IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2010
SC 117/2010
[2011] NZSC Trans 2

TABBASUM MAHOMED

AZEES MAHOMED

Appellants

v

THE QUEEN

Respondent

Hearing:	17 February 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J Young J
Appearances:	P L Borich for the Appellant T Mahomed G J King and C B Wilkinson-Smith for the Appellant A Mahomed M D Downs and K A L Bicknell for the Respondent

---

CRIMINAL APPEAL

MR BORICH:

May it please the Court. Counsel's name is Borich. I appear for the appellant Tabbasum Mahomed.

ELIAS CJ:

Thank you Mr Borich.

MR KING:

If it pleases Your Honours, King and Mr Wilkinson-Smith appearing for the appellant Azees Mahomed.

ELIAS CJ:

Thank you Mr King, Mr Wilkinson-Smith.

MR DOWNS:

May it please the Court. Downs and Ms Bicknell for the Crown.

ELIAS CJ:

Thank you Mr Downs, Ms Bicknell. Yes Mr Borich?

MR BORICH:

May it please the Court, this appeal deals in general with what is propensity, what, if any, directions are required, and how those two principles have in the appellant's submission, led to a miscarriage of justice in her case. I commence with some preliminary observations which would be clear in my submission from the material filed by myself and also by the Crown, that the common law in this area is not particularly clear and there appears to be differences in different jurisdictions in relation to what I will describe as similar fact evidence. And I would urge the Court in dealing with this appeal to perhaps take the, or adopt the sentiment the Court of Appeal set out in the case of *R v Healy* [2007] NZCA 451 about grasping the opportunity for a, if you like, clean start, and in that regard, in my submission, whilst there might be perhaps the lowering of thresholds of admissibility or a change in focus to relevance in the Evidence Act, there are corresponding, in my submission, protections which are imported into the Act as well to bring balance to ensure that the evidence is dealt with in a more focused way and that, in my submission, is a key factor in this appeal and in my submission what the Court of Appeal has failed to do and the learned trial Judge has failed to do, is to conduct a focused inquiry as to the evidence in question. The problem is that whilst more evidence may be admitted, the issue here is that the Crown in essence is saying, "We are seeking to offer this evidence for this particular purpose" and in my submission the undirected juror may illegitimately use that evidence for another purpose and the Court should be wary to

ensure that, if you like, an honest appraisal as to the possible effect of evidence is undertaken and that jurors are warned, having regard to common sense notions, that if evidence is offered for a particular purpose, it should be only used for that purposes and dangers alerted to them.

YOUNG J:

Is that consistent with the Evidence Act? I thought the basis, a theme that runs through the Evidence Act is that once it's in, it's in.

MR BORICH:

Yes, I agree, once it's in, it's in, but that doesn't mean that the Court should step away from its responsibilities in recognising, if we do let something in and there are dangers associated with it, we've got to ensure that the trier of fact, that the jury are warned of those dangers and –

YOUNG J:

Well that's a different point.

MR BORICH:

Well if it's in for a purpose, so we can't let jurors use, I mean if it's in, "in" doesn't just mean that we can give it to the jury, we're giving it to the jury for a purpose.

YOUNG J:

Well sorry –

TIPPING J:

Well could it be put this way, that if it has a certain relevance and not a relevance for another purpose, then the true relevance must be brought home to the jury?

MR BORICH:

That's implicit, that's precisely the point. So "in", doesn't just mean "in", "in" means if you like, with this purpose and I guess for not this purpose.

YOUNG J:

I think that the less contentious way of putting it might be that if there is a risk of an illegitimate reasoning process being initiated by the evidence, then the jury should be warned about that.

MR BORICH:

Yes, and that's the point I make in the second part of my submissions. The other preliminary point I wish to make before moving to the written submissions and in my submission it's a point that's been overlooked right throughout these proceedings through the pre-trial phrase, through the two Court of Appeal decisions and my submission and my learned friend's submission in response to this appeal, is that Mrs Mahomed was entitled to separate consideration in relation to this evidence. She is in a somewhat unique situation, because the strength of the evidence in question, this car evidence, was variable as between her and her husband and it's prominence in the trial landscape, if you like, was also not the same and it seems in my respectful submission, that the way in which the Court of Appeal have approached the evidence, is to, if you like, default to Mr Mahomed's situation rather than giving her separate consideration. And if I can perhaps draw the analogy of a skyline of a city, and Mr Mahomed's skyline had a perhaps particularly tall building, which was the murder charge, and some slightly less tall buildings which were these other violence counts, a slightly less tall building being the count for which Mahomed, Mr Mahomed was jointly tried, and then this other building which was a bit smaller again perhaps, the car incident. And so when one looks at his skyline as it were, the car incident doesn't assume great prominence when one comes to look at the overall flavour if you like, of the trial. Contrast that to the skyline of Mrs Mahomed who has that same building if you like which was count 4, and the car incident, and so there's a real risk there that paying too much prominence to that second smaller building if you like, the car incident runs the risk of it dominating the skyline and so the point being that the strength of that evidence against her was less and its prominence in the trial landscape was greater, hence the need for a focused inquiry as to its admissibility against her and also the need for directions in relation to that.

In my submission the starting point has to be section 40 and what is propensity in the definition set out there. And in my respectful submission the definition is a reasonably wide one. It has an exclusion which is reasonably narrow. The point here is that the Crown seeks to import into that definition a further exclusion, for example, that it doesn't relate to another victim. The Crown say that evidence was not offered as propensity, therefore it didn't need direction. Ironically, the irony of

that argument is that if it was offered for a non-propensity purpose which the Crown claim, and it was capable of being used as propensity reasoning, then the need for the direction was greater to avoid the jury using it for the purpose other than which it was intended. The sections are comprehensive, there's perhaps no other evidence, this is sections 40 to 43, no other evidence in the Act with which it's dealt with in my respectful submission, as comprehensively as propensity, and that may reflect the factor that Parliament and the Law Commission recognise that this area is fraught with danger and in need of a close and careful and focused analysis as to admission.

I make a point in my written submissions that what seems to have happened is the Court of Appeal in its decisions have engaged in the process of trying to say evidence isn't propensity for various reasons, and I think some of the commentators have described it as engaging in the tortured logic of avoiding the propensity calculus. If I can make the point that that is something that comes through in the Court of Appeal judgments and contrast the position say, for example, section 44, which deals with sexual experience of complainants in sex cases. And one contrasts the two sections as they, section 43 and section 44, sit side by side and the Court of Appeal judgments seem to freq –

ELIAS CJ:

Under different headings of course?

MR BORICH:

Yes, but –

ELIAS CJ:

I'm not sure if the side by side makes any difference does it?

MR BORICH:

Well I mean, they sit together in the same Act is perhaps a better way of explaining it.

ELIAS CJ:

Right, yes.

MR BORICH:

But when one looks at the section 44 cases, we tend to try and run evidence that's even closely related to those section 44 issues, through section 44. We have

questions, leave needs to be obtained, and for good reason, but we sometimes prohibit questions about false complaints depending on whether it's a demonstrated false complaint or not and the point I'm really seeking to make is that we try and send that evidence through the section 44 analysis readily, very readily and yet on the other hand, and that's to safeguard the rights of a complainant in a sex case.

ELIAS CJ:

What's the submission you're making on this?

MR BORICH:

The submission is that the Court of Appeal seems reluctant to send the section 43 propensity evidence through section 43. There seems to be a –

ELIAS CJ:

Oh I see.

MR BORICH:

– theme in the cases that, "Well let's avoid section 43, we don't need –

YOUNG J:

This is really only in relation to propensity as between the defendant and the victim, is that right? Or are there cases?

MR BORICH:

I didn't follow Your Honour's point.

YOUNG J:

Well isn't it – I thought the cases that are challenged by the commentator and which you take on, are all, and I may be wrong on this, cases where the "propensity evidence", relates to the propensity of the defendant to do things to the victim. Are there cases where the Court of Appeal hasn't applied section 43 that aren't in that particular group of cases?

MR BORICH:

Non-victim section 43 cases?

YOUNG J:

Yes.

MR BORICH:

Yes, as I stand here I can't answer that, but I'll need to give that some thought.

YOUNG J:

But predominantly the cases that you're concerned about are propensity to do things to the victim?

MR BORICH:

The ones that spring to mind, yes, but as I say Sir, I'll have to come back to that. The submission really is simply this. That we tend to try and run it all through section 44, for good reason, but there seems to be a reluctance to run it through section 43 where relevant, and the point being that the scrutiny which we use section 44 to look at that evidence, appears to be lacking when we look at section 43.

ELIAS CJ:

Well the submission, or this is really background isn't it? Don't you need to move on and tell us what you say is the right approach?

MR BORICH:

The right approach –

ELIAS CJ:

Yes.

MR BORICH:

– in my respectful submission, is that we go to the definition in section 40 and we look at that, and if the evidence tends to show a person's propensity to act in a particular way or have a particular state of mind, then it is propensity, subject to the qualifications in (b) which are that it's not the cause of action in the proceedings in question and not one of the elements of the offence. So in there is a wide definition. The exclusions are narrow. The statute is wide and in my submission that signals a change, which in my respectful submission, the Court of Appeal have not grasped as to the fact that it's Parliament's intention to have a wide definition of propensity not a narrow one, which seems to be contended for by the Crown in some of the

Court of Appeal cases. The exclusion doesn't say, "except against the same victim" and that seems to be the Crown response. If we look at some of the other common law cases from other jurisdictions. *Gipp v R* (1998) 194 CLR 106 for example in Australia, that was a sex case involving a step-daughter where similar fact evidence was – the similar fact evidence was against the same complainant.

TIPPING J:

Would you not simply look at the evidence that's alleged to be propensity evidence and ask whether it answers to the definition?

MR BORICH:

It's as simple as that.

TIPPING J:

I mean –

MR BORICH:

And whether it's the same victim is a factor, but you don't say, well it's the same victim, therefore it can't fall within the definition.

TIPPING J:

Are people saying that?

MR BORICH:

Well the Crown is saying that –

TIPPING J:

I couldn't entirely understand whether they're saying that the fact it's the same victim, means it can't be propensity evidence, do they put it as high as that? In your understanding.

MR BORICH:

Yes.

ELIAS CJ:

Well they say that there are two reasons for admission available, and because it's available as narrative evidence, you don't need to go to the propensity limb for

admission, but that's actually, that's something I have some queries about myself. But that's really how it's put isn't it?

TIPPING J:

Does that suggest that if it, even though it answers to the definition, because it's "narrative" whatever that means, you take it out of the definition?

MR BORICH:

Well that's what the Court of Appeal seems to think. That's what the Crown thinks, and that's what the appellant complains of. That is it in a nutshell.

YOUNG J:

Does it – in this case the Court of Appeal in the admissibility hearing saw it as propensity evidence didn't they, but regarded the relevance as being narrative. But does it make any difference as to admissibility? Because the test is pretty much the same isn't it?

MR BORICH:

In my submission the test is different.

YOUNG J:

Well what is the difference?

MR BORICH:

Well the difference in the test is that the section 7 and section 8 test deals with the proceedings and the –

ELIAS CJ:

Well isn't the difference really the analyses you're required to go through under section 43? But it must be a more particular subset of the general section 7 and 8 inquiry surely?

MR BORICH:

It's a more focused inquiry.

ELIAS CJ:

Yes.

MR BORICH:

It's directed at whether the evidence doesn't have a prejudicial affect on the proceeding and so maybe in this particular case, because there were two accused and the evidence had different strength, maybe the proceeding is important there, but the section 43 test talks about having an unfairly prejudicial affect on the defendant and section 4 it goes further –

YOUNG J:

It's pretty hard isn't it really to say, envisage a situation where a Judge would say, well no problem with the evidence under section 8 because it meets that balance but no, it doesn't meet the section 43 balance because they're so similar. I know there is a difference between, there is the defendant, or the proceeding.

BLANCHARD J:

I don't think that latter difference means anything. It's explicable because section 43 is dealing with prosecution evidence –

YOUNG J:

Yes.

BLANCHARD J:

So it's not concerned with prejudice to the prosecution, they won't be leading the evidence if it's prejudicial to them presumably. Whereas section 8 is looking at it both ways. I don't think that there's any difference in the test between section 8 subsection (1) and section 43. The difference in wording is simply situational.

TIPPING J:

Well doesn't that mean then that you can't, if it's more prejudicial than probative whether under 43 or 8, you can't get out of that by saying it's part of the narrative.

BLANCHARD J:

Yes.

YOUNG J:

But I don't think anyone has tried to get out of it. I think everyone, the narrative cases, the res gestae cases still address it in terms of probative and prejudicial affect, because that applies to –

ELIAS CJ:

To everything.

YOUNG J:

– to everything.

MR BORICH:

With respect Sir, I think that's exactly what the Court of Appeal is doing and they've done it in this case, they've said, well let's go down the 43 route. For example, *R v Broadhurst* [2008] NZCA 454 is an example where the Court of Appeal went down the 43 route and said, well look we don't need to go down there, because we can get it in via section 8, but if we went down the 43 route it's in anyway. In this particular case what the Court of Appeal have said is, well look, we'll start the 43 exercise, but we will sort of stop halfway through because it comes in under section 8 or section 7, section 8.

YOUNG J:

Yes I know that but is there any reason why it wouldn't have come in, given the considerations they referred to under section 43. Why would it be different?

MR BORICH:

Why would the section 7 and section 43 test be different?

YOUNG J:

Yes in applying the evidence, say in this case.

ELIAS CJ:

Section 8.

YOUNG J:

The Court still has to balance probative value and prejudicial effect?

MR BORICH:

On the defendant and taking into account those extra factors that are set out very clearly that –

BLANCHARD J:

To the extent that they are relevant?

MR BORICH:

Yes.

BLANCHARD J:

Because they are pretty clearly primarily directed to classic similar fact situations with multiple victims, so you wouldn't expect in a case like the present, that the charge would have to go through all of them, because some of them are so obviously inapplicable, in fact most of them.

MR BORICH:

Well I don't necessarily accept that the test in seven and eight – or eight sorry in 43, is the same. If it is the same test, then what is the reason for 43?

BLANCHARD J:

Reinforcement perhaps.

McGRATH J:

A check list.

ELIAS CJ:

Yes a check list.

McGRATH J:

Can you explain why subsection (3) of section 43 is worded permissibly, in your view?

MR BORICH:

Well there are other things that might arise. I think, with respect, that the guts of 43(3) deals with the permissive we will allow it, considering these factors. The real effect in my respectful submission of 43, is contained in (1) and (4) which is a red flag

to the judge. You have to bear these things in mind because this evidence is so crucial, we might even be able to tick a lot of subsection (3) but you have to bear in mind (1) and (4).

TIPPING J:

If it is propensity evidence, within the definition, does the section really require the Court to go through to the extent relevant to the various steps that are set out in section 43. Why would you be going to section 8, albeit the two seem to be very similar, but this being the particular, if you like, why would you not simply be focussing on the requirements of 43 and not muddying the water by reference to section 8, to the extent that that does any muddying.

MR BORICH:

Yes and that is what the cases seem to do. The cases seem to say well we don't need to choose some of the explanations, we don't need to get into the semantics. We don't need to put the lens of propensity, we don't need to undertake the section 43 exercise because, look we think it is under section 8 and that is precisely what is complained of, in that section.

YOUNG J:

You may well be right, that that's going about it the wrong way but what difference does it make. Why would the balance be different if one looks at it under section 8 rather than section 43, because the test is virtually the same and as Justice Blanchard has pointed out, to the extent to which it differs, is because the focus of the two sections is slightly different. One on all evidence, the other one on evidence which is led by the Crown against the defendant.

MR BORICH:

Well the first question is, are we clear that the Judge going through the exercise, who has sort of taken the section 8 bypass, has he considered those factors in section 43, that he is required to?

BLANCHARD J:

Or that are relevant?

MR BORICH:

Yes.

BLANCHARD J:

Or should say, and that are relevant.

YOUNG J:

Most of, well I suppose one of the reasons why the narrative in relationship jurisprudence grew up, is because most Judges thought it went without saying, that particular offending by the defendant against the victim, would always, or almost always, be relevant if it is related in type, kind or circumstance to the offending charged.

