I

think it's 39(1) of the Act makes it very clear that a defendant can adduce veracity evidence against themselves – about themselves.

TIPPING J:

Well is section 38(1) subject to section 37(1)? In other words, does the substantially helpful test apply to 38(1)?

MR KING:

In my submission it does not, 38(1), "a defendant in a criminal proceeding may offer evidence about his or her veracity", is not qualified in that regard and you'll note Sir that at the conclusion of the subsection there's no reference that this is subject to section 36.

TIPPING J:

No but 37(1) talks about a party which must include a defendant?

MR KING:

Yes, in my submission, that's the general and it obviously incorporates both civil and criminal parties but when we are specifically going onto a defendant's veracity then section 38(1) –

ELIAS CJ:

Well I wonder whether that's right but it does seem to me that the matter has to be addressed sequentially and there's first the issue of whether relevance needs to be established and it may be that section 38(1) is wholly permissive about evidence of veracity.

MR KING:

Yes.

ELIAS CJ:

The second step would be the application of 37(1), that the evidence must be substantially helpful in establishing or in assessing veracity but that is not the same test as a test for relevance at large which section 7 would apply. In

other words, it is arguable that section 38(1) assumes that veracity and section 41 assumes that propensity is in issue in all criminal proceedings or at least to the extent that good character and good propensity, to that extent.

MR KING:

In my submission that's the proper reading. I've rather taken it as meaning that when – I suppose it comes down, I mean, to the evidence of veracity, it has to be relevant. It's inherent in it being evidence of veracity that it is relevant so not all evidence will obviously constitute evidence of veracity. If it doesn't, then the argument falls for determination under section 7 is it relevant in some other respect. But in my submission once evidence is properly regarded as evidence of veracity, then by virtue of section 38(1) it is admissible without resort to section 7 but obviously it would still be subject to the general exclusion provisions of section 8.

ELIAS CJ:

Well it would also still be subject to the substantially helpful test?

MR KING:

In my submission that's not necessarily the case.

BLANCHARD J:

I think it must be the case. Look at section 37(2).

MR KING:

Yes.

BLANCHARD J:

Must also comply with section 38 or 39.

MR KING:

Yes.

BLANCHARD J:

The “also” is building on subsection (1) of section 37.

TIPPING J:

But 38, I’m just being the devil’s advocate here, 38(1) isn't really something with which you comply.

MR KING:

Indeed and in my submission the key factor is, is it evidence about a person’s veracity? If it’s veracity, then in my submission 38(1) says it effectively trumps 37(1) by saying it must be substantially helpful because that is the structure in which it goes down.

TIPPING J:

But surely if it was intended 38(1) was to overtake 37(1), one would have expected it to say so.

MR KING:

Well on the face of it of course, there is an anomaly there. If one takes it that it must be substantially helpful before it is admissible, then that would seem to contradict the straight out proposition that a defendant in criminal proceedings may offer evidence about his or her veracity. So in my submission, the proper interpretation to say, if it’s veracity evidence, then it is substantially helpful.

ELIAS CJ:

Well I don’t, myself, I can't read it like that Mr King. But it does seem to me that you get a long way if you can get to the point that you don’t first of all undertake an at large relevance enquiry because the scheme of the Act is that in criminal cases, and one can readily understand this might be the consequence of the presumption of innocence and the –

MR KING:

Right to offer a defence.

ELIAS CJ:

The traverse, the defence traverse of the case, that veracity and propensity, or good veracity and good propensity are always relevant but in terms of veracity, the evidence must be helpful, that's the control.

MR KING:

Yes.

ELIAS CJ:

And you do, it seems to me, need to address that.

MR KING:

Yes.

ELIAS CJ:

But it isn't the case that in every case you have to establish that veracity is relevant and then get into this sort of dismissive attitude really that the Court of Appeal has expressed, although tentatively, that really it bears on it so marginally that it's not relevant. Relevance, it seems to me, you've overcome in that sense.

MR KING:

Indeed, and in my submission that's entirely correct. the concern, I suppose, that I'm trying to express is that –

ELIAS CJ:

Well you don't want it to be substantially helpful as well but it seems to me that there is some control there and you just have to face up to that.

MR KING:

I suppose Ma'am, in my submission, the concept of substantially helpful is inherent in it being evidence of veracity.

ELIAS CJ:

Well I don't think that that can be right as a matter of statutory interpretation. It's about the quality of the evidence.

MR KING:

Yes. I think that must be correct Ma'am.

ELIAS CJ:

The quality of the veracity evidence rather than what it's directed at.

MR KING:

Yes. In *Aziz* and the English authorities, they focus obviously not on the admissibility of an absence of previous convictions but the response to it and the Court talks about there being an affront to common sense and they give the example of a person who is charged with theft as a servant, say, who has no previous convictions but in the evidence it's adduced that he has made numerous fraudulent insurance claims in the past, and the Court identifies that. In the particular circumstances of that case it would be an affront to common sense to require the Judge to go through giving good character directions when clearly the evidence establishes the opposite in the case. In my submission, it may be that that's the type of scenario which the substantial helpfulness issue has sought to overcome. That obviously in that type of scenario where the person does have all those other problems in his or her past, then the evidence of a clean conviction history may not be substantially helpful.

ELIAS CJ:

This is a general provision. It has to apply to all sorts of veracity evidence, not just previous convictions.

MR KING:

Yes, indeed.

ELIAS CJ:

And so, was it *Aziz*, the case, one of the cases there's employment history and the Court says well that's not really, it doesn't bear on the issue of whether this crime was committed, but I suppose what the Court has done here is almost say that as a matter of categorisation, previous convictions are never evidence of veracity. Well absence of previous convictions are never evidence of veracity.

MR KING:

In themselves, yes. Which seems to suggest of course, if one takes the *Falealili* approach, that if you've got someone else to come along to give hearsay and opinion evidence that you've got a good reputation in the community, that somehow you can then bring in evidence of an absence of previous convictions and the combined effects of those two things would constitute evidence of good character but in itself, evidence of a lack of previous convictions does not constitute evidence of good character. In my submission that is the, that was regarded as the New Zealand position in *R* v *Kant* when, I submit that if one looks of course the Australian and the United Kingdom authorities, an absence of previous convictions is generally regarded as constituting good character, subject to the affront to common sense exception discussed in *Aziz*.

TIPPING J:

Is it helpful, Mr King, to concentrate quite closely on the definition if you like in subsection (5) of section 37 of veracity because it's a wee bit awkward because it says "the disposition of a person to refrain from lying". Now disposition is different from reputation. It's the actuality, not the repute.

MR KING:

Indeed, not the hearsay opinion.

TIPPING J:

Yes. So I mean this is a point that sometimes arises in the law of defamation, that the character and reputation are different concepts.

MR KING:

Indeed.

TIPPING J:

And here they seem to be focusing on what you might call character rather than reputation. It really is quite conceptually difficult.

MR KING:

Precisely Sir.

WILSON J:

Just following on from Justice Tipping's question, Mr King, given the definition of veracity in section 37(5), can convictions, or the lack thereof, for any offending other than dishonesty be relevant?

MR KING:

Well it depends. Well, if one was to look at it purely in veracity terms, and of course veracity was a word that was introduced at the last stage, before that the Law Commission talked about truthfulness and in others it talked about credibility, so we've got those three, I don't, with respect, really understand what the difference is but we're stuck with the word veracity, but, in my submission, when one talks about disposition as opposed to reputation, then really the hallmark of disposition would be previous convictions or lack thereof.

WILSON J:

Of any kind?

MR KING:

Of, well, I suppose it comes down to, if one looks at it purely in veracity terms then it would have to be truthful convictions, dishonesty. Whereas when one looks at it also, as the appellant submits it should be as also involved in the propensity, then that obviously involves the more specific known convictions

for violence and so on. So if one looks at it purely in veracity terms then one is probably stuck with the dishonesty or absence of dishonesty convictions.

TIPPING J:

We have to be careful here, don't we, to have at least some analytical separation, if you like. It would be rather awkward to simply say well let's roll veracity and propensity up together and let's have a –

MR KING:

And I've thought about that a lot Sir.

TIPPING J:

And stir it round and say well, you know, it's just about all right.

MR KING:

Broad brush. No, perfectly correct Sir but of course traditionally and the process has been an absence of previous convictions is regarded as evidence of good character. Good character is relevant both to veracity, that is their truthfulness, and also to propensity, the likelihood of their having acted in this way. So in my submission, although one does need separation, it's quite clear that there is a huge degree of overlap and the *Aziz* case again talks about it. In the trial in that case one of the accused had not said anything outside, did not give evidence in Court and had not made an exculpatory statement to the authorities and so that was regarded well you can't have your truthfulness direction, your credibility direction, but you can have your propensity direction. In the respect of the other two accused, the opposite was true. They got, I think they got credibility ones but no propensities, and that was really the issue that the Court was confronting.

TIPPING J:

See part of the problem, I suspect, derives from the fact that the drafting of this focused on the consequences of good character and analysed good character upon their consequences and possibly has left out some residual function, if you like, of good character.

MR KING:

Indeed, and in my submission the other problem that we have is that the focus of the draft, the focus of the Law Commission, the focus of Parliament in enacting it, was very much on trying to prescribe effectively the similar fact evidence rule. When the prosecution was adducing evidence against the defendant, that was the area which in the past has always, as everyone knows, given rise to huge problems in cases. The issue about an accused person adducing evidence of an absence of previous convictions, in my submission simply did not come into anyone's focus. It's in by dint of it but in my submission, 38(1) is the enabling provision to allow one to do that.

TIPPING J:

There's a prior problem. I'm yet to be persuaded that lack of conviction, for anything, tends to prove that you have a disposition to refrain from lying. I think my brother Wilson's point perhaps put it slightly more starkly.

MR KING:

Yes well in that regard one can, I suppose, only go back to the cases which for hundreds of years have regarded an absence of convictions as being evidence precisely of that.

ELIAS CJ:

We can't go back to them. It may be that the cases that said this is an impossible distinction at the overlap are quite right but Parliament has chosen to make this a stark division.

MR KING:

Well in my submission it's not clear that they have chosen that. They have enacted legislation where this issue has not featured prominently or even, I can't find any specific reference to trying to plant a prohibition against an accused person adducing this type of evidence and so to interpret it in that way, in my submission, it's simply not logical.

ELIAS CJ:

Is there no reference at all in the Law Commission papers to evidence of previous convictions?

MR KING:

Well only really in the context that the presence of previous convictions can amount to veracity evidence and so on.

ELIAS CJ:

Yes.

MR KING:

We've got some extracts in the bundle of authorities which are under tab 6 where there is I suppose covert reference to it. This is really, I suppose, firstly in the context of propensity evidence, and I'm referring to page 115 of the commentary.

TIPPING J:

I have to say I think you're stronger on propensity than veracity.

MR KING:

Yes.

TIPPING J:

Whether you're home is another matter.

MR KING:

Of course, but just dealing with the propensity issue it says, "Another common form of propensity evidence is 'good character evidence'. In both cases, admissibility will be governed by relevance and the other matters set out in section 8."

ELIAS CJ:

Sorry, where are you?

MR KING:

This is on page 115 under tab 6, evidence code and commentary, the last sentence of passage C193.

ELIAS CJ:

Thank you.

TIPPING J:

That's Delphic in the extreme because it suggests that it's controlled by relevance and it suggests that it's not generally admissible, but only if it's specifically relevant.

MR KING:

And then it goes on to C194. "The code reflects the law's traditional concern that the prejudice associated with propensity evidence that reflects badly on the character of a defendant in criminal cases." And then at C195 it notes that "Section 42(2) removes the operation of the hearsay and opinion rules in connection with evidence of a person's reputation (which would normally comprise both hearsay and opinion evidence) relating to propensity".

TIPPING J:

Mr King are you able to give me, I read this statement with some bewilderment actually, when they said, as if it was a self-evident truth, that another common form of propensity evidence is good character evidence. I've never seen propensity evidence linked with good character evidence in that way before.

MR KING:

Well in my submission that's the stage 2 test. That is the likelihood of the accused having committed this particular offence so a person without previous convictions for burglary, charged with burglary, is able to adduce evidence. The Judge traditionally gives the two tier direction saying that it's relevant to truthfulness and it's relevant to whether this person would –

TIPPING J:

This particular, yes.

MR KING:

Indeed, And that, in my submission, encapsulates what the Law Commission is discussing at the propensity side of it.

TIPPING J:

Yes, thank you, that is helpful.

MR KING:

And if I can refer the Court to tab 5 which deals with the report 55, volume 1 of the Law Commission, which is from August of 1999, page 48, and it's numbered in the bottom left-hand corner, paragraph 170, talks about truthfulness which of course, without any real explanation, was changed to veracity. "As with evidence about truthfulness, defendants in criminal proceedings – " sorry, this again propensity, " – may offer propensity evidence about themselves, whether in evidence in chief, cross-examination of prosecution witnesses or rebuttal, section 43. Such evidence will usually be to the effect that the defendant has a propensity to act in an upright fashion or at least in a manner other than that exemplified by the charge he or she faces. The proposed rule also governs the consequences of offering such evidence. The prosecution may, with the leave of the Judge, offer propensity evidence about that defendant."

Essentially, in my submission, a codification of the common law, that if an accused puts his or her good character in issue, the prosecution is entitled to rebut it. It goes on to say that, at 171, that offering evidence includes when it's extracted from cross-examination.

McGRATH J:

That's in the Act, isn't it?

MR KING:

Indeed, yes. Most of this of course, they've just changed the terms. But the point is that in none of these discussions is it suggested, in my submission, that the age old practice of adducing evidence of no previous convictions is somehow to be done away with and it was such a radical change that it should have been clearly and expressly done. It should have been open to debate. But in fact all of the focus seems very much on prescribing the circumstances in which the prosecution can adduce the evidence with only really fleeting reference to an accused person doing it and with no suggestion that that practice was intended to be discontinued.

McGRATH J:

I suppose an answer to that, Mr King, might be a sort of general purpose of the Evidence Act in section 6 that everything now including facts is to run off logical rules in general purpose if you like and if that is applied, what happens in specific cases just goes with the flow and the fact it's not mentioned shouldn't be taken as too significant.

MR KING:

Yes. One can understand that but obviously the Courts have always found it helpful to look at the legislative history to ascertain what the intent was behind the particular provision so that's still relevant, in my submission, to interpretation and for an interpretation now to be given to the Act, that such a radical change has been introduced, in the absence of any express discussion, debate, analysis of it in this particular context –

McGRATH J:

The legislative history is always important as part of the context but so is the purpose, particularly when it's the first purpose expressed in the statute.

MR KING:

Of course.

ELIAS CJ:

And it is the case that the treatment of lack of previous convictions has always been a bit anomalous because, as you say, the general rule has been that the prosecution can call rebuttal evidence but the case law hasn't permitted that in this case so in a statute that does have the ambition of imposing logic on the experience of the common law, it's to be expected that a more analytical approach is now required.

MR KING:

Yes.

ELIAS CJ:

I mean, I would question, for example, whether, if you were right and this is propensity evidence which should have been admitted, whether the concession in this case that the evidence of subsequent conviction should not be led was appropriate because it does look as if everything, you know, if it comes in then it can be counted.

MR KING:

Yes, well, and that's one of the issues I've put on the table, that there is that subsequent conviction. The explanation for it being that his life really spiralled out of control. He was held in custody for an awfully long time, never been in that situation before. He lost his employment, lost his job, lost his father and it was in that context that things eventually fell apart for him.

TIPPING J:

It seems to me Mr King that provided you can get evidence of lack of previous convictions characterised as propensity evidence, section 44(1) – 41(1), sorry, 41(1), gets you home.

MR KING:

Yes indeed.

TIPPING J:

The crucial question is can you characterise it as propensity evidence because obviously 41(1) implies good evidence, if you like, of a good propensity.

MR KING:

Correct.

TIPPING J:

Now, is it evidence that tends to show the accused's propensity to act in a particular way or to have a particular state of mind and so on. That's, with respect, where I think your primary focus would be most helpfully directed –

MR KING:

Indeed.

TIPPING J:

– because it's much more promising than veracity.

MR KING:

And it's my submission that it's in that precise context that the common law still has a very real part to play in this consideration because it's always been the case, in my submission, that an absence of previous convictions is regarded as being relevant to that factor. It will never be determinative of it. It will never be a complete defence, as the cases have said since time immemorial, that a person has no previous convictions but it has, in my submission, always been the case that an absence of convictions is regarded as being relevant in that regard.

TIPPING J:

But because we've got to be a little bit more analytical now, how do you fit it within the definition of propensity evidence in 40(1)(a)?

ELIAS CJ:

The propensity to act in accordance with the law?

TIPPING J:

Well it's negative. It's propensity not to be actually convicted.

MR KING:

Indeed.

TIPPING J:

For acting against the law. It's whether the negative tends to prove the positive is really the great dilemma in my mind.

MR KING:

And that's why I've addressed it, I think I've used the heading "Goose and Gander" in my written submissions to say that where the presence of a previous conviction and it can be admitted to help prove a charge, that's been recognised forever in both the similar factors. It's expressly identified as factors for propensity evidence where the Crown seek to adduce it against a defendant, that a person has one or more previous convictions, so the flip side of that coin is the absence of convictions must be relevant to propensity not to act in that way.

TIPPING J:

Well with respect I don't think it can be quite as simple as just saying it's the flip side of the active coin because the active coin is a matter of logic. It clearly suggests that if you've got a propensity to act in a certain way, and you've acted in the way now alleged then that's logically relevant, but what I have more difficulty with is the negative. The fact that you haven't got a conviction doesn't really prove anything more than you haven't got a conviction.

