IN THE SUPREME COURT OF NEW ZEALAND SC 100/2010

[2011] NZSC Trans 11

STEPHEN THOMAS HUDSON

Appellant

v

THE QUEEN

Respondent

Hearing:	7 April 2011
Coram:	Elias CJ Blanchard J McGrath J William Young J Anderson J
Appearances:	G J King and C J Milnes for the Appellant M D Downs for the Respondent

---

CRIMINAL APPEAL

MR KING:

If it pleases the Court. Mr King appearing for the appellant, I may be joined by Ms Milnes. She's in another Court but I'm just not sure whether she'll make it in time.

ELIAS CJ:

Thank you Mr King.

MR DOWNS:

May it please the Court. Downs for the Crown as respondent.

ELIAS CJ:

Yes Mr Downs, thank you. Yes Mr King.

MR KING:

Yes if it pleases the Court. This is a case where no body has ever been found. No scene has ever been identified. There was no direct eye witness to the alleged crime and the case really stood or fell on the jury's acceptance of the testimony of the critical Crown witness a Ms CV. That is beyond dispute and in fact the Judge directed the jury to exactly that point. In support of that assessment, however, the Crown also were permitted to adduce, or did adduce, evidence of propensity in its truest and purest sense of acts of previous violence against other victims undoubtedly committed by the appellant at a time prior to the disappearance of Mr Pike. And secondly, and in my submission very detrimentally to the defence, the Crown adduced the evidence of cellmate confessions from some six witnesses, six sources. Leave has been granted by this honourable Court to appeal the conviction on the question of the evidence of previous acts of violence by the appellant, the propensity evidence, and the evidence of the cellmate confessions. Now a great deal of material is before the court which details the background. Mostly I would refer the Court to the respective submissions, written submissions, that were provided to the Court of Appeal. They are contained in volume B and it has the appellant's submissions and the respondent's submissions in full.

ELIAS CJ:

Why are you taking us to these submissions?

MR KING:

I'm simply referring the Court to where they are and I'm doing that because I'm not proposing to go through the whole background of the case.

ELIAS CJ:

I see.

MR KING:

So simply identifying the summary of what's alleged to have occurred from both the appellant and the respondent's perspective in the Court of Appeal is set out and is before the Court in the written submissions that were filed then. So I'm simply referring to that on the basis that I'm not proposing, unless the Court wishes me to do so, to go through the background. Needless to say, and in very short summary, the defence mounted a strong and substantial challenge to the evidence of Ms CV, her credibility, there was also evidence of alibi that was called which if accepted by the jury would have completely contradicted her evidence. So that's set out, the Court of Appeal judgment deals with it, but in a fuller way both the appellant and the respondent have set it out in those submissions to the Court of Appeal.

The critical issue here, of course, first and foremost, relates to the evidence of previous acts of violence. That evidence was the subject of a pre-trial challenge and was ruled to be admissible. Now in volume 2 of the case on appeal, under tab 7, at pages 12 and 13, one has the challenged evidence.

YOUNG J:

It was common ground, I take it, that – or not disputed that it was the appellant who assaulted Mr MW?

MR KING:

Correct.

YOUNG J:

Because Mr MW doesn't actually identify –

MR KING:

Doesn't identify him, he just saw a shadow, but yes it was absolutely common ground to that effect.

ELIAS CJ:

Mr King, I didn't, I'm afraid, catch the name of our junior counsel but she's very welcome to come forward.

MR KING:

Ms Milnes, thank you. Thank you Your Honour. So that's the evidence. Now the first thing to note, of course, are two points; that the evidence was read to the jury,

and it was read to the jury at a very early stage of the proceedings. So that was an attempt to try and contain as much as possible the prejudicial effect or the so called illegitimate prejudicial effect of the evidence so there were those steps –

ANDERSON J:

The Crown could have opened on it and no doubt did.

MR KING:

Sorry Sir?

ANDERSON J:

The Crown could have opened on it and no doubt did.

MR KING:

Yes indeed, and closed on it.

ANDERSON J:

So the timing of it doesn't seem to be very material.

MR KING:

No it was, that was – it was very early in the piece and there was a discussion in the Court of Appeal about whether that was a correct tactical decision to have made. Whether in fact the trial – a substantial amount of the evidence should have been led to see whether the basis on which it was deemed to be admissible still stood or whether the evidence had come up to brief in that regard. But in any event the decision was made, rightly or wrongly, that this evidence could be best handled by it being read to the jury at a very early stage in the trial.

YOUNG J:

It had an advantage in terms of the jury's understanding of the case because the fact that the appellant was on the run was a pretty material contextual factor in terms of what was happening between December and March.

MR KING:

That's exactly right and so it had a logical narrative placement and of course it dealt with events that pre-dated the alleged homicide by several months and so in terms of time it was natural to come at that point as well.

YOUNG J:

It's really where the story starts, isn't it?

MR KING:

Yes.

YOUNG J:

I mean there's not much about the relationship between the appellant and Mr Pike before then. They were, had some sort of association?

MR KING:

That's right. That's right. So it's there and the question, of course, that's posed, and this Court has granted leave on, is whether it was appropriately there or not and in my submission, unsurprisingly, it's that the evidence should not have been admitted. That its probative value in a real sense, in the context of this trial, was very slight. Not negligible but slight. Against that it is submitted that the prejudicial tendency of the evidence in the ways envisaged by section 8 of the Evidence Act were both engaged to the extent that there was a clear weighting in favour of exclusion.

In dealing with the pre-trial application His Honour Justice Ronald Young considered the basis upon which the evidence was to be led. This is contained in volume number 1 of case on appeal, under tab 3, and the discussion commences, and it's accepted it's a very thorough analysis. It commences at page 43 under the propensity application, paragraph 62. The heart of it really is I submit at paragraph 67 where it's the Crown case, is that the accused's motives for killing Mr Pike included his suspicion that Mr Pike was a police informant and his jealousy about Mr Pike's relationship with CV, the accused's girlfriend. It goes on to say that support of the latter motive comes –

ELIAS CJ:

So where are you?

MR KING:

Paragraph 67 on page 44.

ELIAS CJ:

Thank you.

MR KING:

Support for the later motive comes from three of the cellmate confessions witnesses, A, F and D, and of course those names, the names of all the cellmate people are suppressed but with the Court's leave it would be useful, in my submission, if I'm able to refer to them by name in the context of this hearing.

ELIAS CJ:

Yes, that suppression order is continued.

MR KING:

Thank you. The interesting feature of that aspect of it is that there were, in fact, no directions given to the jury about how the evidence had cross-applicability, how the propensity evidence provided support for the suggestion that this was a jealous motive, and so on, in the way that perhaps the Court were envisaging. An answer to that would be to say, well what it's relevant to is motive. The jealousy motive as opposed to the propensity evidence but certainly in the context of this discussion His Honour was very mindful that the jealousy motive had some support with the cellmate confessions and the point that I make at this juncture is that no directions were given to the jury as to how they were to approach that concept.

Page 46 of the judgment, paragraphs 70, 71 and onwards, we really get what is the very heart of the basis upon which the learned trial Judge admitted the evidence on this pre-trial basis and paragraph 70 says, "It is evidence which if accepted tends to show Mr Hudson's propensity to react with extreme violence when he believes another person is involved in or interested in his girlfriend." 71, "If the evidence of Mr DJC and Mr MW is accepted and they describe extremely violent, jealous rages." The word "rage" is repeated in paragraph 73. Also here there were two previous occasions of similar jealous rages.

His Honour goes on to consider the extent of the similarity. He notes that the accused argues that the previous attacks used a knife and a hammer whereas in the present case a gun was alleged to have been used and that on one of the previous occasions there was more than one assailant involved. And one can add to that, that of course they're different girlfriends, if one uses that phrase. The person relating to

the DJC incident was a different person to the person relating to the MW incident and of course Ms CV was neither of those people.

YOUNG J:

Is Ms AS's name suppressed?

MR KING:

I don't know to be honest but I would have no objection to that being done Sir. Of course. The learned Judge goes on, and I'm not trying to unduly paraphrase it, obviously there is a structure in it. I'm just taking the Court to the salient parts but His Honour at paragraph 80 notes, "That there is no doubt that the evidence of the extreme violence on two other occasions does have the capacity to unfairly predispose the jury against the accused. In addition, given the extreme violence described in the earlier incidents, it is probably that this evidence will weigh on the jury when they deliberate." But His Honour goes on to say that, all that considered, he is of the view that the extreme violence reaction really is illustrative of the strength of the claim of the propensity evidence and that therefore the balance falls in favour of admissibility.

The top of page 48 in paragraph 82 His Honour makes the suggestion that the prejudice can be reduced by having the evidence of Mr DJC and Mr MW given by an agreed statement of facts and that, of course, is precisely what occurred in the format that we have.

Now in my respectful submission that's all well and good but in fact the evidence, as it came out at trial, did not, in any way, shape or form, support the proposition of a jealous rage. Ms CV, whose evidence of course was absolutely critical in this regard, does not suggest that anything occurred in the course of a long road trip, a drive from Auckland to where, she says, the Desert Road –

YOUNG J:

To be fair the DJC and MW incidents didn't really reveal rage either. I mean the Court of Appeal took the view that the Judge had misspoken when he used the word "rage".

MR KING:

Mmm.

YOUNG J:

Because each were planned, premeditated assaults.

MR KING:

Yes and each involved extreme violence with the use of a weapon. So that's understood but His Honour did talk about rage and extreme violence has been triggered by beliefs in, or jealousy, belief that the victim was engaged in some type of relationship with a girlfriend of his.

The evidence does not disclose that anything occurred in the course of the long road trip which had the effect, or raised the specter, of jealousy as a motive. There is no suggestion of any trigger or anything being said in that time that set him off or in any way provided a justification or whatever for his reaction. What she says quite clearly is that it was a surprise to her when he suddenly pulled over and asked her to get out of the car. Drove off, was gone for about 10 minutes or so, came back alone, and proffered the story that he had some plants growing in the area and Mr Pike was going to stay and tend to those.

The other aspect of it, the trial evidence which the appellant relies on, is that the jealousy motive really just did not assume any real significance in the course of the case.

ANDERSON J:

Well it was referred to by two or three of the

MR KING:

The cellmate –

ANDERSON J:

– prisoners.

MR KING:

– people, exactly, and I'll be having something to say about that later on but Ms CV herself does not provide any real support for that. I mean there are references and those are properly set out but it is submitted that really in terms of the alleged motive, the so called jealousy motive was very much the tail end Charlie –

ANDERSON J:

It depends how scrutable his emotions are rather than how perceptive Ms CV was.

MR KING:

Well that's true but this evidence is said to support it whereas his own evidence, it's not suggested to her that that's why he – quite the contrary.

ANDERSON J:

Well he thought that she, her evidence was that she took it that the appellant was sexually interested in her.

MR KING:

Yes and they did form a relationship shortly thereafter.

ANDERSON J:

And they did have sex the night of the alleged murder?

MR KING:

Yes. Well, according to her, yes.

ANDERSON J:

According to her and he had made remarks the night before, I think, or two nights before in the balcony incident about, that had indicated jealousy?

MR KING:

Well they were pretty tame, with respect.

ANDERSON J:

I mean it's not a big deal.

MR KING:

No.

ANDERSON J:

In the case as a whole but it was there.

MR KING:

Well I mean the evidence is there, the references are there. In my submission it doesn't go within a bull's roar of providing any type of suggestion that this killing was because of a jealous reaction. The motive evidence was far stronger on the suggestion that it was because Mr Pike was a police, or believed to have been a police nark, or an informant. The belief that he was a risk to the appellant's freedom. There was a suggestion that he owed the appellant money for drug debts. I mean there was at least some direct evidence in that regard.

ELIAS CJ:

Well there was direct evidence in the confessions which you are going to deal with separately but they can't be ignored in this context surely?

MR KING:

No, no, that's right.

ELIAS CJ:

So there was evidence that jealousy was one of the motives and the Crown is entitled to rely on that.

MR KING:

Yes and I suppose, and it's wrong, but I suppose I'm philosophically keeping them in a separate category –

ELIAS CJ:

I know. But I'm not sure that you can.

MR KING:

– but I'll agree with Your Honour's point, yes.

ELIAS CJ:

Yes.

MR KING:

No, I accept that. But in any event the submission is that the jealousy motive was a weak one, and very weak if one deals with the cellmate confession evidence in a

separate category. I accept certainly on a pre-trial basis that it was not proper to deal with it on that discrete way and that His Honour reached a full decision.

Significantly he noted that this was evidence that was potentially, or likely to engender prejudice and that it was likely to weigh on the jury's mind. In my submission that's absolutely correct.

YOUNG J:

How do you factor in the reality that the jury were going inevitably to understand that the appellant wasn't a very satisfactory person? That he was a drug dealer. That he was on the run. That he'd been in prison. That he'd broken out of prison. That he really didn't engage with the police inquiry into the death of someone who ostensibly was his friend, and so on. That he carried a gun, which was loaded. That he presented that at Mr Pike on one occasion. I mean the fact that he isn't a very satisfactory person was absolute, it ran through the case, it couldn't be ignored. So did this really add a lot more to it than that?