MR BORICH:

But if that narrative carries with it, that propensity.

YOUNG J:

Well all the cases that deal with it, still say it is subject to a balancing effect and I mean there can be prejudice because it could be such a wide net that there don't need to be particulars, and all sorts of prejudice that might be material, but on the whole, given that we admit evidence of offending by a defendant against people other than the complainant, it might be thought to go without saying that we would normally admit related, offending that's related to the charges, where it is addressed to the particular complainant.

MR BORICH:

But the common law has developed on the basis of these facts, specific situations, case by case, perhaps starting with sex cases, then homicides and violence and so we have this similar fact, doctrine if you like, that has developed, and we drag that through with us, but my urging to the Court is to perhaps grasp the *Healy* flag as it were and say, well we don't need to, if you like, poison the propensity analysis in sections 40 to 43. I'm not saying disregard the common law, but we don't need to drag notions like, well Judges have always allowed relationship evidence in for various reasons. What we need to do is go back to that section and say, well, either it fits within the definition, or it doesn't and if it does, the Judge had to engage in the section 43 analysis and he just can't say, well I can go the shortcut via section 8 and anyway in the past we've always allowed this type of evidence in.

YOUNG J:

No, but that's not the proposition that I put to you. It's not that it, because it's always done in the past that we should do it again. It's rather that it was always done in the past because the relevance was obvious. Or, in the cases where it was admitted, and that's the proposition I'm putting to you. You see if you look at section 43(3)(a), there's three. There would be a number of ticks here and there'd be some you'd say that aren't relevant. You'd say, probably in this little girls 11 week life, she seems to have received three severe beatings, was left in a car and there were two occasions when there was a bit of a reluctance to get medical treatment. So there's rather a lot of frequency. You'd look at (b), well there's plenty of connection because this incident happens right in the middle of the offending covered by the counts. Well (c) would be a matter of debate. One view of it is pretty similar to what the Crown alleged on the 27th, 28th of December. (d)'s irrelevant because it's not that sort of case. (e) gets a, I suppose, a negative tick, because obviously it's not collusional suggestibility. (f) it's a matter of opinion. So it would be a relatively, and it's quite similar to the Court of Appeal's analysis, although they use different language.

MR BORICH:

With respect I don't necessarily agree as to the similarity.

YOUNG J:

No, I didn't expect you to –

MR BORICH:

No.

YOUNG J:

– I just said that's a matter of debate.

MR BORICH:

Yes.

ELIAS CJ:

Is another way perhaps of looking at it, that the Evidence Act really does require the Judge to think about relevance and really that one needs to look at sections 7, 8 and 43 where that's applicable, as part of a whole package, where as in the past perhaps Judge have been a little sloppy and that the significance of section 43 is not the

ultimate result that is reached, but that in the context of that relevance, there are some flags put up by the legislature in demonstration of a judgment that this particular sort of reasoning can be particularly unfair.

MR BORICH:

And it reflects the position, I guess globally if you like, of the common law pre the Act. It's if you like a –

ELIAS CJ:

I thought you quite perhaps rightly thought we shouldn't go there?

MR BORICH:

Well, the difficulty with some of the common –

ELIAS CJ:

Well, it's not necessary really, is it?

MR BORICH:

No and it, I mean, charitably one might argue that the drafters of the Act have sort of looked around at the various common law jurisdiction and picked the best bits of all of the common law cases and amalgamated it into a combination between sections 40 through to 43 and, for example, have left out what some might says a traditional, we don't include sane victim in that scenario, although there are lots of cases. I've mentioned *R v Gipp*, there's *R v D(LE)* [1989] 2 SCR 111, there's *R v Rongonui* [2000] 2 NZLR 385.

TIPPING J:

I wouldn't agree that in common law there was a same victim exception?

MR BORICH:

Neither do I.

YOUNG J:

Well, there are cases that say that but there are certainly cases that say the other thing.

TIPPING J:

Yes, there are. I don't know why this is all so complicated. We have here a section which tells us what propensity evidence is and how to deal with it and I find it strange that we don't just get on with it along those lines.

MR BORICH:

I think the difficulty is that perhaps we're anchored a little bit to the pre-Evidence Act situation.

TIPPING J:

Well, we shouldn't be.

MR BORICH:

I agree.

TIPPING J:

I thought we made that pretty clear in one of those recent cases we had, the Chief Justice in particular.

ELIAS CJ:

Mr Borich, where does this troubling language of narrative come from? I can't remember when it first emerged but it does seem to be fairly sloppy and that in the post-Evidence Act era we should try and keep away from it.

MR BORICH:

There are all sorts of phrases. There's narrative, there's relationship, there's tendency, there's propensity, not Evidence Act propensity as defined by section 40 but just general propensity. We've got all of these labels and each of them are dealt with in different ways and I submit that the appropriate way is to say, wipe that away and we've got propensity and, with respect, don't think that propensity is exclusively similar fact and similar fact is, similar fact is exclusively propensity, that's not the position either. I think the propensity definition covers more than just similar fact evidence and I think that's the intention of the statute and I agree. We, the sloppiness and it comes – perhaps sloppy is being unkind. It comes from a development of the law of a case with a set of facts so we give a decision on it and then another case, which has reference to that so you get this, sort of fairly fluid amorphous thing that is the common law but the, let's just deal with the section is the submission that I make.

ELIAS CJ:

Well, it seems to me that really perhaps the most significant section is section 7 and that in some of the cases dealing with "let it in because it's part of the narrative" there was insufficient focus on what the relevance of the evidence was. Now, we do need to identify what the relevance and if it's propensity, just go straight to section 43 and which is, is not only a flag, it's a very helpful set of permissive considerations and it also has a mandatory consideration so you'd want to see that that had been properly addressed.

TIPPING J:

I would – could I add a gloss to that? That if the relevance includes propensity –

ELIAS CJ:

Yes, yes.

TIPPING J:

– you should go to –

ELIAS CJ:

Yes, that's what I mean.

TIPPING J:

No, I wasn't cavilling it. I was just saying you can have dual relevance of which one might be not propensity. The other might be propensity because the jury might reason down both lines.

MR BORICH:

Yes, and one has to undertake an honest and common sense understanding the nature of jurors' assessments of how the evidence might be used, because it's one thing for the Crown to stand up and say, look, we're just throwing in this car incident because it's just sort of all part of the story of what happened to the deceased and we're not relying on it for any other reason when it's the sort of evidence that would inflame the very things that are referred to in section 43(4).

TIPPING J:

Well, even if the Crown disclaims the reliance on it for, the Judge must still –

MR BORICH:

Conduct his own assessment?

TIPPING J:

And direct on it –

MR BORICH:

Correct.

TIPPING J:

Would be my thinking anyway.

YOUNG J:

Well, that may be the critical point in the appeal because, again, the English Courts, as I understand it, and the Canadian Courts do not direct on propensity and this sort of case except in sex cases. Of course generally in the Canadian Courts only in sex, except in sex cases, don't direct on a propensity basis where it's defendant victim violence. The Australians certainly do in sex cases. I'm not sure what they do in other cases. I'm not sure that in New Zealand cases, other than *R v Rongonui* there's been a requirement for a propensity direction, say a case like *R v Witika* (1991) 7 CRNZ 621.

MR BORICH:

I simply question the need for that qualification. In sex cases we do something different with section 40 to 43. I would have thought –

YOUNG J:

I'm just interested – I mean, the direction has got nothing really to do with section 43. The direction is the requirement ultimately to have a fair trial. So whether something requires a direction, although it doesn't come out of section 43, it just comes out of the practice of the Courts.

MR BORICH:

I don't see the need to, when conducting the admissibility exercise to say, well, look, we'll have one class of admissibility sort of rules in relation to sex cases and a

different class in relation to all of the others, so all that is, with respect, is simply an expansion or a different way of running the narrative argument.

YOUNG J:

No, it's not. If you say, for instance, to take a silly example, the defendant immediately before stabbing the victim said, "I'm going to kill you," thereby committing an offence of threatening to kill, he then stabs the victim. Well, it's propensity I guess. It's evidence that shows a likelihood of a certain state of mind. I know I'd give a propensity direction there but it becomes a matter of judgment over time.

ELIAS CJ:

Well, it's of direct relevance to the stabbing –

MR BORICH:

Threat to kill.

YOUNG J:

Well, that's of course –

ELIAS CJ:

To the stabbing and that is really why, surely, section 7 does require, or the scheme of the Act now requires you to identify what use the evidence is to be put to.

MR BORICH:

Can I highlight an example from this case? Say, for example, the homicide was committed against the younger child but the other car incident a couple of weeks or so earlier was, in fact, the older child in the car who had been distressed. Now, I'm pretty sure that the Crown would be advancing that evidence as propensity to say that they were bad parents, that they neglected to get her medical treatment, they were poor parents and all those sorts of things and that would carry with it a whole bundle of bad person/prejudice against both accused. Is it any different, really, that we put the deceased in the car? Does all that prejudice all go away? It still all sits there.

TIPPING J:

You mean in substitution for the older one or together with the older one?

MR BORICH:

Well, in substitution so at the moment we've got the deceased in the car a week before or thereabouts and the – that's the situation we're confronted with and this is just in relation to that same victim argument. If we put the older child there, the Crown would still be advancing, I would have thought, that it shows a propensity for them to be bad parents and not get medical attention and on either basis there would be that terrible overlaying prejudice against both parents and you'd need to –

TIPPING J:

Well, don't you have to assess the true relevance of the car or van incident as it's being called, if any, against the obvious potential prejudice? Isn't that what this case is ultimately all about?

MR BORICH:

Yes, but the 43 exercise of admissibility would be saying, well, would we allow the previous incident in if it was the older daughter because we're worried –

TIPPING J:

I'm sorry, I'm off the hypothesis –

MR BORICH:

I'm sorry Sir.

TIPPING J:

I'm back to the reality. Isn't what this case is all about, is to say, well what is the true relevance and probative affect of the van incident, as against its risk of prejudice?

MR BORICH:

Yes, and its effect against Mrs Mahomed.

TIPPING J:

Yes, individually.

MR BORICH:

Yes.

TIPPING J:

Individually.

BLANCHARD J:

You can hardly get away from relevance in considering probative values.

TIPPING J:

Exactly.

BLANCHARD J:

It's obviously inherent. If something's irrelevant it doesn't have any probative value.

TIPPING J:

If it's marginally relevant it may have little probative value, if it's right on the bull's eye, it might have a lot of probative value.

MR BORICH:

Yes. And the argument here is that the van incident was marginally probative but hugely prejudicial, and that's why it shouldn't have come in. I mean I don't –

YOUNG J:

You take the – what about the malnutrition, the malnourishment of the little girl? Do you still challenge the admissibility of that?

ELIAS CJ:

No, it's not.

MR BORICH:

Well it's not challenged here.

YOUNG J:

It was challenged in the Court of Appeal wasn't it?

MR BORICH:

It was challenged in the High Court. But one just has to bear in mind the two, the two pieces of evidence. The malnutrition was not a footnote, but it was a very small part

of that trial landscape. It was there because the death weight needed to be before the jury and there wasn't a lot of evidence about – what we had with the car incident was –

YOUNG J:

But that's not true is it? It wasn't that the – the malnourishment wasn't there just to explain why the death weight was so low. The malnourishment was there as part of a pattern of mistreatment.

MR BORICH:

To a degree, but it wasn't the focus of the trial and it didn't occupy a lot of the trial, where as this car incident had, I think, probably eight, nine witnesses, it took three-quarters of the day, and there was a 111 call. In that skyline I talked about, it assumed huge prominence.

ELIAS CJ:

Well Mr Borich, I wonder whether we could in fact focus on the facts of the particular case and the relevance to which the evidence was directed, because there are spiralling circles of propensity for anyone who's had form. I'm not sure really whether this was put forward because the incident indicated bad parenting, in which case then you would look at the issues at the trial, to see whether that was, that really an issue at the trial, or whether it's directed at some sort of particular animus towards this child. In which case you'd look at the – you'd assess the evidence differently. So I'm not sure that it's terribly helpful to speak too abstractly, perhaps we should look at the particular case and how the evidence was used and what the Court said about the way it was being used, or able to be used.

MR BORICH:

Well, in terms of what it was put forward for, I think the analysis is slightly more nuanced than that, it's not a look at –

ELIAS CJ:

Well should it be?

MR BORICH:

Yes it should.

ELIAS CJ:

Should it be more – oh it is more nuanced?

MR BORICH:

Yes it's not about, well what reason did the Crown advance it for? It's all about what – recognising what the jury may in fact have used it for.

YOUNG J:

Well can we look perhaps at the facts a little, because it is of a high level of generality. You've given a narrative in para 6 of the injuries. The medical evidence is quite diffuse, are those timings common ground?

MR BORICH:

Common ground, except 6(b), "I set a leg break one to two weeks prior to the murder injury, my learned friend's view is about two weeks."

YOUNG J:

The little girl was seen by a Plunket nurse on the 15th of November. Did the Plunket nurse give evidence? I didn't find a trace of that, but I may have missed it.

MR BORICH:

I think her evidence was read, I'll just check with Mr Wilkinson-Smith.

YOUNG J:

Well it may be I didn't have the brief.

MR BORICH:

I think it's common ground that there's nothing wrong at that point.

YOUNG J:

All right. So as at the 15th of November, nothing wrong, nothing untoward with the child.

MR BORICH:

More on the basis that had there been something wrong, it would've been noted by the Plunket nurse, or seen in the Plunket book and there wasn't anything of that sort.

YOUNG J:

All right. It was part of the Crown case that the little girl was never taken to, with the exception of the Plunket nurse visit, was never really exposed to the health system?

MR BORICH:

Not really. So I agree, that was the position.

YOUNG J:

And that was a component of the Crown case?

MR BORICH:

Well it was part of the evidence, but it wasn't, in my submission, a significant component of the Crown case.

YOUNG J:

By the time of the van incident, the little girl had therefore at least the 6(a) injury and probably the 6(b) injury?

MR BORICH:

Yes.

YOUNG J:

As a result of the 6(a) injury she was blind in one eye, her left eye?

MR BORICH:

Once again, if I could just consult with Mr Wilkinson-Smith. I think the blinding Sir came as a result of the – no I'm sorry.

YOUNG J:

She was blind in the right eye as a result of the assault on the 27th of December?

MR BORICH:

Yes.

YOUNG J:

I think you will find she was blind in the left eye as a result of the earlier assault?

MR BORICH:

Yes, thank you Mr King, that's correct.

YOUNG J:

So if there had been official intervention of the 19th of December, the fact that she'd been very seriously injured would've come to light?

MR BORICH:

It may have in fact come to light.

YOUNG J:

And it was part of the Crown case that Mr Mahomed's abrupt departure from the shopping centre was an indication of guilty knowledge about the injuries the girl had?

MR BORICH:

That was certainly part of the Crown case.

YOUNG J:

And at least in that little circle of relevance, the van incident itself was just part of the narrative for setting the scene for something, namely the abrupt departure, which was itself, directly relevant.

MR BORICH:

It was certainly part of it, I mean the Crown case as presented was that he left to try and conceal those injuries.

YOUNG J:

And there was absolutely no other evidence as to the state of the little girl between when she left the hospital after being born, and when she turned up on the 28th of December?

MR BORICH:

Apart from the Plunket.

YOUNG J:

Yes, the Plunket, yes I mentioned the Plunket.

MR BORICH:

Yes, the Plunket visit.

YOUNG J:

Could you find out if her evidence is somewhere? Because it may be that it wasn't in the bundle. Don't worry about it now. And what final thing, there was a broken shoulder bone, but that was sufficiently likely to be caused by birth to be treated as irrelevant, is that right?

MR BORICH:

I think it was one of the factors that was not necessarily attributable to any sort of abuse.

YOUNG J:

I think the midwife was indignant at the suggestion that she wouldn't have noticed it, but the doctors rather thought it was a birth injury.

MR BORICH:

Are there any other issues relating to the facts that I need to –

TIPPING J:

I'd just like to clarify what my brother, about the van incident. It was relevant insofar as it set the scene for the male accused's abrupt departure, it was put.