MR KING:

And in my submission a jury is therefore – that's, on one level is entirely logical and therefore provides its own security in a sense that the jury is not going to misuse it. A jury isn't going to say, oh well he's never previously appeared before therefore he must be not guilty of these charges, but it is a factor that tends to demonstrate it's a person who's not disposed to act in the way that the Crown alleged. And in my submission, that must be the flip side of the coin, if the presence of conviction shows it. The difference being of course that it's acknowledged that adducing evidence of a previous conviction carries with it its own inherent risks that a jury will misuse it, the forbidden chain of reasoning and so on. And so all of the safeguards, as it were, are put in place to prevent misuse by a jury. But those same considerations do not apply when an accused person is seeking to adduce evidence of a lack of previous convictions because there is simply no way that it could be misused or misapplied. It's not unfair to the Crown and it's so fundamental in my submission that a person defending themselves in court should be able to stand up and say, I have not previously been convicted of any matter. If there are, nevertheless, other antecedents that a person has been involved in bad behaviour, misconduct in the past, then obviously the Crown would be entitled to, with leave of the Court, balance that ledger. But where it is the case that a person does not have relevant previous convictions then I submit it's so fundamental to the right to a fair trial –

TIPPING J:

Under the old law, just giving that evidence was not normally regarded as putting character in issue?

MR KING:

That's the *Falealili* interpretation, In my submission that was not necessarily the case that it was, I would accept Sir that there were no prescribed rules of practice and of course that's what led to the English *Vye*, initially, and then *Aziz* when they endeavoured to do that. In New Zealand that type of practice was never really –

TIPPING J:

But what are Judges going to do? A person gives evidence or elicits evidence that they've got no previous convictions from the officer in charge.

MR KING:

Yes.

TIPPING J:

And the Crown knows that this person is an absolute rotter, I mean putting it colloquially, are they going to be able to call evidence?

MR KING:

Yes. Because the person has introduced character.

TIPPING J:

That would be quite a major shift, wouldn't it, from the normal, well I'm a long way off trial now, I may be behind the play, but when I ceased presiding at trials it was, it would be rare to deem someone to have put character in issue just because they'd elicited evidence of lack of previous convictions.

MR KING:

I think –

TIPPING J:

Very rare.

MR KING:

Yes, in the United Kingdom the position seems to be now that that's exactly what it is.

ELIAS CJ:

Yes.

MR KING:

An absence of previous convictions. And you'll see this goes back to the issues that I identified. The first question is, is the evidence admissible? In my submission, it is, whether it's veracity, whether it's propensity, whether it's simply relevant to the speculation of the jury or a combination of all three of those things. If it's accepted that the evidence can be given, then the consideration must go to whether appropriate directions are required and that brings us back to the same position that the United Kingdom Courts were in, in *Aziz* and *Vye* which provide very detailed analysis of the approaches that were taken. Essentially getting to the position where they identified the principles that once evidence of a lack of previous convictions is in then that, prima facie, invokes the need for both propensity and credibility directions but on the particular facts of the case that may not be warranted if it's an affront to common sense.

Now I agree with Your Honour that, I can think of countless cases where an absence of previous convictions has been adduced in evidence without the Judge then giving the comprehensive good character direction about truthfulness, about propensity, but one can also think of many cases where that has been done and it seems, with respect, that there was no settled practice in regard to doing that in New Zealand and there is quite competing authorities to it. *Falealili* represents one limb of that but some of the other cases that are before the Court –

TIPPING J:

It used to be done, in my experience, when there was what you might call active evidence of good character was put before the jury rather than just simply a brief question, as you say, to the officer in charge.

MR KING:

Yes.

TIPPING J:

But it's wrong now, it seems to me, to focus on character. We have to focus on propensity and the rejoinder in subsection (2) of section 41 has to be not about character, the Crown if it gets leave to rejoin, it doesn't offer character evidence, it offers propensity evidence about the defendant. So it's a much more analytical regime now than the old character regime.

ELIAS CJ:

Well I wonder about that because character can only be relevant to propensity.

MR KING:

Indeed. It's never been a defence that you're a nice person.

ELIAS CJ:

Yes.

MR KING:

But it has been helpful that you have a reputation for truthfulness and that you have not previously acted in the way the prosecution allege so, in my submission, good character really was simply concerned with credibility and propensity.

TIPPING J:

That was the extrapolation from it but, in my experience, it wasn't limited to what is now the technical definitions of veracity and propensity.

WILSON J:

Just following on from that, Mr King, can I just take you back to the definition of propensity evidence in section 41(1).

MR KING:

Yes.

WILSON J:

And ask you, how does the absence of convictions fit within the second part of that paragraph started with the words being evidence of acts?

MR KING:

Well in my submission “act” includes omissions.

WILSON J:

So an omission to have any convictions?

MR KING:

Yes.

TIPPING J:

Circumstances in which a person is alleged to have been involved, it’s pretty strained.

MR KING:

Again because this focus was so much on the parameters when the prosecution can adduce evidence against a defendant, in my submission, that’s what the focus was so clearly and directly on, that it may not be the most comfortable fit in the world but that’s, in my submission, by oversight rather than by intention.

TIPPING J:

Isn't there something in your submissions that told us very helpfully about how Parliament was going – or the Bill had a more general character section in it and then that was dropped out?

MR KING:

Yes well that dates back to the Law Commission reports of course.

TIPPING J:

Does it?

MR KING:

There's quite a lot which seems to have changed without any real analysis.

TIPPING J:

I could understand if there was an ability under this Act to give general evidence of good character, codified in some suitable way, then you could say, lack of previous evidence is general evidence of good character. My difficulty is in fitting it within the definitions.

MR KING:

I suppose if one looks at 41(1), "A defendant in a criminal proceeding may offer propensity evidence about himself or herself." If one interprets that that can only be acts, then it's difficult to reconcile that with any type of propensity.

McGRATH J:

It's always the case, isn't it, that the propensity evidence seems to have a different meaning in section 41 than was contemplated in section 40. I mean, you have that introduction to the definition that, unless the context otherwise requires, you might be off on a different argument here.

MR KING:

Yes, that's right. That's exactly right. But it is difficult to reconcile those.

BLANCHARD J:

Well I'm just wondering whether we're reading too much into the definition which is fairly generalised and I would have thought easily covers omissions, which are specifically referred to, and would cover in a generalised way the omission in a previous life of having committed an offence.

MR KING:

And a particular state of mind as well Sir that your particular state of mind is that of a law abiding citizen.

ELIAS CJ:

Mr King just on this definitions thing, we have jumped to propensity and, like Justice Tipping, I must say I tend to think that character evidence fits within the scheme of the Act much more into that than into the veracity limb but is there anything more you want to say to us about the definition of veracity?

MR KING:

Well just in the sense that veracity in this context is no different to credibility under the common law cases as it were, where evidence of good character was always subject to some very limited exceptions deemed to be relevant to credibility. Some cases sought to draw a distinction between where an accused has exercised a right to silence throughout and therefore has not put anything exculpatory in front of the trier of fact but where an accused person has made an exculpatory out of court statement or indeed has given evidence in court denying the offences, then the existence of good character, which I equate to an absence of previous convictions, in accordance with the authorities, especially the UK authorities –

ELIAS CJ:

Well it's evidence of good character.

MR KING:

It's not proof of it.

ELIAS CJ:

No.

MR KING:

And that, I think, in my submission, is where the analysis perhaps falls down because no one's saying or suggesting that an absence of previous convictions is proof of innocence, it's certainly not, but it is a factor that would be submitted if the Court takes it that it has to be substantially helpful then, in my submission, an absence of previous convictions would demonstrably satisfy that test. It's not determinative. It's not proof but it is a substantially

helpful factor in making an assessment about whether the accused person has told the truth in either an out of court exculpatory statement or in the evidence that they have given in court. And that is the classic basis upon which evidence of good character has traditionally been approached. It's relevant to credibility and to propensity. Now, there are cases which say even if an accused person has not said anything out of court or in court, it is nevertheless still relevant to their credibility which does seem to blur the distinction with propensity to say that they are truthful and therefore they wouldn't have committed this type of offence.

BLANCHARD J:

That's a hard argument to make though given section 37(1) and section 37(5).

MR KING:

Yes, well I suppose the definition of veracity, as referring to disposition, brings it a lot closer to the concept of propensity because disposition and propensity would, in my submission, be very similar concepts or very similar states for a person to be in, if a person has a disposition.

BLANCHARD J:

But it's a propensity to refrain from lying.

MR KING:

Refrain from lying, yes.

ELIAS CJ:

It is a big reversal in the law because it really makes it clear, the section on veracity, that motive to lie is veracity evidence, doesn't it? I think that's right, of 3(e).

MR KING:

A motive on the part of the person to be untruthful, yes. Which is, again, I suppose I'm sounding like a stuck record, but all of this is premised on putting limitations on when the Crown can adduce this evidence. It just seems to be

that the references to what a defendant can do in their own defence are very much add-ons that, to some extent, and I identify the 37(1) versus 38(1), do seem to have an ambiguity about them.

ELIAS CJ:

Unless you say that 38(1) overcomes 37(1).

MR KING:

Well that is my argument, 37(2) says, "In criminal proceedings, evidence about a defendant's veracity must also comply with section 38…"

ELIAS CJ:

Well it's the "also" that's the problem, isn't it?

MR KING:

Yes. And it doesn't distinguish to – in my submission, what was probably being thought about in 37(2) was not 38(1), 38(2) again imposing limitations on when the prosecution can adduce the evidence. But it doesn't say that expressly I accept.

ELIAS CJ:

No. It is the case, though, that 37 applies to all witnesses and 38 is specific to a defendant in criminal proceedings.

MR KING:

And, in my submission, that's why 38(1) trumps 37. The rider in 37(2) with the "also complies" means that for the prosecution to adduce evidence not only does it have to be substantially helpful but it also has to satisfy those factors –

ELIAS CJ:

Whereas the defendant may call veracity evidence.

MR KING:

Absolutely and that is not curtailed by the requirement that it be substantially helpful. And that's why there is reference to, I suppose, the Law Commission reports, it's my submission that if there was intended to be this type of interpretation placed on the combination of sections that a defendant would not be able to do this, then it should and would have been done very expressly.

TIPPING J:

Is there any guidance in the materials leading up to the legislation being passed as to which was supposed to trump which?

MR KING:

No.

TIPPING J:

This is now a product of this splendid Spartan style of drafting they seem to have inflicted on us.

MR KING:

Indeed.

ELIAS CJ:

I must say that I'm, on the veracity thing, which you probably should move on from shortly, but on the veracity thing I accept that 38(1), I think, means that a defendant can always offer evidence about veracity. My doubt is the question of whether –

MR KING:

An absence equals veracity.

ELIAS CJ:

– absence, yes, bears on the definition of veracity.

MR KING:

Yes.

ELIAS CJ:

Whether it is, whether absence of previous convictions is evidence of veracity.

MR KING:

Yes. Just addressing that, and I suppose that's the point that was at the heart of *Falealili* and also adopted by *Kant*. Can I refer the Court to one of the cases that was filed yesterday, and that's *R v M*.

ELIAS CJ:

I don't have that unless it's made its way into Court. Is it in another bundle?

MR KING:

It's in the bound volume, additional materials for the appellant.

ELIAS CJ:

Sorry, yes.

MR KING:

And I apologise for the late filing. As the Court knows the Criminal Bar Association applied to be interveners and when that was declined, they referred some authorities and some arguments that they thought would be of assistance and this includes some of these cases. But under tab 4 is *R* v *M* which was a case from 2007 which His Honour Justice Wilson was party to. This case, in my submission, probably represents the alternative school of thought from *Falealili* and the starting point for the analysis is the Privy Council decision in *Teeluck* which is discussed at paragraph 21 of the judgment. And of course this is not the Court of Appeal necessarily adopting these but simply setting out what the position is.

ELIAS CJ:

Sorry, what paragraph are they?

MR KING:

Paragraph 21.

ELIAS CJ:

Thank you.

MR KING:

When they quote paragraph 33 from *Teeluck* and I'm referring to 33(i), "When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the Judge when summing up to the jury, tailored to fit the circumstances of the case." And that represents both the Privy Council position as well as the *R v Aziz* and the *R v Vye*. In my submission, that is the correct position if one translates from good character to good veracity, or a veracity, to be truthful –

ELIAS CJ:

Why would you, though, in terms of the definition of veracity? The benefit of the good character direction may well be directed at the propensity element.

MR KING:

Well, I suppose that's my – my position on that is that an absence of previous convictions has traditionally been relevant as good character, good character being defined as both a propensity to not act in this way alleged as well as a truthfulness, and it's my submission that veracity, which deals with the disposition to tell the truth effectively, is the same as truthfulness, so working back, an absence –

ELIAS CJ:

And there's certainly the statement that where credibility is an issue, a good character direction is always relevant, the *Berry* case, it's just the question being, how much of this remains?

MR KING:

Indeed, and, in my submission, it all remains, and I know that's, it's not particularly helpful.

TIPPING J:

Do they mean there by "relevant", required? Because that's quite a large statement.

MR KING:

Convictions of relevance or significance, that means in the particular –

TIPPING J:

A good character direction is always relevant. Presumably they mean required, in any case where credibility is an issue.

MR KING:

Which paragraph is that, Sir?

TIPPING J:

33(iv).

MR KING:

Sorry, I'm right down – yes, it must be required I think.

TIPPING J:

I think it must be, is always relevant to be considered –

MR KING:

Yes.

TIPPING J:

– rather than required.

MR KING:

Yes, yes.

TIPPING J:

I don't know, I'm not familiar with the case.

ELIAS CJ:

And then they say the full thrust of this approach has since been questioned in the UK, so I don't know where it ends up.

MR KING:

And then they note that the Court of Appeal, notwithstanding the arguments, that the Court of Appeal in *Wade* appeared to endorse that, and also in *Tamanui,* both of which I think are now before this Court, they are in tabs 1 and tabs 2. And then they identify the dichotomy held in *Falealili* that evidence of good character has a twofold relevance in a defence case. "First, evidence of good character can be relevant to the credibility of the appellant in his consistent denial of any wrongdoing. Secondly, it can be relevant to whether it is unlikely that the appellant committed the offence charged." Both could have been of significance here. So, in my submission, the real question for the Court is, does an absence of previous convictions amount to good character? If it does, then, in my submission, good character incorporates the concepts of both veracity and propensity, as it always has done.

ELIAS CJ:

I suppose in the case of an accused, a disposition to refrain from lying, to take the statutory definition we now have to grapple with, is not just in relation to evidence but also in relation to plea.

MR KING:

Well, that's it, I mean, pleading not guilty, at the commencement of trial, and that's, as I'm saying –

ELIAS CJ:

And that's why the accused may be in a different position –

MR KING:

Yes.

ELIAS CJ:

– and the definition of veracity needs to factor that in.

MR KING:

Yes, in my submission, that's entirely correct. But what I do submit is that *Falealili* should not be seen as representing the position of the law in New Zealand. Cases such as *Wade* show that in fact there were different schools of thought and certainly in *R v M*, it was noted that both *Wade*, which was a more recent decision, from 2005, and also *Tamanui*, had effectively adopted the Privy Council approach, and they expressly deal with *Falealili.* The Court goes on to consider a number of decisions, including *Hills* at paragraph 25, *Lindsay* in 2007, so I suppose the process of thought of the appellant is this, that in the past, an absence of previous convictions has been regarded as evidence of good character, generally. There are some exceptions to that, such as where there is evidence of bad conduct that does not result in convictions, and that's the affront to common sense proposition. But an absence of convictions is generally regarded as evidence of good character. Good character really meant both credibility and propensity. In that sense, it is submitted that veracity and propensity are akin, that although there has been a change in terminology those are not in any way fatal to the assessment that good character equals evidence of veracity, evidence of propensity.

ELIAS CJ:

Well, at least in the case of a defendant in criminal proceedings –

MR KING:

That's exactly right, Ma'am –

ELIAS CJ:

– it's difficult to –

MR KING:

– and in my submission there's a very sharp distinction. The legislation is all designed at drawing that sharp delineation, and it's always recognised that the defendant has a special place in the criminal justice process. And I think one of the earliest cases, *R v Rowton*, marked the illogical rules that applied to a prosecution as per a defendant and talked about it as being a concession to the presumption of innocence, as being one of the bases in which evidence of good character was allowed in, in those days, but evidence of bad character was not. This rule is so fundamental, of course, that it was in existence a hundred years before an accused person was even entitled to give evidence, him or herself, before an accused was even compellable as a witness, they were nevertheless able to adduce evidence of hearsay and opinion that they have a good reputation within the community. And *R v Rowton,* which was a decision from the 1860s in the United Kingdom, it's before the Court, identifies the practice of an accused person adducing such evidence as going back at least 200 years, it's under tab 5. And this is in the judgment of Martin B and this is at page 554 and, as I say, this is a judgment from 1865. Justice Martin identifies, and this is between E and F on page 554, "If I were investigating the case for myself, my first enquiry would be: What was the prisoner's character in cases like this? and if I was informed that he was addicted to such practices I should be much influenced by that; but in a court of law that kind of evidence is not admissible. Nothing but evidence bearing on the issue is admissible. The law says that the evidence in support of the charge shall be confined to evidence bearing directly on the issue before the jury. But a practice has sprung up that the accused may give evidence of good character, and show that he was, therefore, unlikely to commit an offence of the kind charged against him. That is an anomaly in the law, and the first case in the books in which it appears to have been done occurred nearly 200 years ago". So, with respect, we're dealing with a practice that goes back some 360-odd

years, as being documented in the English common law. It was recognised, even in this case, that it was something of an anomaly that the rules –

ELIAS CJ:

Well, the great Willes J, who is the next judge –

MR KING:

Indeed.

ELIAS CJ:

– because there's a mixed bag here, but he doesn't –

MR KING:

He talks about collateral issue.

ELIAS CJ:

Well, he thinks that this evidence should be rejected. But it's been given for years and the practice has prevailed.

MR KING:

Yes.

ELIAS CJ:

Maybe in our brave new Evidence Act they've done what Willes J would like to have done.