MR KING:

Well in my submission I suppose the argument is it's the straw that broke the camel's back in terms of –

YOUNG J:

But it is only a straw though isn't it?

MR KING:

Well it's –

YOUNG J:

Well that's probably putting it too –

MR KING:

No I understand Your Honour's point. It's in, there was a vast array of highly prejudicial material that was before the jury. It went further, I would submit, than was probably intended and certainly through some of the cellmate confessions, which I'll come to later on, there was, it went further than was briefed about him being seen carrying weapons and being violent in prison and so on. But it was always the case where out of necessity a certain amount of material was going to be before the jury

which would reflect poorly on the accused's character. The fact, as Your Honour has identified, that he was on the run, that he had been in prison, it was necessary for the jury to know those things. It provided the context for the case. But the submission is that when there is already such evidence before the Court then the probative value of the propensity evidence for Mr DJC and Mr MW is significantly diminished because it's just effectively, at least on one level, more of the same.

ANDERSON J:

Isn't it the case that the prejudice was because of its probative quality?

MR KING:

Well that's what His Honour had identified but it's the fact that someone is prone to acting in an extremely violent way, in my submission, does not come anywhere near. It's like, well there's a scenario where if someone has got 50 previous convictions for burglary.

ANDERSON J:

Well the timing is fairly proximate.

MR KING:

The timing is a few months, a couple of months.

ANDERSON J:

The reaction was extreme. If anything the evidence was watered down. I mean there's no evidence about what injuries were actually inflicted when this man had his face smashed four times with a hammer and that could have been expanded on –

MR KING:

Indeed.

ANDERSON J:

– but it was toned down really. Sometimes the prejudice is legitimate prejudice.

MR KING:

That's exactly right and of course that's the problem with propensity evidence because the reason we sometimes exclude it is precisely the same reason that we sometimes admit it and it's just a case of where on the spectrum it sits.

ANDERSON J:

It's really factually specific to cases, isn't it? I mean you have to look at the context –

MR KING:

Absolutely.

ANDERSON J:

– in which it is coming through.

MR KING:

Yes, yes, and in this case the context was that there was already a great deal of material that the jury could properly –

ANDERSON J:

Well I would have thought that the context was the person who disappeared from the face of the earth shortly after going off a side road in the middle of the North Island with the appellant –

MR KING:

Yes and it could have been kept –

ANDERSON J:

– whether the person was alive and if not whether he was killed by the appellant, they were integrated issues and they were crucial to the case.

MR KING:

That's right and yes there is a holistic perspective to this because if one, for example, had reached the conclusion that the so called cellmate confession evidence should have been adduced, then that would have obviously significantly reduced, if not completely negated the need for the jury to know that the person had been in prison.

ELIAS CJ:

Why do you say that? Oh I see, no, he was in prison. I'm sorry I was thinking of a different point.

MR KING:

Yes so in a sense if the cellmate confession evidence is in then it's necessary for context to show that he was in proximity to them, obviously in a cell next door to them. But if that's out then one can see a scenario where it could have been run in a different way entirely. How far it would have been proper to go in terms of motive then is, I suppose, the question. I mean at the end of the day, of course, motive is not an element of the offence but we all know and appreciate it's an important evidential consideration. It's something that the jury obviously, to an extent, need to grapple with. But there are plenty of cases where people have been convicted in the absence of any motive being demonstrated. So it's not going to an essential element of the offence, first and foremost. But the propensity evidence here showed a person who is capable of extreme violence with a weapon. That really is the height of it.

The question is, does that mean that it is more probative than prejudicial in the context of this case? And in my submission that is simply not sufficiently, I'm trying to avoid using the word "similar" because one knows that we're well past those *Boardman v DPP* [1974] 3 All ER 887 (HL) days of striking similarity and so on, but that type of analysis is still pertinent to consideration of whether the evidence is more probative then prejudicial and if it goes no further than showing this is a person who at times proximate was, that is proximate to this alleged homicide, was capable of extreme violence using weapons against people that crossed him, whether it was for love or for money or for drug dealing, or whatever, then in my submission it just does not come close enough and it would be a significant and dramatic lowering of the threshold for the admission of propensity evidence to allow evidence which is just so likely to engender strong feelings of distaste and dislike against an accused person –

YOUNG J:

Can I just put it this way? There was evidence of motive, that the appellant had a motive to kill Mr Pike. It was well open to the jury to conclude that someone had murdered Mr Pike. Whoever murdered Mr Pike had a capacity, it would seem, to administer extreme violence.

MR KING:

Well murder –

YOUNG J:

Lethal violence.

MR KING:

– murder, extreme violence, it's the ultimate expression.

YOUNG J:

But so, the hypothesis that your client was innocent involved what might be thought to be something of a coincidence that there was someone else in and around Mr Pike who, like him, had a motive to kill and like him have had this propensity for extreme violence.

MR KING:

Well that he was around someone who was capable of committing murder.

YOUNG J:

Yes. I know Mr Pike mixed in a not very satisfactory social milieu –

MR KING:

Yes.

YOUNG J:

– so it's not necessarily the hugest coincidence in the world but it still is a coincidence.

MR KING:

Well it becomes very significantly less of a coincidence if one takes out the CV evidence. If all we're left with is that someone has disappeared and we think, he hasn't surfaced and he hasn't used his bank accounts, and we know that there were issues, nothing extreme, but we know that there were issues between him and Mr Pike, in my submission the case just wouldn't get off the ground.

ANDERSON J:

But that was obvious and it was pointed out to the jury –

MR KING:

Exactly.

ANDERSON J:

– if you don't accept CV there's nothing else that you can convict on.

MR KING:
Exactly.

ANDERSON J:
And another contextually relevant matter is that he was last seen alive in a wilderness so if it wasn't the appellant it was someone else with a homicidal tendency wandering around the Desert Road.

MR KING:
Yes but –

ANDERSON J:
With a grudge against Mr Pike.

MR KING:
But again without – it's circularity of reasoning in my submission Sir because that comes back to Ms CV –

ANDERSON J:
I don't think it's circular, I think it's one of those cases where they are a number of interlocking –

MR KING:
Yes.

ANDERSON J:
– pieces that eventually show a picture, but any one on its own weight…

MR KING:
Well if one accepted the evidence of Ms CV, that the last, she's the last person to have seen Mr Pike apart from the appellant, that she was pulled over, asked to get out of the car and wait, he goes off and comes back, then with those other factors no one has seen him since, his bank accounts haven't been touched and so on, then there is, I suppose, scope to draw an inference that he was, he was dead. Is it enough to say that he was killed or murdered or didn't just, in fact, stay there to tend plants and got overcome by the environment I don't know.

ANDERSON J:

Well you see there was no talk about tending plants on the trip down from Auckland either.

ELIAS CJ:

It's a funny place to have a garden.

MR KING:

Terrible environmental conditions to grow marijuana I would have thought.

ANDERSON J:

It's 3000 feet up. It snows for months of the year.

MR KING:

Yes but putting that aside, we don't have a scene. We don't have a body. We have Ms CV pointing out the road, which didn't exist at the time, the access road, and that was accepted and you'll see there's reference to that in the summing up. So there are those difficulties. Against that we have an alibi that the guy was at home and we have a large number of –

YOUNG J:

Yes a pretty much unpicked alibi though wasn't it?

MR KING:

Sorry?

YOUNG J:

I mean it came, it distinctly unravelled at both ends.

MR KING:

Well in my submission it didn't, it actually – I mean clearly I'm behind the eight ball, the jury didn't accept it.

YOUNG J:

Well from the 25th of March it was just untrue because it was common ground that he wasn't in Masterton, he was up at Karapiro.

MR KING:

Yes.

YOUNG J:

So that aspect of it was simply untrue.

MR KING:

Yes. Or mistaken.

YOUNG J:

Secondly, it was pretty dodgy at the beginning because his mother's evidence was simply, well, was barely credible as to the date.

MR KING:

Well she related that to working at the chicken farm.

YOUNG J:

And she wasn't working on the day that – well it's most unlikely that she was working on the day that she put the start of the alibi. Then there's the intercepted conversation between his brother-in-law and his sister which involves rather a complex issue as to whether the girl he was with could be Ms CV.

MR KING:

Yes.

YOUNG J:

Well initially they didn't care whether it was her or not, not really realising that she herself had an alibi that didn't put her in Masterton.

MR KING:

Yes.

YOUNG J:

And it was only after it became apparent that that was a problem that they said, oh no it wasn't CV, whereas the brother-in-law is saying on the intercepted phone call it

was which suggests it must have been a later date. I mean all of that is, it was a pretty scratchy alibi.

MR KING:

An alibi nonetheless supported by multiple witnesses. Obviously the jury didn't accept it as raising a reasonable –

YOUNG J:

What happened to the brother-in-law's case, because he was being prosecuted for attempting to pervert the course of justice?

MR KING:

I think he was acquitted.

YOUNG J:

Was he?

MR KING:

I think. He was discharged pursuant to section 347.

ANDERSON J:

No doubt because he might have been honestly mistaken.

MR KING:

Yes. I mean the conversation is not, I mean on one level it's not sinister, it's natural that people are going to, untrained people are going to –

ANDERSON J:

Seven years later too.

MR KING:

– untrained people are going to compare notes and they're going to say well was it her, was it not, I think it was, and it's not unsavoury, necessarily. I mean in the cold light of the court case where we know the importance of keeping witnesses independent and uncontaminated it has issues but on the face of it, it was simply people, effectively, comparing notes as to what it was they recalled. In my submission Sir I'm reluctant to agree with the suggestion that the alibi was in tatters.

There were aspects of it which were strongly maintained, that did strongly suggest that Ms CV could not have been correct and again I place that by the fact that there's no body found, no scene has been identified and there's nothing scientifically or forensically to link anybody to this disappearance. And that's the context in which I respectfully submit to this Court that the jury is likely to turn to things like propensity evidence and of course to cellmate confession evidence because it does, at least on one superficial level, fill in the gaps nicely. It makes it easier for the jury to say, well we know he was such a bad person, we know he's got this capacity to do damage to people. The fact that he had previously exhibited extreme violence with weapons, does that necessarily add to the equation in determining whether or not he committed this murder with a firearm, allegedly, although no one knows of course, on this occasion because there's no suggestion that he beat the man to a pulp with his bare hands with a type of extreme violence reaction.

ELIAS CJ:

Well we don't know.

MR KING:

The reality is a lot of people who are complete and utter first offenders and have never been in any trouble before have been convicted of shooting other people. The Meads case this week is a classic example. He had no previous convictions and shoots his wife with a shotgun. So the fact that the person has a capacity for violence, we know from just experience of the criminal laws, does not necessarily make it more or less likely that a person commits the act of murder.

ANDERSON J:

Again it depends on the case. I mean if one was last seen in the presence of Hannibal Lecter and never seen again, Mr Lecter's propensity to violence might very well explain why the person was never seen again.

MR KING:

Legitimately I –

ANDERSON J:

Maybe the propensity here is actually an important element. Not just an evidential matter but an important element of the case.

MR KING:

If there was, for example, three eye witnesses to this alleged – to Mr Pike allegedly being shot by the accused, and they were persons with no previous convictions and there was no inroads made into their testimony, they're independent and so on, then if one can just look at that context and see how does propensity evidence fit into the equation, and that point I'm making, because it highlights –

ANDERSON J:

Well it mightn't then, it mightn't have the same probative quality.

MR KING:

Exactly because it's all about, it's – I know Bayes' probability theorems and so on about contextual admissibility that something is admissible in one context that wouldn't necessarily be admissible in another and it's about pulling all those threads together, which is essentially of course the role of the jury. That ultimately though the Bayes probability theorems, they look at all the bits and make an assessment, but this propensity evidence was very highly prejudicial, I submit. That's the starting point, this is extreme violence, with weapons, to men involving, well the jury would obviously infer were serious injuries, being hit four times, once in the mouth with a hammer, four times in the head. You don't need, in my submission, the jury to be given the fractured skull evidence for them to be able to say that was a terrible event. That must have resulted in serious injury. And likewise the second one from Mr MW where you do have a description of the chunks being cut out and the four stab wounds in the back and son on, a chunk being cut out of his bicep. It's my submission that in the context of this case the jury were in no way being evidentially misled or dissuaded about the nature of Mr Hudson. Here the jury knew he was on the run, knew that he was involved in these others. The fact that he was capable of violence would not have come as any surprise to them. But being confronted with it in this way does, in my respectful submission, risk a jury simply saying he's a very bad person, we just don't care about the evidence, the gaps in the evidence, and that's where the danger bites in my submission. It's not that they think he's a bad person therefore he's more likely to have committed the crime, that's part of it. But that scrupulous analysis, the burden that a juror feels when they are asked to sit in judgement of a fellow citizen, a burden which we all know weighs heavily on the jurors, and we've all seen how they respond to that important and critical duty, can be released or can be, have that burden taken away by thinking, it doesn't matter, he's a bad person anyway. We're not risking putting a good person in jail for life. And that's

where this, that's really the prejudice, in my submission, where it bites him the most. So it's one thing for a Judge to say, look don't say because he's a bad person he's more likely to have committed this act of murder. It's that it takes away that critical safeguard of a jury bringing in an assessment without knowing, that blind justice concept.