MR BORICH:

Yes.

TIPPING J:

That's accepted, is it?

MR BORICH:

Well that's what happened.

TIPPING J:

And it was part of the Crown case and legitimately part of the Crown case that this abrupt departure suggested a guilty mind in relation to at least some of the incident?

MR BORICH:

That's what the Crown advanced.

TIPPING J:

Yes, but that's a perfectly proper, you couldn't say that was a untenable –

MR BORICH:

An available, absolutely available inference.-

TIPPING J:

It was an available inference?

MR BORICH:

Correct.

TIPPING J:

Yes, thank you, that's helpful.

MR BORICH:

At the time the incident occurred, Mrs Mahomed is removed –

TIPPING J:

She's off somewhere else.

MR BORICH:

– selling jewellery. And the inference the Crown asked the jury to draw as that the child had been in the car for a number of hours.

TIPPING J:

Well that suggests that perhaps, I'm thinking aloud, the van incident might have been admissible, but there should've been a very careful direction as to its proper use.

MR BORICH:

Well, and perhaps not used against Mrs Mahomed at all.

TIPPING J:

Yes, yes.

MR BORICH:

I think we run into this tension of, well, it may be inadmissible against Mrs Mahomed and have more value against Mr so it's in the trial proper because –

ELIAS CJ:

Well, wasn't it relevant on the guilty, as indication of guilty knowledge? It was relevant to counts 1 and 2, wasn't it?

MR BORICH:

For Mr Mahomed, yes.

ELIAS CJ:

Yes.

MR BORICH:

But there was not a lot of evidence. I mean an available inference that Mrs Mahomed first of all knew about the van incident before it happened. Clearly, she knew after because she talked to the shopkeeper about that but an available inference that she knew and/or participated in leaving the child there but equally an available inference that she knew nothing of it and neither condoned it nor was involved in it.

YOUNG J:

Well, the Crown position on this was that, as I understand it, that plainly they had arrived at the shopping centre together, including the older girl, that they were both at the shopping centre that morning, that there was no evidence that the little girl, the younger girl was other than in the car. The explanation, the only explanation that was given seemed to be that Mr Mahomed had rigged up a sort of baby alarm by using two cellphones and then as – so that to the extent to which the child was left in the van, Mrs Mahomed was part of that and secondly, and I thought this was relied on by the Crown, her reaction to it to Mr Turner, was it?

MR BORICH:

Mr Turner.

YOUNG J:

Was not, "Gee, we shouldn't have left the child in the car", it's, "Oh, the police are going to be coming around"?

MR BORICH:

Well, that's a – she didn't say, oh, I'm not too worried about the child. I'm only worried about the police. He gave evidence of her being worried about the police but that doesn't mean that there's a lack of any concern for the child.

YOUNG J:

Well, not necessarily, but if there was a concern, it didn't, as it were, register with Mr Turner so isn't that what the Crown – now, this may be less relevant or less cogent might be a way of putting it in relation to her but isn't the Crown saying, well, this is a situation where you've got a little girl who's suffering pretty severe injuries, very badly malnourished, is kept away from the health system and here's an incident where there was an opportunity for official intervention but what Mrs Mahomed's worried about is the police and that, in that general way, is consistent with what happened, according to the Crown on 27 and 28 December.

MR BORICH:

I don't think a concern about the police necessarily excludes any other concern and whether or not you were complicit in leaving the child or didn't know anything about it if there was a suggestion the police were going to be coming to speak to your husband. You could be concerned with them coming to speak with your husband whether you had full knowledge or you didn't.

ELIAS CJ:

That goes to cogency. I think what's being explored with you is how is the evidence relevant? Is that –

YOUNG J:

That's true. I mean it does go to cogency and in terms of cogency, it is part of a pattern of events the Crown could point to because it's not very likely that the head injuries leading to blindness could have been unnoticed by Mrs Mahomed.

MR BORICH:

I'm no expert but I wouldn't have necessarily thought blindness in a seven, eight, nine, 10 –

YOUNG J:

The head injuries that were sufficiently severe to cause blindness might be thought to be something which Mum would have picked up.

MR BORICH:

One of the points I have made is that the behaviour or the lack of life, if you like, might be more apparent in an older child but maybe not so in a young baby.

YOUNG J:

There must have been some evidence about this at trial.

MR BORICH:

The evidence in relation to the leg break injuries was more, perhaps more direct in respect of that about –

YOUNG J:

She may, of course, been at least – if it had happened, if her shin was fractured two weeks before the murder injuries, fatal injuries, then that could hardly, that would have brought it ahead of 20, 19 December. So if that two weeks is right then she was blind in one eye and had a broken shin which, you know, might be a reason why she wasn't, as it were, brought out to view at the shopping centre like her older sister. I mean –

MR BORICH:

And that was the Crown case and the inference the Crown asked the jury to draw as far as Mr Mahomed is concerned and the inference they asked to draw as far as Mrs Mahomed was concerned.

TIPPING J:

Is it possible that the evidence of the van incident was sufficiently prohibitive as against prejudicial to be admissible against Mr Mahomed but not sufficiently prohibitive as against prejudicial to be admissible against Mrs Mahomed? That's effectively what you're arguing without conceding anything vis-à-vis Mr Mahomed because, of course, you don't have the carriage of his case but you're suggesting the very least that vis-à-vis Mrs it wasn't sufficiently probative as against prejudice and you were drawing some distinctions as to your client's case as against Mr King's client's case.

MR BORICH:

Yes and that is the point that I made with regard, reference to the skyline that, yes, it may have been admissible against Mr Mahomed.

TIPPING J:

But in both cases, the direction arguably must, ought to have been given assuming it was admissible.

MR BORICH:

Well, particularly in Mrs Mahomed's case because it relied and there's no direction or inferences at all in the summing up. It relief on inference because –

TIPPING J:

Well, I would have thought if it was admissible against either of them a direction should have been given apropos of each accused –

MR BORICH:

Because it required –

TIPPING J:

– either together or individually.

MR BORICH:

It required the jury to do a two-step, as far as Mrs Mahomed was concerned. One to take those factors that Your Honour Justice Young referred to and draw an inference against her in relation to that and then from that inference conduct the propensity reasoning process.

YOUNG J:

Well it's interesting. This two-step segmented process may be a bit unreal but doesn't the jury really just have to asses the evidence as a whole in a holistic way?

MR BORICH:

They – well, that's the problem. The holistic way is that you left the child in the car. You're a bad mother –

YOUNG J:

No, the cases of *R v Degnan* [2001] 1 NZLR 280 or *R v Sanders* [2001] 1 NZLR 257 show that there's no requirement before the Evidence Act for the similar fact allegation to be proved beyond reasonable doubt until it, before it became material. The Crown could rely on coincidence and say well here's this defendant. He's got three young women making very similar allegations against him and assessing the evidence of each you can take into account the evidence of the others and you then make a holistic assessment. You don't say well, I'm not satisfied beyond reasonable doubt that what A says is right therefore I put her evidence entirely to one side and then segment the case doing that with B and C.

BLANCHARD J:

That's in *Sanders*.

YOUNG J:

Sanders is it?

BLANCHARD J:

Yes. *Degnan* was the acquittal case, wasn't it?

TIPPING J:

Yes, *Degnan* was the acquittal case.

MR BORICH:

That highlights the difficulty here of Mrs Mahomed's case because we're not talking about the jury having to assess a complainant and a supporting person who there's

been sexual offending against who says he's also offended against me and then the jury will have to, in essence, have a credibility run-off between the two –

YOUNG J:

But the jury didn't really have to make a discrete finding in relation to the van incident. All it had to do was say well here's a pattern of events, what we make of the van incident is in fact to some extent influenced by what we make of the first two assaults and then the events of the 27th and 28th of December and in the end we've got to make a global assessment of the case as a whole.

MR BORICH:

But the requirement to draw the inference about the van incident highlights and makes it more important the need for special care in relation to that evidence as say compared to a traditional sex case where a complainant and a supporting person who's being offended against, just leaves the jury what a credibility issue between the non-complainant witness versus having to draw inferences in relation to that van incident. And so in my submission in a case where you're also – the evidence requires the drawing of inferences, then extra care is needed as to admissibility, in the same way I suppose a factor which you might import into section 43 in the same way as section 43 refers to the Judge needing to take into account collusion or suggestibility and that's another way, or a shorthand way of saying, well the Judge needs to, if you like, conduct a preliminary strength of evidence assessment. In my submission where the propensity reasoning needs to be preceded by the process of drawing inference, then that heightens the need for special care before the Judge lets it in, and the way in which the Judge deals with it, having let it in.

TIPPING J:

We're starting to get rather complicated in making distinctions between direct evidence and inferential evidence and so on. I, speaking for myself, I'd be a little reluctant to start enshrining those perceptions into any tests Mr Borich. I take the ultimate point, but I don't know that it would be helpful to actually make it in quite the terms that you're advancing it. The case will depend on all the circumstances of which the nature of the reasoning process may be won, but I don't know that it would be very helpful to set up, sort of as it were, apparently different regimes or processes, depending on the acts or the characterisation of the reasoning process. I may have got you wrong.

MR BORICH:

No, I think Your Honour's got me right. I guess the point – I think the point I'm trying to make is that the inferential process required, reduces the actual probative value of the evidence.

TIPPING J:

Well it may or it may not.

MR BORICH:

Well in this case.

TIPPING J:

It might be a blindingly strong inference –

MR BORICH:

But in this one.

TIPPING J:

– it might be a shallow inference.

MR BORICH:

Yes.

TIPPING J:

What I'm tentatively suggesting is that the inference here was not particularly strong. And that's a fact.

ELIAS CJ:

Well there are a number of inferences and they are relevant in different ways according to the different counts. What I've taken from what you've said, is that you acknowledge the inference that the abrupt departure was to conceal the injuries to the child and that would be relevant to the counts against Mr Mahomed, not the – not necessarily the murder charge, I think that there's a different issue there. But the other basis on which you're accepting there may be some relevance, is in relation to the charges which Mrs Mahomed faces of failing to provide the necessities of life, if the evidence suggests indifference to the child, or indifference to obtaining medical attention, in which case it is a propensity line of reasoning that's being invited.

Whereas the guilty mind one isn't really a propensity reasoning thing. But I suppose the question is, when you have these mixed uses, does the Judge really have to look, or direct the jury as to what is impermissible in this and I think there is an issue which Mr King is going to address us on in relation to the murder element. But available to you is perhaps the submission that even though there may be some relevance to the charges faced by your client of failing to provide the necessities of life, that's not particularly cogent.

TIPPING J:

That's what I was suggesting.

ELIAS CJ:

Yes.

MR BORICH:

Particularly when one puts in the prejudice side of the equation, the nature of the incident itself.

YOUNG J:

What – just explain the prejudice?

MR BORICH:

Leaving a child in a car on a hot day and the nature of that evidence of the child screaming and crying, it's the sort of evidence that most jurors could readily understand in terms of not accepting it, but have a familiarity with such an event. It's one that when one thinks about it, is, it engenders all sorts of feelings. Justice Chisholm was of the view that it was so prejudicial that not even directions would help. That was his view of it.

YOUNG J:

It's one of these cases where in a sense the prejudice is quite related to the relevance. The prejudice is that it shows a really bad attitude to the little girl.

ELIAS CJ:

If that's the –

MR BORICH:

Inference drawn.

ELIAS CJ:

– use that you're putting forward.

YOUNG J:

And that usually is part – that's the propensity relevance of the evidence –

ELIAS CJ:

Yes.

YOUNG J:

So the prejudice and the relevance sort of marched side by side that day.

MR BORICH:

Well I think the Court of Appeal even acknowledged the propensity nature of it and this is para 31 of my submissions, they refer to the evidence showing the propensity on Mrs Mahomed's part to go along with ill-treatment by Mr Mahomed. At paragraph 45 they note the difference between leaving her in the van and endangering her by neglect, which in my submission supports the argument I make and they also note the – it shows a tendency to be careless about her wellbeing and fail to show what might be regarded as acceptable.

ELIAS CJ:

Sorry, what paragraph are you referring to?

MR BORICH:

Para 31 of my submissions.

ELIAS CJ:

Yes, thank you.

MR BORICH:

They show a tendency to be careless about her wellbeing, and this is in paragraph, the ending to 45, "Fail to show an acceptable parental concern". And quite properly

the Court of Appeal noticed that it's likely to promote a lack of sympathy to the mother, to the Mahomeds in the view they were neglectful parents.

YOUNG J:

They were sort of in for that anyway though weren't they? I mean the child was malnourished, had had received very severe injuries and on any view it hadn't been brought into the hospital very quickly, so they were, I think it was conceded that they weren't great parents. Perhaps a response in part to the van, but in reality that concession was inevitable wasn't it?

MR BORICH:

Maybe against Mr Mahomed, but there wasn't a lot against Mrs Mahomed.

YOUNG J:

Except the condition of the child.

MR BORICH:

Yes. But that didn't assume the prominence that the van incident drew in the trial.

McGRATH J:

Did the trial Judge who gave – who recorded his reasons didn't he in this respect in a separate note? Did he deal with your client's position separately?

MR BORICH:

No. I'll just find it. It's in volume 1 case on appeal and it's at page 76. In essence what His Honour said is, I'm just following my interpretation of the pre-trial appeal, and whilst he refers to Mr Mahomed, he doesn't refer to Mrs Mahomed at all, and that's one of the failings in my respect, at all levels.

YOUNG J:

Did you ask for a propensity direction?

MR BORICH:

Yes I did.

YOUNG J:

You did as well, so he hasn't dealt with your request, he's dealt with Mr Wilkinson-Smith's request.

TIPPING J:

Why was count 4 put to a Judge alone? Because this is the charge over –

MR BORICH:

No originally the – if I can draw Your Honour's attention to, in my submissions para 3.

TIPPING J:

Yes, I probably misread this, because I didn't find this terribly easy to follow as to what went off to trial by Judge alone and hasn't yet taken place.

MR BORICH:

That's count 3(c) and 3(d). They went off to Judge alone, so count 5 became count 3 and count 6 became count 4.

TIPPING J:

What's called the Otahuhu car incident?

MR BORICH:

That's the car incident.

TIPPING J:

That's not the same as the –

MR BORICH:

It is. It's the same thing.

TIPPING J:

Yes, well it was originally intended that that incident formed the basis of a charge at a concurrent trial.

MR BORICH:

Correct.

TIPPING J:

Now if that had been the case you'd probably have great difficulty getting severance and you would have obviously been entitled to a direction. Now why does it go off to trial separately and by Judge alone?

MR BORICH:

Because that was the election post-committal.

YOUNG J:

What happened is the defendants asked for trial by Judge alone on those charges, taking the view that they would get, that this would ensure de facto severance but with the threshold for getting de facto severance in this way was less than getting real severance and the Crown's position was that it obviously didn't like it but it didn't have a right of appeal.

TIPPING J:

Did the Judge order this or did they –

YOUNG J:

Yes, Chisholm J –

MR BORICH:

It was part of Chisholm J –

YOUNG J:

He took the view that it didn't really matter that severance wouldn't have been granted. Under this, under the test for ordering – a Judge alone a defendant can, in effect, get a de facto severance –

TIPPING J:

But he didn't have to order a Judge alone trial, did he?

MR BORICH:

The test is slightly reversed. There's a right of election post-committal.

TIPPING J:

Yes.

MR BORICH:

And the onus is on the Crown, if such an election is made, to demonstrate that it shouldn't be the case.

YOUNG J:

He just basically said well if the defendants want trial by Judge alone they clearly know what they're doing and I'm not going to second guess them. And it doesn't matter that this is, might otherwise have been the subject of a single trial.

MR BORICH:

Well –

TIPPING J:

But this is what's caused the arguments, at least from the –

MR BORICH:

Yes.

YOUNG J:

It's a very unhappy start to the case really.

MR BORICH:

Well that, it's consistent with his reasoning though because he then ruled the evidence out, at least as far as count 4 is concerned, so the Judge has been consistent in that regard.

YOUNG J:

But he didn't rule out the malnourishment evidence.