MR KING:

They've done it very subversively, if that's the case, Ma'am. "Evidence of general good character makes it less probable that the prisoner committed the offence charged, Evidence of bad character is not in the first instance admissible on the part of the prosecution." What His Honour, in my submission, is talking about, is when an accused introduces good character, is the prosecution entitled to effectively rebut that, and it seems that the practice had been that they could not. In fact, that's what the whole case is

about and Their Lordships, I'd say they couldn't find a single case where that had been permitted. And in my submission, that is what Justice Willes is talking about. "The question of character is relevant to the issue. General evidence of good character does not mean mere evidence of the general opinion among a man's acquaintance, but general evidence of the character of the man. I agree that particular acts must be excluded, because there is no notice to the prisoner that any inquiry is about to be made into the particular acts." It's all talking, in my submission, about the prosecution responding to a claim of good character.

TIPPING J:

All this suggests that the primary focus was propensity, as Baron Martin says –

MR KING:

Absolutely.

TIPPING J:

– and then it sort of spilt over into veracity or credibility.

MR KING:

Indeed. And in my submission, one of the better cases for perhaps identifying that is *Aziz,* which talks about the, really the passage that it took through. But again I make the point that in none of these cases was it ever suggested that an accused person could not adduce evidence of good character. In all of these, it was about what the consequences of that are. Firstly, what are the parameters on the Crown responding? That was the issue in *Rowton*. Secondly, what directions were required? Is a propensity character direction required or is simply a credibility direction required? But the point is that none of these cases before the Court have ever suggested that the evidence simply cannot be admitted at all, and my submission is that the Evidence Act does not seek to depart from that common law practice. Had it done so, it would have done so expressly, had it been intended to then it would have been the

subject of widespread debate, discussion and consultation, which it clearly was not.

ELIAS CJ:

There's a general provision that was inserted late into the Evidence Act, which refers to the common law. Is that relevant? I can't remember. Do you remember –

TIPPING J:

Yes, it's at the beginning.

MR KING:

Yes, I think it's early in the piece. Yes, section 10(c), 10(1)(c).

TIPPING J:

And also 12.

MR KING:

Yes.

TIPPING J:

It could be argued that there was a residue of good character evidence that was not specifically provided for in veracity and propensity and that that residue is still open under section 12. I'm not suggesting that's one of the most forceful arguments that could be mounted.

MR KING:

No, I suppose I've hit the residue under section 7 to say even if it's not veracity, even if it's not propensity, it's still relevant.

TIPPING J:

Yes, it's always got cross-relevance, but to get it over the proposition that this is a code, you could invoke 12.

MR KING:

Twelve, yes, or 10 –

TIPPING J:

Or 10, yes.

MR KING:

– (c), on the interpretation to the Act, an interpretation in accordance with these common law principles is not inconsistent with the purposes and principles of the Act.

TIPPING J:

Is there anything before *Vye* and *Aziz* and so on between this case of *Rowton* that might be helpful, Mr King? I'm not suggesting I'm familiar with anything, I'm just –

MR KING:

I've put forward *Redgrave* and, really, this was a strange case and really the only, I guess, pertinent references are page 15. This was a case which really was going, I suppose, beyond the pale. It was a man alleged to have been engaged in lewd conduct involving men in a public facility, where he sought to adduce evidence that he was heterosexual. The Court made a wonderful statement at the bottom of page 13, "It is a matter of both history and judicial experience that many who commit homosexual acts also indulge in heterosexual activity." But the –

ELIAS CJ:

The next sentence is rather good too.

TIPPING J:

The Lord Justice Lawton wasn't known for being sort of shy with his language.

MR KING:

No. "Judicial experience" was the phrase, that struck me, Sir. And at page 15 they simply identify that – well, what Mr Redgrave was endeavouring to do was produce bundles of letters and photographs of him with all his girlfriends, to try and rebut the suggestion that he was homosexual, which he saw as a defence. But as you see, the Court certainly didn't. But the Court does acknowledge, at page 15, that they were "not seeking to stop defending counsel putting that kind of information before a jury. It has long been the practice for judges to allow some relaxation of the law of evidence on behalf of defendants". And then it goes on, in quite a specific context, to say that, look, even in this type of case the fact that he was, if he was married and in a happy, heterosexual relationship, then that type of evidence would be given.

So it's my submission that this case represents really the concessions to a defendant, recognising the principles that are applied to obtaining a fair trial and the presumption of innocence, and allowing a degree of leeway, which obviously in this case goes far, far beyond an absence of previous convictions, but goes to adducing that type of sexual tendency evidence.

But it's the, it's really the *Aziz*, and especially perhaps *Vye*, cases which I submit are of relevance. But also we have the 2004 judgment of *R v Gray*, which is under tab 3, and what we have, and it's all very helpful and it undertakes a very comprehensive review of the law in this regard, but at page 515 paragraph 57, their Lordships say, or the Court of Appeal says that, "In our judgment the authorities discussed above entitle us to state the following principles as applicable in this context. The primary rule said is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified," that's the *Aziz* position. "If a defendant has previous conviction which, either because of its age or its nature, may entitle him to be treated as of effective good character, the trial judge has a discretion so to treat him," and if he does so, then we go back to the *Vye* position. "Where the previous conviction can

only be regarded as irrelevant or of no significance in relation to the offence charged, the discretion ought to be exercised in favour of treating the defendant as of good character," and so on. And in my submission, the reason this has been drawn to the Court's attention is because it is so clearly aligned that good character, really the hallmark of good character, is the absence of relevant previous convictions.

TIPPING J:

Is there anything in the Act about this question of the Judge's directions on this topic?

MR KING:

No.

TIPPING J:

Just looking through the index, I couldn't see it.

MR KING:

No, I don't believe there is, Sir. And that's why, in my submission, one needs to defer to the common law to an extent in any event, because the Act is incomplete in that regard. I suppose, arguably, although it does deal with identification directions and it does deal with many, many other types of judicial directions.

TIPPING J:

It's got directions about all sorts of things.

MR KING:

Indeed, but it doesn't have in this context. And it's my submission that the principles that are set out in *R v Gray* are apposite to what they should be, and they are fair and they are rounded, they conclude with paragraph 57, "A direction should never be misleading. Where therefore a defendant has withheld something of his record so that otherwise a trial judge is not in a

position to refer to it, a defendant may forfeit the more ample, if qualified, direction which the judge might have been able to give."

Now, this summary, in my submission, should be adopted as the law of the land here. It is essentially a pulling together of *Vye* and *Aziz. Aziz* was the decision that was interpreted in *Falealili*, as setting out the English position. *Falealili*, as I've said, did not represent the unified position in New Zealand, there were cases which went in the other direction as *R v M*, *R v Wade* and *Tamanui* demonstrate, that the principles herein are in no way inconsistent with the principles or purposes underlying the Evidence Act and can properly be incorporated under the different guises of veracity and propensity.

Now, in my submission, it's probably a helpful distinction to have made, and I've been thinking about Your Honour Justice Tipping's question about the broad brush approach, to say well it's a bit of this and it's a bit of that, maybe the law of New Zealand where there is, it doesn't simply have a provision in the Evidence Act that talks about good character so it does seek to divide it. Now in the United Kingdom, as this case demonstrates, the general proposition is that an absence of previous convictions goes to both credibility and propensity. And, in my submission, whilst I would fully endorse that approach, it may be that one could take the view the Evidence Act has sought to differentiate and so in some situations an absence of previous convictions may be only relevant to veracity. In my submission, it's always going to be relevant to veracity but that may not get much traction. But it's a case specific thing to say that, well, an absence of previous convictions in the UK equates to good character, good character means credibility and propensity. In New Zealand we've drawn a sharp distinction, or drawn a distinction between veracity and propensity. It may be that good character is relevant to one but not the other in the sense of the type of judicial directions that are required. And that may do away with the affront to common sense concern that was identified in *Aziz* and was again encapsulated in paragraph 7 of the principles in *R v Gray.*

WILSON J:

Mr King, if the Court were not to accept your veracity and propensity arguments, but were to accept your section 7 argument, would this form of direction be appropriate?

MR KING:

Well probably not and I've identified that as a position, that the issues are, is it admissible at all, on what basis and, if so, what directions are necessary. In my submission, obviously if it's veracity or it's propensity then directions of this type are necessary. But if it's the residual category then really the problem, if it were, was identified that a jury will naturally speculate, well that's rebutted straight away without further comment being required. Obviously a defence counsel would probably make reference to it in their closing address and I note that one of the cases actually referred to leaving it to lawyers to make of it what they want. But I suppose there may be some type of direction so that there isn't misuse in that context, so a proper use direction or a caution against improper use. But certainly, from an appellant or from a defendant's perspective, if the concern is that a jury will speculate that this is another Michael Scott Wallace or another Liam Reid or a million other high profile cases, Rickards and Schollum, where it's dramatically revealed at the conclusion of the case with headlines and talkback radios going crazy for weeks afterwards and why don't juries know about a person's previous convictions, then that is remedied by the officer in charge saying this person has no previous convictions.

Now just on that, of course, in my submission, the whole trend of the criminal justice process has been the opening of the doors. The avoiding – suppression orders are getting harder and harder to get as the winds of publicity are deemed to blow through our courts and in my submission it's not consistent with that openness that an accused person is prevented from adducing this type of evidence. Now, I know that one will automatically say well come on, you'll fight heaven and earth to prevent an accused's previous convictions coming in but those really involve the differing considerations of the right to a fair trial prejudice against an accused person and there is

acknowledged risk in a jury learning of an accused person's previous convictions. In my submission, the same cannot be said to apply to a defendant telling a jury or the officer in charge in cross-examination confirming they have no previous convictions.

Now unless the Court has any questions all I can really do is urge the Court upon the analysis of *Gray* really as following up from *Vye*, from *Aziz*, the New Zealand Court of Appeal cases other than *Falealili* which –

TIPPING J:

These directions are all premised on the basis that your principal argument succeeds, aren't they?

MR KING:

They're not just premised on it Sir. This is proof that the common law has always regarded an absence of previous convictions as good character.

TIPPING J:

With respect, I don't think there's too much difficulty about that.

MR KING:

No, no Sir.

TIPPING J:

Common law has always regarded –

MR KING:

But, so my point I suppose on that Sir is that if it's always been regarded in common law that an absence of previous convictions goes to a person's credibility, then one, the question automatically becomes, is there a difference between credibility and veracity in this context? Veracity is defined as a disposition to tell the truth, effectively, and that must be the same as credibility.

TIPPING J:

I would prefer to say that the common law has always taken the view, with some hesitation in quarters, that it goes to propensity and we've had this sort of veracity gloss come upon it later. Therefore I would feel – you don't really mind how you get home but it might be helpful to say that I would have thought that it's much stronger on propensity, I know I'm repeating myself, than it is on veracity.

MR KING:

Yes, no I understand that Sir. My submission though that although *Rowton* is clearly focused very much on propensity back in 1865, the authorities since then have, well I don't know, uniformally since then and certainly the recent ones that are before the Court, clearly equated equally with credibility and in my submission they don't seek to distinguish –

TIPPING J:

But it's really your veracity in denying the charge, isn't it?

MR KING:

Yes or your truthfulness in your exculpatory statement, not just a not guilty verdict.

TIPPING J:

Unless the charge involves dishonesty, where reputation or disposition to act honestly maybe more directly relevant, it's veracity in the sense of denying the charge.

MR KING:

Accepting the evidence that the accused gives. Accepting the out of court statement.

TIPPING J:

Yes, accepting the denial.

MR KING:

Yes if this person has a disposition to tell the truth then that makes it more likely that the evidence that they're giving to the jury can be accepted, in my submission, so it's not just veracity when one is dealing with dishonesty charges, the fact that the person has been truthful in the past. It can be any type of charge that the accused is giving evidence –

TIPPING J:

Oh yes I understand that.

MR KING:

So that's my submission Sir. It's –

ELIAS CJ:

The adjournment time.

MR KING:

Yes, what I want to do in the second part, with the Court's leave, is to really turn to the specific context of this case but I'm happy obviously to try and address any questions. I don't want Your Honour to think that I'm happy just to get on propensity because I will face the wrath of the Criminal Bar Association if I'm seen to be going weak on credibility or veracity.

BLANCHARD J:

Sorry if we've put you in that position.

TIPPING J:

You're being very faithful to your brief, Mr King, and I don't think anyone could have put it any better frankly.

ELIAS CJ:

We'll take the adjournment. Thank you Mr King.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.48 AM

MR KING:

Just before turning to the particular case, I did just want to specifically draw the Court's attention to rule 44 of the Evidence Act, section 40(4), 40(4), it says that –

ELIAS CJ:

Sorry, section 40(4)?

MR KING:

Yes.

ELIAS CJ:

Thank you.

MR KING:

"Evidence that is solely or mainly relevant to veracity is governed by the veracity rule set out in section 37 and accordingly this section does not apply to evidence of that kind." Now I suppose having identified it, the obvious question is, well, what is the significance of that? And I don't profess to have a clear answer.

ELIAS CJ:

It's very odd to say, "Mainly relevant veracity," –

MR KING:

"Mainly," yes .

ELIAS CJ:

– if it's partly relevant to propensity.

MR KING:

Indeed. So I've really just drawn that to the Court's attention for what it's worth, but I agree that it does demonstrate that there can be overlap, obviously, between the two concepts. Whether that again is an attempt to divide the previous so-called good character into veracity and propensity terms, which, in my submission, is not necessarily illogical at all, and it may in fact provide some of the answers to the problems of the *Aziz* type, as identified in the United Kingdom, but it makes it quite clear, in my submission, that it follows into section 41(1) and (2) that, "A defendant in a criminal proceeding may offer propensity evidence about himself or herself." It's difficult to say that if the evidence is mainly veracity, but still has a propensity component to it, that that somehow does away with the requirement of the Court to deal with it on propensity terms. One would have thought that if it had a propensity element to it then that engaged the propensity rules. But it goes down in the following sections on propensity to really try and address a lot of those issues that were at the forefront of *Aziz* and *Vye*, for example, when one defendant seeks to lead good character evidence, whereas a co-defendant does not have good character, and what is the position there? And it essentially reaches, in my submission, the same position as the English common law as articulated in *Gray,* that really it is the co-defendant's tough luck if they don't have the benefit of a good character and therefore good character directions, that a person with good character is entitled to adduce that and that is not curtailed by the fact that it could have a negative impact on a co-defendant. Well, essentially that is precisely what is codified here. So, in my submission, what it does demonstrate is that there is some thought given to those types of issues, the same types of issues with which the Courts have, over a long period of time, struggled with character evidence.

I've also undertaken at the end of my written submissions what the appellant submits is the approach to be taken with the interpretations of sections of the Evidence Act, and tried to extrapolate from *R v Kant* the principles which I submit it was based on, and so on. I don't propose to go through that material again now, it's set out and obviously much of it has been covered in debate.

I've dealt with what the pre-Evidence Act position was, in paragraph 56, to the extrapolation of the *R v Kant* of what they regarded at the pre-Evidence Act submission. The qualification to that, I suppose, is that the *Falealili* line of authority is matched by the other cases to which the Court has been referred, *Tamanui, Wade* and *R v M*, and so *Falealili* should not, in my submission, be seen as having represented the pre-Evidence Act position in New Zealand, but really just one school of thought of it.

I then go on from paragraph 60 to deal with veracity, sought to distinguish that a person may not have good character, but nevertheless have a veracity, which is simply the requirement to be truthful. A really horrible person who's cruel to kittens may nevertheless have a veracity of being truthful. So in that respect I've sought to submit to the Court that really veracity is a sub-set of good character, but one can have a good veracity without good character, and really the hallmark of truthfulness, in the absence of anything to the contrary, would be that the person has no relevant or no previous convictions. So in my submission, veracity –

ELIAS CJ:

A fact that might be arrived at without ever having tested his truthfulness. It's quite difficult.

MR KING:

Yes, and one can think of those scenarios, Ma'am, and in my submission those should not be bars to its admissibility, because no-one's suggesting it's definitive, no-one's suggesting that it's proof, what is being submitted is no more than it is probative, and obviously the fact that it's not determinative can be made and would be made, and in any event would be obvious to a jury. So it's my submission that that points to its admissibility rather than against it, as just a factor to it. But if one looks at veracity as the disposition to tell the truth, then it's difficult to ally that with something other than an absence of previous convictions. One can think that someone could come along and say, "Well, he's always been truthful," or "She's always been truthful, in my dealings with them," but really the best evidence, I would submit, would be an

absence of previous convictions to that. And so, if one is grappling with the concepts of what is the difference between good character and veracity, in my submission, the absence of previous convictions is a better fit with a veracity, as in a disposition to tell the truth, than it is to saying, "This is a good person." It's a neater fit, in my submission, rather than a worse fit.

And so I've gone through those elements, and then I deal with propensity evidence at 65 onwards. I see I've dedicated a staggering three-quarters of a page to that whole concept when, I suppose, the reason being that it is, in my submission, just such clear evidence of propensity. If a person has previous convictions of a similar ilk, then that is used as propensity against them. In my submission, the absence of previous conviction is propensity for them. It is not, it is accepted, as probative, and I make that point very early in the submissions, that the existence of a propensity conviction will always be more probative in proving a charge than the absence of a propensity conviction will be in defending one. But unlike the former scenario, where there is the inherent risk of a jury misusing evidence of a previous conviction, in the latter scenario there is just no risk that it can be misused, misapplied, that the Crown is in any way prejudiced, that the fair trial process is prejudiced, that the public is somehow let down by the criminal justice process, those types of considerations, in my submission, simply do not arise. So whilst one can readily acknowledge that the absence of previous convictions is not as probative as the existence of a propensity conviction, it is nevertheless still probative and does not carry risks of misuse, and therefore is properly admissible on that basis.