Now it's something which ironically enough the cases don't seem to enunciate even the Sopinka J judgment identifying the types of prejudice inherent in this type of evidence, they never say, well in fact it lowers the threshold for the jury because they simply do not care as much. They are unlikely to bring that scrupulous evidential analysis, the weight of judicial office to their considerations because really, even if the evidence doesn't quite establish it, no harm is done because he's a very bad person in any event.

So His Honour on the pre-trial basis allowed the evidence in on that basis. Whether one says the word "rage" is misplaced or not it was certainly cognisant of jealousy as being a significant motive and in my submission that's inherent in what he said, he doesn't use that phrase, he says it's one of the motives, but clearly it was believed, on a pre-trial basis, to be stronger than what it panned out to be in the evidence. I've referred in the written submissions to the, really the high point I submitted was Ms CV's evidence where support for a jealousy motive is disclosed, and that's at paragraph 23, page 7 of the appellant's written submissions, and the fact that there'd been something of an incident, if one can call it, in the nights before that the deceased, or the assumed deceased, Mr Pike was told to sit in a couch and not go out. It doesn't come, I submit, within a bull's roar of establishing that jealousy motive. If one does not factor in the cellmate confession evidence which really was the strong point and as again the point I make is that there were no directions given to the jury about their assessment of the, the cross-assessment of the propensity evidence and the cellmate confession, even the concept that they actually supported each other. There was really no guidance given to the jury in that regard.

So the argument that was advanced in the Court of Appeal is summarised at paragraph 27, page 8 of the appellant's written submissions, and the Court of Appeal's response to that is also effectively the Court holding that references in the pre-trial judgment to rage were misplaced instead suggesting that the propensity episodes indicated a cold blooded retribution. And the Court ultimately held that although the evidential basis for the jealousy motive was perhaps not as high as it

may have appeared pre-trial it was nevertheless there and available and made reference to the prison inmate confessions.

The difficulty, I submit, is the way in which the jury were directed about this evidence because there was a deficiency in –

ELIAS CJ:

Sorry what, are you saying that that was the difficulty?

MR KING:

No the difficulty that the Court of Appeal have identified.

ELIAS CJ:

I see.

MR KING:

What they've essentially held is if it wasn't admissible as a jealous rage motive, it was nevertheless admissible or had propensity value as cold blooded retribution. Really the complete opposite side of the coin. And my point is that the jury weren't told about that and the Crown may suggest that the defence was advantaged by that because effectively what His Honour Justice Ronald Young had said, was that if you don't consider that the jealousy motive is made out you should just put the evidence completely to one side. So beyond what I've set out there in the written submissions, the summary of the appellant's arguments as to why the jealousy motive was so weak, including the fact that the appellant had, according to Ms CV's evidence and others, had willingly engaged as assisting her in prostitution, tended to suggest that a sexual jealousy was unlikely to be any real basis of a motive.

ANDERSON J:

I don't know whether that's so, lots of prostitutes have been murdered by their lovers and pimps over the years.

MR KING:

True.

ELIAS CJ:

Well it's more that's there a non sequitur in any event because from one he was gaining –

MR KING:

Yes.

ELIAS CJ:

– and it's a different sort of, if it wasn't an emotional attachment, maybe quite different than a commercial transaction.

MR KING:

Certainly and that's just one of the points which is set out and that was repeated to the jury as being something which undermined the jealousy motive. I've set out some pages, the analysis going through the Evidence Act 2006 and through the propensity evidence I've referred extensively to the *Stewart (Peter) v R* [2010] 1 NZLR 197 (CA) and I'm conscious of course that this Court has had argument on the proper approach to propensity evidence in the appeal from *Mahomed v R* [2010] NZCA 419 and that a lot of the authority which is referred to there, especially in the *Stewart* case may well be up for debate but I don't know if I could advance that debate by just simply repeating those suggestions there because ultimately the point in this appeal, that's advanced, is that however you package the evidence from Mr DJC and Mr MW, whether it's supporting a jealous motive or whether it's somewhere related to a, to a cold-blooded retribution type propensity, it simply does not meet the threshold for admissibility that this is really simply akin to the old person which previous convictions for sexual offending is facing a new count of sexual offending and it does not displace that age-old presumption that people are tried on what they are alleged to have done rather than what they have done in the past.

ELIAS CJ:

Well the Crown submission is that there's been a revolution.

MR KING:

Yes and in my submission there hasn't and I that's I suppose what this Court needs to determine. In my submission the Evidence Act is largely a codification of the pre-existing rules and principles and that it should not be seen to be lowering the threshold to the extent that effectively what we would have is any person with a

previous conviction that's in any way relevant comes in. A burglar with a previous conviction for burglary comes in.

ELIAS CJ:

Maybe that was what was intended however Mr King.

MR KING:

Well in my submission that was not apparent from any of the material, including the Law Commission Reports, Ministry of Justice responses, the Parliamentary debates – this was, in this aspect of the case, in my submission it was simply a recognition that the law of similar fact evidence or probative versus prejudicial evidence, however one termed it, was somewhat difficult to find because it was in a number of cases rather than having a statute at its heart.

ANDERSON J:

Hasn't the Act just abolished a strikingly similar prerequisite because even under the Common Law if you pass that then you still had to weigh probative against prejudice qualities and here the real issue – it is codified but it's always a question of fact in a particular case whether something is actually probative –

MR KING:

As opposed to its prejudice.

ANDERSON J:

– if it's probative then it's provisionally admissible but then you have to say, well should it be excluded because it's too prejudicial?

MR KING:

Yes. Well yes I don't – in my submission the consideration of its probative value does still under the Act, very much have the similarity of the events, the proximity of the events, the number of –

ANDERSON J:

It may do, it may well do, it depends on the case because it –

MR KING:

– previous events.

ANDERSON J:

– the classic situation is trying to identify someone and the identity would be because of similarity of modus operandi for example. But that's not the only situation in which propensity or habit has relevance, it depends on the case and here the issue was, "What happened to Mr Pike?".

MR KING:

Exactly so the fact that person has acted violently to people in the past, in a context where we don't actually know how Mr Pike met his death and what means it was carried out – there's an inference there that it was with a firearm but there's nothing more than that. How does the fact that a person has acted extremely violently to people in the past, in a legal sense, assist that question of can we be sure it's him, because that is precisely in my submission to invoke all of those forbidden chains of reasoning – he's a bad person, he's done things similar in the past, he's more likely to have done it this time. Now there's a superficial attractiveness to that proposition. Where it falls down of course is that all the police have to do is find the person in close proximity with the most number of relevant convictions and they're likely to get a conviction because a jury will reach that, that's the danger.

ANDERSON J:

I think with respect, that's a bit simplistic –

MR KING:

Well, well it's no more simplistic than I submit than highlighting that those traditional prejudices associated with propensity evidence, those identified in the Murphy – by Justice Murphy and Sopinka in the Canadian authorities which are routinely identified in this Court, and I think I've bound to have referred to them somewhere. I certainly did in the *Mahomed* case and put those forward. It engages those types of pathways that one urges and I add to that, as I've said, the fact that it just lowers the whole pressure and the ultimate safeguard that the juror will approach their task in such a scrupulous way, fearful – there's a lovely old saying that you approach the question of justice with trembling hands and that's what juries do in my submission. They –

BLANCHARD J:

And we're not a jury.

MR KING:

No of course. But, yes and I'm not trying to go into that type of rhetoric –

ANDERSON J:

I take your point, there are dangers inherent –

MR KING:

Yes. And yet the probative is simply that he's been a very violent person in the past, we don't know whether this was, we know a murder's obviously going to involve violence, we don't know if it was extreme brutality in the sense engaged by or envisaged by section 104 of the Sentencing Act 2002, for example, whether it was done with a high degree of callousness, whether it involved extreme brutality and so on. I think it would be open, if one accepts Ms CV's evidence that there was a pre-meditation, nothing seems to have happened according to her account that set him off or triggered it but –

ELIAS CJ:

Don't you have to really argue – I'm surprised that people don't look at the terms of the statute –

MR KING:

Yes.

ELIAS CJ:

– don't you really have to argue that behaving on previous occasions with extreme violence when crossed is not acting in a particular way within section 40?

MR KING:

Yes exactly. I probably misplaced my submissions in that regard by taking it straight to the probative versus prejudicial to say that those same basis, it's not sufficiently probative –

ELIAS CJ:

Because I think that there is, and it's something that I was going to ask Mr Downs, there is an issue as to how the line is drawn because on the Crown argument wherever anyone acts violently and they have previous convictions for violence, if it's

as general as acting with extreme violence, that evidence is propensity evidence and admissible.

MR KING:

Indeed.

YOUNG J:

Yes but the definition of propensity isn't an admissibility rule, it's not admissible because it's propensity –

ELIAS CJ:

No.

YOUNG J:

– it is because it's propensity it's subject to section 43.

ELIAS CJ:

Yes and it's more probative than prejudicial. But the probative nature is simply a propensity to act with extreme violence in this case –

MR KING:

Yes, exactly.

ELIAS CJ:

There is nothing more.

MR KING:

Yes and so my argument, taking it to that final step, is to say that is not very probative and yet is still very prejudicial.

ELIAS CJ:

Well it may be probative but there's an unexpressed major premise if so in the legislation which is about how people act.

MR KING:

Yes and I've set out the structure of the Act from page 10 onwards dealing with ss 7 and 8 first of all of the Evidence Act and then going onto the definition of propensity in my paragraph 34.

YOUNG J:

I just, to pick up, really bounce something back towards the Chief Justice through you, the propensity evidence rule does presuppose that there are some actions which if done once are likely to be repeated.

ELIAS CJ:

That's the unexpressed major –

YOUNG J:

That's the unexpressed premise that some particular actions are outside the norm so that if a person is prepared to do it and secondly that people who are prepared to do it on two occasions are likely to be prepared to do it on a third occasion.

ELIAS CJ:

I accept that.

MR KING:

I mean that's age-old but that's always been the exception and the *Boardman v DPP* cases before you, for example, at that time there were charges of homosexual offending, the fact that the accused had previously engaged in homosexual acts, that was the argument – was to say well it shows that he has a disposition or whatever to be involved in same-sex sexual relationships and that was where the line was always drawn and *Boardman* is very clear at saying that is not enough and in my submission to say simply that a person has acted violently in the past, therefore the Crown can educe that evidence because it makes it more likely he or she has acted violently on this particular occasion is certainly a massive change.

YOUNG J:

But it's all contextual isn't it?

MR KING:

It is but –

YOUNG J:

I mean if for instance the jury accepted CV's evidence but were still – had to fill in the gap as to what happened after the appellant Mr Pike went down the road, off the Desert Road, then as I think Justice Anderson pointed out the fact that Mr Pike's never been seen again, last seen in the company of a man who did have a motive for murder and did have a propensity for extreme violence, it does put a picture, it does form part of a picture which is rather a bleak one from the point of view of the appellant.

MR KING:

The circularity inherent in that, in my submission, is that in deciding whether or not they accept Ms CV's evidence, a jury is very likely to have had resort to the propensity evidence and the –

YOUNG J:

All right, then all the people –

MR KING:

– and the cellmate confession so they pull it together.

YOUNG J:

Okay, well let's look at it that way. Of all the people Ms CV shows to make an unsubstantiated allegation of murder against, it might be though to be an implausible coincidence that she was A, lying but B, just happened to chose someone who did have that propensity.

MR KING:

Well she knew it, she knew he had a propensity for violence so it could be she chose the right person – the person that... If one goes down those paths –

YOUNG J:

But why wouldn't she make – oh well, okay, well I suppose –

ELIAS CJ:

I'm more interested in the legal, in the error of law first –

MR KING:

Yes.

ELIAS CJ:

– we seem to be sliding into almost, maybe it's impossible to disconnect it from the strength of the case against the appellant but I'm interested in more help with –

MR KING:

Yes.

ELIAS CJ:

– what was this propensity of – I think the Crown accepts that it's only propensity to commit extreme violence when crossed –

MR KING:

Yes.

ELIAS CJ:

– and it – I do have a question as to – it may be that that is sufficient –

MR KING:

Yes.

ELIAS CJ:

– within the definition but where does one draw the line? Is a propensity to I think, I mean is there a concept of being, of out of the ordinary or being extraordinary in this legislation, there may not be.