MR BORICH:

I agree with that –

YOUNG J:

So, on a severance issue there could have been absolutely no basis for severing the malnourishment charge from the other charges.

TIPPING J:

I would have thought it would be very difficult to sever count 4, absent this subtlety about Judge alone trials.

YOUNG J:

Yes.

TIPPING J:

Which rather suggests that the real issue in this case is the directions.

MR BORICH:

Well –

TIPPING J:

So far as this case is concerned for precedent purposes then there may be wider issues.

MR BORICH:

I don't necessarily agree that severance would have, I mean if one follows the traditional view, which would be severance sometimes follows the similar fact or propensity ruling.

TIPPING J:

Well how the Judge could have left the malnourishment in and severed the car incident, I don't know. I would have thought you either sever them both or keep them both in. But, I'm sorry, I'm probably being quite unhelpful Mr Borich. It's just a curiosity that –

MR BORICH:

I still maintain that elected Judge alone or otherwise that the severance argument sits allied with a propensity argument as far as the car incident is concerned.

TIPPING J:

I agree. I agree.

MR BORICH:

So if it's not in propensity then it wouldn't be in, it'd be out as far as severance goes.

TIPPING J:

But what I'm tending to think at the moment is that there's enough in it to let it in with a proper direction.

MR BORICH:

And that may be a time for me to move on to the question.

TIPPING J:

Well that's not a formed view at all. I mean it's just quite an unusual situation.

MR BORICH:

The prejudice of the incident can't be under-stated. The effect of it. Because it's a commonplace thing that people can understand and I endorse the approach of this reference to sliding scales, I do it in my written submissions, and I adopt it again today. Whether it's in or out is really dependant on whether the probative value overcomes the prejudicial value.

McGRATH J:

Isn't the commonplace nature of the incident though something that means the jury can perhaps, arguably unaided, get its proportion right in relation to the charges that are being faced?

MR BORICH:

No because it's just a sort of horror that it engenders the – leaving a child in a car is the sort of thing that will lead the news, as it were, or if a dog is left in a car there's concern on a hot day and so the commonplace doesn't dull, if you like, the prejudicial effect of it.

YOUNG J:

But what – the direction that would have been probably a cautious Judge would have given, would have been if you find the van incident occurred and that each of the defendants acted with culpability then don't jump to the conclusion that because of that they're guilty. Rather focus on the relevance, does it display or is it consistent with guilty knowledge on the part of Mr Mahomed. Does it display a particular attitude by Mrs Mahomed to the child, which is consistent with what the Crown alleges against her on the 27th and 28th, that is an unwillingness to have her exposed

to view and to the medical system. I mean if the Judge had given that direction would you have had any problem with it?

MR BORICH:

It would need to be a bit fuller.

TIPPING J:

Well somebody's got a good one in here, is it you Mr Borich?

MR BORICH:

Well thank you Sir. I've thrown something together, as it were, at paragraph 53.

TIPPING J:

It's broadly along the lines of my brothers', but somewhat expanded –

MR BORICH:

Yes and covers those important factors. Those, if you like, stepping off points where the jury can decide well, it may have some value against one and not the other. We don't think it's got any value against Mrs Mahomed so we've put it to one side. Even if we think –

YOUNG J:

Why would the jury not put it to one side if they thought it had no value against her?

MR BORICH:

Because it's just such a horrible incident.

YOUNG J:

But all sorts of horrible – I mean the whole case was a horrible case.

ELIAS CJ:

Well that –

MR BORICH:

Well not for Mrs Mahomed.

ELIAS CJ:

I must say that's what worries me, that why was it necessary to over-egg matters in this way?

MR BORICH:

That's perhaps not a –

ELIAS CJ:

That's not a question for you Mr Borich.

MR BORICH:

No but that's the problem.

ELIAS CJ:

Yes.

YOUNG J:

Well, I mean it is –

ELIAS CJ:

Particularly given the objectives of the Evidence Act and expedition and costs and all of those sort of things.

MR BORICH:

Mrs Mahomed's culpability, although the trial Judge took a different view, was really limited to what she did immediately following the administration of the fatal injury and whether she knew and whether she acted that amounted to a major departure. How the car incident a week before really helped, other than –

YOUNG J:

It could help you, if she does two really odd things, it makes it less likely that it was just a mistake on the 27th and 28th of December. The more the level of default that's shown against her, the stronger is the inference that she did exactly what the Crown said she did on the 27th and 28th and that is knowing that her husband had inflicted serious injuries, didn't do anything about it in the hope that he could avoid legal consequences.

MR BORICH:

And that is propensity reasoning.

YOUNG J:

Of course. Absolutely. I don't dispute that it's propensity reasoning but it's, and I don't think anyone here would really –

TIPPING J:

Except the Crown.

YOUNG J:

Well yes but I mean whether it requires a direction is another matter but the relevance of it is not, on the way I've put it to you, entirely insignificant.

MR BORICH:

It's weakened. Its probative value is weak in my respectful submission. Its probative value is weak. It doesn't overcome you left the child in the car and it was crying on a hot day.

TIPPING J:

It depends how much she was implicated in that event, doesn't it?

MR BORICH:

And that comes back to the –

TIPPING J:

As to how weak it is?

MR BORICH:

That comes back to the inference point and she wasn't really, she's there or thereabouts, she's selling the jewellery, she's expressed some concerns about her husband speaking with the police. Doesn't express any concerns to the witness about the child. It is, with respect, weak. And it needed to be strong.

YOUNG J:

It is consistent with her knowing that the child was injured and was therefore best left in the car.

MR BORICH:

In my respectful submission, there needed to be a bit more to draw that inference.

ELIAS CJ:

And what charge that she faces is it relevant to?

YOUNG J:

Well she only faced one charge.

ELIAS CJ:

Yes.

YOUNG J:

That is that knowing the child was injured and needed medical treatment, she didn't get it.

MR BORICH:

I think that's the time to move on to directions.

YOUNG J:

Can I ask you a question just before you get on to that? The Judge in his summing up said, "I told you yesterday about the need to keep the evidence in relation to each count separate". I couldn't find a space where he said that.

MR BORICH:

The only – I just find – there was some preliminary remarks –

YOUNG J:

He gave some preliminary directions didn't he?

MR BORICH:

It's at volume 2, page 386. The closest he comes to is on page 390, left-hand corner. And the practice adopted by His Honour, which I think was a good one in terms of the legal matters, was some preliminary remarks about the law, distribute the issue sheets and then counsel were able to address those directly in their summing up, which was helpful. But at the top of the page there, what he says is, "The charges against each must be proved beyond reasonable doubt by considering the evidence against each separately, although, of course, many facts necessary to prove the offence are common to both."

TIPPING J:
Well this is headed as a ruling, is this a direction to the jury?

MR BORICH:
Yes.

ELIAS CJ:
Which volume?

MR BORICH:
Volume 2.

BLANCHARD J:
It's the numbers at the bottom of the page.

TIPPING J:
Oh at the bottom.

ELIAS CJ:
Right.

MR BORICH:
Sorry. All references in the volumes and the material are to the stamp numbered at the bottom right or left-hand of each page.

TIPPING J:
So this was done before the closing addresses?
MR BORICH:

Correct.

BLANCHARD J:

Is this a new form of procedure?

MR BORICH:

It's the first time I've encountered it and it was somewhat strange but from a practitioner's perspective, I found it helpful, because then when coming to address the jury, they've got the issue sheets and the legal matters sorted and you could pick out what you wanted to address, so I don't know whether it's common or not, but –

TIPPING J:

Well the issue sheet has become relatively common and distributed before closing addresses, but it's new to me when you give a more elaborate direction, but still no harm I'm sure.

MR BORICH:

And the top there at 390, which is really directed at the separate counts, is the closest we get to –

YOUNG J:

He picks it up slightly, just sort of picks up that reference again later in the proper summing up but it's by reference to what he said the day before.

MR BORICH:

In terms of directions, it's difficult to know where to start. I mean my submission is the Judge hasn't given any direction whatsoever.

YOUNG J:

Well I think you're right, I don't think there is a direction. There's no – the Judge speaking as a Judge saying what the relevance of the evidence is and what it's not.

MR BORICH:

And it's something that the Court of Appeal in their pre-trial ruling, certainly envisaged as occurring.

TIPPING J:

I think it was conventional, at least in my time as a trial Judge, that you tended to – if it was marginal, if it was clearly in or out you said so. If it was marginal you tended to say, oh well we'll let it in and the Judge will give directions as to how to do it. But it's always struck me that the Judge, before doing that, has got to be actually able to articulate what the directions ought to be, so that you can actually satisfy yourself that you can give a sensible direction, because it's all very easy in the abstract you say you're going to give directions but I think it may be quite helpful for people in the course of doing this, to say, well can I give a satisfactory direction, a cogent simple direction, that will inform the jury of the permissible reasoning and the impermissible reasoning. And if you can't do that then if it's marginal, you probably should have ruled it out.

MR BORICH:

Well the point I make is that – I mean the Crown point in the pre-trial, in the post-trial appeal, the conviction appeal, it was that approval was never given, just too awkward, couldn't do it.

TIPPING J:

Yes, well that's the very point.

YOUNG J:

I think what they were saying is that a *R v Stewart* [2010] 1 NZLR 197 (CA) direction designed to pick up the case of a number of women alleging sexual abuse didn't fit, when it is perfectly – it would be perfectly possible to give a direction, I mean I think you modify *Stewart*, perhaps making it, I do think it is a bit awkward, but it would be simple enough to give a limiting direction, don't jump from a conclusion that this happened to a verdict of guilty. And in particular also to identify in a specific way, the relevance of the evidence.

MR BORICH:

But the key –

ELIAS CJ:

And to indicate that it's not relevant to some of the counts where that's so –

YOUNG J:

I think the Crown would've said it's relevant to everything.

ELIAS CJ:

Well it might have, but that might not have been correct.

TIPPING J:

Yes, it may have had different relevances, I don't know,

YOUNG J:

Well the Crown case was that the one assailant throughout was Mr Mahomed.

TIPPING J:

He was the aggressor if you like, and she was just an unfortunate –

YOUNG J:

Yes, so they did run their case on the two assaults and the murder closely together, and that was in a sense based as much, in part, on the admissions that he appeared to have made on the intercepts, I think. That's true isn't it?

MR BORICH:

Yes, that was the distinction between the two, was the intercepts.

McGRATH J:

Mr Borich, is it fair to say that the Judge gives his reasons anyway, on page 77 of minute 9?

MR BORICH:

Yes.

McGRATH J:

And he thought that in the end it would confuse rather than enlighten.

MR BORICH:

And he also took the view that the Court of Appeal didn't think at paragraph 4, didn't think it was propensity and just sort of took the section 7 and section 8 road.

McGRATH J:

That's so, but the question I wanted to ask you was, when in relation to paragraph 5 of the direction at page 77, he's addressing only the question of whether the direction's necessary in relation to Mr Mahomed's propensity, what does that mean in relation to your client?

MR BORICH:

Well precisely. That's one of the complaints, is that His Honour's failed to consider the separateness of both accused.

McGRATH J:

But does that indicate he just doesn't think it's relevant, or doesn't think the question even arises in relation to Mrs Mahomed.

MR BORICH:

I think probably the latter. I think he's done what I've indicated as being the general position with regards to these proceedings; considered the case of Mr Mahomed and how the propensity may or may not apply to him and how – as to admissibility, and as to directions, and then said, well that goes for Mrs Mahomed as well. And it's that failure to give that separate consideration.

TIPPING J:

I found rather difficult the second sentence in paragraph 4.

BLANCHARD J:

The last few words?

TIPPING J:

Yes.

ELIAS CJ:

Yes. Well Mr Borich I'm not sure that that's a question that you're expected to respond to, but we'll take the adjournment now.

COURT ADJOURNS: 11:30 AM

COURT RESUMES: 11:52 AM

ELIAS CJ:

Yes Mr Borich.

MR BORICH:

Thank you Your Honour.

ELIAS CJ:

Where are you taking us to now?

MR BORICH:

Directions and the need for them.

ELIAS CJ:

All right, thank you.

MR BORICH:

The post-Evidence Act Court of Appeal cases tend to say where propensity exists there need to be directions. The common law would tend to say the same thing and the Court of Appeal itself and its decision, notwithstanding its view that they needn't carry through that propensity analysis, expressed the view that the limits that its relevance can be firmly outlined in the Judge's summing up. Chisholm J was of the view that the evidence was so prejudicial that even with direction a fair trial was not possible. My simple submission is that there should have been directions. And the Crown response is, it was too tough, it was too awkward, couldn't put anything together that might have not been confusing. With respect, at paragraph 53 I've encapsulated what I've described as a modified *Stewart* direction which captures the essence of what the jury needed to be told. They needed to be told, "Look you've heard some evidence. The Crown rely on it for this reason. If you find it as having happened you can use it for this reason – "

YOUNG J:

Why do you have to find it as having happened? Why not do a *Sanders*?

MR BORICH:

If you're satisfied that it took place.

YOUNG J:

Mmm.

MR BORICH:

Well if you're satisfied that she was never there, or that it never happened, then it's of no relevance whatsoever.

YOUNG J:

Well that's different but on the *Sanders* approach you do, the jury should do it holistically, not the segmented way.

BLANCHARD J:

Sanders was really directed to the other type of classic similar fact evidence.

YOUNG J:

Yes, absolutely yes.

BLANCHARD J:

And it was really addressing the fact that it would be ironic if you had a large number of similar fact witnesses, each of whom on their own wasn't very convincing because the story to be told was a strange one, yet you couldn't put them all together and say, well the coincidence is just so great. That was all that was really directed to.

TIPPING J:

You couldn't ignore one simply because it didn't come up to a certain level of proof.

YOUNG J:

But we don't, and I know that it's a terrible case to cite for this, but *R v Thomas* CA305/98, 15 December 1998 does make it clear that in a circumstantial case there's no standard of proof in relation to each circumstance. It's the holistic – the jury doesn't say, well did this happen, did this happen, did this happen, did this happen and then from those segments reach a verdict. The jury is expected to look at the whole of the circumstances and engage in a process of Bayesian logic which is not always easy to explain but it does rest on ideas about coincidence.

MR BORICH:

But the jury have to be told what they do with Otahuhu. We don't just sort of give it to them and say –

YOUNG J:

We do in a circumstantial case.

MR BORICH:

Well I mean we're back to arguing about whether it's propensity.

YOUNG J:

No we're not arguing propensity.

MR BORICH:

No well –

YOUNG J:

We're arguing as to what directions are required.

MR BORICH:

Yes and in my respectful submissions they are those set out at paragraph 53, or something similar, which was to identify what the evidence was. Say why the Crown think it's relevant, and for what reasons, invite the jury to consider the evidence and decide whether they will place any reliance on it whatsoever or not, and if they do put it to – if they don't, put it to one side and if they do then just work through the process. Nothing, in my respectful submission, awkward, confusing or cumbersome about it.

TIPPING J:

Perhaps the key difference between propensity evidence and circumstantial evidence generally is that propensity evidence has the capacity to lead to improper reasoning whereas circumstantial evidence, either you think it helps or you don't.

MR BORICH:

And that's what is encapsulated in section 43(4) and in the cases. They recognise the capacity, as Your Honours stated, to lead to an improper reasoning process prejudicial to an accused –

TIPPING J:

Well that is the essential vice, isn't it, in propensity evidence? That it is capable of being truly probative but at the same time leading to improper reasoning.

MR BORICH:

Yes, because it's –

TIPPING J:

And you've got to be careful where the balance lies and then if it's in you've got to be careful that the jury don't use it for the wrong – in the wrong way. I don't – there seems to be a sort of mystique has grown up over all this which we should perhaps do our best to dispel.

MR BORICH:

I agree. It's common sense. You've got a piece of evidence and you can tell – the Crown can say well it's offered for this particular reason but there's another unstated obvious purpose or effect, and that's why the definition in section 40 doesn't –

TIPPING J:

Well you can't really blame the Crown. If it's got a proper use you can't blame them for putting it in. It's just that the jury shouldn't use it wrongly.

MR BORICH:

And they need to be told that they shouldn't use it, if it tends to show, that's the key phrase, if it tends to show.