The final residual position, whether one brings it under section 7 or brings it in under common law residual exceptions under 10 or section 12 of the Act, simply addresses what is and must be acknowledged to be a matter of considerable public discourse. And that is about why a jury does not routinely get to know about an accused person's previous convictions. It is such a topical area, it is behind, in my submission, the reports of the Law Commission, it is ongoing, it receives an awful lot of publicity, and it is natural in that context that a jury empanelled into a case will speculate about

whether a person has – and the proposition for that, I mean, that's the passage that was read out to the Court previously from *Rowton*, to say, well, "The obvious question is, 'What's this person done in the past?'" But, in my submission, we need to stand up and confront the fact that there must be a tendency on members of the public empanelled to sit on a jury hearing a case, to question or speculate whether an accused person has previous convictions. And as part of the presumption of innocence, the right to offer a defence, the right to a fair trial, then a defendant should simply be allowed to take 30 seconds of the Court's time to elicit that they have no relevant previous convictions. And it's whether that invokes, in the context that a veracity direction or propensity direction, or neither, is secondary to the question that as a matter of just basic fairness in the criminal justice process, a defendant should be entitled to adduce that evidence. And it's, with respect, to try and think of a rational reason to preclude that, it's, with respect, beyond counsel to say that it could in any way prejudice the process. No one is going to misapply, misinterpret, say, "Oh, well, he's not been in trouble before."

TIPPING J:

The only rational reason I would have thought, consistent with the policy of the Act, was if one could posit with total confidence that the absence of previous convictions was irrelevant. I'm not suggesting that's necessarily my view, but if –

MR KING:

I think that must be correct, yes.

TIPPING J:

– provided it has got some relevance, albeit relatively slight, then the policy of the Act must surely be to let it in.

MR KING:

Absolutely, and then you've got the section 8, which is the exclusion of relevant evidence, will it needlessly prolong the proceedings, it won't, is it likely to, whatever the phraseology of the section is, but once it's relevant it

doesn't have to be in that substantially helpful or highly – once it's relevant, in that context, it's subject to section 8.

TIPPING J:

And the question then is, does it logically have a tendency to prove or disprove –

MR KING:

Anything that is of consequence to the determination of the proceeding.

TIPPING J:

– i.e., guilt or innocence?

MR KING:

Yes, well, or anything that is of consequence to the determination of the proceeding. In my submission, Sir, that could include simply ensuring that the jury are not distracted by collateral concerns about whether or not the person has previous convictions. They're keeping them focused on the primary issue, so you clear the decks with that.

TIPPING J:

Leaving aside this heading of speculation, is it possible to argue that logically, the fact that you have no previous convictions does have a tendency to suggest, maybe very slightly, that you're not likely to have done it?

MR KING:

Well, that in my submission brings it automatically into the veracity propensity grounds, unless one sees that there's a separate heading, the good character heading.

TIPPING J:

Are you really saying that you can only get it in outside veracity and propensity on this heading of speculation premise?

MR KING:

I'm not trying to limit ways to get it in, Sir, but in my humble analysis of it, that would be correct, that if it's veracity it's in under veracity, if it's propensity it's in under propensity, if it's neither then we come to this it's relevant to rebut speculation proposition.

ELIAS CJ:

If you're rebutting speculation though, it's because the speculation is directed at propensity, so I just don't see how you get away from propensity really.

MR KING:

Well, the argument being that in the absence, a jury not knowing whether the person charged –

ELIAS CJ:

It's the illegitimate reasoning that, look, he's almost certainly got previous convictions, and therefore he's guilty. The sort of point that was made in the *Rowton* case.

MR KING:

Yes, although they do – I don't want to abandon those common law concessions to the defendant that it is relevant to the presumption of innocence and so on, which I suppose are independent of propensity and veracity.

ELIAS CJ:

Why? Why are they independent of propensity?

MR KING:

Propensity is dealt with quite specifically in the context of this Act, as is veracity. I submit, obviously, that really those two concepts were what we used to call good character evidence and the division, although it is divided, doesn't really represent any bar on admissibility of that type of evidence. So I suppose I'm addressing, Ma'am, the scenario that that analysis or that

submission is not accepted, and trying to see whether there is a residual category under section 7.

ELIAS CJ:

Yes, and I'm just putting to you that your residual category seems to be a propensity category.

MR KING:

Is, I suppose rhetorically, is asking or explaining to a jury, "Look, this person's got no previous convictions, so you don't need to worry about whether or not he or she's been in trouble before, so we just concentrate on the evidence of this case." Does that go to propensity, I suppose, is the issue? And, in my submission, it doesn't necessarily. It can equally go to simply the just determination of the proceedings, so that we know we've got a jury that is focused on the evidence in this case and is not going to be influenced in their analysis by any type of speculation. In my submission, that is not necessarily the same thing as propensity, that is simply clearing the decks with the jury, making sure they focus on the case. That's an issue which comes within the definition of, I say the just determination of the proceedings. I know that this talks about, "has a tendency to prove or disprove anything that is of consequence," disproving speculation.

WILSON J:

Mr King, looking at the matter more broadly, if this type of evidence isn't relevant, it's a little difficult to understand why it was allowed in by the Courts of this country and other countries for so long.

MR KING:

For 300 years, exactly. That's exactly right, in my submission, and – yes, indeed. Now they held it was relevant as to credibility and propensity. Propensity initially perhaps in the *Rowton* days, but certainly it developed into credibility, and all I'm doing is saying that the Evidence Act doesn't talk about good character, it talks about veracity and propensity, but that, in real terms, doesn't represent any sea change in the approach.

WILSON J:

So however you compartmentalise it, it's relevant.

MR KING:

Yes, exactly. And with that, and I don't propose to go through the analysis that is set out there, but I have tried to refer to the specific statutory context. I know when I was writing these submissions that I thought that there might have been this distinction that, you know, a person can be truthful and yet not have good character, and that this Act is a better fit to the absence of previous convictions than perhaps saying, "He's got no previous convictions, therefore he's got good character." In my submission it's a better fit to say, "This person has no previous convictions and therefore that is a factor relevant to the disposition to tell the truth. It's a better fit, in my submission.

Now, specifically in the context of this case, I've identified the factors which, in my submission, say that notwithstanding what the Court decides about general principles and the rules to be applied in trial processes in light of the Evidence Act, that this was a scenario where the incident giving rise to the charges occurred in November 2003. It has resulted in three jury trials. The first trial in 2005, March 2005, Mr Wi was jointly charged with a significant number of family members, including his partner, two of his brothers, brother's partner and his mother. I was just discussing with the Crown beforehand – it occurred after the All Blacks lost to France in the semi-finals of the World Cup. I've just done the makutu trial, which had its genesis in the second loss in the subsequent World Cup to France in the semi-final, so –

ELIAS CJ:

Well, we should ban the All Blacks.

MR KING:

As soon as the All Blacks start winning we'll be much better off. But, there was a wedding, Mr Wi, who had at that stage only one previous conviction for drink driving, a moderate-level $550 fine and six months' disqualification.

He'd previously been a soldier, a person who had not previously been troublesome. He was involved in a family wedding and things really just got out of hand from that point as, in my submission, was frankly and fully acknowledged. Now, he became involved in an altercation with the police. He was convicted in the first trial, along with a number of his family members, who were convicted of other charges. His brother, Adam Wi, was acquitted, and I've set out in the written submissions, at page 11, really the context that occurred there. The brother was charged as being a party, because the police officer claimed that he was being held down and there was someone else trying to hit him. Now, during the course of the trial it seems that Adam Wi, the brother, became unwell and was in fact excused from attendance at the trial. And I've put in there what the Court said about that, because essentially he was, for want of a better expression, left alone, no one really touched him and the Crown were pretty fair really in their assessment of him. As a result of that, the brother, Adam Wi, was acquitted, whereas this appellant was found guilty.

I've set out the evidence that was given regarding the absence of significant previous convictions at paragraph 28. Now, in this summing up, and I've looked at it, because obviously it's topical to see what it was the Judge actually said about the evidence that he had no previous convictions, and in the time that I've taken up, it's a very long summing up and really quite a, with all respect to Judge Rollo, was, in some respects it's a bit difficult to follow, His Honour breaks it down into issues as well. But at page 458 of the case on appeal, volume 5, paragraph 140, the Judge repeats in the summing up the submission that had been made by defence counsel, he started by saying, "There is not a lot that you can like about Aaron Wi…" and that of course reflected the fact that the evidence at trial reflected that he'd engaged in very discreditable conduct, "…with regard to what happened that night, as he was drunk, obnoxious and loud, but that he has only got one previous Court appearance for excess breath alcohol and he has no criminal convictions, that might suggest that what had happened was out of character for him." Now that seems to have been, and again I don't profess to have gone through it in the detail which I should have, but in my reading of it there is no specific

character directions in that sense. But what is significant, in my submission, is that he did not give evidence in his defence at that trial, whereas of course at the second and the third trials he did give evidence in his defence, so whether that invokes the credibility direction.

ELIAS CJ:

I'm sorry, I'm getting a little confused. This is the summing up with which the –

MR KING:

From the March 2005 trial, Ma'am.

ELIAS CJ:

The last trial?

MR KING:

No, the first trial.

ELIAS CJ:

Oh, the first trial, I see.

MR KING:

Yes, so at the first –

ELIAS CJ:

And that's when the evidence was –

MR KING:

Was in.

ELIAS CJ:

– was in. I see, yes, sorry.

MR KING:

So the evidence was in from Mr Whiteside, that's what's at 11 and 12 of the written submissions –

ELIAS CJ:

Yes.

MR KING:

– and how it was addressed in the summing up at that trial. What I was interested in, Ma'am, is whether, for example, Mr Wi had had the benefit of a full good character direction.

ELIAS CJ:

Yes.

MR KING:

It doesn't seem that he did. It's at paragraph 140, that's the only reference I could find to that and –

TIPPING J:

The last sentence of that paragraph is unusual.

MR KING:

That might suggest that what had happened was out of character.

TIPPING J:

What had happened. It presupposes that what –

MR KING:

Yes, indeed. Oh, no, I think what he's referring to, Sir, is that –

TIPPING J:

Anyway, it doesn't matter, Mr King.

MR KING:

No, I know.

ELIAS CJ:

Drunk, obnoxious and loud.

MR KING:

But he was drunk, obnoxious and loud, and he candidly admitted that. And it was because he had really, there was such discreditable conduct on that night, on his version of events he had behaved, I think Mr Earwaker said it in the final trial, disgracefully.

TIPPING J:

Right, well, it doesn't matter, I'm sorry, I shouldn't have distracted you.

MR KING:

No, no, but that's the context in which that's said. But I couldn't find any particular character directions in that case. Whether or not that was influenced by the fact that he did not give evidence at that trial, in my submission, is –

TIPPING J:

Why are we going through these summings? Surely the real question is whether or not the failure to, even if the general principles are against you, there is some particular feature of this case that should have let it in?

MR KING:

Yes, indeed, and in my submission I can – that's exactly the point, and what I submit is that, on the particular facts of this case, where the Crown allegation against him was that he had really suffered such a, what the Crown described as, "A loss of self-control," that's a phrase which I shudder as I repeat it.

TIPPING J:

Is it the point you're making, Mr King, that he was, in your submission, painted as a general aggressor?

MR KING:

Yes, exactly.

TIPPING J:

Whereas, and to that it might have been relevant to –

MR KING:

Yes, indeed.

TIPPING J:

Yes.

MR KING:

And that's coupled – and this is perhaps best set out, Sir, page 17 of my submissions, where I've got paragraph 41, "The Crown case is summarised to the jury by the learned trial Judge in the course of the summing up. The Crown relied on what they described as, 'four consistent sober witnesses' and so on. The Crown says that all of the oral evidence from the Crown witnesses is consistent, suggesting a loss of control from the accused." Now, that type of phraseology, "loss of control", in my submission, can or could have been interpreted by the jury as a character assessment of the appellant, that he wasn't just in a bad mood and acting in this way on that night, but perhaps it was something more inherent in him than just the event of this particular night.

TIPPING J:

You mean, a propensity to lose self-control?

MR KING:

Yes.

TIPPING J:

Well, that's pulling a very long bow, with respect, Mr King, isn't it?

MR KING:

It might be, but it follows on, Sir, that's the starting point. Now, in paragraph 42 I refer to the fact that one of the witnesses, Sharlene Temple, had testified to the effect that he was the, worse than any gang, Filthy Few, Skin Heads, worse than she's ever seen, and that's repeated by the learned trial Judge in the summing up, and I've got the references there, that she had described the appellant as, "The most violent she had ever seen." Now again, when one combines it, the Crown case is that he's had a brain explosion and lost his power of self-control, that he's described as being, "The most violent she had ever seen." In my submission, a jury hearing that would be apt to think, "This is a person with a propensity for extreme violence."

And then that is really built on in the next paragraph, paragraph 43, where the Crown had made the submission that Adam Wi, that's the man who was acquitted at the first trial, because he'd had the breakdown and whom, it was alleged, had actually struck the constable with the handle of beer, was not an aggressor or an aggressive sort of person. So, the case is fundamentally a credibility issue. The police officers identify Aaron Wi as being the person who had struck one of the police officers repeatedly with the handle of beer. The defence case was that in fact it was the police that were the aggressors and not him, that anything he did was simply in the course of trying to defend himself, that it was not he who struck Constable Horler, sorry, Constable Bennett, with the beer handle, that it was his brother, Adam. And the defence called seven witnesses, really to either give effect to claiming that the man, Adam Wi, had admitted to them subsequently that he was the person who struck Constable Bennett with the beer handle.

So, the case was very much credibility-focused. The defence case was that the police were lying in their identification of him and in fact they were doing it to cover up their own aggressive behaviour, and that actually the person who struck the police officer was not him but his brother, Adam Wi. Now, the

accused was called, not just someone who had acted in this way, but it was put to the jury that he was lying in his defence, that he had effectively called – well, he had obviously called perjured evidence, to give him a defence that he didn't have, that his brother, Adam Wi, who could not be recharged because he had been acquitted at the first trial, was being put up as a sacrificial lamb. So it's not only a situation where he is being accused of acting in this way on this night, he's being accused of perjury, of conspiring to pervert the course of justice, of facilitating perjured evidence being given to the Court, of blaming his brother because he couldn't be re-charged.

So all of these allegations are inherent in it, and it has to be acknowledged that obviously there's no criticism to the Crown that all of these matters were in issue, because this was the way the defence was being conducted.

Now, there'd been a jury disagreement, a hung jury, at the second trial, and so we're dealing really with what happened at the third trial, but we have the Crown making the submission that it was more likely that it was the accused that struck Constable Bennett with the beer handle because Adam, his brother, was not an aggressor or an aggressive sort of person. And that, in my submission, automatically invokes the type of character, or whether one calls it disposition or propensity, that this man should have been able to tell the jury, "Well, I'm not an aggressive type of person either, I've only got one previous conviction."

TIPPING J:

He gave evidence, did he, at the third trial?

MR KING:

He did, he did, Sir.

TIPPING J:

Was he cross-examined on the basis that he was generally aggressive?

MR KING

No, he –

TIPPING J:

What was the evidential foundation for the submission that – well, I suppose it was a submission that Adam was not an aggressive sort of person, you say there was an inference that the accused was.

MR KING:

Indeed, indeed.

TIPPING J:

Yes.

MR KING:

Well, that's his defence is that it was Adam. The Crown at the same –

TIPPING J:

Yes, quite.

MR KING:

Well, the argument is, is it Aaron, or is it Adam?

TIPPING J:

But there was no evidential foundation for the proposition that the accused was an aggressive sort of person.

MR KING:

Well, other than – well, that submission was not expressly made, it was by inference made by saying –

TIPPING J:

Yes, I know, but that's the malice that, your vice, you're saying.

MR KING:

The basis for saying that Adam was not an aggressive sort of person really arises in the cross-examination of the witnesses other than the accused, who are called by the Crown, as I say, seven witnesses were called and some of them, I can't point to it directly, but some of them were certainly asked about Adam generally and gave evidence that he was not an aggressive type of person. So there was a – whilst there was a sufficient evidential basis for that, what it, in my submission is, was that it was unfair to mount that type of character evidence on Aaron, sorry, on Adam, when this accused had been expressly prohibited from adducing evidence as he had done at trials one and two, that he had no previous significant convictions. And in my submission, when the Crown seek to run in a case like that, to effectively rebut his defence by saying the person he's putting up as the culprit is not an aggressive sort of person, in the same trial where he himself has been precluded from adducing that type of evidence of an absence of previous convictions, it's simply not fair.

TIPPING J:

Well, you're saying that it was not fair to deny him the opportunity of rebutting that.

MR KING:

Indeed.

TIPPING J:

Is effectively the –

MR KING:

Absolutely.

TIPPING J:

Yes.

MR KING:

Or, not rebutting it in the sense, Sir, but balancing it. They're saying that the person he says committed this offence is not an aggressive sort of person. He should have been able to balance that by saying, well, neither was he. So, it's not rebutting that evidence, it's not saying that Adam is an aggressive person, it's balancing the ledger.

TIPPING J:

No, no, the inference is that the accused is an aggressive sort of person –

MR KING:

Yes, sure.

TIPPING J:

– so he should have been allowed to rebut that inference.

MR KING:

That's right, sorry, Sir, yes, I misunderstood that, yes, absolutely right. And I've gone on that, in paragraph 44 setting out there, Constable Bennett described the accused as, "Such a frenzy and so completely out of control" that he thought he was going to be killed. All of these propositions, in my submission, must have given rise in the jury's mind that they're dealing with some sort of psychopath here, that they're dealing with someone with just the most violent disposition. That's all there, one can't criticise that evidence being there, it's, it is on one level specifically relevant to the incident in question and is not seeking to invoke character generally, but it must, in my submission, give rise to that speculation.

TIPPING J:

Was complaint made? The Judge's ruling, of course, preceded the closing address.