MR KING:

The legislation, certainly when it came out and when it was looked at, was not seen, I respectfully submit, as embarking upon any change, it was actually seen as a very helpful codification of the principles that had been applied in cases in any event. It uses the word propensity which previously of course, was not, it was almost a taboo word – those seminal judgments of His Honour Justice Fisher, when he talked about mere propensities – I mean well that was Justice Eichelbaum but we talked about the fact of propensity evidence, it became almost a dirty word, if it was just propensity

evidence it was out, it had to be more than that. The legislation has changed that and has identified that propensity can have a value as it shows a state of mind or a habit of a person to act in a certain way. But then it goes on to put in all sorts of safeguards, it gives that broad definition of propensity in section 40, but when we get to section 40, subsection 3, and section 43, "The prosecution may offer propensity evidence about a defendant in a criminal proceeding, only if the evidence has a probative value in relation to an issue in dispute in the proceedings which outweighs the risk that it will have an unfairly prejudicial effect." Well that's nothing new, that's exactly what the previous law was.

ELIAS CJ:

What –

MR KING:

But then we go on and we have a series, I submit, of safeguards because they direct the inquiry of the Court to those factors, ss 43(3)(a) to (f) which I've set out at paragraph 36.

ELIAS CJ:

But they're only may consider, because –

MR KING:

Yes indeed.

ELIAS CJ:

– because I have a query as to the Judge's view that this propensity evidence could be seen as supporting the credibility and reliability of the confessions. That's certainly not within the language of (d) and (e) which seems to be about the particular offence, but then it's not an exclusive range of considerations.

MR KING:

The structure of 43 tends to look at similar fact – sorry at propensity evidence as almost stand alone evidence that is taken and assessed on its own value and merit. Although –

ELIAS CJ:

In context as Justice Young says.

MR KING:

Yes but when those (a) to (f) factors are all very much specific to the particular incident of propensity rather than trying to place that in the overall context in the case and as Your Honour makes the point, there's nothing that says does it or is it supported by something else in the case or does it support something else in the case but the point is also made, of course, that these are not exclusive considerations and that it's open to bring in other ones. But the – what we do have is a clear articulation in paragraph, in subsection 43(4) that when assessing the prejudicial effect, the defendant must consider, among other matters, whether the evidence is likely to unfairly predispose the fact finder against the defendant and whether the fact finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions. In my submission that is something more than simply saying, is it more probative than prejudicial, because the Court is required to give consideration to evidence that would do it in that way. And so in that extent it seemed as a raising of the bar to what the previous cases said. And certainly that disproportionate weight one, well that again gives it a particular trial context.

McGRATH J:

Well it tends to give disproportionately.

MR KING:

Will tend to, yes indeed. Indeed. But the argument is that a jury's approach to the evidence will really depend on what's around it. If there's nothing else, they're likely to give it a lot of weight, if there's an awful lot of other stuff pointing in the same direction, they're less likely to give it disproportionate weight. But that balance is a significant consideration, which is new in my submission in the legislation, it was not previously articulated in the cases. So I, the suggestion that this is seen as a brave new world and is really a lowering of the threshold and that – if one takes it to that extreme, if it's propensity, well if someone's committed two burglaries in the past they're obviously not averse to breaking and entering and –

YOUNG J:

I think a person who has committed a burglary is 27 times more likely than anyone else to commit a second burglary –

MR KING:

That was *R v Senior*?

YOUNG J:

I mean – whether that person committed a burglary in the past may be quite material depending on the other evidence and the explanation.

MR KING:

Yes but what's recognised is the danger. There is a superficial relevancy and a superficial – well it may be more than superficial, it may be, it might be completely logical, if someone's never done a burglary in the past, they're less likely to suddenly change their mind at age 48 and go off and do one. Whereas if someone's got many previous convictions, and then that's just basic common sense and logic but the law has always prevented that material going before a jury unless it has some added and important probative value and the mere fact of previous convictions is not enough. That was the law, that was what was articulated in that *Boardman* decision, in the cases *DPP v P* [1991] 2 AC 447 (HL) and so on that followed, that perhaps watered down striking similarity and placed greater emphasis on probative/prejudicial, the legislation really pulled all of that together and contained it, but it does not, I submit, lower the threshold for it and certainly not to the extend of saying that the prejudice is always going to be outweighed because of the elementary inference that you've done it before, you're more likely to have done it this time.

McGRATH J:

Doesn't it give a wider discretion to admit the evidence and even pointing out certain factors that may be relevant to that which the Judge may wish to consider than did the common law?

MR KING:

Well no in my submission it doesn't, and the common law was gloriously wide, it simply said more probative than prejudicial and within that there was talk about the factors that would make something more probative, A to F really are just highlighting those particular –

McGRATH J:

They're really talking about the common law of similar fact evidence.

MR KING:

Yes indeed of *DPP v P* which did away with the similar fact label and just talked about more probative than prejudicial. *Boardman* was the height of the striking similarity jurisprudence and that was followed for a long time until it became too modus operandi focused and it was obviously much more focused on the issue of identification of the offender whereas it was recognised that evidence of a person's past conduct is relevant to other features, well including motive, propensity and so on. So there was an extension in that regard. *DPP v P* really simply articulated in gloriously vague terms, similar to what is set out as I've said in paragraph 43(1) that the evidence can be admitted if its probative value in relation to an issue in dispute, is higher than its prejudice. What the legislation has done is in effect to identify circumstances in which that would be so and because it's identified those circumstances, the court needs to go through to make the assessment and then put on the safeguards, even if all of that or some of that is met and one makes the decision, it's not – they're not and/or or, they're disjunctive. But then we still have two safeguards left. Firstly we have 43(4) which says that when assessing prejudicial effect, to specifically turn, you must turn your mind to those two considerations which are not previously, I submit, articulated in the common law, those are factors which are properly and cleverly articulated. But even then, even then, one still goes back to the basic principles of section 7, section 8 of the Evidence Act, so there it's built in a number of safeguards along the way.

McGRATH J:

What do you make of the other mandatory provision in subsection 2, that one must take into account the nature of the dispute in issue? Sorry the nature of the issue in dispute?

MR KING:

Yes well that's, in my submission that's simply a factor which focuses the court's mind on the true probative value of the evidence and by linking that to what the issue in dispute is, it just focuses the court's mind to that, so what is relevant in one case and in an identity, wasn't me –

McGRATH J:

But if you could perhaps give us an example of how it, how the nature of the issue in dispute might vary?

MR KING:

Yes, well, well if the issue is identity, as opposed to accident in a sexual case, so it's saying "It wasn't me, I didn't drag that child off the street and do these horrendous things to it", as opposed to "It was accidental touching". Then those can be the same case, same allegation but with the difference of issue in dispute – I accept it was me that did this but I, it was accidental. And so the fact that the person has committed previous indecencies of the same sort of weight will be relevant to rebutting, effectively that suggestion.

McGRATH J:

It's not a provision that has particular relevance here though I take it on your argument? You haven't highlighted it.

MR KING:

No, it – well in the sense that it's – the reason I haven't highlighted it per se, is because it all comes down, everything comes down in this particular case to an assessment of what was the true probative value of the evidence, assessing that you need to identify what the issues in dispute were, then one can –

YOUNG J:

There are two tiers of issue, one is was CV telling the truth –

MR KING:

Yes.

YOUNG J:

– and secondly assume she is telling the truth, or one gets to the point where, where one is satisfied she is telling the truth, did the appellant murder Mr Pike when they went off down the Desert Road –

MR KING:

Yes can we draw the inference?

YOUNG J:

Those are the two tiers of issues.

MR KING:

Mmm, it's a factor for the inference about whether A, Mr Pike was murdered and two, whether he was murdered by Mr Hudson.

ELIAS CJ:

But there's other – I'm just because I am worried about floodgates type applications here, if it is intensely contextual whether it's probative to an issue in dispute, the issue in dispute in proceeding is really the identity of the killer, there's other circumstantial evidence as to death. There's the evidence of Ms CV as to association and opportunity. In that context, there's the fact that he's not seen after the incident –

MR KING:

Yes.

ELIAS CJ:

– in the Desert Road, in that context, only in that context the fact that this is a man who is capable of extreme violence is extremely probative.

MR KING:

Well I say lowly probative but that process of reasoning is obviously what was –

ELIAS CJ:

Yes.

MR KING:

– urged upon the jury.

ELIAS CJ:

But what troubles me is that that sort of reasoning hasn't taken place, why in the context of the particular case it is probative, but in that context it is highly probative is it not?

MR KING:

Well again I come back to the submission, the suggestion that only people with extremely violent pasts are capable of murder –

ELIAS CJ:

But there would have to be the additional evidence around it which, of opportunity and the disappearance and so on. It isn't a case that whenever you had identity in issue and somebody with a string of convictions for violence, that that evidence could be treated as probative of the issue of identity.

MR KING:

Yes, no I agree.

YOUNG J:

Can I just – who – leaving aside CV, who was the last, the next last person to see Mr Pike alive, it would have been people in Tauranga?

MR KING:

Tauranga, the Tauranga crowd, yes.

YOUNG J:

And so, was there evidence from people other than CV that they went together, that they left together?

MR KING:

That they went to Auckland?

YOUNG J:

Yes because her evidence was that she and Mr Pike and the appellant went to Auckland.

MR KING:

Yes.

YOUNG J:

And there was evidence from the Tauranga people about departures –

MR KING:

That they're leaving.

YOUNG J:

– if we could, it's probably the case isn't it that if we take out CV, the last person who would have been seen with Mr Pike probably was the appellant wasn't it?

MR KING:

Yes but days before the alleged homicide.

YOUNG J:

Well days before the –

MR KING:

My friend will check up on that.

YOUNG J:

– days before the 18th of March, it would have been the 16th of March they went up to Auckland wasn't it?

MR KING:

Yes.

YOUNG J:

I think that was the Saturday wasn't it?

MR KING:

I think so. But I mean again if the Judge accepted rightly and directed the jury accordingly that if they didn't accept Ms CV's evidence they just could not convict so –

YOUNG J:

No.

MR KING:

– I mean, but the danger that I submit is that in deciding whether or not to accept Ms CV's evidence the jury could and likely would have resorted to the propensity

evidence and the cellmate confessions evidence and that's where the rub of the case really bites. But in my submission, the point I'd like to make about the Evidence Act is I submit it does not intend to lower the threshold for the admissibility of propensity evidence. That what it does do is provide focused inquiry into the types of factors which need to be taken into account and then provides safeguards in the sense that even if those factors do tend to establish a propensity, the Court in a very focused way must take into account those particular dangers; that it may be given disproportionate weight and that it could unfairly predispose the fact finder against the defendant. And then against all of that, of course, one has the overriding principle that even so it may be excluded if it's deemed to be more prejudicial than probative. Now whether the test under section 43 for admissibility is in reality any different to that under section 7 and 8 of the Evidence Act because they do seem to cover the same type of ground, but it does give the two-pronged attack and at least under section 43(4) the inquiry is very focused as to the types of prejudice which could be invoked. But the ss 43(3)(a)–(f) criteria do have at their heart I submit, those types of criteria which show that just the mere fact of previous convictions is not enough, the mere fact of previous violence is not enough, the mere fact of previous sexual proclivities is not sufficient, they identify those and including (c) of course, the extent of the similarity between the acts, omissions and so on.

So those factors are all there and they, it's the application of those principles which can be seen to give evidence a true probative value as opposed to that superficial one. And even if evidence does have a probative value, one needs to be careful in balancing that against its prejudicial tendency. And in this case, clearly there is a, what I've deemed, a superficial probativeness or relevancy, the fact that someone has committed a burglary in the past makes it 27 times more likely they have committed this one. But that is not sufficient to displace the inherent prejudice of a jury or a trier of fact becoming aware of those matters, and that those factors, (a) to (f) demonstrate situations in which the probative value comes in to play as being properly and legitimately outweighing of the inherent prejudice.

Here, the prejudice is obvious enough. It was recognised by His Honour, who said it's likely to weigh on the jury, that it's evidence of extreme violence with the use of weapons, and, ultimately, it's my submission that it just does not assist a trier of fact in a legitimate way in deciding whether or not, one - the evidence of Ms CV is to be believed and two - whether or not it somehow assists that he's the type of person who is likely to murder. And that process, and I've set out the paragraphs from *R v*

Stewart, if there's a problem with *Stewart* it's that it effectively almost invokes a statutory-like direction to a jury, where a jury is required to go through effectively the admissibility considerations that have already been determined by a court. But when it identifies in those paragraphs that are set out, the principles and the approach to be taken, including of course the reconciliation of the Evidence Act with the guarantees of a fair trial contained in section 25(a) of the Bill of Rights Act 1990 and so on, s 25(c), the right to be presumed innocent until proven guilty, and to natural justice, it identifies all of those factors as coming into play, in my submission that process is scrupulous. The question is how much of it do you have to relay to a jury? But that reconciles the approach of the Bill of Rights Act and the Evidence Act, in my submission, and I can do no better than to adopt that reason.