YOUNG J:

You are saying, if it's propensity there has to be a direction?

MR BORICH:

I'm saying in this case there needs to be a direction.

YOUNG J:

All right. Okay. That's effectively a common law requirement rather than an Evidence Act requirement.

MR BORICH:

I agree there's nothing in the Evidence Act that directs – I think it's one of the points, that's one of the points that the, my learned friend makes, that well, it's not in the Evidence Act but there's all sorts of things about directions that –

YOUNG J:

Of course, I agree, but I'm just trying to identify the issue. Now in terms of the authorities you've got on the one hand a case like *Rongonui* which says, yes, in these sort of circumstances a propensity direction is required – a limiting direction is required but there are many other cases where such directions were not given in cases involving homicide and child abuse. Or where they haven't been, at least overtly, seen as necessary. Do you accept that or not?

MR BORICH:

Well the evidence isn't – that falls into that category of cases where you've got exceptions relating to motive –

YOUNG J:

No but I think probably we would have to say that given the definition of propensity, all that stuff is now propensity, right?

MR BORICH:

Yes.

YOUNG J:

So the motive cases, the pattern of conduct cases, relationship cases, the background cases, come in under section 43, right. But what's material, or may be material, in this context is whether such cases have in the past been seen as requiring a limiting direction. Now my take on it, and correct me if I'm wrong, dealing first with New Zealand, is that *Rongonui* is right in your favour. Against that there are cases on sexual abuse where the Courts didn't accept a similar fact evidence analysis, even where there was some corroboration of some but not other parts of the complainant's narrative. And that in the cases closely like this, evidence of motive, hostility and so on, that in practice a propensity direction wouldn't have been given up until now. Is that a fair take on it?

MR BORICH:

Perhaps, but this case isn't a, if you like, child abuse case, in the classic sense, it's a neglect case. It's not a homicide so far as Mrs Mahomed is concerned, it's a failing to provide, it's a neglect if you like, an omission to do something.

YOUNG J:

Maybe, she could've been charged perhaps with being an accessory after the fact to murder, I mean that's the particular, because there'd be a sort of congruence of events that the same evidence would be applicable.

MR BORICH:

I don't think we should be creating a special category of class by charge or by victim.

YOUNG J:

Of course not, absolutely, it's by relevance.

MR BORICH:

Because what we've got to do, what the law should do, is it should look at the evidence, its effect in the trial, and whether the concerns set out in section 43(4) and (1) require the need for a direction.

YOUNG J:

All right. Well my take on the Canadian cases is that a direction wouldn't have been given in this case if it occurred in Canada, is that your understanding?

MR BORICH:

Well I can neither say one way nor the other because I can't find a case.

YOUNG J:

Well I think that's Mr Downs' argument, based on the cases he's cited.

MR BORICH:

Well I think those deal with persons charged with homicide and those various other things. I don't know whether there is a case where someone's been charged and Mrs Mahomed has been charged, as solely failing to provide the necessities of life and not responsible for any allegation of abuse.

YOUNG J:

My understanding in relation to the English cases under the Criminal was it Justice Act 2003, or Criminal Evidence Act 2003 – but in this sort of situation, a failure to give a limiting direction would not be seen as fatal to a conviction. Are you aware of the English cases at all?

MR BORICH:

No, I'm, well the – some of the English cases talk about, and the problem is of course that a lot of the cases talk about similar fact and –

YOUNG J:

But they don't after 2003.

MR BORICH:

The –

YOUNG J:

There are seven gateways and one exception.

MR BORICH:

Well my researches have not revealed, if I can put it that way, and I'm not aware of the cases that Your Honour's talking about.

YOUNG J:

All right, and then finally in Australia a limiting direction would be required in a sexual abuse case, I'm not so – I just don't know what the position is in relation to violence cases. Are there any Australian cases outside the *Gipp* and *HML v R* [2008] HCA 16 cases, which are sex abuse cases that you can refer us to?

MR BORICH:

No.

YOUNG J:

Okay.

MR BORICH:

I come back to the point that it's the effect of the evidence which should determine the triggering of whether a direction is required, rather than the, I mean the category of case and all of those other factors, are things that are taken into account when one comes to consider whether that trigger is triggered if you like, and I wouldn't have thought there's any basis as it were, for saying, well if it's a sex case, yes, or if it's a violence case, no. And in my submission, because of the nature of this particular evidence and the fact that in the background the child died – not at the hands of Mrs Mahomed – and a tendency perhaps, in a situation like that, to blame Mrs Mahomed for the child's plight and sheet some responsibility home to her when she's not charged in relation to that and then look to the Otahuhu car incident to say, well look, there's an instance of her being a bad mother, if we find that's the case. This is precisely the sort of case that that point's triggered.

In terms of directions and so on, I'd draw some support from this Court's approach in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 about the need for directions, unless there's a real risk, and this is at paragraph 54 of my submissions. "Directions shouldn't be mandatory, unless without them there's a real risk the jury will approach the matter in an inappropriate way, which does not do justice to the defendant's case." And in essence those are protections for a fair trial. And in my submission the way in which propensity is set out in the Act, the trouble the common law has had with it down through the years, if there's any category of evidence capable of causing a miscarriage, if there's any category of evidence if it's before a jury that needs direction, if an accused's right to a fair trial is going to be compromised in any way, the most likely way is with this sort of evidence and so those protective directions about how to use the evidence and more importantly how not to use the evidence, to outline the prohibitive reasoning, are mandatory. And in my submission failure to give directions in this case has occasioned a miscarriage. Unless I can assist the Court further.

ELIAS CJ:

Thank you Mr Borich. Yes, Mr King.

MR KING:

If it pleases the Court, my submission, even though this appeal naturally can involve many different nuances regarding the interpretation of the Evidence Act, propensity evidence and so on, as far as the case of Mr Azees Mahomed is concerned it really is relatively straightforward and simple. The fact that the evidence was before the

jury is of course beyond dispute and it was before the jury in spades. Multiple witnesses –

TIPPING J:

What evidence are you referring to?

MR KING:

The van incident evidence.

TIPPING J:

Oh the van incident.

MR KING:

Sorry Sir. It was before the jury in spades. There were multiple witnesses called in relation to it. There was a 111 call and its transcript that was before the jury. It was the subject of reference in the intercepted communications and so on. So really it comes down to what use the jury may have put that evidence to. And it's highly significant, I submit, to consider the way in which the Crown proposed the evidence was to be put, because I submit it's quite different to what is being suggested today by the Crown as the basis of admissibility.

Now the reference that I would like to take the Court to is in the summing up. It's at page 412 of volume 2. Paragraph 34, when the learned trial Judge is summarising the Crown case he says this. "Now in summary the Crown case as outlined to you by Mr Hamlin relies on four areas of evidence. First, there are the events which occurred at the Mahomed's home on the night of the 27th the morning of the 28th of December. Second, there is Mr Mahomed's statement to Detective Solworthy when he was interviewed on the 28th. Third, there are Mr Mahomed's statements made in the communication with his wife in their house, which were intercepted over the following months, and fourth, there are the events in the carpark at Otahuhu on the 19th of December 2007.

ELIAS CJ:

Sorry, what page, is it 412 did you say?

MR KING:

Page 412 in the bottom, 000412 Ma'am.

ELIAS CJ:

Yes.

MR KING:

Paragraph 34, top of the page.

ELIAS CJ:

Oh I see, thank you.

MR KING:

His Honour then says he will deal briefly with each of those four areas. In paragraph 40 he deals specifically with what he terms the carpark incident, the fourth area. "Mr Hamlin says it is directly relevant to the murder charge. That is for you to determine. The issue is whether you consider it shows that Mr Mahomed was in the habit of acting negligently towards Tahani and had an uncaring attitude towards her. Whether or not you reach that conclusion or whether you form a view that in all the circumstances he was prepared to risk the baby's health, even her life, by leaving her unattended in a hot car while he worked, is for you to decide. What you make of his apparent indifference to Ms Trevena's reference, – and she was the security guard that was there – to Tahani's condition when he arrived, again is for you to decide. Mr Hamlin says this incident illustrates how Tahani had assumed a nuisance value for her parents. Again whether you agree, or whether you think it is relevant to the murder charge, is entirely for you."

So, regardless of the niceties which a, with respect, very senior appellate Court can put on this evidence and what basis it could be admissible and whether it was relationship evidence, history evidence, narrative, res gestae, propensity, or whatever, in my submission that does not take away the very simple fact that the jury was directed by the Judge in the manner set out in paragraph 40 and the Crown relied on it in the way that they summarised their –

YOUNG J:

I don't think that's quite right is it? In the closing address Mr Hamlin relies on it as I see it in really two ways. The first is saying basically, that the Mahomeds didn't love the little girl, which is –

MR KING:

Nuisance value to her parents.

YOUNG J:

Nuisance value. Which, you know, there's evidence in motive hostility, which would be customarily admissible in a murder trial. But secondly, he sort of gets back to it at page 295.

ELIAS CJ:

Is that the numbers at the bottom of the page?

YOUNG J:

That's the numbers at the bottom.

ELIAS CJ:

295?

YOUNG J:

Yes.

ELIAS CJ:

Gets back to it?

YOUNG J:

He gets back to the –

ELIAS CJ:

Oh yes, yes.

YOUNG J:

The first reference in the address is basically, "I didn't love the little girl". Secondly, he then says, "Leaving a baby in a hot car that day was not a big deal". He's ironic there I think, in relation to how Mrs Mahomed behaved, but then he says her concern was not directed to her child's wellbeing:

"…but the police are coming, more worried about that because of her previous injuries and the malnourishment of that child. They do not want to let police near, and they referred particularly", (and this is back to the transcripts); "that this incident is big proof against us". "We leave a baby in the car." …

She discusses leaving the baby in the car etcetera and so on. Then:

"So on their own words you can see it fits, and the December incident is the only one we can look at is it not? It's a unique way of judging how this couple in a sense were looking after it, because all the other evidence starts at the medical and works back, doesn't it, because we know medically what has happened when the child presents on the 28th. The evidence from there is worked back, but for the 19th a little window of opportunity, members of the jury, on the 19th to look and see what is happening and I suggest to you that that confirms the medical evidence that we subsequently find nine days later."

I mean there are a number of issues that are sort of touched on there, but one of them is guilty knowledge.

MR KING:
Yes, and you'll see Sir, at paragraph 61 of the summing up, in paragraph 000413 that is specifically referred to.

YOUNG J:
Yes.

MR KING:
In particular he points to the carpark incident at Otahuhu and says, "That Mr Mahomed's haste in departing, once he knew that the police were called, is consistent with a guilty mind."

YOUNG J:
He's actually summed up on each count I think, hasn't he?

MR KING:

Yes. But my point is that a jury, nonetheless, is told of its direct relevance to the murder charge. And that that's the basis upon which this evidence is there and that it chose –

YOUNG J:

Well its relevance to the murder charge was twofold. First in terms of basically the relationship between the parents and the child, and secondly; the guilty knowledge linked Mr Mahomed to the first two assaults, which in turn were linked back to the murder.

MR KING:

In my submission, that's not what paragraph 40 directs the jury on however. What it says is, "That the issue is whether you consider it shows that Mr Mahomed was in the habit of acting negligently towards Tahani and had an uncaring attitude towards her," and so on.

YOUNG J:

But that's part of the case.

MR KING:

My point is, Sir, that this, by linking it so firmly to the murder charge, as the fourth area of evidence which proves the charge of murder, which is the way in which the jury, in my submission, would inevitably have heard that passage. And one needs to be very careful in saying that, well this evidence was admissible in terms of count 6 for failing to, provide the necessities of life, and therefore it's admissible on that basis, because that is not what the jury was being told in paragraph 40, they were being told it was directly relevant to the murder charge. And the Crown submissions –

YOUNG J:

He does explain why that is in 61.

MR KING:

Well not – in 61 he's talking about the grievous bodily harm.

YOUNG J:

All right. Well I suppose that's true, although it's complex because the two assault charges and the murder charge are linked up quite closely in summing up.

MR KING:

Yes indeed. But my point is this Sir. That where a jury is told that this is directly relevant to the murder charge, they required proper and firm directions on how it was said to be relevant. In my submission that does not go far enough in that regard. And secondly of course it requires the improper use cautions and by repeatedly telling the jury it was a matter for them to decide, "It's entirely for you to decide". That passage can be seen as effectively inviting improper use, as effectively inviting the so called forbidden chain of reasoning of the old line of cases.

YOUNG J:

What's the forbidden chain of reasoning here? How would it work?

MR KING:

Bad person, bad father, murder. Now the issue –

YOUNG J:

Therefore we'll find him guilty of murder, even though we're not satisfied beyond reasonable doubt that he is.

MR KING:

Well the issue on the murder charge was first and foremost, "Who was the author of the injuries?" That was the key defence point for Mr Mahomed, essentially saying that the injury could've been inflicted by his wife. She, it seems, is alleged to have tacitly gone along with that at least. But on deciding that question of, "Who is the person that inflicted these injuries?" In my submission, it was of no assistance to the jury on a legitimate basis, but was nevertheless highly prejudicial to say, "Well because he'd left her alone in a car on a previous occasion" he was the author of this crime, of murder.

Now the point that I would seek to make is firstly, the Crown in this Court today is saying that the relevance of the evidence was multi-faceted as we all acknowledge their submission to be. But paragraph 76 of the respondent's submissions, they give a summary of the probative value. "In summary the evidence had significant probative value in relation to count 6 –

TIPPING J:

Sorry where? I've lost.

MR KING:

Paragraph 76 of the respondent's submissions Sir.

TIPPING J:

Thank you.

MR KING:

"In summary the evidence had significant probative value in relation to count 6 as it disclosed similar conduct in approximate period. It constituted circumstantial evidence of guilt by tending to refute the appellant's statement to the police and the evidence was also admissible as part of the narrative. In terms of the Evidence Act, the evidence was admissible under all three heads pursuant to section 7 and 8 of the Act." What the Crown does not appear to be seeking to uphold, is the relevance as propensity evidence on the count of murder. And in my submission –

YOUNG J:

Well I think that's because they don't call it propensity isn't it?

MR KING:

No, but the Judge clearly did put it forward in my submission, as propensity evidence on the charge of murder. And I submit that any –

YOUNG J:

No, but I – if it's put forward as tendency or a habit of doing something or thinking something and it's then, for the sake of argument, let's accept it is propensity –

MR KING:

Yes.

YOUNG J:

But what's caused a lot of the difficulty in the case, is that the Judge and the Court of Appeal the first time around, tended not to use the word propensity for that evidence. Treating propensity to harm a – the victim is not being within the propensity rule.

MR KING:

Which would in my submission, be contrary to the very words that section 40 of the statute, but –

YOUNG J:

Yes I understand that. But I'm not sure that the Crown is saying, if we agree on a common nomenclature I suspect the Crown is saying that its propensity evidence. That the Crown are saying –

MR KING:

But not –

YOUNG J:

The Crown are saying, they're not calling it propensity, but they are saying, this is evidence that points to a particular habit of behaviour.

MR KING:

It seems a very fine distinction, your habit behaviour.

YOUNG J:

Yes.

MR KING:

Even narrative. I mean it still has to be relevant. And the relevancy must be in my submission on a propensity basis.

YOUNG J:

Would you accept the guilty mind point?

MR KING:

Yes.

YOUNG J:

So it's guilty mind point, plus a habit of behaviour and a habit of thinking.

MR KING:

Which is the propensity component, yes.

YOUNG J:

Yes.

MR KING:

But what the Crown do not prepare to be linking that expressly to, whereas they do in respect of count 6, the failing to provide the necessaries of life count, they don't seem to align it to the murder charge in quite the same way that the learned Judge directed the jury as its relevance.

YOUNG J:

It's quite subtle though is it?

MR KING:

In my submission it isn't because one must never lose sight of the fact that a jury is hearing this direction and are being told, the Crown say, and the Judge repeats, that it's directly relevant to the charge of murder. It's a matter for us to make what we want of this evidence but then it does tend to show a tendency or an inkling – actually it goes further to –

TIPPING J:

Well one of the unsatisfactory features of this case, at least subject to further argument Mr King, seems to be that the Judge is simply here saying what the Crown was saying.