MR KING:

No complaint was made after the closing address to say that it should now be admitted.

TIPPING J:

Because the Judge wasn't going to know that that's how the Crown were going to put it.

MR KING:

Correct.

TIPPING J:

And you say no – the counsel for –

MR KING:

I've specifically enquired –

TIPPING J:

– didn't leap up and say, "Hang on a moment, –

MR KING:

Correct, yes.

TIPPING J:

– I didn't know you were going to say that, therefore-"

MR KING:

That's right. I've specifically enquired with Mr Earwaker. Now, in the Court of Appeal Mr Earwaker filed an affidavit, because he was concerned about the way that the closing addresses and so on proceeded, I think he was going 'til after 5.30 pm in his closing address and the air conditioning had all switched off at 5 o'clock, so by that time everyone was hot and bothered and tired and so on. But that was –

ELIAS CJ:

But attentive.

MR KING:

That's what the – yes, indeed.

ELIAS CJ:

That's what he says.

MR KING:

It's what he said, yes. Having briefed me to do the appeal on that ground, he then gives me that affidavit, but in typical fairness and of course without in any way trying to gild the lily, as Mr Earwaker would never do. So whether one could say that he was himself slightly distracted and hadn't focused on this particular issue, but he had sought the ruling, to allow the evidence in, and the Judge ruled it out and he, of course, complied with that.

TIPPING J:

And the Judge didn't say anything about this in his summing up?

MR KING:

The Judge didn't say any – other than to repeat it to the jury. The quote that I've given you, Sir, is actually directly from, it's from paragraph 68, page 582 of the summing up.

TIPPING J:

Oh, I see, you've taken that from the summing up, of course, yes.

MR KING:

From the summing up, yes. So His Honour has repeated the direction to the jury, the submission to the jury.

ELIAS CJ:

Is there a – which volume are we in?

MR KING:

It's in volume 4, tab 12, this was summing up, and it's at page 582, paragraph 68. So, to summarise the specific submissions on the case, and I've done that at paragraph 17, page 5, of the written submissions. Firstly, it's submitted that it's fundamentally unfair that this evidence was allowed to be adduced at his first and second trials but not at his third, that the third trial occurred almost five years after the incident and it was really through bad luck more than anything that the case had to proceed to three trials, the first one there was the appeal because his defence had not been properly availed, the second one ended in a jury disagreement, and the third one is the one that we're concerned with, which, by misfortune for this appellant, occurred after the passage of the Evidence Act into law. I've set out the submissions there in (iii) through 'til (vi), as well, why I submit that on the particular facts of this case, the evidence should have been able to be adduced.

Now the final, I don't propose to read those out, paragraph 18, it's noted that there is that conviction post this event for assault on a female. In my submission, the Crown acceptance that that evidence was not relevant in the first and second trials was the correct one, but if it's accepted that if that is not accepted, then this appellant would still have been in a better position than he was to be able to adduce his full record where he could have explained the circumstances of that assault on a female charge, which was described as a minor matter resulting only in a sentence of community work, where he could have explained to the jury that, "Look, I accept that there is that incident afterwards, but what happened was, my life really spiralled out of control. I went from being an ex-serviceman in the New Zealand Army with a successful work history and full time employment, to being unemployed, accused of these matters, remanded in custody for a long period of time and really things just spiralled out of control from that point." So in my submission, it is not something that could invoke certainly the proviso in this case, that position being that first of all, the Crown was right to agree not to lead that, secondly, if they were wrong and went back on that, then he was still better off to have that full picture before the jury when he could give the explanation about that

and at least say to the jury, “At the time of this, I had no previous convictions for violence. I accept my life has changed after this but it was not the same.” My submission, classic jury fodder for the jury to assess in the weight of things.

TIPPING J:

Are you asking for a fourth trial?

MR KING:

No. God willing.

TIPPING J:

Are you asking that the verdicts be set aside without any further –

MR KING:

That’s, I always feel somewhat difficult Sir, because really that’s not for me, that’s a matter for the Court, in my submission, to assess on public policy considerations.

TIPPING J:

Well, indeed.

MR KING:

Obviously I would prefer it to be ended here, but in the same vein, I don’t want it to be seen as an all or nothing position. If a retrial is ordered, then obviously there would be consideration given to a stay of proceedings and so on and so on. But this is an event, Sir, that took place in November of 2003. The accused is still in custody to this day, ironically my father, who is a prison officer, is locking him up, they’re in the same unit. And so here, years and years later –

TIPPING J:

Has he been in custody throughout?

MR KING:

No he hasn't Sir, that's the difficulty, he was in custody initially for a few months, he got bail, and it's always, it's a salutary lesson for anyone, why apply for bail, just do time served, you know, that's my recommendation on sort of serious charges. But he got bail after the first appeal in the Court of Appeal, I think before that his father had passed away and he was given compassionate bail, essentially, for a time there.

ELIAS CJ:

This says he was incarcerated for two years, was he inside for two years before he got bail or was that the supervening sentence?

MR KING:

I think in total, yes, I think that's the supervening sentence Ma'am. I mean, he got a big sentence in any event, with a long non-parole period. Unfortunately for him, it's been staggered over a five year period of time, well six years now, and he's still got a very considerable period to go before he's eligible for parole. So it has been, I mean if one talks about deterrence and punitive and hanging something over a person's head for a long period of time, then it is my submission that all of that has been achieved. The fact that there was a hung jury at the second trial, well, I know what the Privy Council says about their consideration to be given to hung juries in light of *R v Matenga*, but in my submission, this is a case where the Court could properly take the view, there'd been three trials, there's been a very significant, I was going to say kick in the pants for the appellant, I don't know what the correct word is, but I mean, if he hasn't learnt his lesson after all that he's been through and there's this drawn out process, and it's a miracle, but his partner has stood beside him, Ms Walters, and it's just been going on too long.

TIPPING J:

Was it four years, the minimum non-parole period? Four years?

MR KING:

Four years, or, yes, I think four. Yes, seven years with a minimum of four and an 18 month concurrent sentence on the aggravated assault charge. The event relates to November of 2003, I was going to say nearly two World Cups ago, but not quite.

TIPPING J:

You don't know how long, in total, he's been in custody from go to whoa, Mr King?

MR KING:

No Sir, but I think, I did have a conversation with him and I don't believe he's eligible for parole until July or August next year, so that will be four years at that point, and I can't be more precise. On that analysis, he's done obviously about three years of actual cold, hard porridge with my dad locking him up which can't be much fun.

So unless the Court has any questions, I've hoped to have set it out as well as one can.

ELIAS CJ:

Yes, thank you Mr King. Yes, Mr Pike.

MR PIKE:

Thank you, may it please the Court, the fundamental proposition in the respondent's case is, as it has to be, that the Evidence Act has effected substantial shifts in the law as to the admissibility of what used to be called character evidence with the result that, essentially, it is inadmissible unless those aspects of it that have become to be seen as facets, that is veracity or propensity, can come within the definitions in the Evidence Act.

As it has been observed from the Bench already, and I don't want to rehearse a lot of things that have been said, but it has been said one of the salient

points is that the principles of the Evidence Act clearly, under section 6 and 6(a) in particular as to the application of logical rules, the character evidence, as is said in the respondent's case, has never been a logical rule. While, of course, with great force and passion, my learned friend has pointed out that for over 350 years or so, the Courts have been accepting of character evidence as, in some ways, relevant to a trial, therefore ought to be obviously accorded that sort of respect that goes with antiquity, in this sort of case, and I might point out with respect and to take matters back even further, in fact the character evidence rule can be traced to the wager of law, which started to emerge around about the 1200s and possibly even a little earlier, but interestingly, in the middle of the 1200s, the Judges of the Royal Courts suddenly decided they'd had enough of it insofar as wager of law or compurgation, as it was sometimes called, which is essentially oath-helping, which is essentially what we're talking about now, they decided that it was no longer to be received, that it was only, sort of, lackeys, as it might be seen, of the accused or of the party who came along on both sides, 12 men each, and attested to the veracity and wonderfulness of the particular side of the dispute, which included criminal cases.

So I would simply be saying in response that 850 years ago, the Courts got it right and as we were bedevilled up until *Matenga* or *Weiss* and so on, with the interloper known as the Court of Exchequer Chamber, then it was indeed the Court of Exchequer Chamber that, in competition with the Royal Courts of Justice, reinvigorated the character evidence or the wager of law and continued it on for many, many, many years after the Royal Courts had had enough of it, simply, of course, to garner the business as was the want in those days to get the accused and other people before them, so the history of it has been somewhat chequered, but the point I want to make to bring it to practical realities, with respect, is that we struggle, or the Courts and lawyers have struggled for years, is what character evidence really is, and the dispute now, or the way it's seen with *Aziz* and *Teeluck*, cases that are quite contemporary, dealing with character evidence, categorises being both going to general truthfulness and also to propensity in the sense that it's relevant, say the Courts, to whether the person committed the crime at all, and it's also

relevant to anything that person has said, whether it might be truthful, so it was a bifurcate, it had a double effect, and there had to be a direction as to both, but counsel's submission would be, with respect, that in a sense, character evidence was never truly propensity and never truly veracity, it was essentially, as, I think it was the Australian Law Commission in the material you've got before you, indicate that that Commission, as with our Commission, faltered at the final hurdle of the out – if we're going to have a logical code, and thought that there was something to be preserved in character evidence, consistent, as my friend has said, that the ultimate over-arching picture is the fair trial that we mustn't get an innocent man convicted but somehow this will possibly just save that event falling in, in particular trials.

To an extent, that's right, I would submit, that its real purpose was pretty much like the old days of the constitutional right to a manslaughter verdict when there was clear evidence of murder. It wasn't until about 1972 that the Court of Appeal in this country said there is no such possible direction could ever be given to a jury, a case called *Clarke*. There's some affinity with that being character evidence, it's submitted, and it really comes through in the over-arching type of proposition, that is that in the end, it's really a facet of protecting, in the final analysis, an accused person from the possibility of a wrongful conviction when, possibly in cases finely balanced. That is really, in counsel's analysis, this factor, never mind if it's veracity, propensity, what it is, the factor is that the person is of good character, part of that is the person has no previous convictions. It is but a part of good character. And so it's thrown into the mix, it's logically probative of nothing, but it's thrown into the reasonable doubt scales in the end, as an undifferentiated proposition that a jury may take into account in a difficult case perhaps.

Now, there's a fear that if it's lost, as the submission is it has been, that we'll lose something and the trial process will tend away from convicting people who are truly guilty and tend to have an error rate of innocent persons. The only response one can say to that, with respect, is that the rule comes from a time, without tediously going out, the changes in trial process, the Courts will

know it comes from a time when there was nothing much going for an accused person, not even the briefs of evidence or a lawyer. Now we've got criminal disclosure, we have a very different defence, bail, we have legal aid, we have all the procedural protections and I don't know that the sort of ghostly rattle of the old law of character need necessarily be seen as now a deterrent against wrongful convictions.

There is a powerful industry from the Courts and the executive to put anything like that right, and so it could be seen that the Evidence Act fits in to a scheme of modernising the law, rationalising it, the primary and over-arching submission is that the character evidence was, in a sense, irrational, and has a strong emotional appeal to it, but nowadays, the Law Commission has sought fit to recommend and Parliament to adopt an Evidence Act which increasingly, in counsel's submission and indeed what the Law Commission says, is to make a sort of gender neutrality, as it were, or a party neutrality as to what it is.

The evidence called, whether for the Crown or the accused, must be probative, it must have a logical and rational connection to a fact in issue. There is still a protection, and rightly so, in terms of propensity evidence and veracity, in as much as that, of course, if the accused offers propensity evidence about him or herself then – sorry, if the Crown seeks to offer it, it must be on the basis that it is through the similar fact and all the barriers as to its lack of illegitimate prejudice. So long as there's propensity evidence, the accused, and rightly so, is not so constrained, and the same with veracity, veracity evidence does not automatically put the accused at risk of contrary evidence.

So we say, with respect, that *Kant* is rightly decided in that section 40 as to propensity rule and section 37 as to veracity rules, cannot be satisfied, they exclude, ex facie, evidence which doesn't fall within either of them and there is no residual category. And so the argument is that lack of previous convictions per se, and it is underscoring per se, is not capable of being propensity

evidence. It tells you nothing about an accused person or their background. The difficulty with –

ELIAS CJ:

Does that mean that in combination with other evidence, it –

MR PIKE:

It might be.

ELIAS CJ:

Give us a "for instance."

MR PIKE:

Well I think one of the "for instances" might be the often heard, not often heard at all, the sometimes heard defence that someone is charged with, say, indecency on a young girl, in the witness box, "I'm a burglar, that's what I do, I've got 46, I've got 50 convictions for burglary, nothing else." And that with other evidence, might be seen as somehow with other evidence, might be seen as raising – as a reasonable –

TIPPING J:

What other evidence?

MR PIKE:

Well evidence from people who know the person, I mean, you can call people as to the accused's veracity.

TIPPING J:

You mean saying, yes he is – he's a pretty good burglar but he's not much good at indecency.

BLANCHARD J:

He spent so much time on burgling, he doesn't have time for indecency.

MR PIKE:

That's right. Indeed, well the police often have been called and they've sometimes willingly given evidence that they have known X for so and so and certainly, so far as they can say, that all he's ever come to notice of and all he's ever been heard of in the community is a burglar or a forger or whatever it is. It's not commonplace, but it's one of those areas where I think the Crown would be pressed to exclude it.

ELIAS CJ:

Well why is calling that evidence different in quality or effect than simply calling the wider evidence that there's no previous convictions.

MR PIKE:

The difficulty is, as my friend has put his case, on the base that if convictions are probative of something –

ELIAS CJ:

Absence of convictions.

MR PIKE:

Absence of convictions must be probative of something as well. The difficulty is that that rests in logic, and I turn to 6(a) for that, in logic, that's what's, I think, is known as the undistributed middle, or something like that, a bit like mine, but the –

TIPPING J:

Undistributed muddle.

ELIAS CJ:

I've just been writing down muddle for something else.

MR PIKE:

Not this argument, I trust, so far.

ELIAS CJ:

No definitely not this argument, Mr Pike.

TIPPING J:

Not this time, Mr Pike.

MR PIKE:

The difficulty is that the distribution, the lack of previous convictions is a concept that has to be distributed, whereas convictions does not, convictions are facts that can speak for themselves and one can see what they're relevant to and so forth. The lack of it simply can be explained on the basis, one, that the person is angelic and does nothing bad, that's one, but there are then numerous other possibilities which then lead to speculation, that they haven't been caught, that they've been in a seminary for all their lives and these are historic sex cases, so the fact that somebody says they were a wonderful priest in the way they carried out their duties doesn't tell you anything. The fact they haven't been convicted or they've lived in an enclave where they can terrorise witnesses and so on and so on and so on, then the difficulty is that that is the problem with lack of convictions. In strict logical terms, there is not an equivalence between the probative value of convictions and the probative value of lack of convictions, they are not equivalent terms.

ELIAS CJ:

Well they may not be, because we're not really concerned with probative value, are we, we're concerned with bare relevance.

MR PIKE:

Yes, that's true, but to be relevant, they need probative value, it is submitted.

ELIAS CJ:

Yes.

MR PIKE:

That is what the Evidence Act now is striving to do.

BLANCHARD J:

But they don't need very much probative value, it can be weakly probative and admissible.

MR PIKE:

It must be substantially helpful, must it not, if it goes to –

BLANCHARD J:

Well that's the veracity. Propensity is much lesser.

MR PIKE:

Well propensity is awkward, is it not, with respect, because for instance, we've got simply a lack of information, the only information we've got is there's no convictions and then a black hole as to propensity, and from that we argue, or can be seen to argue that it comes within section 40's definition, which I would submit is difficult and the extreme was not intended by Parliament, or the Law Commission for that matter, "means evidence that tends to show a person's propensity to act in a particular way or have a particular state of mind being evidence of acts, events, circumstances with which a person is alleged to have been involved." None of that particularly comfortably fits the fact that there is no information other than no convictions. You can't say that there is no record, no criminal record, therefore that shows that my client acts in a particular way or has a particular state of mind in circumstances in which he is alleged to have been involved, which of course, in this one, is violence.

McGRATH J:

But don't we have to make it fit when we look at section 41?

MR PIKE:

"May offer propensity evidence about him or herself"?

McGRATH J:

That's the term that's being defined.

MR PIKE:

Well indeed, well certainly, but not the lack of conviction, the Court would be right to say look, the mere lack of convictions doesn't get you into 41(1), because it's not propensity evidence. Certainly an accused can offer propensity evidence, but the lack of convictions per se, could never be seen as propensity to do or not do something, because it has to be, I mean, the snegging words are "act in a particular way or have a particular state of mind."

ELIAS CJ:

Well an innocent way, keeping out of trouble, whatever, you've got to make it work, it's very general, the provision, really, Mr Pike, isn't it?

MR PIKE:

I would submit not, with respect, in fact, the very word "particular" means it is not general.

ELIAS CJ:

Well "act in a particular way" is pretty general.

MR PIKE:

Yes, in relation to the events for which the person's connected, so what is it about the lack of convictions, the Judge might ask my friend, what is it about the lack of any previous convictions that shows that your client, in a situation of hot blood and aggression, will not act violently? What is it? One can only say that, well, there's no convictions, including convictions for violence, but that only means that nothing like this has happened before, he hasn't been caught before, it's been in circumstances –

ELIAS CJ:

That's why it's weak, but it doesn't mean to say it's not relevant, applying the section 7 fundamental principle.

WILSON J:

Mr Pike, when this evidence was allowed in pre-Act, was it relevant?

MR PIKE:

The evidence of no previous convictions?

WILSON J:

Yes.

MR PIKE:

I would argue no, in the strict sense of relevance, no.

ELIAS CJ:

Well you have to argue that.