I don't know if I can really assist the Court any further in the argument of propensity evidence. Essentially it's quite a straightforward argument. It's saying that the way in which it was allowed in was undermined in the course of the trial, that any residual basis for it being admitted was, firstly, not the subject of any directions and, secondly, was not open in any event, because it is just too basic to say, "Well, he's acted violently in the past, he's therefore a person capable of extreme violence or violence and retribution," or whatever, however one terms it, it just does not meet that threshold, and yet it is highly prejudicial.

ANDERSON J:

What do you say to the Crown's argument that the trial Judge drew the lines too narrowly, that it wasn't simply violence in connection with jealousy but violence in connection with people who'd crossed him?

MR KING:

Yes, and, in my submission, that's, the point I make is that that is not enough, the fact that someone is violent to people that cross them has a superficial attractiveness to it but is not anywhere near strong enough to displace the prejudice inherent in a jury hearing that information.

ANDERSON J:

Well, it depends on the particular case. I mean, it's not very helpful in this area to generalise, you have to look at facts at say, "What is the…

MR KING:

Yes, but here we don't have any facts is my point. We don't have a body, we don't have a scene. We have Ms CV saying that he dropped him off and 10 minutes later he came back on his own, and no one's seen him since. So, in this context, the propensity evidence couldn't be more central, because it's got to fill the gaps that the evidence in other respects just does not have. So, it becomes, if one looks at the facts of this case, it become extremely likely to be given disproportionate weight, I –

ELIAS CJ:

Or proportionate weight, Mr King.

MR KING:

That's the point I made earlier about if there were three independent eyewitnesses who claimed to have seen it, then this propensity evidence would have very slight weight because it wouldn't add a lot to that. But in a case where you've just got this gaping gap in the narrative and the evidence just does not exist to show bodies, scenes and so on, then there is a danger that the fact that he's acted violently in the past is likely to be just latched on by a jury and to go beyond inference into that speculation row.

YOUNG J:

Can I ask you this: did Ms CV know the details of the October and November incidents?

MR KING:

I don't know, sir. She knew he was on the run. She says that she knew he carried firearms and was violent and so on – that he was disparaging to Mr Pike and all of those details. Whether she knew of the actual details I'm not sure. My friend will check up on whether there's any reference to that in the evidence.

ELIAS CJ:

Do you want to deal with the directions to the jury?

MR KING:

Very briefly because really all I can say in regard to that is firstly, that there was no direction about how this propensity evidence would assist the jury to assess the cellmate confession - that was just left alone. It was treated very independently, despite the fact the Judge and the Court of Appeal both said this evidence was

relevant to assessing the cellmate confession evidence and supporting it in some way. There were no directions on that. The directions that there were –

ELIAS CJ:

What was it? Do you have a submission on that as to whether propensity evidence was admissible to that end - to support the evidence given by the other prisoners? It's just that it doesn't fit, I know it is only an example, it doesn't fit within 43(3)(d) and (e).

MR KING:

No. Yes, no I -

ELIAS CJ:

And I would have thought you were into then, if you are talking about whether they are to be believed, you are into the veracity provisions of the legislation.

MR KING:

Yes indeed. Yes it's, I suppose I rather stop at the point of saying well the jury were not given any directions on how they could have approached it. How they could have is very much, I submit, a secondary point because, in the absence of guidance and how they were to approach, the fact that they could have approached it in some particular way, rather is secondary I submit.

ELIAS CJ:

Well except that if it is a contextual assessment that the Judge has to make and if he says it is only relevant if you accept Ms CV's evidence and then it may help you in determining whether it wasn't coincidental that he did not come back.

MR KING:

Yes.

ELIAS CJ:

That is one thing but here seemingly both the Judge and the Court of Appeal thought it was relevant to help them assess whether the prisoners were to be believed in their evidence and there's no sort of veracity analysis undertaken.

MR KING:

No there's not and there is no direction, as I say, in relation to that.

ANDERSON J:

It's not a veracity situation though because veracity is defined in section 37(5) as the disposition of a person to refrain from lying. So it's a sort of pattern of truthfulness but that is not what we are concerned with here, it is a question of are these prisoners to be believed. I mean given their records they are predisposed to lying I suppose but not refraining from lying. So it is not a veracity analysis.

YOUNG J:

It is whether their evidence of the admissions they say were made to them engage with the facts of the case as the jury think they probably were when they are assessing it holistically.

MR KING:

I agree. The Crown, as one of their arguments, say that effectively the accused had the benefit of limitations being placed on the use that could be made of this argument, that they argue that it was available to be used in other ways, including of course the violence to people who crossed him as opposed to the jealous rage scenario but that the Judge had limited the jury's focus on it. My response to that is that if the evidence was available to be used legitimately in another way then it required directions to the jury as to the limitations and the safeguards that are in place in that regard. It is not enough to say well they wouldn't have fallen into error, they are likely to have just approached it in this way in any event and it is allied to that that one really does have to approach the case, I submit, on the directions that were given. If that is seen to be limiting the probative value of the evidence then it certainly does not limit the prejudicial effect of the evidence and that is a relevant consideration in the balance. His Honour directed them it was only relevant in this very limited way but it is still inherently prejudicial.

ELIAS CJ:

Can you just tell me the page reference, I didn't mark it, of the direction?

MR KING:

The directions – I've set them out –

ELIAS CJ:

Yes I know you have set it out, I just want to check it against –

MR KING:

Yes 29, it's volume 1, tab 4, page 127.

ELIAS CJ:

Thank you that's fine.

McGRATH J:

The Crown's wider position is the same as the Court of Appeal in this.

MR KING:

Yes they retracted, they –

McGRATH J:

There are four elements not one, I think it was something like that?

MR KING:

Yes. Yes but in my submission, you will notice my directions to the jury it's to say well it could have been used in this other way is not an answer when the jury weren't directed about what limitation safeguards or how to do it and the danger is that they could have just embarked upon a similar type of path themselves unguided. Now I have made some criticisms of the directions that were given. In the cold light of day they are probably pretty lightweight arguments really. I have highlighted the fact that in paragraph 12 of the summing His Honour talks about the mere fact that he used violence and so on and then down the bottom of that passage, "So just because Mr Hudson may have behaved badly, indeed behaved illegally, doesn't because of that make him a murderer".

ANDERSON J:

What should he have said?

MR KING:

What he should have said was, "You must, in assessing this case, you must not invoke character evidence", I don't know. I mean I –

ANDERSON J:

It's probably more comprehensible to the jury in the way it was put, the same idea.

MR KING:

Yes it's the – the only – and I accept it's not my high point in this case.

ANDERSON J:

I don't think it is.

MR KING:

It isn't but I am saying that the danger is that a jury hearing this, not his lawyers assessing it, we know what His Honour meant and His Honour was scrupulous in his approach, as he always is, but the danger of a jury hearing, "That the mere fact". So we can't say that just because he is violent he has committed this but –

ANDERSON J:

Juries have been told this for donkeys' years. I mean, "Just because the accused is a member of a gang, members of the jury, you can't take it that...", so on and so forth, just because this and this. It is a stock phrase.

MR KING:

Well the problem with "just because" or the "the mere fact" is that it says it is not standalone. You can't say he's a bad person therefore he is a murderer but it does not say you can't take this into account at all and it is that absolute –

YOUNG J:

But the evidence, there were reasons why his bad character was in evidence.

MR KING:

Yes.

YOUNG J:

They had to know that he was on the run. They really had to know that he was a drug dealer. So it did have some materiality.

MR KING:

Yes. Look, no you are right of course, I mean we could not have excluded all of that but when you have got evidence like that coming in, then it is incumbent upon the Court to ensure that what evidence shouldn't come in, doesn't, recognising that the context of the case is that there is already an array of prejudicial information before them. So putting it there for context is one thing. They wouldn't understand what a cellmate confession was without knowing he was in prison. Why they had to know he had escaped from prison and all those other sorts of things I suppose are all marginal but there wasn't any challenge to that and I am stuck with that, I accept that and I don't impugn defence counsel in this case. So it is there. It is apt to engender feelings of prejudice, illegitimate prejudice towards Mr Hudson but where it becomes untenable is when you supplement that with these acts of extreme violence with weapons involving obviously serious injuries that really goes no further than saying well he's a person who is capable of violence when he is crossed. Well they know he is a drug dealer who carries a gun, who escapes from prisons, it is probably not a million miles from that to say he is a person who is likely to react in a certain way when he is crossed. This evidence I submit just takes it to a completely different level of prejudice though, without adding very much in probative terms.

But I can't – reading those submissions I made to the Court of Appeal about what His Honour had said, I accept that it is certainly not the high point of the appellant's argument but do submit that it would have been useful for the Court to have very firmly told them that you cannot take his bad character into account at all and I would invite the Court to say that look, it might be useful to say, "Look you are to give this man the same type of consideration if it was anyone else sitting in the dock. He doesn't get somehow second class justice because he's done things badly in the past. He's entitled to the same consideration you would expect". I mean that type of submission can go a long way, I submit, to addressing the concerns.

Can I, with the Court's leave, then turn to the consideration of the cellmate confession evidence? In my submission this case was, certainly in my experience and in the research I haven't anything else, was unique in the sheer volume of this type of evidence. It was also largely unique in the characters that were giving it. E and F and A, perhaps especially funnily enough A because he is a person who was known by the prosecution to have provided assistance to the police in previous cases, including the Barlow homicides where police had actually raised issues that he had lied to them and that was notified to the defence before the trial. So initially

the decision had been made we are not going to call A but he was. All that the defence is told about him is this: "In my letter of 8 August 2009 I indicated that I would not call A at trial, I have changed my view and will now call him. I understand that A has given evidence for the Crown previously in a rape trial in Auckland on 13 November 1995 and again at the retrial on 22 April 1996. An opinion has been expressed by a police officer about that evidence, namely that A perjured himself. Opinion has also been expressed by a separate police officer that A provided false information to two police inquiries, firstly about an offender in Operation Wanderer, a homicide in Auckland Domain and secondly the Barlow homicides in Wellington. A has never been charged or prosecuted in respect of any of these matters, there is nothing to disclose in respect of these matters." Well that's the person that the Crown are calling and of course he is important.

ELIAS CJ:

But that information was supplied.

MR KING:

Without any details. I mean how do you cross-examine on the fact there is someone who's expressed an opinion that you perjured yourself in relation to that, where nothing else is forthcoming? But there is enough there in my submission to raise real concerns about it and he is one of the important witnesses because he is one of the three that attributes the jealousy motive to Mr Hudson.

YOUNG J:

Who were the two that came forward without being - prior to the canvassing?

MR KING:

I have got a table that actually addresses that. I just wonder, there are some bits that, with my friend's leave, I will take out because he rightly says he doesn't want, but I have got a table of the cellmate evidence which summarises it, Sir.

ELIAS CJ:

Do you want to hand that in after the adjournment?

MR KING:

I will because I just need to remove some pages if I may.

COURT ADJOURNS: 11.27 AM
COURT RESUMES: 11.50 AM

MR KING:

Your Honours, what we've prepared is a table which summarises the evidence of each of the six cellmate confession people that we're interested in. It does no more than contain what the Court of Appeal said about each of them as well as some additional references that were made. I should start by noting, of course, there was a seventh who had also given the same type of evidence but his evidence was simply to be the subject of the clearest possible direction by the Judge to the jury to ignore because it had been established that he simply could not have been in the place where he said, the mingling of the two prison blocks, so with that in mind not much more can really be said about him. He was proven to be, in my submission, unreliable and the jury were instructed completely to disregard that evidence. But that left six. The two that came forward, seemingly of their own account, were the witnesses B and C. They came forward in June of 2007 and when one considers what there was that they had said about the alleged confession we can see that both of them have in common that the body was disposed of at sea. B claimed that the motive was a drug debt. That the method of killing was bashing the deceased with a club then caving his head in. That the location of the death was on the outskirts of Tauranga and that the body was disposed of at sea off the Tauranga Wharf. C claimed that the motive was he's a possible nark and that the body had been disposed of at sea. He didn't really give much else in the way of evidence.

So the Court of Appeal dealt with B's evidence on paragraph 51 of their judgment and at the bottom, or the top of the following page you will see that there is the additional material there where the witness claims that he'd met Mr Hudson in C block of Paremoremo and then again May of 2005 at HM6, a high medium unit at Rimutaka, and that he saw Mr Hudson again in January 2006 at Mt Crawford.

C, again his evidence is summarised at paragraphs 52 and 53 of the Court of Appeal judgment, and there are the additional matters in the table at the bottom about other, what we've called, summary of bad character and so it's additional evidence beyond the mere fact of confession that was allowed to go and including, he says, the additional drug dealing. That Hudson had come into his cell with methamphetamine which they smoked together and that Hudson and another inmate were getting more and more drugs into the prison, some P and pot and so on. And then talking about drugs coming into the prison. So that's been highlighted because, in my submission,

it just demonstrates the further and what I would submit is unnecessary character evidence that was coming in by virtue of these witnesses. Those matters, I suppose on one level, can say well they had an association, they had something in common but there's a lot of that material there which in my submission really is just in the character assassination bracket. And I would say in fairness to the Crown, a lot of the matters in those tables was not, was just stuff that came in. It was not intended to be led, as I understand it.