MR KING:

Mmm.

TIPPING J:

I mean, so what? The jury needs to know what the correct position is in law?

MR KING:

Yes it will. The closest we get to that is at the final sentence where again whether you agree or whether you think it is relevant to the murder charge is entirely for you. I mean in my submission that is not assistance to simply say, it's yours. The classification of the nature of the evidence, in my submission, as far as Mr Mahomed

is concerned, is of far less relevance than what the jury could have made of it and in my submission if they were to follow that direction, that you must consider that evidence as potentially directly relevant to the charge of murder, because it shows a pattern, then that is absolutely a classic case where propensity directions weren't necessary.

TIPPING J:

I suppose in fairness to the Judge's direction, "the issue is whether you consider" et cetera, is his own input –

MR KING:

Yes. It's a matter for you to decide whether you accept that submission.

TIPPING J:

Well he's in effect telling them that if they consider it shows that, it is directly relevant to the murder charge.

MR KING:

Yes but he doesn't say how.

TIPPING J:

How, no.

MR KING:

Or why or how it's not relevant.

YOUNG J:

Might it not be obvious? It's because it shows they don't love the child, making it all the more likely that the 27, 28 events took place as the Crown alleged.

ELIAS CJ:

It's a big stretch, however, from not loving to killing.

YOUNG J:

Of course.

MR KING:

And if it's limited to motive then it should, it would take an extra sentence to say that. You may – the Crown's case is that this is relevant to motive, and the other ways in which Your Honour has articulated, but the nonsense, with respect, and I don't use that word lightly, of saying that it would confuse the jury to give them a proper use direction in the context of the directions that were given to them, how could they not have been already confused about the proper basis on which to use it. And then we seem to have, with the greatest of respect to the learned trial Judge, an almost different approach, when he has been, after the summing up, requested by both counsel to give a propensity direction and His Honour says, well it's not propensity evidence. That's in the minute, of course, the learned trial Judge at volume 1 at page 000076, paragraph 5, page 77, "With respect, the evidence of the car incident is not propensity evidence. It is not offered to show Mr Mahomed's propensity to act in a particular way or to have a particular state of mind or pattern of behaviour. The evidence of his treatment of the older child Tasmia, is to the contrary, but as discrete evidence it was attitude of neglect of and disinterest in her support."

Well in my submission when one weighs that explanation alongside what His Honour has just told the jury in paragraph 40, that it is directly relevant to the issue of murder, for the reasons set out there, it just cannot be reconciled. And this isn't one of those cases where someone has come along well after the event and said, oh well this direction should have been given. This matter was raised specifically at the conclusion of the summing up by both counsel requesting that His Honour recall the jury and give them those specific directions. So in my submission one cannot say that there was any want of care on the part of the trial counsel. They had identified this issue, they had raised it with His Honour and what we have is an explanation that it's not propensity evidence despite what His Honour has told the jury –

TIPPING J:

The Judge seems to have been influenced when coming to this view by what the Court of Appeal had said in the first round in the case.

MR KING:

Yes and in my submission he misconstrued that because although the Court of Appeal did say it was relevant in that basis, of relationship evidence for want of a better label, they certainly recognised it had a potential as propensity evidence and –

TIPPING J:
And as I recall it didn't they say –

MR KING:
The need for a firm direction.

TIPPING J:
– that the directions would be required?

MR KING:
Absolutely. They say that and they were right, in my submission, and this is at – in the same volume, page 000074, paragraph 50 of the Court of Appeal's judgment. "In any event the jury can be warned that even if the van incident is regarded as proven it by no means establishes the guilt of the Mahomeds in relation to the actual charges. The limits of its relevance can be firmly outlined in the Judge's summing up."

Now the comment was made earlier, or there was discussion earlier, that the Evidence Act does not require specifically, or does not address the need for directions. In my submission the need for directions is an inherent part of the overall balancing exercise of determining probative value against prejudicial tendency. In respect to section 43(4) the particular prejudices known as being inherent in propensity evidence are identified. "When assessing the prejudicial effect of evidence on the defendant the Judge must consider, among any other matters, (a) whether the evidence is likely to unfairly predispose the fact finder against the defendant and (b) whether the fact finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions." Those are the specific prejudices.

In my submission it is inevitably the case that when a Court is assessing the prejudicial evidence, one of the factors is whether that prejudice can be ameliorated by appropriate directions. So in the balancing exercise, right it's on the face of it this evidence is highly prejudicial. However, we think it can be managed with sufficient

judicial directions to the point that the prejudice is less than its probative value. So I would respectfully submit that it is inherent in that balancing test the probative value is dependent upon the Judge properly identifying and directing the jury as to what the probative value is. The prejudice is subject to whether it can be effectively ameliorated through judicial directions and the Court of Appeal in dealing with the interlocutory appeal clearly in this case recognised that there was risk. They refer to it in some detail and they summarise the arguments of Mr Wilkinson-Smith on behalf of Mr Mahomed and then effectively in their conclusion recognise that firm judicial directions are required.

The balance between probative and prejudicial evidence is context specific and it is in my submission also charge specific. In this case Mr Mahomed was facing this most serious charge, of course, the most serious one we have in the Crimes Act, that of murder, followed closely by two counts of grievous bodily harm. Count 6, the failing to provide the necessaries of life must, it is submitted, pale into almost insignificance on the global scale of his alleged criminality. So to say that –

ELIAS CJ:

Well it's not a – it's also, contextually it's not a continuing pattern as sometimes arises which is slightly different. It is consequential on this catastrophic assault.

MR KING:

Yes, those charges are, but the charge of failing to provide the necessaries of life –

ELIAS CJ:

Oh I see, in respect of –

MR KING:

– is of course an omission.

ELIAS CJ:

Yes.

MR KING:

So my submission is to say that this evidence was relevant to the charge of failing to provide the necessaries of life, if that's where the probative value is seen to be most then that needs to be weighed against the fact that in the scheme of things that

charge was just so trivial and is there a risk – or the consequent prejudice that the evidence may be misused is all the more greater if it is to be applied against these extraordinarily serious charges.

The next point I would make on the balancing between prejudice and probative is that the respective towers change in height depending upon the basis of admissibility. In my submission if it is simply to be regarded as the Crown would say, as relationship evidence, it's probative value is fairly low. Whereas, if it is legitimately to be available as propensity evidence by which a jury would be invited to reach an inference of guilt, it becomes an important strand of a circumstantial case as opposed to simply narrative or background.

TIPPING J:

Can it be admitted as "relationship", in inverted commas evidence, unless it is propensity evidence? I mean, this idea of relationship evidence has always rather troubled me because it's almost a licence to put anything in.

MR KING:

Yes, it's almost the Delcelia Witika case I suspect which was the child abuse case that is well known, where there were many previous incidents of violence against the deceased admitted in evidence without consequence directions in –

TIPPING J:

Well, that may be perfectly all right but to sort of invite putting in anything to do with the relationship that presumably is not very favourable to the accused –

MR KING:

Yes, well my submission is as simple as this. If the nature of the relationship is relevant, then subject to probative value being more than prejudicial effect it's admissible but it's difficult, with respect, to see in an allegation which is discrete and is unrelated to the events and what I really mean by that is would the Crown be able to present proper evidence in relation to the charge, the serious charge of murder, in the absence of this evidence. In my submission, of course they would. They still had a great deal to work with.

YOUNG J:

Does that really matter?

MR KING:
It does, I submit Sir.

YOUNG J:
I mean, I know, in difference to the Chief Justice and what she said before lunch, I see that Professor Spencer says that the over-egging complaint that is often made is a perverse one that in fact, similar fact evidence, or propensity evidence, is at its safest when it's closely linked to a strong case.

MR KING:
Well that's I suppose the Bayesian theory of admissibility really in the sense the contextual admissibility that a partial fingerprint is admissible in one case, where you've got lots of other evidence which tends to support the person there. Whereas, on a standalone basis it wouldn't be admissible.

YOUNG J:
Yes.

MR KING:
That's the argument I suppose. What I would – and really in the same type of logic, submit, is that the basis of admissibility determines its relevancy. Relevancy determines its probative value and it's against that that prejudice is to be measured. So, how we say – if one comes to the conclusion that this evidence was admissible for one purpose, then one then needs to look at that purpose and its probative value in respect of that purpose and my point is simply that if it's admissible as propensity evidence its probative value may be different, in my submission, may be higher than if it's admissible only on some other relationship contextual type basis.

So one doesn't properly, in my submission, have to identify what is the relevancy of this evidence before one can determine the probative value of this evidence, before one can measure that against the prejudice.

I agree with the comments that have made earlier, wholeheartedly, that it's an artificial distinction to say that relationship evidence is really any different to propensity evidence in the normal sense in which it has been discussed in this case.

YOUNG J:

Can I just ask you a question about that that is slightly off the topic? In sex cases, the complainant will often give what is described as relationship evidence, not so much with a view to the Crown seeking to rely on one incident to reinforce another but rather because the complainant wishes to explain why perhaps she apparently acquiesces in behaviour?

MR KING:

Yes.

YOUNG J:

Now, is that propensity evidence?

MR KING:

No, it's not. That's relevant evidence because it helps explain an element of events or an issue in the trial. Where it would become propensity evidence is if for example, it was being suggested as grooming behaviour so it reflected on the accused's state of mind, the accused's habits, the accused's conduct, as opposed to the –

YOUNG J:

It will reflect, I mean, it's in a sense propensity evidence but the complainant is saying well, the reason I did this is because this chap has got a propensity to be violent.

MR KING:

It's very case specific in my submission and that's why I simply say we're guided by the Act in sensible logical fashion by saying, first of all determine whether it's truly relevant to a fact in issue, and secondly –

ELIAS CJ:

Well it is – whether it's directly relevant?

MR KING:

Yes.

ELIAS CJ:

Yes.

MR KING:

Section 7 and then we apply that against the section 8 balancing test, is it more probative than prejudicial but this is all a very nice debate but, in my submission, what it comes back to in Mr Azees Mahomed's case, is the direction to the jury that this is directly relevant to the charge of murder and without further – without explanation, without warning, it's just fatal in my submission. This was the fourth area of evidence identified to the jury as being relied on by the Crown. It was the subject of extensive evidence from multiple sources and the directions on it, apart from saying it's a matter for you and it's directly relevant to the charge of murder with, it's accepted Sir, in fairness, with those riders added on in paragraph 61, those directions do not come within a bull's roar, I submit, of preventing the danger that the jury would simply conclude he's a bad person, that proves that he was the author of this horrendous crime of murder. It's the classic forbidden chain of reasoning that because the person is a burglar or a thief and clearly disposed to this type of conduct, he or she is the author of the crime.

In my submission, when one looks at those old cases, the *Boardman v DPP* [1975] AC 421 (HL) and others, and I know they're pre-Evidence Act but when one looks at those dangers, they are here in abundance.

TIPPING J:

Was the real issue – probably the only liable issue on the murder charge, whether it was him or his wife?

MR KING:

Yes, authorship of the crime.

TIPPING J:

It wasn't suggested that it was anyone other than –

MR KING:

It wasn't suggested it couldn't have been anyone else. There were no babysitters identified or anything of that nature –

TIPPING J:

No but there was no tenable –

MR KING:

Correct, correct.

YOUNG J:

There was a murderous intent issue?

MR KING:

Indeed.

TIPPING J:

Oh, yes.

MR KING:

Yes, of course.

TIPPING J:

Yes.

MR KING:

So it was –

YOUNG J:

(a), author and (b) –

MR KING:

– this way and –

TIPPING J:

Well, once you got it being – you still have to go through the necessary mental state but the primary issue, I would have thought in reality, was who was it?

MR KING:

Who was it and did they intend –

TIPPING J:

And whether they had murderous intent, yes.

MR KING:

Indeed, those were the issues. His Honour really, in that paragraph 40, invites the jury to use the carpark or the van incident, I submit, in both of those ways.

TIPPING J:

So he's really saying that this van incident is directly relevant to whether it was Mr –

MR KING:

Mahomed –

TIPPING J:

– and directly relevant to whether he had murderous intent?

MR KING:

Yes and they're clear on that second aspect than the former but they're both there.

TIPPING J:

Mmm.

MR KING:

By saying to them, was the person prepared to risk her life –

TIPPING J:

Well the use of the word negligently in there is a little awkward if you're telling someone it's directly relevant to murder.

MR KING:

Yes, indeed.

YOUNG J:

He probably means neglectfully I suspect.

TIPPING J:

I'm sure but it's just not helpful.

MR KING:

In my submission, whatever His Honour intended to say, we can't assume that the jury would have thought oh well, what he really meant was this, this and this and he didn't intend us to take it this way. On the simple facts of this case, the jury were directed that this evidence that they'd heard so much about, from so many different sources, as one of the four areas relied on by the Crown, was directly relevant to the murder charge. It showed his uncaring attitude, it showed that he was prepared to risk her health, even her life, by leaving her unattended in a hot car.

Well, that's for you to decide but in my submission it just – no matter how one classifies this evidence, no matter whether one says it's admissibility on one basis or the other or a combination of basis, the direction there must just be apt to mislead, in my submission. It's not a – the failure to give a proper use direction, it is in essence an improper use direction.

TIPPING J:

Well, it's capable of being heard in that sense.

MR KING:

Indeed. I'm sure His Honour didn't mean it to be heard like that – and I certainly don't suggest that, but a jury hearing it, being asked to apply it, having heard so much of the evidence, having the 111 transcript with them, having heard that really prejudicial tape where you've got Mr – if the Court's seen it, it's there but you've got Mr Mahomed allegedly laughing in the background at the suggestion that he's not being a good father, refusing to stay and racing off. I mean, this was not just something that in some cases and we'll have one later on this year where the so-called propensity evidence was dealt with by way of a summary of facts to avoid, or to try and minimise the prejudice to the jury. Previous incidents were put forward in witness statements which were then read to the jury. So it's there, the Crown can make what they want of it and one hopes and I'll be arguing that it wasn't sufficient of course, that's my job.

But when one compares that situation to here, we've 10 witnesses, intercepted communications refer to it, there's the transcript of the 111 call, there's the playing of the 111 call, this was something that assumed real prominence and significance in the case and it was necessary, it was incumbent on the Judge to direct on it. The

flags were all there. This incident had been the subject of a discrete charge. That charge was severed off effectively by His Honour Chisholm J. His Honour Chisholm J determined that the evidence of the van incident could not be admitted, it was simply not capable of being put forward in a way which did not jeopardise the right to a fair trial. That decision was reversed by the Court of Appeal but the charge, as is known, was not reinstated. So the Crown case could have been perfectly adequately presented without any reference to that at all. It's not one of those situations where it would have caused massive – the cases used to talk about the case being presented on an artificial basis. In my submission it was not that type of case. The allegations of murder and grievous bodily harm and so on could have been properly and adequately presented. But the question of admissibility might be secondary to the question of sufficiency of directions and I don't know if I can assist the Court further than to say that the directions, in my submission, in paragraph 40 especially, when one compares that to the minute and written – now given there, really is inviting improper use.

TIPPING J:

Well the minute is really a side issue in a sense isn't it? It's how the jury may or may not have been –

MR KING:

Yes.

TIPPING J:

The Judge's musings, if you like, of his minute.

MR KING:

Yes. Well it's his justification for not directing them and his conclusion that it would confuse them –

TIPPING J:

Well it's almost an argument in favour of the non-direction but –

MR KING:

Yes, well that's what he's saying but that's contrary, I submit, to what the jury has been directed about the evidence.

TIPPING J:

But it's inconsistent with the –

MR KING:

I say contrary but yes.

TIPPING J:

The question is whether or not the direction was adequate –

MR KING:

Yes.

TIPPING J:

– or misleading?