MR PIKE:

Well I not only have to, I do, in the validation I hoped I've already said is the fact that it is part of character evidence which was irrational, I'd have to say, with respect.

TIPPING J:

Is your argument this, to put it in a different way, that with evidence of previous convictions, an inference may be capable of being drawn relevant to the commission of the offence alleged, but with evidence of no previous convictions, no inference can reasonably be drawn, relevant to the commission of the charge defence?

MR PIKE:

Yes, that is exactly the argument.

TIPPING J:

You prove a primary fact, either the presence or absence of previous convictions, but the real issue is what inference, particularly when there are none, can you draw from that? It can only be, can't it, that that, albeit

marginally, makes it less likely that the person committed this offence? That has to be the premise, forget veracity for a moment.

MR PIKE:

Yes, to make it relevant, it would have to be that it was –

TIPPING J:

It has to have a tendency to suggest that the person did not commit the offence.

MR PIKE:

Yes.

TIPPING J:

Now, it may have only a marginal tendency to suggest that, but as a matter of logic, are you able to say that it has no tendency?

MR PIKE:

Yes I am, well I do say that.

TIPPING J:

Yes, but can you just elaborate on that? Why would an ordinary mind not say to themselves, well it doesn't prove much, but it does, perhaps, is a tiny weight in the scales in favour of innocence, if I may speak without reference to the burden of proof, and so on.

MR PIKE:

Well I do agree with that Your Honour, that's what I had submitted, with respect, to when it came in as character evidence, that logically it was probative of nothing in a trial, but it did go in a sort of generalised way into the scales in the end, in the jury room.

TIPPING J:

I know it did, but the question is, was that not capable of being justified on the basis of logic? Albeit pretty marginal in a sense, in that it doesn't prove a great deal, but it does tend to suggest that the person may not have been guilty, if they've got a clean record.

MR PIKE:

Well in true logic, depending on what logic really you seize hold of, but in a strictly and rigid analytic way, I would still, with respect, submit it didn't show it as less likely that they didn't commit the offence because that evidence has no necessary bearing on any of the evidence of the prosecution being wrong. These are the sort of, this is a globalised approach, so in this case, does the fact that Mr Wi has no previous convictions bear on Ms Bullock's eyewitness account which she wrote down straight after the offence and so on, does it cast that into doubt? And the answer is really, no, not specifically, there's nothing about the fact he hasn't got previous convictions that makes it likely that she's lying or mistaken. Again with the nature of the injuries or what other people saw, again item by item, nothing removes any of the circumstance and direct evidence as being logically probative and proved. What happens, with respect, is that the Crown, in its global address, says all of these matters are probative of guilt, please convict, the accused basically says, well, we've chipped away at them, but overall, you've heard his character, can you be satisfied that this person's character is such that he would have done this thing? So it doesn't address any particular item of the specific charges against him, it is a general appeal which I would say is not logical, but has been part of our law for a very long time.

TIPPING J:

Say a wholly upright member of the community is charged with committing indecencies on a child in the street, and the child, aged nine, professes to identify the accused. The accused says, "I'm 57 years old, I've led a completely upright life, I have no previous convictions." Never mind what a *Kant*-ian, if I may be forgiven, logician, may say of that, surely as a matter of broad common sense, that is a factor that would weigh in the mix, if the

question of the identification was in issue, "It wasn't me." Now, we can't really have a rule which suggests that it all depends on the nature and quality of the defence, because then we're going to have endless arguments about whether it's in or out, what worries me, Mr Pike, is that intuitively, I would have thought that example you would say, well that must have some weight.

MR PIKE:

Yes, intuitively, one has done that.

TIPPING J:

We've all done it, we've let it in on that basis that it must have some bearing, it may not have much depending on the nature and quality of all the other evidence, but don't we have to bite the bullet here and have a clear rule, one way or the other?

MR PIKE:

Indeed, and I mean, my case is, and must be, based on the statutory test and to some degree on its history, that this evidence was evidence that was called character, it was called reputation by the Law Commission, it got into the Evidence Bill as reputation evidence, and then the select committee in a process, very helpful, short little summary, sorry I don't think I've referred this to you or given it to the Court, but in the Auckland University Law Review, the not unknown Peter Marshall has written on volume 14, 2008, there's an article called "The Veracity of Witnesses in Civil and Criminal Proceedings" and so on, and he points to the arguments in page 36, which I'll get copied for you, for the Court, but he points to the fact that the reputational evidence was taken out by the select committee, and he makes the comment or he notes the committee's comment that, sorry if I can just find it now, he writes "An important, unanswered question posed by section 37 is whether reputation evidence remains admissible", and indeed here we are. "The Justice and Electoral Select Committee removed all apparent support for reputation evidence from the Evidence Bill because 'a person's reputation is irrelevant and should not be considered when assessing the veracity of their evidence.'" That is 232, that is Justice and Electoral Select Committee Report which is

noted above at 82, which we can get the reference to. These events, he said, show that, and he essentially argues or says that Parliament's obvious purpose was to expel reputation evidence from criminal and civil trials.

ELIAS CJ:

No, but it's veracity that he's addressing there.

MR PIKE:

Yes, and veracity.

ELIAS CJ:

Well, not and veracity, the article that you've read out to us is about veracity.

MR PIKE:

Yes it is.

ELIAS CJ:

And presumably, the quote which we don't have, which it might have been helpful to have, of the Justice and Electoral Select Committee, says that it's also directed at the question of veracity when it says –

MR PIKE:

Yes, they do direct it at veracity. The difficulty with the case is that if it's not now seen as veracity, and I have heard the arguments, it seems clearly enough it's not veracity, but propensity which is in issue, which I must say, with respect, I would have thought the other way around, but since it has now got some traction that we're dealing with propensity, the respondent's argument on that is simply as foreshadowed in the introduction.

ELIAS CJ:

I'm not, myself, convinced about the veracity point either, so you might want to address that, and indeed after lunch, I'd be assisted if you would indicate to me whether it's substantially helpful whether the word "substantially" means in substance or whether you say it means, it goes to questions of weight.

MR PIKE:

Yes, indeed, I'll do that after lunch. The submission would be that it is a matter of as substance, that it must be something that is really helpful and not something which leaves room for speculation or can be misapplied, it must be directed as in opinion expert evidence, the phrase is the same of course nowadays, whether the opinion evidence is substantially helpful, that it must have such a real bearing on the issue, one would think, that without that evidence, the point would be left obscure or unexplained or open to speculation.

ELIAS CJ:

That's a question of connection, and thank you for reminding me about the expert evidence, because we did consider that in *Bain* I think.

MR PIKE:

Yes. As the Court pleases.

COURT ADJOURNS: 1.00 PM

COURT RESUMES 2.18 PM

ELIAS CJ:

Yes, Mr Pike.

MR PIKE:

Yes, may it please the Court, the question before lunch was, we were briefly touching on the veracity rules and the Evidence Act and the question, I understand, let me just double check this please, was whether the substantial helpfulness was the governing criteria for veracity.

ELIAS CJ:

No, I was really just querying the word "substantial".

MR PIKE:

As to its meaning?

ELIAS CJ:

Yes.

MR PIKE:

Well, the submission in respect of "substantial" is, it's in relation to evidence that is relevant. It must be, obviously, more than barely relevant, that is, relevance is the tendency, it's simply seen at the tendency to prove or disprove a fact in issue or a state of affairs, and certainly this Court in the 111 *Bain* decision had put in a considerable amount of research and reasoning into that side of it, so I won't detain you, because it's Your Honour's judgment which is substantially helpful on the point of what is relevant.

ELIAS CJ:

It very rarely is.

MR PIKE:

Which is how one approaches relevance. In terms of the step, substantially relevant has to be a step up from that, it must be more than relevant, and the case which we have belatedly, and I'm sorry, I really apologise for this oversight, I'd have thought we'd put it in – the *Alletson* case, which I referred to twice this morning, which we now have got before the Court, has some assistance on that point, starting at [33], para 33 of the judgment. It's a case about character evidence in relation to which the judgment of the Court of Appeal given by Justice O'Regan was that essentially character evidence is inadmissible, as such, it now has to be streamed into the veracity or propensity categories. And in that judgment, there is perhaps some assistance, and I certainly rely on it, in the manner in which the Court deals from [37] onwards, noting that evidence of good character was routinely admitted prior to 2006, pointing out that the failure to do so was often fatal. The directions to which Judges were required to give is gone into, but the

Court then notes that under the Australian position, and that was what I'd relied on this morning, the citation from the Australian Law Reform Commission in *Alletson* as to the rationale for keeping character evidence, which of course our Law Commission shared, and that in turn was offered in support of the argument that to return to our roots, character evidence was in a category of its own, it wasn't veracity, it wasn't propensity, it was something quite different, it is a final counter-balance to a problem that the Court saw as to the risks of wrongful convictions and that therefore character evidence, never mind its logicality or its probative value, character evidence ought to go into the mix.

The Court then turned to the actual evidence offered in this case, in the *Alletson* case, and it was to go to veracity. They saw it as having to go, of course having determined character evidence per se wasn't the proper sign-posting, it had to go down the veracity channel here. So they put it into that channel, and then at paras 42, 43, 44 they do draw some attention to factors that might assist in seeing the difference between mere relevance and substantially helpful. In 44 the Court notes that, accepting that the appellant was religious in his younger days and possibly when the offending occurred, had a strong religious faith, "we do not see this as tending to prove anything in issue in the present case. We do not see any logical connection between evidence of religiosity and good character and the likelihood of a person having those characteristics committing sexual offences …[T]he chain of reasoning which the jury would be invited or asked to follow is no more logical than the obviously impermissible chain … that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls." But then the Court goes on to say that evidence of good character cannot be said to be "never relevant as propensity evidence (or, for that matter, substantially helpful as veracity evidence)," and they note this –

TIPPING J:

Does that mean that the Court took the view that the substantially helpful test governed the section 38(1) ability of a defendant to offer evidence about his or her veracity?

MR PIKE:

Yes.

TIPPING J:

But without much discussion that point.

MR PIKE:

No, they might have seen the point as possibly straightforward, and perhaps it isn't, that the, the respondent's case is that, yes, it clearly, it must be clear from the statutory context and its settings that in the veracity equations, the veracity rules, this is section 37, speaks of or is sub-headed, which of course is an interpretative guide post now, has been for some time, "Veracity Rules." Then rule 1, if you'd like to look at it that way, is "A party may not offer evidence in a…", relevantly, …"a criminal proceeding, about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity." Then we go right through to the definition of what veracity is. It is the disposition of a person to refrain from lying, whether generally or in the proceeding. Then 38(1), of course, is the crux of the argument for my friend. "A defendant in a criminal proceeding may offer evidence about his or her veracity," and so on.

ELIAS CJ:

Sorry, have you finished with *Alletson* now?

MR PIKE:

No, I think we may have to come back to that, Your Honour. I'm sorry, because –

ELIAS CJ:

Oh, that's all right, yes, I just have a question about it, but you carry on now.

MR PIKE:

I'm trying to clear away the rather critical point, it seems to be here, of the statutory structure.

ELIAS CJ:

Yes.

MR PIKE:

Of course, it is our case in relation to the veracity issue, is that clearly 37(1) as a general proposition, which is a substantive or a, yes, it could be called a substantive rule as to evidence of veracity, and it's a prohibition on offering it unless it is substantially helpful in assessing that person's veracity. Then when it comes to saying that a defendant in a criminal proceeding may offer evidence about his or her veracity, that is to counter, it's a counter-point to the next procedural principle in 38, is that the prosecution can do exactly the same thing but the prosecution has a different set of hurdles and that is the condition's precedent to the prosecution doing it and how the Judge must evaluate or adjudicate on the prosecution's application. So essentially 38's procedural or mechanical, a defendant may offer evidence about his or her veracity, full stop. But it must be evidence that falls within the rule of the – the veracity rules cover everybody. To say that there's suddenly a different rule for the defence that's to be really interpreted out of 38(1) is not supported by the statutory text and the very different context and purpose of the two sections.

ELIAS CJ:

You're just saying here that the evidence has to be substantially helpful in assessing veracity?

MR PIKE:

Yes.

ELIAS CJ:

That's all, isn't it?

MR PIKE:

No matter – as led by whom.

ELIAS CJ:

Yes.

MR PIKE:

The Crown of course, or the prosecution, to be specific.

TIPPING J:

Can I put to you the proposition that 37(1) is talking about a party giving evidence about another person's veracity, whereas 38(1) is talking about a defendant giving evidence about their own veracity, and it's only when it's in relation to someone else's veracity that the substantially helpful test bites. Because a party and a person suggests to me that it's someone other than the party.

MR PIKE:

Well that, Sir, would be a radical distinction between the two cases, which it would be, with respect, surprising that Parliament hadn't made it clearer, if that was to be the case, that in fact in relation to anybody, except a defendant, 37(1) applies, but in relation to a defendant then notwithstanding –

ELIAS CJ:

But isn't that because, as I think I put to Mr King earlier, the defence is always putting its veracity in issue by the not guilty plea? Whereas you could have entirely collateral evidence really coming in, which is the reason why 37(1) requires this test of substantially helpful.

TIPPING J:

Exactly.

MR PIKE:

Well, certainly I accept that it is an argument but I would, with respect, submit to the contrary and the fact that 37(1) is apt to cover any person in the proceeding including a defendant.

WILSON J:

37(2) helps that argument, doesn't it?

MR PIKE:

Yes it does and –

BLANCHARD J:

36(1) might help it as well.

MR PIKE:

About a person, yes indeed it does, I think this, yes, the statute is talking about a party which includes every person who is a party including a defendant and those rules relate to the party giving evidence about a person's veracity which is apt to include that person's veracity as well. It's neutral. It doesn't exclude the defendant. It's not any other person's veracity. It's a person's veracity and of course the defendant is a person as well as being a party so the language is detached somewhat from the accusatorial as it were about that person.

BLANCHARD J:

It's got to work in a civil proceeding too.

MR PIKE:

Yes indeed Sir. And so the argument is –

TIPPING J:

The argument against that is that there is an express carve out for accused people in criminal proceedings which allows that evidence to be given, veracity evidence, on a lesser threshold of, well, without the substantially helpful criteria.

MR PIKE:

Yes I appreciate that's the argument that I must meet Sir.

TIPPING J:

Because it seems to me to be very odd if they have intended that 38(1) was to be subject to 37(1). It's not made clear and I suppose the argument could run the other way that it was so obvious that it was but it doesn't strike me on the language that it's that obvious. I know that points have been raised against that.

MR PIKE:

It would be – the interpretation Sir wouldn't be the most obvious if I can respectfully put it that way because what matters more perhaps strained than an interpretation which follows the logical flow of the statute which proposition by proposition from the general to the more specific goes through and points out –

TIPPING J:

Why do you need 38(1) if 37(1) covers a –

MR PIKE:

37(1), with respect, is saying what – is an admissibility issue. It's a substantive rule about veracity that veracity, you do not get evidence of veracity in just by calling it evidence of veracity. It must go beyond merely relevant to substantially helpful and the Judge can block it, of course, if it is not. It would be inadmissible if it is not substantially helpful. The Judge, of course, as the *Bain* decision makes it clear obviously, the Judge excludes it as not relevant.

TIPPING J:

But that would cover 38(1) if it was intended that the substantially helpful filter was to apply to defendants in criminal proceedings. It wouldn't be necessary to have 38(1) at all. You'd just start with 38(2).

MR PIKE:

Well in a sense there's a certain amount of possibly belt and braces. You could live without 38(1) quite possibly, but 38(1) is in a – I mean section 38 is to be read as a whole and it distinguishes the case of evidence, as the head notes suggests or states, it is evidence of a defendant's veracity.

TIPPING J:

But it's saying the same thing as 37(1), in part, but on a different premise?

MR PIKE:

Yes, my friend has advanced me forward, thankfully, to possibly looking at the Law Commission background as well which may help.

TIPPING J:

Well anything that would help would be welcome.

MR PIKE:

That's 164, this is under tab, this is of course the appellant's bundle, tab 5 of my learned friend, the appellant's tabs. There's an extract from the Law Commission.

ELIAS CJ:

What page?

MR PIKE:

It's under tab 5 and it's in the second page in, it's para 164 under tab 5 of the Law Commission's reasoning and there they assert, "Both the prosecution and the defence may offer evidence about a defendant's truthfulness provided

the evidence is substantially helpful in assessing the defendant's truthfulness."

TIPPING J:

This is the 1999 report is it?

MR PIKE:

Yes.

ELIAS CJ:

Do we have the legislation annexed that they proposed to see how it was dealt with?

MR PIKE:

Tab 6, yes.

ELIAS CJ:

Is it the same?

MR PIKE:

No it's not exactly, it's not the same structure. It's under tab 6 there's a clause 39 you'll see set out there. "A party in a civil or criminal proceeding may offer evidence about a person's truthfulness only if the evidence is substantially helpful in assessing that person's truthfulness." So it's a slightly different but it's, I mean it's only gone to veracity though, that's the only real difference. So 39(1) is switching veracity for truthfulness is the same.

TIPPING J:

But it's cast in the positive rather than the negative?

MR PIKE:

Yes.

TIPPING J:

As was the ultimate.

MR PIKE:

Yes. Certainly under 39(1) is probably – there would be 38(1), the present 38(1), would look at it a little otiose, but of course the 37(1) now, it's a prohibition, so may not. You may not adduce evidence of veracity, no person, about anybody in any trial that is not substantially helpful or passed that test.

TIPPING J:

But this position doesn't have the equivalent of 38(1)?

BLANCHARD J:

Yes it does.

TIPPING J:

Does it, where?

MR PIKE:

Section 40.

TIPPING J:

40 does it?

MR PIKE:

"A defendant in a criminal proceeding may offer evidence about that defendant's truthfulness than the prosecution may offer evidence." So it's got, it was 40, it's now 38.

TIPPING J:

Yes, fair enough.