But after those two men, B and C, both of whom had the body disposed of at sea, neither of them suggest a love or jealousy motive, and we have a bashing with a club and a head caved in, in respect of one of them, and nothing in respect of the other. The police prepared this package, and this is all detailed with appropriate footnotes at paragraph 60 of the appellant's written submissions. So what happened was that on the fifth anniversary of Mr Pike's disappearance police commenced a media campaign and began re-interviewing people they'd spoken to in 2002. They'd spoken to Ms CV, she'd apparently refused to give a statement previously. I'm not sure if she'd given an untrue statement previously but in any event at that time in 2007 information was forthcoming which formed the basis of what it was that she ultimately said to the jury. As a result of that, searches were undertaken of scenes but no body or scene was ever located.

In June of that year, so again we're talking about five years, five and a half years, almost, after the disappearance of Mr Pike, we have these two gentlemen coming forward claiming that the appellant had made these confessions to them in 2003 and 2004. And again I point out that the confessions that are alleged to have been made really bear no resemblance to what the Crown allegation was. It's not suggested that the killing occurred in the outskirts of Tauranga or that he was bashed to death with a club or that his body was disposed of at sea. But as a result of that information coming forward in September of 2007 police prepared a package which was distributed to over 300 persons whom the police had been able to identify as having been in proximity to Mr Hudson during his time in prison. It contained a questionnaire and copies of magazine articles about the deceased. As a result a further six former, or then current, prisoners came forward, each claiming that the appellant had discussed the murder of the deceased with them to differing degrees. And as I say one of those prisoners was proven, or his evidence was shown to be so unreliable because he just could not have been in contact with Mr Hudson in the way that he described because prisoners from C block and D block did not mingle. So

he's disregarded but it does demonstrate, in my submission, the whole inherent difficulties that can arise with this type of evidence.

But dealing with the four that we have. D, he came forward as a result of the package being given to him. He suggested drug debt and jealousy as a motive and said the deceased was shot with a revolver. That location of the injury was to the head. The location of the death was Rotorua or Tauranga.

We then have E, who claimed it was a drug debt. That he was stabbed three times and then there was talk of suffering an asthma attack and he gave the environs as the Desert Road. Desert Road and the plantation and again that information is set out in the table which we've now provided. So E says in response to the question, "What happened between you?" "Basically it was more like gidday. He was yelling out that, hey, yeah, you know. Excuse my language but he says, 'Hey, fuck, I killed that Nick Pike.'" "Did he say that to you privately or?" "He wasn't directly saying it to me, he just said it as he was coming towards me while I was talking to a prison officer at the grille." Now a prison officer has never come forward and said that Mr Hudson was yelling out I killed Nick Pike and so on.

YOUNG J:
Have we got a copy anywhere of the package that went out to the prisoners?

MR KING:
No I don't. My friend will have I think. Yes, my friend has got one copy Sir, and I certainly do think it's appropriate for the Court to have it.

YOUNG J:
That wasn't put in evidence or was it?

MR KING:
No.

YOUNG J:
I think it, no I think it was actually.

MR KING:

Oh it was, it was Sir, sorry, yes. So we've got a copy and I'm happy for the Court to have that.

And then of course we have equally, in my submission, a notorious criminal, F, who again came forward as a result of the package, giving quite an elaborate account of what he says was said to him over a number of occasions.

YOUNG J:
Quite a contextual account.

MR KING:
Sorry?

YOUNG J:
It was quite a contextual account because he referred to the dossier that the appellant had collected himself?

MR KING:
Yes indeed.

YOUNG J:
And he wasn't challenged on that aspect of his evidence so I assume it was accepted that the appellant had collected a dossier about the disappearance of Mr Pike?

MR KING:
If he wasn't challenged on it that would have to be the assumption made Sir. I mean it was said – it was put to him that it was completely untrue, his account of the confessions and so on that were made.

YOUNG J:
Yes.

MR KING:
So we have, in addition to him we have of course the evidence of A who had also given the woman in his words "motive" and that the accused had "blown away" the deceased. A also introduced other material, and this in the first page of the table, on

page 737 of volume 3 of the casebook, “For the jury A, what’s Pare?” “Paremoremo maximum security prison”. He goes on to state at 756, “I’ve known him and seen him, I’ve known him to act violently and I’ve seen him act violently and I’ve seen a weapon in his hands several times, so I know what he’s like”.

ANDERSON J:

That was an answer to a question in cross-examination was it?

MR KING:

Yes. Yes I believe so. My friend will just confirm that.

ANDERSON J:

It’s a bit like the reference you have got here to D and I’m looking at your highlighted section, “Shared racist views with Hudson” but that’s not a reference to Hudson at all, it’s a reference to people other than Hudson, if you look at the transcript. First he asked him about Hudson and then he says, “Did you have views of about other people that you shared? Kind of yeah. What were they? It was quite racist and stuff”. So it is about everyone but Hudson apparently.

MR KING:

No but he had a common view with Mr Hudson of racism.

ANDERSON J:

“Did you have views about other people?”

MR KING:

Which you shared with Mr Hudson.

ANDERSON J:

That you shared. Yeah but that’s about other people it’s not about Hudson.

MR KING:

No it’s saying that Hudson has racist views about other people and that they had that in common.

ANDERSON J:

Well that's not how I – well perhaps I'm misreading it but it looks to me as though it's –

MR KING:

Well I may be as well so I'm just trying – but my understanding was he was saying what they had in common was their racist views of others.

ANDERSON J:

I'll just have to have a look at that but I don't think it does.

MR KING:

No it's not, I don't expect the case turns on it but it is another unpleasant aspect if the jury were to think –

ANDERSON J:

As for the references to the higher security, a jury would be inclined I think to think it was perfectly appropriate for someone who had done these bashings to be in high security, it's just taken for granted.

MR KING:

I'm not saying that this evidence was not, some of it at least, legitimately admissible and legitimately before the jury, what I'm saying is that it's further examples of information the jury would have that could lead them to have an unfair disposition towards Mr Hudson or a fair disposition.

ANDERSON J:

Is this separate from your argument about the inherent undesirability of cellmate evidence?

MR KING:

It's part and package of that but when you have these inmates that are just laying prejudicial material on with a trowel like, "I've seen him carrying weapons around, I've seen him act violently" and so on, I mean that is part of the context about the type of evidence that we are dealing with and it is always the risk one runs when people of this ilk are called by the Crown to give evidence against a person in a murder trial and what I am really advocating is that we need some firm guidelines put in place

about firstly; when it is appropriate, what are the parameters for the admissibility of the type of evidence, what safeguards should be put in place and secondly; when evidence of this type is adduced what appropriate guidance should the jury be given and it is really I suspect in that latter category that I, on the strongest or firmest ground, I don't expect this Court to be saying that cellmate confession evidence should not be called in cases because of course that's far too broad and is, probably one would say, the domain of the legislature to set but what I do advocate is that a firm set of principles should be applied and we shouldn't just have a situation where, in this case, seven inmates, including some of the country's most notorious criminals, are brought in and are able to just recite this evidence. I mean it really does turn the trial into something of a sideshow in my submission and the feature of this type of evidence is that it is often used, it seems, to supplement gaps.

We see it in the Scott Watson case. Again no bodies. We see it in the Tamihere case, again no bodies and we see it in this one and that is the danger that there is really no measure to be placed against this evidence to see if it is accurate. I have made the point that a submission was made to the jury in this case about the dangers that a person faces when giving evidence like this. That's paragraph 71 of my written submissions, "Crown counsel submitted to the jury that they keep in mind that the prisoners were narking, that was a dangerous thing to do and surely you would only nark the truth, given the risks involved".

Now that, in my submission, is a submission that is made and forcefully so to a jury who really could be expected to have very little experience of the criminal world for a start. If they have been to prison for a period of time they are likely to be challenged if they have more than the most modest criminal history themselves and they grow up in this movie *Shawshank Redemption* world where their experience of prisons is probably more from fiction than from reality and that would bite, I would submit, this concept there is honour amongst thieves, that they are unlikely to go against the grain, that they are putting themselves at huge personal risk by coming forward. It almost gives their evidence a ring of truth that they wouldn't do this, they are breaking the criminal code, putting themselves at risk, they are only doing it because it is the truth and that is part of the inherent danger, it is what I would submit is a counter-intuitive position to the reality. The reality is that they are a group of people, as identified in some of the cases and referred to, who have no respect in the justice process, are proven successful liars, convincing, it is part of their trade. They are, in the case of some of these people, in just the most desperate situations, facing very

lengthy sentences in prison where one could envisage that anything that they could do that could get them some benefit would be worth taking.

ELIAS CJ:

Well your submission is that a direction should have been given?

MR KING:

I am submitting that two-fold but the direction point is my strong point. His Honour did give the caution under section 122 of the Evidence Act, what I am submitting is that it is time for a *R v Turnbull* [1977] QB 224, [1976] 3 WLR 445 type direction to be adopted and to be routinely given, where this evidence is put forward but obviously I am also submitting that this type of evidence should not be called unless there are strong indicators of reliability and to that extent I can do no better than refer the Court to the material in the bundle from the Canadians. Under the appellant's bundle of authority under tab 5, there is the enquiry regarding I think it is Thomas Sophonow and in tab 6 are the federal prosecution guidelines.

ELIAS CJ:

Sorry whose bundle is it?

MR KING:

The appellant's bundle of authorities Ma'am. The enquiry is in parts and it is a useful resource on many aspects of it. I suppose on a general basis there is a good discussion on a number of different issues but where it comes to what they call jailhouse informants then it is really about two-thirds of the way through.

ELIAS CJ:

What page are you at?

MR KING:

The problem is it is dated at the bottom 11.18.02 but unfortunately I am just looking they are all dated –

ELIAS CJ:

I must be in the wrong place. I thought you said –

MR KING:

They are all dated that day I'm afraid.

ELIAS CJ:

I thought you said divider 6.

MR KING:

Five Ma'am.

ELIAS CJ:

Five, I'm sorry and where are we to go to?

MR KING:

Unfortunately the pages aren't numbered but we have got about two-thirds of the way through we come to the enquiry regarding Thomas Sophonow, jailhouse informants, their unreliability and the importance of complete Crown disclosure pertaining to them and that is the extract which is repeated.

ELIAS CJ:

And what aspect of the extract are you taking us to?

MR KING:

Well I would – all of it really but they go on, on the second part to give a summary of the, what have the studies of jailhouse informants revealed.

ELIAS CJ:

The US studies?

MR KING:

Yes.

ELIAS CJ:

Oh yes.

MR KING:

"The findings can be summarised in the following manner, jailhouse informants are polished and convincing liars. Two, all confessions of an accused will be given great

weight by jurors. Jurors will give the same weight to confessions made to jailhouse informants as they will to a confession made to a police officer" and so on. "Confessions made to a jailhouse informant have a cumulative effect and thus the evidence of three jailhouse informants will have a greater impact on a jury than the evidence of one. Jailhouse informants rush to ..." So it is all of that in my submission and then what we do is we go over to the recommendations that they make and the recommendations are, "(1) As a general rule jailhouse informants should be prohibited from testifying" and then it goes on –

ELIAS CJ:

What is the status of this document? What is it? It is just a recommendation?

MR KING:

That's right, it is an enquiry into this particular case which ultimately resulted in him being pardoned. Perhaps with –

McGRATH J:

Sorry Mr King I am just having a bit of difficulty, you will appreciate, with where to get to.

MR KING:

Sorry Sir.

McGRATH J:

But this is after the discussion of jailhouse informants.

MR KING:

Yes.

McGRATH J:

And we have then got to think disclosures and you have got a heading saying "Recommendations" have you, towards the end, is that right?

MR KING:

Yes indeed Sir. So after we have got, "Jailhouse informants, their unreliability and the importance of complete Crown disclosure".

McGRATH J:

Yes I have got that.

MR KING:

That is two pages, then we have got "US studies on jailhouse informants" is the page after that.

McGRATH J:

Yes I have found that.

MR KING:

And then we have got the page after that, "What have the studies of jailhouse informants revealed?" And reference to that and then two pages on we have got the recommendations.

McGRATH J:

Got that, got it now thank you.

MR KING:

The prosecution guidelines for the Federal Prosecution Service desk book talks about first of all immunity agreements, which is a slightly different context but then goes on to talk at page 8 and 22 at paragraph 35.7, the jailhouse or in custody informer and goes on to identify a number of, I don't know what one would call them, guidelines or principles or protocols.

ANDERSON J:

Who conducted this enquiry Mr King?

MR KING:

The Federal Prosecution Service desk book is just from the Department of Justice in Canada.

ANDERSON J:

We don't know what the status or qualifications are of the person writing this.