MR KING:

Yes and in my submission it was neither adequate and it was potentially misleading and it would have been, when one reflects on how a jury hearing this in the context of the very distressing evidence that they'd heard already, could have applied this in the absence of any type of improper use direction. I mean what's a jury to make of this respect, well say I was right, this incident is nine days previously. He's left the baby in the car and we've heard all this about it and it's directly relevant to the charge of murder. Well, then it's a matter for you to decide whether that's so and then some talk about it shows there's a habit and a pattern of risking her life. In my submission it just cannot be sustained and despite the fact the Court may have concerns about the strength of the prosecution case and everything I would respectfully submit it is not a case where the proviso could legitimately be applied in respect of both, either appellants. If the evidence is sufficient to found the charges, notwithstanding this evidence or this evidence being properly before the jury and properly directed on, then that can be determined at a retrial.

Mr Mahomed has been sentenced to life imprisonment with a minimum period of 17 years. That's a relevant consideration I submit but the way the evidence was put forward is one of the four key areas. The way the jury were told it's directly relevant to the charge of murder. The absence of any improper use directions. And if one does compare, the case of *Rongonui* has been referred to, in that case the reference to the previous burglaries was fairly fleeting. It was not something that assumed great prominence, it certainly wasn't the subject of 10 witnesses and recorded

transcripts and so on and so on as we have here. And like that case it was in the context of horrible allegations of extreme violence. One distinguishing factor that I say makes this case more compelling than the *Rongonui* one was that in *Rongonui* of course it was never disputed that Mrs Rongonui was not the author of the crime. She accepted manslaughter and the jury knew that. They knew that she accepted responsibility for those horrendous injuries inflicted on that unfortunate person. So one must measure the prejudice against that trial issue. Here the trial issue was who caused the injuries and did they do it with the reckless of intent. Manslaughter was not conceded and this type of evidence classically, and almost in a textbook way, would invoke those, all of those issues or prejudice identified in those Canadian authorities that I put forward, this is Sopinka J and Murphy J and I know that they've, I've probably put them before the Appellate Courts a hundred times but they're the best encapsulation, in my submission, of the types of prejudice but when one adds to it also that evidence can have a detrimental effect on a person's exercise of their right to silence, that was a factor identified in the Court of Appeal in this case in the interlocutory appeal that the admission of this evidence put increased pressure on the appellants to give evidence.

YOUNG J:

He staunchly resisted.

MR KING:

Sorry?

YOUNG J:

The defendant staunchly resisted the pressure to give evidence.

MR KING:

Very strongly resisted the pressure to give evidence but he's got an IQ of 70. He would have made an appalling witness frankly and, you know, that evidence wasn't before the jury. And of course, and I'm not going to go any further, but there was a direction to the jury about his silence at trial which in a case where the Judge knew but the jury didn't that this man had an IQ of 70. But that just adds to the picture in my submission.

Unless I can answer any specific issues I don't know if I can –

ELIAS CJ:

What direction was given on the failure to give evidence?

MR KING:

The Judge made adverse comment on the accused's failure to give evidence.

ELIAS CJ:

Right.

MR KING:

In a case where he had an IQ of 70 which the Judge knew but the jury didn't. Unless there are any further questions?

ELIAS CJ:

No thank you.

MR KING:

Sorry, can I just in close – can I just identify one issue because it assumes some significance this morning and that is the blindness issue. There is a minute of His Honour the trial Judge dealing with that. It's at volume 2 at page 000381 and it just explains how that evidence really had come out of the blue. His request was properly based. He refers to evidence given by Dr Zucollo that on examination Tahani was found to be suffering from an older optic nerve injury. She found evidence that the left eye was damaged from an earlier event. That event could have caused blindness in the left eye. Later Dr Zucollo referred to it being likely.

So that was something and although these things can assume greater significance through reanalysis and hindsight, let's, in my respectful submission, not lose sight of the fact that that was evidence which had not even been briefed to be given.

YOUNG J:

Was that all the evidence there was on the topic? I thought there was a bit more available? Wasn't their evidence from the ophthalmologist?

MR KING:

There may well have been. I'm sorry I can't – yes that was the second injury, this is the older injury Sir.

YOUNG J:

Yes I know that but didn't the ophthalmologist look at both the little girl's eyes? Don't worry about it.

MR KING:

I don't know if –

YOUNG J:

Sorry, do you know, is the evidence of the Plunket nurse anywhere?

MR KING:

The Plunket book was admitted as an exhibit. We do have – there is reference to – at page 000991.

YOUNG J:

911.

MR KING:

There was, I understand, a brief of the evidence of the Plunket nurse that was read to the jury but unfortunately does not seem to have been included in the case.

YOUNG J:

Sorry 009?

MR KING:

One. 991.

YOUNG J:

991?

MR KING:

Yes Sir.

YOUNG J:

Okay.

MR KING:

And there's, page – line 15. Now you'd expect a nurse vaccinating a baby to notice if it was severely malnourished wouldn't you? I would hope so and so on. But that is supplanted by the fact – well supplemented by the brief of evidence which we'll arrange to get to the Court.

YOUNG J:

Which presumably is that she noticed nothing untoward?

MR KING:

Yes. If it pleases the Court.

ELIAS CJ:

Yes, thank you Mr King. Yes Mr Downs?

MR DOWNS:

May it please the Court, I wonder if it may be of assistance to the Court to identify, hopefully with sufficient precision, the ways in which this evidence we contend was relevant and cogent in relation to the issues at trial. And we respectfully submit these points number 4. The first is that the carpark incident was directly relevant and cogent of matters in dispute in relation to counts 1 and 2. The court will recall they were the old injuries, the old head injury and the old leg injury. Because of flight on the part of Mr Mahomed from the carpark scene when he was confronted by a security guard. And I should interpolate, the uncontested evidence at trial, was that the old head injury necessarily predated the carpark incident. In other words, it was at least a fortnight old, and that is a fortnight working back from the date of admission to hospital.

YOUNG J:

Some of the dates, some of them relate to the date of the post mortem don't they?

MR DOWNS:

Yes, they do. I have satisfied myself that Dr Hope's evidence on the point, was dated from the date of the CT scan and MRI. Both of which were taken on the 28th

when the deceased was brought to hospital by the parents and therefore necessarily predated the carpark episode. We can't be so clear in relation to the leg injury and that was because the jury heard evidence that fractures are more difficult to date. The best that could be said was that the injury was approximately two weeks' old. Now that reference to approximately two weeks' old was in reference to an x-ray taken of the deceased, and I use that term specifically, on the 2nd of December, so it's working back from that date.

YOUNG J:

Sorry, the 2nd of January?

MR DOWNS:

Yes I'm sorry, the 2nd of January, yes. But to recap in relation to this first ground, it was undoubtedly, we respectfully suggest, relevant and cogent in relation to consciousness of guilty for the older head injury, which was associated with probable blindness of the left eye. The evidence wasn't put higher than that, probable was the phraseology if I recall it correctly, of the relevant expert.

The second head –

ELIAS CJ:

Sorry, in respect of that –

MR DOWNS:

Yes.

ELIAS CJ:

The evidence that needed to be led, was simply of flight?

MR DOWNS:

It may be an answer, if I identify the second head.

ELIAS CJ:

Yes I realise that there's a different argument in respect of different uses, but if this is cogent and the other isn't, it is the case that the background perhaps didn't need to be developed to the extent that it was.

MR DOWNS:

If I might –

YOUNG J:

Can I just ask you a question as to that? Was it the case – is it part of the Crown case that the reason for leaving the child in the car may have been related to her injuries?

MR DOWNS:

I don't recall that ever being suggested, I have to say. But it may or may not be an answer to the Chief Justice's question if I identify the second point, which is that by virtue of being close in time and similar in character to the subject matter of count 4, and by count 4 I mean of the trial indictment, which was the failure to provide the necessities of life, which involved on the evidence, the exposure of the deceased to the risk of serious harm by not obtaining immediate medical treatment, the evidence was directly referable to whether both appellants had failed to provide the necessities and whether there was any lawful excuse. Now put in a much less verbose way, I respectfully suggest that this was similar conduct to that which occurred in relation to count 4, because the allegation in essence was, that both parents were deliberately exposing the child to the risk of serious harm by leaving her in a car, at approximate period to an allegation that they similarly exposed her to the risk of serious harm, by failing to take her to hospital eight or nine days later. Now I think everyone would probably now agree, that that is a propensity purpose, and I shall return to that necessarily later.

The third point, or the third head in my respectful submission, is that the carpark incident, or the van incident as it's been described, had a slightly broader orbit to all of the counts in the indictment, including murder, by virtue of being part of a pattern of mistreatment and neglect against the deceased and only the deceased, from which the jury could then infer that the appellants acted with the requisite intent in relation to each and every count in the indictment. Or, hopefully unpacked, that there was a hostile animus on the part of both appellants towards the child.

The fourth head, and again it's of slightly broader orbit.

ELIAS CJ:

You stressed of both parents?

MR DOWNS:

Yes.

ELIAS CJ:

Because of course the other two counts provide the same in respect of Mr Mahomed?

MR DOWNS:

Yes. In relation to the fourth head, we would respectfully submit it was circumstantial evidence of guilty in relation to both appellants for this reason. When each was questioned by the police, I think I'm correct to say on the day the deceased was hospitalised, each vigorously protested that neither would have done anything to harm the child, or expose her to harm in any way whatsoever. And indeed, and I used this as an example only, Mrs Mahomed was asked, and the reference is in our written submission, by the interviewing officer, whether there had been any incident within the previous 10 days that might have contributed to the child's condition.

Now I should acknowledge that question wasn't asked, because the police knew about the carpark incident. They didn't then. But nonetheless, the response on the part of Mrs Mahomed was "No", and that essentially she and her husband could not and were incapable of doing anything to harm the child. And with respect this –

ELIAS CJ:

Can you just give us the reference for that please?

MR DOWNS:

Yes, I should have done so earlier and I apologise.

ELIAS CJ:

The question was whether there was any potential cause of the death –

MR DOWNS:

Yes.

ELIAS CJ:

– which had taken place in the last 10 days?

MR DOWNS:

Yes, that's right.

ELIAS CJ:

So –

MR DOWNS:

The reference is at page 542, this is of the new numbering. So we'll find it in volume 2. And if we look at about the middle of the page, the officer introduces the topic of any changes in behaviour in the previous 10 days and then the reference to anything that might've contributed to what's happened. Now clearly it's a reference to the injuries sustained, but if we look at the interview more broadly, it's clear that the appellant Mrs Mahomed asserts, and asserts vigorously that she was incapable of exposing her daughter to any harm and –

ELIAS CJ:

But that's the, that's the second, that's the third argument you put forward. This, as circumstantial evidence of guilt, it's – you're not suggesting the carpark incident should've been disclosed as part of this, in answer to this question about the last 10 days?

MR DOWNS:

In conjunction with the other events, we are submitting that. In other words, it was part of – legitimately part of the picture in response to the allegations by both parents.

ELIAS CJ:

I'm not sure that that is what was asked though. Sorry, where's the question again?

MR DOWNS:

The precise question –

ELIAS CJ:

Is there any incident, is that the one, anything –

MR DOWNS:

Yes but if we look at – I might have misguided the Court. If we look between for example, pages 564 and 567, Mrs Mahomed is very vigorous in asserting that she would never have done anything to either harm her daughter or to expose her to the risk of harm –

YOUNG J:

Sorry, what pages were they, I'm sorry, page –

MR DOWNS:

I'm sure Sir, this is between pages 564 and 567, we're at the same volume, volume 2.

TIPPING J:

Is the force of the point that this was a lie which was indicative of some guilty mind?

MR DOWNS:

That's precisely the point.

TIPPING J:

Yes.

BLANCHARD J:

But would – was the questioning such that she would have appreciated that an incident of the kind that occurred in the carpark came within the ambit of the question? If she's asking questions in relation to a child who has suffered a blow and died as a result, would the kind of questioning she was having trigger a recollection about the carpark?

MR DOWNS:

The questioning becomes more general.

BLANCHARD J:

Can you show us?

MR DOWNS:

Hopefully.

ELIAS CJ:

Perhaps we should take the adjournment and you can return to it but it does seem to me that in fact you're developing this point on two bases. One is the question that was earlier put which is what I was taking you to, about the last 10 days and the issue there is well, why was the carpark incident relevant to that but you've expanded it to say that she was answering more generally that neither of them would doing anything to harm the child and that was a lie from which – which was circumstantial evidence of guilt.

MR KING:

Yes and in relation to the latter, may I commend to the Court those questions and answers between pages 564 and 567, as an example of how general Mrs Mahomed was in responding with –

BLANCHARD J:

Well, are you going to come back to this after lunch?

MR KING:

Yes, I shall do, of course.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.19 PM

ELIAS CJ:

Thank you Mr Downs.

MR DOWNS:

Yes, may it please the Court, just prior to the luncheon adjournment I had undertaken to particularise the evidence in support of the fourth head as it were and if it's convenient to the Court I propose to do so now.

The relevant passages are between pages 564 and 569 of the second volume and I should introduce them by observing that it's the cumulative effect and their thrust or tenor that is perhaps important. The first passage is about three paragraphs up from

the bottom on page 564. The question is, "So if it's only you and your husband with the baby?" and this is Mrs Mahomed's answer, she says that, "If she was not normal between the 10 days or even before that I would take her to the doctor first thing because I'm the mother, I can feel my child if she's in pain or what. I can see my child is well or not well because I am the mother." Then on page 565, just above the middle of the page, "Why would we do it with our child, that's my own child, nobody will do that with their own blood." Meaning presumably that no one would inflict harm upon their own child.

Page 566, it's put to Mrs Mahomed at the top of the page by the interviewer that it's either her or her husband who has harmed the child. She replies, "Nobody would do that to a child, we're the mother and father." Then at the foot of the page, at the very foot of the page, "If we know then I would take her to a hospital before something happened, something was wrong with her, I would take her to a hospital first thing." And a similar sentiment at page 567, about a third of the way from the foot of the page, the question is, "Okay." Answer, "Because that's my child, it's not anybody's child, so I can talk lies because that's my child, something happening to my child, et cetera, my own blood." Page 569, again, the same sentiment, "If somebody did it I would tell straight away because that's my child. I won't see my child to die because I'm the mother and I can't see my child in pain or anyone even if I did something I will tell you."

Now, the cumulative effect, in my respectful submission, is that Mrs Mahomed is saying to the police that she is a person who is incapable of harming her child or seeing her exposed to the risk of harm. In my submission, that puts in rather stark relief the incident nine days earlier that she –

BLANCHARD J:

But isn't it still all in the context of violence?

MR DOWNS:

Certainly the question is, the interviewer's questions are directed at violence but I would submit the answers are a little further than that. What Mrs Mahomed is really saying is that I'm a person who could never harm the child or expose her to the risk of harm.

YOUNG J:

And, if there was ever anything wrong with her I would notice and I would take her to hospital.

MR DOWNS:

Yes, indeed and we would underscore that. Now, it may be, it may be that the Court's view is that this sequence by itself is perhaps insufficient to warrant the admission of this material but if that was a concern we would respectfully observe that category 4, or consciousness of guilt, could also simply be seen as part of the hostile animus, or category 3 that we mentioned earlier, as underscored by these observations to the police.

Or, put a different way, I might have extrapolated a fourth category when in fact there's only three but either way the observations to the police of Mrs Mahomed that she was a responsible parent and would go straight to hospital, would notice wrong, would notice harm, et cetera, I mean, it was relevant to the assessment of whether there was indeed a hostile animus.

TIPPING J:

Is this linked in some way with the whole question of lies and their use?

MR DOWNS:

Ah, yes. The Court will recall that, I think I'm right to say at section 124 of the Act that is concerned with the evidence of lies, I should check I suppose rather than simply guessing.

TIPPING J:

No, I don't need you to go through them –

MR DOWNS:

No.

TIPPING J:

– the interstices of that but I wonder whether you agree and you clearly do, that there is a link here?

MR DOWNS:

Yes, it is that. Under the Evidence Act, the use of a lie as circumstantial evidence of guilt is a new thing, in my respectful submission. The Court hardly needs me to remind it that at common law there was great, with respect, complexity and indeed circular reasoning attaching to the use of lies. The direction really was to the effect you had to find guilt proved before you could use the lies evidence of guilt which, with respect, was somewhat problematic and we see –

TIPPING J:

Well, it was a minefield.