MR PIKE:

So reading 38 as a whole, what it's doing is making a very important procedural but nonetheless important distinction between the defendant who can offer veracity evidence fullstop, as long as it is within the rules as to veracity evidence by which all are governed. The prosecution however, and this is the real nub of 38, cannot offer veracity evidence unless leave is given and the criteria satisfied.

So those are, that's the reason for 38 and essentially why 37, and as has been referred to this morning by my friend and by the Bench, section 40(4) of course talks about evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and accordingly this section does not apply to evidence of that kind. Of course, 37 is where we came in with the fact that veracity evidence must be substantially helpful. So it is, is another universal proposition, or general proposition, subsection 40 – sorry 40(4), tends to augment an interpretative stance that there is no radical distinction to be drawn between a defendant's, or no distinction at all to be drawn between a defendant's veracity evidence and anyone else's veracity evidence. It must be substantially helpful. That in turn accords with the logical application of rules which the Law Commission and Parliament in turn were concerned to see evidence in the 21st century rationalised in a code that more or less is indifferent to the circumstances in which evidence is offered. Evidence is evidence is evidence, no matter who offers it, but of course as with veracity, as with propensity, you protect the defendant against the complete logic or incorporation of those two cases, you cement in two protections that have always been there. So that is really the case on that aspect of it.

And so accordingly as we move forward on this point we come to whether propensity evidence and we're now dealing with the propensity side of it. This trial and the question of course, if we come back to it, the question reserved by the Court in this case of course was the approved ground is whether the appellant should have been permitted at his trial to adduce evidence that he had no convictions for criminal offences. At his trial he adduced it as propensity evidence, there was no question Mr Earwaker, and Judge Harding

of course echoing the submission, said this evidence is offered only on the basis of propensity and nothing else, and then went on to rule or to be upheld on the point. It didn't get home on propensity. Now the question then is, can per se evidence of no previous convictions ever, that is in itself, be evidence of propensity. Now the answer to that, with respect, has to be no. It cannot ever, in itself, provide that and one of the reasons comes back to something I would rely on. I think it's in the joint judgment of The Honourable Chief Justice and Justice Blanchard in the *Ellis* case was going back –

BLANCHARD J:
Which case?

MR PIKE:
Oh sorry, did I say *Ellis* –

ELIAS CJ:
I'm not that Chief Justice, the other one is it? No?

MR PIKE:
No, sorry, sorry, sorry. I'll start again. It's a name I have difficulty bringing to mind, *Bain*, the *Bain* case. The approach there was to rely in terms of relevance on the formidable Judge Willes and with respect we would rely on that because it is helpful, if I can just find it. I think it's paragraph 50 of the *Bain* judgment under 2009 New Zealand Supreme Court at 16.

TIPPING J:
Where do we find that?

ELIAS CJ:
We haven't got it.

TIPPING J:
We haven't got it?

MR PIKE:

No you haven't I'm sorry.

TIPPING J:

I'm not as privy to it as my colleagues.

MR PIKE:

I'll read it Sir. The issue was relevance and the approach of the Court was slightly, there was some distinctions to be made as between members of the Court. But in this case the issue of whether evidence was relevant was referenced back to *Hollingham v Head* a judgment relied on from Willes J and he expressed the view robustly enough, and I think it's worthy of repetition again, that "relevance ends when speculation begins". And the Court, sorry those two members of the Court on whose judgment I'm referring to, cited this piece of analysis from the Judge, from Justice Willes, "I am of opinion that the evidence was properly disallowed, as not being relevant to the issue. It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins: but we are bound to lay down rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury being drawn away from the real point."

So what the Judge had said is that relevance is really something to juxtapose against the tendency –

TIPPING J:

Probability, and jumping straight from probability to speculation, is not, with respect, sound, is it? I mean there are levels of tendency to prove beyond – below probability before you descend into speculation?

MR PIKE:

Yes I wouldn't necessarily see that as the touch all because other passages in the *Bain* case itself talked about simply relevance is the tendency to prove or disprove a fact in issue.

MR PIKE:

Just a tendency.

TIPPING J:

Well, we've got a definition here.

MR PIKE:

Yes. So that is something that I wouldn't rely on from *Hollingham v Head*. What I do rely on, with respect, is the other touchstone of speculation that if we're to say that the absence of convictions of any sort is evidence of something in the case, evidence that the person, that the Crown case or prosecution case is not proved in some way, there has to be something about that that does not admit an undue speculation. One of the difficulties with the lack of evidence of previous convictions is that one is led, or may be led, very much into speculating as to why that might be. In the particular offending, was it closet offending, was the person in a position of power where of course no one would come forth and complain. Was it a gang member who would never get a witness through a court door? Was it any of these factors?

The difficulty is it comes back, that initial proposition, that we have one fact only and that is there are no recorded convictions against this person. From that we are to infer that, or to see that that is in some way tending to prove that the evidence of the prosecution is subject to a reasonable doubt. There's no rational basis for doing that, that is the difficulty. It's a speculative basis. If it is to be rationally applied, you have only a fact which is capable of such a myriad of different explanations and possibilities, that it could not rationally tend to support anything and that's the difficulty with it. Certainly when you then funnel that into the definition of propensity it falls, by an appreciable margin, short of being able to show a person's propensity to act in a particular

way, in a particular set of circumstances, so far short of that that it's difficult to find the words for it, it is submitted. It just doesn't do it.

ELIAS CJ:

But your argument has to go as far as saying that no, leave aside the absence of previous convictions, that no evidence of good character can ever be relevant?

MR PIKE:

That's right. Well that's a matter of statutory construction.

ELIAS CJ:

Yes, yes. No I understand that.

MR PIKE:

My submission was under the old law, that it was probably not relevant but admissible as a long fashioned exception that dates back 800 years. Went out of fashion, came back in again and stayed, because of Exchequer but, I blame them for everything, but however it's been –

ELIAS CJ:

Well it came in because of precedent rather than principle or logic.

MR PIKE:

I would see it, I do submit that it may be seen as one of those "constitutional rights of a defendant" which goes to the general concept of fair trial, presumption of innocence. But these days Parliament and the Law Commission are satisfied, presumably because of the panoply of other factors that militate against wrong results in trials. That time has come now to inter it for good.

BLANCHARD J:

Well if it goes to fair trial, then consistently with the Bill of Rights haven't we got to read section 41(1) and the accompanying provisions in a way which is benign from the defendant's point of view?

MR PIKE:

If there was that flexibility in the statutory wording that it might be given an interpretation –

BLANCHARD J:

Well it strikes me that section 40(1)(a) is capable of being read pretty flexibly.

MR PIKE:

Well still one still has to go to the position, with respect, that evidence tending to show a person's propensity to act in a particular way in a particular set of circumstances such as those before the Court, is supplied or may be supplied by the bare absence of any criminal convictions. With respect, that is a little like the *Phillips* argument where the burden of proof, proof has an inherent meaning and you cannot go the Glanville Williams way and say that because of the Bill of Rights it can be established rather than proven. Of course this Court has come to the same conclusion but propensity also has an – well these words have an inherent texture. It is submitted that what Parliament is clearly striking at is there must be a focused application of a fact in issue that makes it more likely or not, or tends to prove or not, or disprove, that the person against whom it is offered behaves or doesn't behave in particular circumstances in a particular way. Now, all you've got is an absence of information from which to make that, except that for whatever reason that we speculate about, the person has no recorded convictions, and with respect, that is taking the language beyond the linguistic interpretation and really more a human rights perhaps approach in the, under the Human Rights Act in England, where that path is possible, if the Court was driven to the fact that it wasn't a fair trial because of this, but of course there's no suggestion – in fact in this case, for instance, we jump into the facts of this case that there's been a denial of a fair trial, because Mr Wi could not advance this proposition. The

fact remains that what he did do is he told the jury, without it being impeached on the point, that he never uses a weapon, never used a weapon against another person, it's not what he does, which is a very focused, dramatic assertion of my character as such, that, "I don't use weapons on people, that's not what I do, but that brother of mine does."

ELIAS CJ:

Are we leaving the questions of general principle now and looking at the fact of this specific case or –

MR PIKE:

Sorry, I just sort of, I really, distracted the Court.

ELIAS CJ:

Just, I'm trying to understand the points of principle.

MR PIKE:

The points of principle really come down to this, and possibly there's little more I can say with respect to them, that what we do say is the Law Commission recommended a residual role for character evidence, they called it evidence of reputation. The Bill is drafted that went into Parliament, had evidence of reputation as able to be offered by a defendant. However the select committee –

ELIAS CJ:

Do we have this?

MR PIKE:

Yes, but in an indirect way, and I –

ELIAS CJ:

Well, why don't we have it in a direct way? Isn't it rather important to the argument you're putting forward?

MR PIKE:

Yes, it's in, I've relied on the, Mr King's materials, and if we look under tab 6 again – sorry, it's, where are we.

BLANCHARD J:

That's not the Bill as it went into Parliament.

MR PIKE:

No, I'm trying to find – no, that's the Law Commission.

ELIAS CJ:

Well, perhaps if we don't have the Bill, just tell us what was in the Bill.

MR PIKE:

The Bill was, as set out in 39.

ELIAS CJ:

Oh, right.

MR PIKE:

Section 39 under tab – it's exactly as was recommended. 39(4) is where the words remained, subsection (1) and – "…do not apply to exclude evidence about reputation that relates to truthfulness." So sharing the doubt of the Australian Law Commission, the New Zealand Law Commission wasn't prepared to go quite that last step and say, "Look, this is to be abolished in its entirety, we do take into the account the presumption of innocence and that lurking fear of a wrongful conviction."

But Parliament, in the passage I read, the select committee saw it as simply illogical and not probative, and so the reference to reputation was struck out of the Bill. That is, of course, a part of the history and can be seen as assisting in the interpretation of the Act, inasmuch as that Parliament saw that the fair trial right was sufficiently protected by the rules as they are now proposed, that is, that you can lead propensity and veracity evidence supporting

yourself, but you must do so in a way which is probative, in the manner proscribed by the Evidence Act, which is of course a code.

BLANCHARD J:

Was the Law Commission, section 42(2) in the Bill as introduced and then removed?

MR PIKE:

The immediate answer is, I'm sorry, I don't know, and I'll just quickly try and –

BLANCHARD J:

It really would have been very helpful if we'd been given a complete set of the materials, the relevant portions, so we could trace for ourselves the process as the Law Commission developed it and then as it went into the House and got amended.

TIPPING J:

I think we should ask for that, frankly, I think we should have the –

MR PIKE:

Oh, of course, plainly we will do it, to save –

TIPPING J:

– thing in a way that we can follow it right through in a bound folder.

MR PIKE:

– looking red-faced about it, we'll do it, yes.

TIPPING J:

From go to whoa.

MR PIKE:

Yes, certainly.

BLANCHARD J:

If you're not able to answer that question, I suppose you can't answer my next question, which is what did the select committee say about it?

MR PIKE:

Well, the oblique reference I've got here now, and that was what I was referring to earlier, was the footnoted reference in the Auckland University Law Review, which cites the – we'll have to get the whole report of the Justice And Electoral Committee obviously. The committee, the author of this article said an important, I read it earlier, "The Justice And Electoral Select Committee removed all apparent support for reputation evidence from the Evidence Bill…" which would answer your Honour's question obviously, it would go out of any, it's gone from any provision, because it isn't there, "…from the Evidence Bill, because, 'a person's reputation is irrelevant and should not be considered when assessing the veracity of their evidence'."

BLANCHARD J:

What about propensity?

MR PIKE:

To the extent there was an exception in the propensity rule too, for not prohibiting, it would be the same, one would have thought, logically. The propensity rule –

BLANCHARD J:

Well, not necessarily.

MR PIKE:

– would not knock out character evidence.

TIPPING J:

The problem with reputation was that it was not necessarily the actuality, it was how people perceived it. What this seems to be focusing on is the actual disposition of the person, the actual propensity.

MR PIKE:

Yes.

TIPPING J:

That's probably what was troubling the select committee, that reputation is one step away, if you like, it's how people perceive it. It's quite normal to have it coincident with the reality, but it isn't necessarily.

MR PIKE:

Yes, so I can answer the two, possibly half of your question, Sir, and Justice Blanchard's. The 42, which Justice Blanchard drew attention to, did have, as His Honour had read, it had exactly the same, as logically would have to be the case, and to preserve that side, the propensity side of character evidence, in the new propensity rule as well, and so that has gone out with the, both references have gone out. 42(2), as proposed by the Commission, was to say that the hearsay evidence and opinion evidence rules do not apply to evidence of a person's reputation that relates to propensity. So that too has gone.

ELIAS CJ:

What's the effect of that though? It may be nothing, because it may be that in fact that evidence is available because it's not evidence, well, under the new hearsay and opinion evidence provisions.

MR PIKE:

Well, I would submit, Your Honour, that what is the effect of it is the, if we come back to the *Aziz* principle, the Courts for a long time now have seen character evidence as divided into credibility and propensity, having a tendency to cover both bases for an accused person. The Law Commission took that on board and split that character evidence into the veracity, its truthfulness rule. So it said its truthfulness rule, "Still does not exclude you from bringing reputational evidence relevant to truthfulness." Then it went propensity, "Our propensity rule does not exclude you, as a defendant, from

bringing character evidence of a sort that goes to propensity," sorry, "reputational evidence" they now call it, that goes to propensity. The select committee, plainly applying the logic that I read out from the veracity argument, did exactly the same thing in relation to propensity, and said that reputational evidence aimed at propensity analysis is also inadmissible, it is not probative of anything. So, logically of course, the –

ELIAS CJ:

Well, I'm not convinced that that is the effect, it would be necessary to work our way through that and what removal of this provision really means. You're making a submission. We're going to have to check it, it seems to me.

MR PIKE:

Certainly, I submit what is clear here and now is that there was a saving in both truthfulness as it was called by the Commission, and propensity draft, in the Draft Bill, were both made subject to the fact that we are not directing the exclusion of character evidence being directed either to truthfulness or to propensity. That remains admissible. We're not prepared, on the same basis the Australian Commission wasn't prepared, to abolish that because with a concern there's overarching concern for their presumption of innocence bill. The ultimate check against a wrongful conviction but Parliament has said per contra that it is satisfied –

TIPPING J:

I think you're making this rather more complicated than is necessary. I understood the select committee's reasoning to be that reputation and character are different things. Character is your actual attributes. Reputation is your perceived attributes. They will usually coincide but not necessarily. So they wanted to focus it on actual rather than perceived and on that premise it's perfectly logical that you'd take out reputation. Is it not, is it any more complicated than that?

MR PIKE:

No it's no more complicated than that although there's a twist to it in as much as that it must also be seen as that saying that character evidence, what we used to know as character evidence, is not admissible per se anymore. There is no residual category.

TIPPING J:

Well, that is a different point. But it turns, doesn't it, the select committee's decision turns on the difference between character and reputation?

MR PIKE:

Yes Sir.

TIPPING J:

Which is well known in the law of defamation for example and it's just simply something that they decided that they wouldn't have reputation. They wanted to concentrate on the reality not the perception.

MR PIKE:

Yes indeed so there had to be specific evidence which was probative of something about that person's truthfulness.

ELIAS CJ:

Like the verifiable evidence that there are no previous convictions. So I don't know why we're really talking about evidence of reputation because we're not in that area, are we?

MR PIKE:

Well yes because Mr King's case is that if he can't pull, if he can't get the previous convictions into veracity, they don't come in there as substantially helpful, which they don't, he's got to go to propensity, which was his case or his client's case at trial, they've got to go to propensity. The Crown case is that you can't do it in propensity either because per se it tells you nothing.

TIPPING J:

But he doesn’t try and bring it in on some reputational basis.

MR PIKE:

Well he brings it in as residual character evidence which –

TIPPING J:

Yes but that’s the difference between character and reputation.

MR PIKE:

Indeed but character evidence is called reputation –

ELIAS CJ:

I would have thought propensity was all about character actually.

TIPPING J:

It is. It’s nothing to do with reputation. It’s to do about your actual character but quite honestly I agree with the Chief Justice, I don’t think we’re in this. It may be helpful from the interpretation point of view as to why they took it out but it certainly isn't a plank of Mr King’s case that he comes in under some sort of quasi-reputational theory.

MR PIKE:

Well he talks about, with respect, a residual category. If he can't go down veracity – if he can't go down propensity –

BLANCHARD J:

Well I thought we were trying to focus on propensity not the residual category?

MR PIKE:

Yes.

BLANCHARD J:

And we only get to the residual category if he fails on both veracity and propensity.

MR PIKE:

That's right. And veracity, substantially helpfulness, is too high a hurdle for per se lack of convictions, it doesn't tell you anything. Propensity as I say, unfortunately I'm conscious of just simply going in circles on this one, but on propensity the submission is, with respect, that per se in evidence of no convictions does not come close to the statutory test, even on the most benign of interpretations, of tending to show, to demonstrate, in other words, a person's propensity to act in a particular way or have a particular state of mind being, and this evidence must be evidence of acts, omissions, events or circumstances, now previous convictions might be a – lack of them might be a circumstance I immediately interpolate, with which a person's alleged to have been involved so the argument that comes in under circumstances dissolves because there's nothing about, it must be governed by –

ELIAS CJ:

Well there is lack of convictions.

MR PIKE:

Yes but in what circumstances were they alleged to be involved? The lack of convictions cannot relate to any circumstances with which a person's alleged to have been involved. It cannot possibly do that. It's very clear that what Parliament is trying to do and the Law Commission as well, is to say that propensity evidence is evidence directed to show that is probative in some way, that a person connected with a particular set of circumstances of which they are –

ELIAS CJ:

Look it's the circumstance that he has no previous convictions. That's the evidence from which there's a – that evidence is being put forward to indicate

a propensity to behave lawfully. This language is not wonderful but it's trying to cover everything. Surely – I just don't see that it doesn't come within it.