MR KING:

Well these are the recommendations that the – sorry the guidelines that the –

ELIAS CJ:

Sort of manual for prosecutors.

MR KING:

Yes it is the policy, it is a desk book but in any event I am not saying – what I am saying is that what they have set out there is sound and sensible and something similar should be adopted here. I am not relying on so much that these have their force of law themselves and obviously they are not binding on New Zealand whatever their status.

ANDERSON J:

But you say it would be a desirable template?

MR KING:

Yes Sir, exactly and the reason I put it in there in that way is because I simply could not improve upon what it is. In my submission that type of approach should be looked at with proper consideration but where, as in this case, we do have this evidence and I want to accept candidly that His Honour gave very firm directions about it, in respect of one he said disregard it completely and the others –

ELIAS CJ:

Well can you just refer us to the page or are they sufficiently set out in your submissions? This was the 122 direction?

MR KING:

Yes. The – I'll just find the -

BLANCHARD J:

Page 147.

MR KING:

Yes 147, paragraph 66 to 95. Then what I say about them is he went on to give the jury firm directions in the course of his summing up, apart from telling the jury to completely disregard this evidence, it is not suggested in this forum that the learned

trial Judge could have gone much further than he did in his directions to the jury on cellmate confessions on the basis of the present law. So that is an acceptance that His Honour went as far as he legitimately could have on the state of the present law but what I am submitting is that this Court should be approving a *Turnbull* type direction which sets it out. Firstly, and if I have got the *Turnbull* decision there, and in my submission the rationale that is there, and of course that is on identification evidence but *R v Turnbull* is under tab 3 and turning to page 228, "Each of these appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases, although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this Court, to reduce the number as far as possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial Judges sum up to juries in the way indicated in this judgment. First, whenever the case against an accused depends wholly and or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused on reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken, provided this is done in clear terms. In my submission exactly the same type of process is required when –

ELIAS CJ:

But mistake is not a feature here.

MR KING:

No, no I don't mean that, I mean highlight the dangers.

BLANCHARD J:

But didn't the Judge effectively do that?

ELIAS CJ:

Didn't he do that, yes?

MR KING:

Well in my submission he didn't do so in sufficiently clear and concise terms. What he could have said is that we know that miscarriages of justice have been occasioned when juries have relied on this type of evidence in the past, special caution is required when assessing it. We are dealing with a class of witnesses who may be very convincing liars and so on. So giving – spelling out the reasons why such caution is required.

ANDERSON J:

Well here a very experienced counsel, Mr Antunovic, made great play of the fact that each of these people were amongst the worst criminals in New Zealand, liars, thieves, murderers, kidnappers, rapists, probably had a field day with it.

MR KING:

Well, and against that of course we have the jury has obviously placed reliance on it.

ANDERSON J:

That is the risk the Crown always runs when they put up a discreditable person they are going to get kicked by the defence.

MR KING:

But one balances that with the submission to the other effect that these people are telling the truth because they are narking and you don't do that in a prison and you put yourself in huge danger when you do, so you would only nark the truth. I mean that is the flipside of that coin and in this case, in my submission, the jury can be taken to have accepted the latter.

ANDERSON J:

Well they may have found the case was strong enough anyway, we don't know.

MR KING:

Well that is true.

ELIAS CJ:

Well are you, in that last submission, saying that because of the way the Crown prosecutor addressed this matter the Judge should have actually said something to put that in context or put up the –

MR KING:

I am saying the Judge should have done it anyway.

ELIAS CJ:

Yes.

MR KING:

But in a case where you have got – I mean I was really highlighting that in response. I mean clearly the defence said that these are the most unscrupulous people the world has ever seen and so on and I know Mr Antunovic and I have done many trials with him and many other cases with him and I make absolutely no criticism. So my strong point is saying that regardless of the context in that way we are dealing with a category of evidence which is just, in my submission, I can't think, with respect, of a more dangerous form of evidence for a jury to rely on. It is just got to be dealt with that utmost scrutiny, that the natural tendency of a jury will be to adopt that type of process which learned Crown counsel urged upon them that this is –

YOUNG J:

Is it not a legitimate argument, it may not be a compelling or controlling argument, but is it not a legitimate argument for the Crown to say well narks aren't popular in criminal circles and particularly prisons.

MR KING:

It is perfectly legitimate for the Crown and I make no criticism of learned Crown counsel for saying that, I am certainly not suggesting it but what I am saying is of course when you are dealing with people like this who go into it with the prospects of rewards, with the prospects of name suppression, of witness protection programmes, prospect of benefits, that that is the reality and that's what these cases, these Canadian studies or the American studies referred to in the Thomas Sophonow one, all identify and the *Bendetto v Labrador v R* [2003] UKPC 27 statement which is set out there that you are dealing with just a whole class of people of whom the jury could not be expected to have any type of previous experience and it is that point I am really trying to make Sir, is that a jury will naturally think this is more worthy of belief because this person is breaking the criminal code and they are doing it at great risk to themselves and they would only do it if it was the truth but in fact the reality is

these are just people that would do whatever they can to try and improve their miserable lot in life and that is what I submit needs to made absolutely clear to a jury in a type of model direction.

The *Turnbull* direction is good because it identifies the risk, it identifies the reason for the caution being given and it highlights the clear scrutiny that needs to be done. I would like it to go further and say don't rely on this in the absence of what you consider to be proper corroboration and one can ally that with the s 122 type direction. The problem that we have under the legislation, I submit, is that section 122 is drafted in very broad terms and is not designed solely to deal with this type of scenario but it is to deal with any scenario where there is unreliable or what may be unreliable evidence and where it comes to this particular category of evidence, in my submission, some firm guidance is required from the Courts that this type of evidence should just not be adduced unless there are a number of thresholds met and secondly, that where it is done then a very specific and tailored direction identifying the dangers of this type of evidence to effectively redress those types of natural tendencies to believe - well he is breaking the criminal code and coming forward, it must be true - and that is why I have set out what I submit that the dicta from the *Bendetto* case which – now and I accept that in the context in which that is given it was not suggested by the Law Lords that that was a type model direction but in my submission it could just as easily be adopted as one and it talks about - I have referred to this in paragraph 65, of my written submissions on page 19 and the case itself is contained in the Crown bundle of documents but I am referring to paragraph 32 of that judgment:

"In the case of a cell confession it is that the evidence of a prison informer is inherently unreliable in view of the personal advantage which such a witness thinks they may obtain by providing information to the authorities. Witnesses who fall into this category tend to have no interest whatsoever in the proper course of justice, they are men who as Simon Brown, Lord Justice put in *R v Bradley* tend not to have shrunk from trickery and a good deal worse". So that type of thing, tailoring that into a direction which just absolutely highlights to the jury the particular dangers that these people can come along, they can be seasoned and convincing but completely untruthful.

In paragraph 78 of my written submissions I have identified a number of bullet points really and that is all they are, suggesting why this evidence can assume a great deal

of prominence with the jury. It is always the case that this evidence is presented with what could be seen by the jury as an usual level of security. Often the cellmate confessor will come in through a different door, of course, there is often greater security and presence of plain clothes police officers.

ELIAS CJ:

We have read all this of course.

MR KING:

Yes. So what I am saying in my submission Ma'am is that New Zealand is going down a path which it should not be going down. We seem to supplant cases where there is an absence of other evidence with this type of evidence. Cellmate confessions, which by its very nature is the most inherently unreliable form of evidence that there is. It is counter-intuitive to a jury despite the inroads you can make about what horrible people they are. The more inroads you make about what a horrible, deceptive, lying, devious person it is, the more on one level it can seem that they are telling the truth here because they are narking because it is the right thing to do and "yes I know I have been horrible in my whole life but I just could not sit back and not do this" and then in the context of most of these people, and four of them, have come forward only after receiving packages which the Court will have access to, including magazine articles and so on, it becomes very troublesome in my submission and so what has been urged upon the Court is to adopt the type of approaches in the type of sufficiently strong language which is referred to in the Thomas Sophonow case and the American studies and in the guidelines of Canada, as being appropriate for this country to follow down that path. Now unless the Court has any questions I don't know if I can advance matters over the written material.

ELIAS CJ:

No, thank you Mr King.

MR DOWNS:

Yes may it please the Court may I commence with two very modest matters of fact but to respond to questions from the Bench in the course of my learned friend's presentation. The first, in response to a question from Justice Young as to the sequence preceding the Desert Road trip. We find that in volume 2 of the case on appeal, commencing at page 242 and the second question asked was, was there any evidence before the jury that Ms CV knew of the episodes of violence by the

appellant to the two other men. There was no evidence that she did and that matter wasn't touched upon in the course of evidence and there is nothing about it so far as I can discern in the record. As to the Crown response to the case on behalf of the appellant, it is necessarily that the appellant has not been the casualty of a miscarriage of justice through the wrongful admission of propensity evidence or that there has been any wrong in the way that the learned Judge summed up in relation to the cellmate confessional material and I frame that response that way because the appellant's case now seems to be refined and the propositions appear, with respect, to be whether the propensity evidence was properly adduced and then whether the cellmate confessional material was the subject of a proper direction in terms of section 122, with the allied point about whether further guidance is required in these cases.

The overarching response, with respect, on behalf of the Crown, is that there was a unity of circumstance that pervaded the evidence in this case and in particular it disclosed motives on the part of the appellant to kill Mr Pike, the deceased, and that he did in fact kill the deceased and I used the phrase "unity of circumstance" because it will be part of the Crown's argument that that was disclosed through a combination of the propensity evidence, surrounding circumstantial evidence and the cellmate confessional material. As to the propensity material, if that is a convenient place to start, I wish to hopefully allay any concerns on the part of the Court that the Crown is urging for the opening of floodgates in relation to the admission of this material and if that was a concern it is one that, in my respectful submission, need not be harboured because it is not any part of the argument on behalf of the Crown that sections 40 and 43 permit almost as of whim the admission of propensity material. Rather it is our proposition that propensity evidence under the Evidence Act 2006, in some respects represents a codification of the common law and I shall, I promise, explain what I mean by that but also that in another respect there is a revolution but that arises in relation to the admission of propensity evidence as propensity evidence and perhaps if I can deal with the latter point first.

Even after the *DPP v P* [1991] 2 AC 447 (HL) which was decided in or about 1991, a case well known to this Court from the House of Lords, the use of what was then similar fact evidence as propensity was not permissible and indeed Your Honours will have been engaged in cases in which such reasoning was held to have been wrongfully permitted by virtue of trial Judges' directions along those lines and so we make what is perhaps a humble point that under the Evidence Act, by virtue of the

definition of propensity evidence and the way in which it's framed, evidence is admissible or may be admissible for that purpose and that, we respectfully suggest, is a revolution. Now, it might always have been the case that that was in fact what the common law had hoped to achieve, but it certainly was forbidden reasoning and that emanates very clearly from *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC) onward. That said, we must acknowledge, because it's tolerably clear from the Law Commission's reports and also the text of the Evidence Act, that a Judge is under a solemn duty in assessing the admission of propensity material to determine, firstly, what the fact in issue is, and then having regard to it to assess the probative value of the proposed propensity evidence in relation to that issue, weighing the then mandatory considerations as to potential prejudice in terms of the trial. And we would respectfully endorse in relation to this process the observations made at various times from the bench that such a process is factually specific and contextual, it must be, I suggest. Or, put another way, it's likely to be an amalgam of fact and evaluative judgement, according to the matter in issue or the matters in issue in the trial.

So, to return to a point that was a subject of discussion, no responsible Crown counsel could suggest that simply because a person had a conviction for like offending, that that by itself would enter a criminal trial when other like offending had been committed. It is rather that, having regard to the fact or matter in issue, which is the critical point, I suggest, of the propensity provisions, such material might, *might*, I stress, have probative value, depending upon what the issue was and what the circumstances revealed.

Now, to turn from the theoretical to the practical, hopefully, this case is perhaps a useful illustration of how that may work. The issue for the jury as a legal concept was whether the identification of the appellant had been established by the Crown beyond reasonable doubt. But, in practical terms, the question for the jury was perhaps twofold. Was Ms CV to be believed when she described the appellant leaving with the deceased in circumstances from which a jury could reasonably infer that she was effectively, *effectively*, I stress, a witness to murder, and, secondly, assuming that she was correct that in fact had happened and that it wasn't pure fiction, as the appellant alleged in cross-examination, what actually happened at that critical juncture on the Desert Road. Now, it is here, I respectfully suggest, that the propensity evidence, while giving rise, we must acknowledge, to the potential for prejudice, had particular value, and it's the cumulative effect of a variety of points that

I suggest gave it that value. But, broadly, it revealed, I respectfully suggest, a motive or a possible motive that could be seen as underlying the earlier episodes of violence. His Honour the trial Judge and, indeed, the prosecution at first instance, characterised that as jealousy arising through what might loosely be described as "triangular relationships". But the other way of viewing it, I respectfully suggest, is rather that it revealed that that appellant had a motive to react in a certain way when her perceived that people had crossed him with jealous –

ELIAS CJ:

But is it really motive or is it just behaviour?