MR PIKE:

I regret, Your Honour, that I probably can't put it higher. The only way I can say it does not come within it is because the only way it could come within it with the word being events or circumstances, which a person is alleged, but they're circumstances with which a person is alleged to have been involved. That is talking about the charge. So what they're saying, they have, you're looking for evidence of acts, omissions, events or circumstances with which the person is alleged to have been involved, that is they have some bearing on what is alleged against the person.

TIPPING J:

No. That is there simply to show a link between the person whose propensity is in issue and the various acts or omissions. It's nothing to do with the offence in question, surely?

ELIAS CJ:

It's the fact that it's "his" lack of convictions, that's the link.

BLANCHARD J:

Otherwise it wouldn't work in a similar fact case.

ELIAS CJ:

No.

TIPPING J:

I think what you're trying to say Mr Pike, and it may have force, that propensity to act in a particular way doesn't include propensity not to act in a particular way.

MR PIKE:

Or propensity not to get caught. I mean the point is –

TIPPING J:

Come on now. That's slightly unworthy of the proposition.

MR PIKE:

Sorry. The difficulty is that there is no probative force in terms of propensity and if you relate it to the words "act in a particular way of a particular state of mind" from the fact that there is nothing that can be said against you in terms of your criminal record, it does not help to show –

TIPPING J:

But it does help to show that you have a propensity not to act in a particular way. In other words it's a negative proposition rather than the more normal positive but they must have intended it to include the negative otherwise 41(1) makes no sense at all because no one's going to lead against themselves evidence that is of a positive, if you like, inculpatory propensity. They're going to be leading evidence of an exculpatory propensity.

MR PIKE:

Well exactly which might bring you back to the fact that I'm a habitual burglar but I don't do these sexual crimes or –

TIPPING J:

I'm in no way a habitual –

ELIAS CJ:

I'm a habitually law abiding citizen.

MR PIKE:

What it might do is reverse, what it may well do is reverse the common law rule, the strange twist in character evidence rule, that you couldn't actually, in terms of character, bring evidence of the very fact in issue. That I cannot be accused, in the days when it was criminal, of a homosexual act because I'm flagrantly known around town as heterosexual beyond belief. You couldn't do

that. Now you possibly can, because we're not dealing with character evidence any more which could never be directed as to whether he had the propensity to do the very thing.

TIPPING J:

But if you can, as a defendant in a criminal proceeding, offer propensity evidence about yourself, what sort of evidence can you offer that's helpful to you? I go around committing all sorts of burglaries but I've never been into the sex offending business which is in effect evidence that I have no previous convictions for sex offending.

ELIAS CJ:

It's just the smaller which is also part of the greater. I mean the argument against you is that the greater is encompassed by this provision. You say it's only the smaller. I just don't see that it necessarily follows at all.

MR PIKE:

I'm not sure what the greater is, with respect, but the –

ELIAS CJ:

The greatest, perhaps I should have said.

TIPPING J:

I think Mr Pike, I think your fundamental problem is 41(1) because we've got to try and make that work with the definition of propensity and I agree immediately that the two are not a brilliant example of a Parliamentary fit but we've got to try and make them work.

MR PIKE:

Well positive evidence can be, if you're accused of pushing a little old lady in front of a bus at a pedestrian crossing you could bring evidence that in fact you've spent your whole life helping little old ladies avoid going under buses. I mean there's no mystery, there's no mystery about the fact that positive acts of propensity can be called that, not necessarily inculpatory, they might be,

but I can imagine it's not necessarily madness for a person who's a burglar, who's accused of a rape in the midst of a burglary, to come along and say look here's my MO and my convictions for 50 previous burglaries, this is what I do every time without exception. Hallmark signature. Never one of them –

BLANCHARD J:

None of my victims ever mentioned rape.

MR PIKE:

No women in the house at the time, not in the house at the time, and so on, then I would have to accept that there's something to be said for that evidence coming forward which means okay, from a fair trial point of view, you have to meet that, that's in issue. But not just –

TIPPING J:

He can't say, "I'm a burglar, I don't do any sex and by the way I've got no convictions for sex." You can't have that additional element just to, sort of, reinforce.

MR PIKE:

Well the additional element would be there, to say he would show his convictions and the MOs in those convictions and if they habitually are that he's, you know, a gentleman Dick Turpin who just prim and proper about the way he does burglaries and never assaulted anyone.

TIPPING J:

But he may have, you know, he may be a sort of distributed burglar in the sense of doesn't do the sex in the burglaries but he's – I really think we're getting incredibly refined. How do we reconcile 41(1) with your very limited approach to the definition of propensity evidence? That's my problem. If propensity to act in a particular way doesn't include propensity not to act in a particular way.

MR PIKE:

Well I think it does include propensity not to act in a particular way.

TIPPING J:

Oh, you do?

MR PIKE:

Yes, there's no question about that. All I'm saying, with respect, is that an absence of previous convictions does not take you within a bull's roar of proving propensity not to act in a particular way. It is neutral.

BLANCHARD J:

Well it may not take you within a bull's roar but it may take you a certain distance. It's certainly not strong evidence, but…

MR PIKE:

It's not, with respect it's not relevant, that's the difficulty because on the test of relevance it really is just you have to speculate and speculate far too much for it to be a rational decision making process. This whole Act is about rational decision making processes. That's the problem. It's possible –

BLANCHARD J:

That's really a basic argument.

MR PIKE:

Possibly I can't take the Court further on this.

TIPPING J:

Not capable of being propensity evidence, that's your fundamental point is it?

MR PIKE:

It is, it is. In terms of relevance equations in 6(a) the logical application of rules that proves nothing. So with respect the particular case, and if I can just quickly deal with that.

ELIAS CJ:

Go ahead.

MR PIKE:

With respect the particular case. In principle we make the point that the fundamental, that the appellant himself got into evidence and that's what we say is quite a strong point. He got into evidence and we've referenced the citation in the footnote in our case that he was not a person who used weapons against other people because he couldn't – if I can just find it. Anyway Mr King doesn't, I think he hopefully doesn't dispute the point. He got into evidence the fact that he doesn't use weapons and of course he couldn't say anything else because by that time he'd been convicted, I think, of the bashing of his partner. So he couldn't say he wasn't a violent person because he manifestly was. What he could say, he did say, is "I don't use weapons."

It's important in the context of this case, with respect, to look at how the respective cases were played out. The police gave their testimony, they were accused of lying on oath because they were covering up the fact they were in fact the aggressors. Then Ms Bullock and the other independent witnesses were also partly tarred with that brush of wanting to help the police for not very clear reasons. So they too were mendacious in what they said they saw.

Then he produces his hapless brother Adam, who had been acquitted of course, and then from the safety of autrefois acquit, Adam says that "I did it." Then of course, and my submission was, there was almost an *R v Lowry* sort of situation that there the accused then says, "Well there you are, my brother has admitted doing it, what more do you want, and by the way I don't use weapons on people. Inferentially my brother does and he did so you can believe him." Sorry the references to the evidence is on page 3 of the Crown's outline of its case and it's under footnote 5. It's notes of evidence, page 360 at line 2. Anyway that's, no one's disputing that was said. So the fact is that what he did was he offered evidence that Adam Wi was the person who got a beer handle and inflicted these rather dreadful injuries on the

constables. Adam Wi said that, to an extent, agreed with that although not to the extent of the injuries. The evidence wasn't very cogent.

To augment this, the best evidence you could possibly have is I don't do violence with weapons and that's exactly what he said and he said it untrammeled by any risk of cross-examination. He wasn't cross-examined on it. And then for some reason Mr Earwaker didn't close on it but nevertheless what did get before the jury is that Adam Wi says he used a weapon, "I don't use weapons. So Adam Wi is truthful and also of course I am truthful in my denials." So the evidence had a multiplicity of uses but it was fundamentally, I'd submit, to augment Adam Wi's evidence which was always going to look shaky because of this poor man's mental condition, it was going to augment his evidence that "Adam Wi must be telling the truth because I don't use weapons on people, never have." And so he got exactly what he wanted before the jury. Much better than "Oh, look, I don't have previous convictions" because then you speculate well – we've gone through all that. He's actually got precise propensity evidence about himself in, "My propensity is I do not use weapons on people. Here is my witness brother who says he does and he did" and in those circumstances inconceivable that his trial would be seen as so skewed as to be unfair by dint of the fact he didn't get in the less specific, much more femoral comment is that I don't have previous convictions.

BLANCHARD J:

Now is this an argument that there's been no miscarriage or –

MR PIKE:

Yes.

BLANCHARD J:

– is it an argument in relation to proviso?

MR PIKE:

Well essentially it's focused enough really to go to the fact there was no miscarriage overall because in fact he got the best possible deal out of what he wanted.

BLANCHARD J:

But you're saying this is something that could never have made a difference?

MR PIKE:

It could never have made a difference.

ELIAS CJ:

Isn't the better point not that he got some propensity evidence before the jury because he was denied the opportunity to put before the jury the propensity evidence that he wanted to put before the jury, but that the propensity evidence he wanted to put before the jury was not actually available to him because he had a previous, he had a conviction.

MR PIKE:

Oh, sure there was a risk factor.

ELIAS CJ:

So it's gone past, the opportunity to put that material in has gone.

MR PIKE:

Yes, that's certainly a powerful issue.

TIPPING J:

He would have had to have said, "At the time when I committed this offence or I'm alleged to have committed this offence, I had no previous convictions", which would have been –

ELIAS CJ:

And realistically, he would not have wanted to do that, because then he'd have had to –

TIPPING J:

No, exactly, and that, sort of, that's –

ELIAS CJ:

Yes.

MR PIKE:

It was an offence of violence, that's why he so, that's why he very accurately said, "weapons" obviously. But that's the case for the respondent, may it please the Court, unless there's any other matters.

ELIAS CJ:

Thank you, Mr Pike. Mr King, do you want to be heard in response?

MR KING:

Just briefly, thank you. Just dealing with that portion of the evidence which my friend has referred to at page 360, line 2 of the transcript. In my submission, the appellant saying in his evidence that he had never, at no time in his life had he ever used a weapon on another human being or used an object as a weapon on another human being, was a comment that, apart from that very brief reference, assumed no other significance in the trial whatsoever, the learned Judge did not refer to that aspect of his evidence at all. It does not seem to have been recited when His Honour is summarising the defence case and, in my submission, that does not go anywhere near far enough to redress the imbalance which the appellant says was created by the way in which the Crown closed to the jury about Adam not being an aggressive type of person.

And on the point that essentially propensity evidence was not available to him because he has a subsequent conviction for assault on a female, as noted, in

the first two trials the Crown, in my submission, properly agreed not to lead that evidence, recognising or accepting the defence explanation that there was an explanation for that, that as a result of being charged with these matters and losing his job, losing his liberty for a long period of time, that his life spiralled out of control. It certainly wasn't a bashing of his partner, it was a matter for which he received a minor community-based sentence and, in my submission, it's not right to say that he realistically would not have adduced that. If it was a choice for the appellant, then obviously he would prefer the scenario that was agreed to at his first two trials, that he could adduce the absence of previous convictions at the time of this offence, with the Crown agreeing not to try and introduce the second, the subsequent conviction, that's preferable. The fallback position is that he would have preferred to have had that conviction before the jury and obviously, in giving evidence, the opportunity to explain it to the jury, that it was a minor matter that resulted in a community-based sentence, that had occurred under the stresses and pressures that he was facing at the time. Far from being unrealistic, it's my submission, Ma'am, that that is the course that he would have preferred and sought to apply.

ELIAS CJ:

But I'm not sure that we're really looking at what might have happened. If we get to this stage, we would be concerned, wouldn't we, with whether there's been a miscarriage of justice –

MR KING:

Yes.

ELIAS CJ:

– through the exclusion of the evidence?

MR KING:

Indeed, and I accept that, and I know that I'm against the Privy Council judgment in *Barlow,* that says a previous hung jury is not something that could be taken into account. But the reality –

ELIAS CJ:

I think you're also against a decision of this Court.

MR KING:

Matenga, if it's interpreted in that way, Ma'am. But, in my submission, the fact is that with this evidence being, I sound, I hear myself speaking to the Privy Council, that when this evidence was present at the second trial there was not a conviction entered. I know it was also present in the first trial, but there were very complex dynamics there, because there were many, many other, well, there were a number of other accused, his family members and so on, and he was not able to present his defence, as he was at the second and third trials. But at the second trial, where this evidence was adduced that there was an absence of previous convictions, there was a jury disagreement and, in my submission, that is properly something that can be taken into the mix. Like everything else we've talked about in this case, it's not in itself definitive, but I would submit that cases like this are decided in inches and not miles, that it is a very difficult task to assess how a jury, knowing the reality of his lack of previous offending, would approach it. Because the way that it was presented to them, they would have been excused for believing that this was a person with extremely violent tendencies, and his absence of significant convictions, even if one factors in that there is the subsequent conviction for an assault on a female, then that would go a long way to redressing that. In my submission, it wouldn't be appropriate at all to apply the proviso.

Dealing with the propositions on the more general basis, in my submission, the starting point is that a defendant may offer veracity evidence about themselves, pursuant to section 38(1), and under section 41(1) a defendant in a criminal proceeding may offer propensity evidence about himself or herself. Now, in my submission, if one is to take the Crown argument to its logical conclusion, there would be very scant opportunity where a defendant could ever adduce veracity evidence. If one takes the *Alletson* decision at its face, then it would seem, on the basis of *Kant*, you are not allowed to adduce evidence of a lack of previous convictions, because that doesn't go to veracity

and doesn't go to propensity, you're not allowed to call someone to give their opinion about your character or reputation within the community because such, according to *Alletson*, does not constitute veracity or propensity evidence. In those situations it's difficult to imagine what on earth one could adduce under 37(1) as veracity evidence or under section 40(1) as propensity evidence.

Now section 41(1) says a defendant in criminal proceeding may offer propensity evidence about himself or herself. Section 41(2) is the counter-balance. It says that, "If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about that defendant." Now that clearly envisages that the propensity evidence being called under 41(1) is in fact beneficial to the defendant, because it's only in that context that the need would be for the prosecution to adduce evidence about the defendant to rebut it. So clearly something was envisaged as being it.

Now under the codes, as is before the Court, there was a proposal that there be this third category of evidence, there be evidence of propensity, there be evidence of what they called "truthfulness" and they also envisaged evidence of reputation. Now the problem with reputation evidence is, as has been articulated, that it deals with not a reality but a perception. Someone, the actuality of a situation, is something which is tangible, is something which can be challenged and is something which can be defined. Wheeling someone in to say, "Well, he's generally a really good bloke," is not tangible, is not defined.

TIPPING J:

Or generally regarded as a really good bloke.

MR KING:

Generally regarded, yes, without reference to a specific incident, which was always bound, so there was this inherent anomaly, identified as far back as *Rowton*, that in effect relied on hearsay and opinion evidence, that was ill

defined. And of course if one looks at, under tab 6, page 115, you see that under the proposed propensity rule, 42(2), it says, subpart (i), "Hearsay evidence," and subpart (ii), "Opinion evidence and expert evidence, do not apply to evidence of a person's reputation that relates to propensity." That was the proposal. The obvious problem is, as we've just identified, is that it deals with hearsay and speculation and that, in my submission, is the rationale for doing away with reputation evidence. Take away the perception, but leave in the reality. The reality is, if a person does not have previous convictions, that is relevant, in my submission, to both their veracity and their propensity.

ELIAS CJ:

Well, I think in this case that's right, I wouldn't want you to think that I necessarily go along with that distinction –

MR KING:

No.

ELIAS CJ:

– because reputation may be evidence relating to propensity, and that's really what the Law Commission original draft acknowledges.

MR KING:

Yes.

ELIAS CJ:

I think the removal of this, and this is a matter that we will have to check, because we don't have the material before us, the removal of this may rather be directed at the fact that it was the case, that hearsay evidence and opinion and expert evidence, those general provisions, were to apply to –

MR KING:

Yes.

ELIAS CJ:

– so those tests for reliability and so on come into it. But what I really rather take from this is that in some cases reputational evidence will be evidence of character. It's not the same as character, but it may be the best evidence that you can actually adduce. But that's not your case –

MR KING:

No, it's not.

ELIAS CJ:

– so you don't really need to meet it.

MR KING:

No. But, in my submission, the best evidence of a person's veracity and the best evidence of a person's propensity, in terms of the positives, is an absence of previous convictions.

ELIAS CJ:

Well, I don't know that you need to even go that far.

MR KING:

No.

ELIAS CJ:

But it is some objective evidence of that.

MR KING:

Yes, and the final point I want to make in that regard is to really draw a comparison with circumstantial evidence, which is being adduced by the prosecution to prove a charge. We are all familiar, of course, with the standard directions that circumstantial evidence is made up of a lot of relatively innocuous factors which of in themselves prove very little. But once

those threads are woven together then it can support a case beyond reasonable doubt.

Now that simply demonstrates, in my submission, that that issue of relevancy means that something doesn't have to be a smoking gun before it gets in front of a Court, and just as the prosecution seeking something which in itself proves very little can be admissible because it's part of a bigger picture, a thread when woven together supports a case, then in precisely the same way the absence of previous convictions is a relevant thread in assessing a person's truthfulness and propensity, will never be determinative, but is nevertheless a relevant factor.

And on that basis it's my submission that it is admissible that the common law, for at least the last 360 years, could not have been intended to have been changed in such a radical way. What the legislation clearly does is put it on a more orthodox, or a more principled and logical basis, by pulling out reputation, by putting the markers of veracity and propensity, but, in my submission, the same type of evidence or a lack of previous convictions that has been adduced for that time immemorial, can be admitted under these provisions.

Unless the Court has any questions, those are my submissions.

ELIAS CJ:

No, thank you, Mr King. Thank you, counsel. It's a case of some difficulty and we have been assisted by your submissions. We will reserve our decision.

COURT ADJOURNS 3.33 PM