YOUNG J:

"Propensity", you mean?

ELIAS CJ:

Yes, propensity. Is it just propensity?

MR DOWNS:

Well, the other limb of the Crown's case, that hopefully answers Your Honour's question, is that the way in which this happened might have assumed some significance, because if we look at the three incidents overall, I suggest that there is a common modus operandi, namely, that they all involved premeditation, that appears to be accepted, extreme violence, they all involve the use of some form of weapon, they were all in the "presence", I put it in inverted commas, of a witness, his then girlfriend at the time, Ms AS on the first two occasions, Ms CV, soon to be his girlfriend at least, on the critical occasion. And all three incidents occurred in a little over four months, I think I'm right to say. The first episode 25 November 2001, the second episode 9 December 2001 and then the alleged killing on 18 March 2002, so, a little over four months. And I respectfully suggest that a reasonable fact finder could infer that, as a consequence of all of those threads, there was an apparent coincidence in terms of both modus and motive, thereby tending to answer the questions posed earlier, as to whether Ms CV was accurate, and also, assuming that she was accurate, whether the appellant was in fact the murderer, as was alleged.

ANDERSON J:

Motive is really rather secondary, it's, the analytical value of it really is to say, "He had a propensity to violence when he was crossed –

MR DOWNS:

In a particular way, yes.

ANDERSON J:

– and, forgetting about the chronological order in which the evidence was presented at trial and looking at it overall, there's evidence from a number of sources, including Ms CV and the people in the cells, that he had a grudge against Mr Pike for one or several reasons.

MR DOWNS:

Indeed.

ANDERSON J:

And then you have evidence from Ms CV that they're driving down the Desert Road, and this unbelievable explanation is given that he's left someone without any equipment or anything, 3000 feet up to tend a hitherto unmentioned cannabis plantation, and Mr Pike is never heard of again.

MR DOWNS:

Indeed.

ANDERSON J:

And, looking at the big picture, you say, "Well, it's obvious what happened," and the motive is, it's really just part of the factual context.

MR DOWNS:

With respect, I agree. The reason I touched on motive was because –

ELIAS CJ:

It was the reason given by the Judge.

MR DOWNS:

And, in fairness to His Honour, it was the stance adopted by the prosecution at first instance.

ELIAS CJ:

Isn't it the case that it's because of Ms CV's evidence that this propensity evidence was relevant, because she provides the opportunity and the, you know, the circumstance of how they parted and so on, that the fact that he had this capacity for violence when crossed is so relevant.

MR DOWNS:

Yes, it may well be so. What I would observe is that the admission of this type of this evidence which, I have to accept can be dangerous, as Courts know, will very much depend upon the matter in issue for the jury. So if, for example, we were to imagine a different case, in which the appellant acknowledged the killing but said, "In actual fact it happened in this way," or, for example, under the old law, that, "I was provoked," then there might be much greater doubt attaching to whether the Court should receive such material, because it would have been more difficult to say the issue to which it went and then the probative value that it had in relation to that issue. And so that's why I do respectfully endorse the observations made from the Court thus far, that this is an intensely factually specific area and one that necessarily turns on context and, without doubt, there is a heavy duty on the part of a Judge determining a propensity application, ordinarily on a pre-trial basis, to ensure that His or Her Honour has an understanding as to what the issue is to which the evidence is referable and an articulation, really, on the part of the prosecutor, the Crown, as to how the evidence might logically be used, that I respect as the starting point for determination. It's only when one engages in those processes that one can assess whether the evidence actually has worth, then turning to potential prejudice.

Now, in this particular case, the prejudicial aspect in one sense wasn't that significant. And I use that phrase guardedly, but what I mean by it is that the Crown case was that, having regard to the characteristics of the appellant he was much more likely than not to be the murderer by virtue of the nature of what happened or was said to have happened at the Desert Road. So it is not a situation in which there is a generalised allegation. My learned friend said it was the Crown allegation that he was simply violent on another occasion. With respect that is bald and simplistic, that wasn't the allegation at all. It was that he conducted himself in a particular way

and in a way that was replicated or could be seen as being replicated in those earlier and proximate occasions.

As to the balance of argument in this area, I am content if the Court is, with respect, to rely on the written material. I am sorry I have burdened the Court with a number of footnotes in that but they may be of some assistance or not, as the case may be. But in terms of the cellmate confessional material, which is the second head of challenge, it now appears to be the case that it is acknowledged that the evidence was admissible but that the trial Judge was under a duty, notwithstanding the terms of section 122 which specifically say that no particular form of words is necessary to have undergone a direction more analogous to *R v Turnbull* [1977] QB 224, [1976] 3 WLR 445.

Now if I might introduce the Crown's response with some preliminary observations and the first is that there was never a challenge to the cellmate confessional evidence in the High Court or indeed in the Court below. The second is that His Honour, the trial Judge, very properly, with respect, having regard to the length of the trial, gave notice of the proposed framework of the summing up and invited counsel as to whether they wished any particular matter to be covered in any particular way and that is apparent if we look at volume 1 of the case on appeal, behind tab 3, at page 113 and the reference again volume 1, page 113. This is a Bench note that explains the processes of the trial Court at the conclusion of the evidence and if the Court would be so kind to turn to page 115 at paragraph 4. His Honour records the process to ensure the appellant was content, at least in general terms, as to what was to occur and I would make reference to the fact that Mr Antunovic raised no issues, as is apparent at the end of paragraph 4. There was a similar opportunity afforded to counsel at the conclusion of the summing up and His Honour was not invited to engage in any redirection in relation to this particular topic. Now we accept of course that that doesn't mean to say that the directions are immune from challenge but it does mean that the first challenge came in the Court of Appeal and it is relitigated obviously today.

As to section 122, I would seek to emphasise that the provision expressly provides that no particular form of words is required on the part of a Judge and that was obviously a deliberate choice on the part of the legislature.

McGRATH J:

Not assisted by the Law Commission, is that right?

MR DOWNS:

I would need to check, if Your Honour pleases.

McGRATH J:

Now I am just trying to work out, there was something about, was it on paragraph, it may have been paragraph D that came in without the –

MR DOWNS:

Yes Your Honour is quite correct. Paragraph D was not in the Law Commission's draft evidence code and it was entered into the Bill as a consequence of the Select Committee's concern about this form of evidence and the result as we see it is paragraph D. But I believe I am right to say that section 122, subsection 4 about no particular form of words being required was something which already existed in the Law Commission's draft code.

ELIAS CJ:

So do you say from that that it is not appropriate for appellant Courts to construct suggestions as to formula?

MR DOWNS:

I wouldn't be impertinent enough to make that submission.

ELIAS CJ:

Well it may be a perfectly pertinent submission to make.

MR DOWNS:

This Court, I respectfully suggest, will always have a role to provide guidance in terms of jury directions.

ANDERSON J:

Its form of words isn't the same as content.

MR DOWNS:

No.

ANDERSON J:

Matters to be covered with whatever form of words.

MR DOWNS:

But that said and I don't wish to have it both ways or be seen to have it both ways, clearly the legislature has intended that trial Judges are to have some measure of discretion as to their choice of language, having regard to the circumstances.

BLANCHARD J:

Yes but equally clearly if this Court considers that what was said was not adequate it is obliged to say how it thinks the Judge say, in the particular case, should have given the direction.

MR DOWNS:

Undoubtedly. I couldn't and don't quarrel with that proposition.

ELIAS CJ:

What may be suggested by this provision is that to require, for example, a formula that juries must be told that serious miscarriages of justice have occurred in the past is not necessary.

MR DOWNS:

And indeed that observation may be thought to be underscored by section 126 which is the particular direction that juries must be given when the case hinges upon identification evidence and if I may draw the Court's attention to section 126 subsection (2), although no particular form of words is required the Judge must, it is mandatory, alert the jury to particular points including the risk of a serious miscarriage of justice. Now I wonder whether section 126 is to be contrasted with section 122 as being more specific and more prescriptive and suggest that reflects the legislative concern or particular legislative concern in relation to identification evidence.

In terms of the directions themselves, I would respectfully invite the Court's attention to one of two other matters. The first is that the Judge gave directions around the

cellmate confessional evidence that touched upon it and which I suggest augmented those particular directions. For example, and if we were to return to volume 1 of the case on appeal, behind tab 4, this is the summing up. At paragraphs 8 and 9 the Judge outlined, and this is obviously towards the beginning of the summing up. I'm sorry this is page 126 Sir. Page 126, paragraph 8 and 9 the Judge gave a preliminary direction that credibility and reliability was an issue and indeed if we look in the middle of paragraph 9, His Honour said that they were at the core of the case, going on to observe that the Judge wanted to signal that right at the beginning and also observing that the jury, in all probability, knew that already.

Now the next relevant references are the cellmate confessional directions themselves and they are between paragraphs 66 and 74. I would respectfully suggest that the directions were comprehensive and accorded with points governed by section 122. These are just the core directions.

There were then particulars in relation to the gentleman about whom the Judge effectively invited the jury to disregard his evidence by virtue of a difficulty that he couldn't, it seems, have been in the same part of the prison as the appellant. But there was then a summary of respective cases beginning at paragraph 78. Again these directions were extensive and they extend to paragraph 88. If I may direct an observation in light of earlier discussion, at paragraph 85 we see a reference to the defence case and what Mr Antunovic's stance was at the trial and I would simply observe that this direction at paragraph 85 obviously follows a trial in which the prisoners have been extensively cross-examined by the appellant's then counsel, as to all the sorts of matters that one would hope they would be asked about in a case of this nature.

There was then, on the next page at paragraph 89, a direction about the reward notice and how that could be relevant in the need for caution as to an assessment of credibility. A reference that tied back in to the inmate reference because at paragraph 86 on the preceding page, Mr Antunovic had said that the prisoners only came forward when a reward was offered.

There are then further directions as to character, and bad character, at paragraphs 92 through 93, and again this touches into the cellmate confessional evidence and the need for caution. And then finally at paragraph 96 what I suggest, with respect to

the Judge, was a very helpful template and guide to the jury as to how credibility and reliability might be assessed and that included letters F and G, references to dishonesty, the prisoner's evidence and matters akin to that.

So to summarise –

McGRATH J:
Can I just interrupt you? The reference to the rewards and the prisoners only coming forward when a reward was offered, was that the case in respect of all of the prisoners?

MR DOWNS:
No it wasn't Sir.

McGRATH J:
Not the first two?

MR DOWNS:
There were a variety of points –

McGRATH J:
It's really a timing point, whether the reward was offered before the first two prisoners came forward?

MR DOWNS:
I'm sorry, I misapprehended Your Honour's question. The reward note was published, I think I'm correct to say, before any prisoner came forward and so indeed it was a defence contention that that sequence was of significance in their assessment of credibility.

McGRATH J:
Thank you.

MR DOWNS:
The submission that I had been making, and I acknowledge in a very laboured fashion, is that the cellmate confessional directions had tentacles that extended

throughout the summing up so that there was an embracing direction of the need for caution and I wondered if I might, subject to questions, conclude with one or two other observations. The Judge endorsed an observation of the learned prosecutor, at paragraph 74 of the summing up, that the cellmate confessional evidence was not alone sufficient to convict for murder. In other words, that if the Crown rejected the balance of the case, believed the inmates, that was insufficient and in my respectful submission that was a solemn but wholly proper traditional indication as to the need for care in this area.

The second and related point is that Ms CV's evidence was described by the learned trial Judge as being pivotal, that was His Honour's phrase, and if we look at paragraph 102 on page 160 His Honour said that, her evidence was pivotal in the case. The allied direction appears at 110 on the opposite page. That the Crown accepts, if you don't accept her evidence, you cannot find the accused guilty and that is clearly the case here.

Now considered in reference to the other observations in the summing up, what the Judge, in my respectful submission, was saying to the jury was consider Ms CV's evidence. If you don't accept it beyond reasonable doubt that is the end of the Crown case and coupled with the allied direction signalled by the prosecution as to the cellmate confessional material, on the assumption that the jury faithfully followed the directions, they could only have reached a verdict of guilty if they had in first fact found Ms CV's evidence proved beyond reasonable doubt. I suggest that that may be an important feature of the case.

May it please the Court. Unless there are further questions that is the case on behalf of the Crown.

YOUNG J:

Can we have the information brochure?

MR DOWNS:

Yes. And it includes the women's magazine article, it was part of a package.

YOUNG J:

Have we got that?

MR DOWNS:

Yes Your Honour, you do. I have to confess that the reproduction of it makes it difficult to read, or at least portions of it difficult to read. Yes, may it please the Court, that is the Crown case.

ELIAS CJ:

Thank you Mr Downs. No response? No questions?

MR KING:

No.

ELIAS CJ:

Thank you counsel for your help in this matter. We'll take time to consider our decision.

COURT ADJOURNS: 12.57 PM