MR DOWNS:

Yes, yes, it caused, I think I'm right to say, problems for Courts on many occasions and needlessly so, we respectfully submit, all of which is another way –

TIPPING J:

We should bear in mind, particularly in relation to your category 4 or aspect of category 3, that what is really relied on here is a lie –

MR DOWNS:

Yes.

TIPPING J:

– as circumstantial evidence.

MR DOWNS:

Yes, indeed.

ELIAS CJ:

But then there would have to have been a warning in terms of section 124, wouldn't there?

MR DOWNS:

I think I'm correct to say and please forgive me while I check the section, that section 100 –

ELIAS CJ:

Oh, it's only if there's undue weight, is that right?

TIPPING J:

Can't remember if it says –

ELIAS CJ:

No, no –

BLANCHARD J:

Yes.

ELIAS CJ:

Yes. If the Judge is of the opinion –

MR DOWNS:

Yes.

ELIAS CJ:

– the jury may place undue weight –

MR DOWNS:

Mmm, that's right.

ELIAS CJ:

– well he'd have to consider that, wouldn't he?

MR DOWNS:

It would be a relevant consideration, yes.

YOUNG J:

Here, the Judge deals with it in a slightly different context at page 409.

MR DOWNS:

I'm sorry Sir, page?

YOUNG J:

Page 409, para 23 of the summing up. The striking thing about what Mr and Mrs Mahomed said to the police was that it was so, each was so congruent with the other and on the evidence plainly untrue because she wasn't right as rain and perfectly well when she arrived at hospital, she was moribund.

MR DOWNS:

Indeed, she was anything but and perhaps this is part of the issue that confronts the Court. While we can identify the separate ways in which the evidence could be used legitimately by the jury against Mr and Mrs Mahomed, there is, we respectfully submit, some overlap for example, between categories 3 and 4 and even in relation to using the evidence as similar conduct in relation to the final count in the indictment, really what is being suggested is that there's a pattern of mistreatment.

AUDIO STOPS: 14.26
COURT ADJOURNS:
COURT RESUMES: 14:35

ELIAS CJ:

Thank you. Yes Mr Downs. Sorry about that, we're having trouble with this recording equipment.

MR DOWNS:

Yes may it please the Court. In terms of any of those various categories or bases for admission, part of the complexity if it is that, of the case, is that some are probably propensity and some are probably not. The first category that is consciousness of guilt in relation to the first counts in relation to Mr Mahomed, I respectfully suggest, is not a propensity purpose, it's rather simply a statement of his state of mind by virtue of his conduct on the earlier occasion. But as to the similarity of the conduct by both appellants to the failure to provide necessities nine days later, on the text at least of the statue, there probably is, we accept, a propensity purpose and therefore referable to the determination of admissibility in accordance with sections 40 and 43.

The third category, the hostile animus category. Because it resides in the jury drawing a conclusion on the basis of conduct over a period of time, involving a number of discrete occasions, but a pattern nonetheless, again, it's probably within sections 40 and 43 that is propensity evidence. But consciousness of guilt in relation

to the lie, if that's what indeed it was, to the police, would appear to be a non propensity purpose. Now I've approached that I acknowledge in a somewhat laborious way, but hopefully it illustrates some of the complexity in seeking to apply only a single label or to singularly analyse evidence under the Evidence Act.

That said, we respectfully endorse and commend to the Court the proposition that the standard for admission for propensity evidence is no different, or not appreciably different, than the standard for the admission of any other form of evidence pursuant to sections 7 and 8. We acknowledge that section 8 encompasses the interests of the prosecution, but in terms of the actual test for admissibility, it is, we respectfully suggest, probative value as against prejudicial effect and we can see no appreciable difference between the two provisions. So to some extent it matters not perhaps how we classify evidence at least for the purposes of admissibility, but if I may venture an observation, and I put it no higher than that, part of the problem in this area might have arisen, and I tread carefully, hopefully, because *Stewart* has been treated as setting out in statute-like form a set of steps that must be applied to propensity evidence, even though *Stewart* itself says that approach shouldn't be applied, and the Crown respectfully observes as a litigant to criminal cases, that there might have been a tendency on the part of trial Courts, to seek to classify evidence, not for the purposes of determining admissibility, but for the purposes of determining whether there should be a *Stewart* direction. In other words it's been the tail wagging the dog, with respect.

BLANCHARD J:

We're having a lot of that this week.

ELIAS CJ:

Yes a lot of that this week.

TIPPING J:

It's just that we had a dog, yesterday, with more than one tail –

ELIAS CJ:

Well maybe a tail.

TIPPING J:

Or a tail without a dog.

MR DOWNS:

Well I can only hope that my observation has some accuracy in terms of what has been happening with the jurisprudence. But I respectfully observe that that might have been a feature of this particular area of law, even though in fairness to the Court of Appeal, the *Stewart* decision itself says that it's a form of words, and not to be applied slavishly to every occasion when propensity evidence is admitted.

ELIAS CJ:

Is the *Stewart* direction set out in your submissions?

MR DOWNS:

Yes it is.

ELIAS CJ:

Well just remind me of what paragraph, I just want to –

MR DOWNS:

Yes, Your Honour's quite right, I should have taken the Court to it earlier. We are looking at page 27 of the Crown's submissions. Now the case is called *Stewart, Peter Stewart,* the footnote citation is at footnote 158, but paragraph 87 of the –

ELIAS CJ:

Oh yes, yes I remember this.

MR DOWNS:

– sets out, with respect, a rather elaborate sequence that a trial Judge under *Stewart* should engage in when there's propensity evidence.

TIPPING J:

I suppose one should be thankful there weren't 39 steps.

MR DOWNS:

Yes, indeed, it could always be worse. But the point here we respectfully observe is that clearly that wasn't intended as the case also says at paragraph 41, that this was a one size fits all formula but because of the, at least on one view, complexity of the

direction it may be that that's actually affected the admissibility determination, at least in terms of putting the label on whether evidence is propensity or not.

YOUNG J:

Step 4, [88](4), I wonder if that step is actually right because it doesn't seem, it doesn't really line up with *Sanders*.

MR DOWNS:

No, may I make one other observation while we're here, and with respect to my learned friends it's a point that they haven't confronted at all, and it's a failing, with respect, of the case. They've talked about the dangers of propensity reasoning overlooking, in my respectful submission, the important point that the Evidence Act permits propensity reasoning and indeed embraces it as the criterion for admissibility. Now the reason we draw that to the Court's attention is that until the enactment of the Evidence Act propensity reasoning was forbidden by the common law. Now the Court obviously knows that point well but it bears repeating because from *Makin v Attorney-General for New South Wales* [1894] AC 57 (PC) onwards, for all of the 20th century, propensity reasoning was bad reasoning and the revolutionary change, we put it no lower than that, affected by the Evidence Act, is that propensity reasoning is legitimate as indeed that's the basis upon which evidence may be adduced. So when we talk about the dangers of propensity reasoning and the need for a *Stewart* direction we need to, with respect, be quite careful as to exactly what it was that the appellants wanted when they asked the trial Judge for a Stewart direction, because that was their request to the Judge in those terms. A direction in accordance with *Stewart*. It seems to me, having heard their cases ventilated to this Court, what the appellants really wanted, really wanted, and urge upon this Court, was a rather more mundane or prosaic direction to the effect that simply because you may find that the appellants have engaged in this behavior in relation to the carpark, does not mean that they are guilty of the various crimes with which they are charged. Or simply because you concluded they're bad parents following the carpark incident that they are therefore guilty. That –

TIPPING J:

Mr Downs, I've just been looking at this and I haven't, and I'm sorry, it's my fault, haven't looked at the *Stewart* seven steps before. I have an anxiety that this is fundamentally flawed. That you don't normally direct the jury, in legal terms, about

evidence. It's relevant to admissibility but once it's in you tell them in practical terms –

MR DOWNS:

That's right.

TIPPING J:

– how it may and may not be used.

MR DOWNS:

And we respect –

TIPPING J:

And why do the jury have to be troubled by all this?

MR DOWNS:

Well indeed if we look at step 2, one wonders whether eyes might glaze over when juries are told what propensity evidence is and with respect it's not entirely clear in those terms that that would make a great deal of sense.

YOUNG J:

Part of the problem, I mean I agree with that –

BLANCHARD J:

Give them a copy of section 40.

YOUNG J:

Part of the problem is that, at least before the Evidence Act and probably still, Judges tended to direct juries that they had to find the similarities and if they didn't they should ignore the evidence whereas perhaps in a more orthodox world the Judge would decide admissibility and then leave it to the jury to just go for it in the right way and perhaps be warned against any wrong ways. Without having to make, as it were, a subsidiary admissibility finding themselves.

MR DOWNS:

Well, may we respectfully endorse the latter course identified by Your Honour for these reasons. First, the Evidence Act as a partial code has very few instances of

limited use. There are some examples, for example a defendant's statement is admissible only in relation to that statement and so on but the Act appears to have sought to distance itself from the common law where something could be in for one reason but not for another and indeed we go back to the obvious example of this Court's ruling that a prior consistent statement may be evidence of the truth of its contents, it is not simply evidence of consistency, with the Court observing that that sort of distinction between hearsay and non-hearsay purpose was difficult at best. So we respectfully suggest that the idea that the purpose of a witness' evidence should be elaborated upon by the Judge with careful control surrounding direction may be anathema to the Evidence Act with respect. It seems to be just as perhaps positive from the Bench that if evidence is admissible, for whatever reason, and it's to go before the jury in that form –

TIPPING J:

But might there not be a link there between relevance and purpose? I mean the evidence might be relevant in one respect but not relevant to support another possible line of – I mean I know we said in *Wi* was that if it's in, it's in for all purposes but I don't think we had in mind the sort of issue you have here.

MR DOWNS:

No and I'm not seeking to hold the Court to that observation.

TIPPING J:

No, no.

MR DOWNS:

It's rather that – perhaps if I can answer in hopefully more concrete terms. If we imagine a Judge, assuming the thought that my analysis of the bases of admissibility is correct, and of course it may be wholly wrong, but if we assume for the purpose of the hypothetical the Judge says, well the Crown has it correct in its analysis, he or she then has to direct the jury according to the four forms in which this evidence comes in, its relevant to this, it's relevant to that. One's a propensity purpose, one is not. Now with respect that summing up might be broken under the, its own weight in those circumstances –

YOUNG J:

Well it's worse than that really because probably on this view there should have been a propensity warning in relation to the malnourishment.

MR DOWNS:

Yes –

YOUNG J:

Perhaps as well if you look at the lies issue there should have been a propensity warning in relation to the fact that they put their heads together and came up with a cock and bull story about how the girl had behaved the night before because that shows a pattern of covering up. Perhaps there should be another propensity warning in relation to their attempts in the intercept of communications to come up with a concocted defence and so on. I mean you say that the summing up would collapse in on itself at this point.

MR DOWNS:

And it may actually be worse than that with respect. Don't assume that the person that broke the leg is the same person that injured the head on the earlier occasion. Don't assume that the person that injured the head on the earlier occasion murdered and so forth.

TIPPING J:

Well that would depend on what, how the case was run.

MR DOWNS:

But I suppose it goes back to the earlier point ventilated from the Bench before about whether there's a holistic approach for evidence. In other words whether we just approach it as pieces of circumstantial evidence or part of a constellation or whether it carries with it the need for particular direction. Now we have to acknowledge some categories of evidence are dangerous. Hearsay, for example, even if it's introduced as reliable hearsay. Some evidence may tend to promote emotive response and obviously a trial Judge is duty bound no less on those occasions to as best as he or she can inoculate the jury against that process of reasoning. But in this case we're not so sure, with respect, whether there's a distinction between the malnourishment and relations – and the carpark incident. Whether there's a distinction between those two and the earlier violence, or the earlier violence and the murder and so forth and we respectfully wonder whether if the carpark incident was going to have an umbrella direction about care and so forth, whether those other directions might also have

gone into that category. And if the carpark evidence had been singled out the argument might then have been, well hang on a minute, what about the other malnourishment, that should have been in there too. We don't mention that glibly with respect but we seek to identify the point that it is rather difficult in these sorts of cases to say that one piece of evidence necessarily warrants a different analysis in terms of direction than any other. At least if the Court reaches the conclusion that most jury cases involve an assessment of the overall circumstances in the case by a holistic process of reasoning mentioned earlier by His Honour Justice Young.

ELIAS CJ:

No directions about evidence?

MR DOWNS:

No obviously I'm not contending for that Ma'am. I'm rather observing that the directions would be limited to situations in which there was a special danger –

ELIAS CJ:

Doesn't section 43 tend to flag this sort of reasoning as carrying the special dangers?

MR DOWNS:

Your Honour, with respect, is quite right, but may I qualify that answer? If we think of a slightly different case, a sexual case, three or four other women come along and say, this person also raped me at knife point, there's a risk in those sorts of cases that a reasonable juror thinks, well the mere fact that the complainant has told me that she too was raped, is enough, so far as I'm concerned, in order to convict the defendant without actually examining the case with the appropriate level of care and caution. And that's why we sought to draw a distinction, admittedly in a very, very turgid way in our written material, between the multiple victim cases, which we think do truly engage propensity dangers, true propensity dangers, with those cases in which there's a single victim in a pattern of conduct, close in time to the events in issue.

Because we see reasoning as being most dangerous when finders of fact are invited to say, well it happened to persons A, B, C and D and it therefore happened to E. Essentially without any further analysis as to whether there are similarities between those incidents. And if that's the course, where the common law in relation to direction may be relevant, because at common law, the sort of direction that the

appellants seem to want, would only have been available at that type of instance where there was multiple victims. I think I'm right to say that, with respect.

TIPPING J:

I'm not sure. You may be.

MR DOWNS:

That's a common problem.

ELIAS CJ:

If for example in this case, there hadn't been the other counts, there had simply been murder.

MR DOWNS:

Yes.

ELIAS CJ:

And the Crown had sought to call evidence of the carpark incident on the basis that it showed a pre-existing animus, what's the outcome there?

MR DOWNS:

I'm sorry, is Your Honour asking as to admissibility, direction or both?

ELIAS CJ:

Well it's both really isn't it? Because it must be a factor that you take into account in the way whether prejudice can be removed. But on both one is evidence of neglect and poor parenting, on that approach, and the other is of physical battering. It's –

YOUNG J:

You could formulate it another way though, you could say it's evidence of a bad attitude.

ELIAS CJ:

Yes, all right, that's –

YOUNG J:

So just as in a homicide case there's evidence that five months before the murder the husband threatened to kill the wife, now that would be admissible I think, *R v Baker* [1989] 1 NZLR 738 (CA) is a case of that sort. It's still – it's propensity it would have to be seen as propensity now I think.

ELIAS CJ:

Well, I must say I would find it surprising if it was admitted, and if it were admitted I would have thought there'd have to be a direction.

MR DOWNS:

Well to return to the first point is to admissibility, we would submit that a hostile animus, whether it arises from an instance such as this or some other form, would ordinarily be seen as relevant and admissible in the context of an allegation of murder. Particularly when the incident in question, that is the propensity incident question for want of a better phrase, occurs just over a week prior to the events in issue. We see that time period as being perhaps of some significance in this case, and in that respect we have, I suspect needlessly, elaborately referred to some of the common law cases, in the case of *R v Meynell* [2004] 1 NZLR 507 (CA) for example, which was a case in the Court of Appeal, in which Justice McGrath delivered the decision for the Court. The case of *Witika* in which President Cook as he then was, thought that the evidence of the earlier abuse of the poor toddler in question, could either be analysed as part of the res gestae, even though it extended over two years, or as similar fact. And if we'd simply done that, not to come to the Court and say, we should apply this label to evidence and it's therefore admissible, but to demonstrate that evidence of this nature would ordinarily be seen as relevant to the sorts of issues that were very much at large in this case. And with respect we don't see this case as involving, in that sense, any greater departure or any change in principle

We've also referred to like Canadian case and again I'm conscious, probably needlessly so, *R v Roud* (1981) 58 CC (2d) 226 (Ont CA)*, R v Schell* (1977) 33 CCC (2d) 422 (Ont CA) and so forth, where there were very, on the facts, very similar cases in which a child was either murdered or was the subject of a manslaughter by virtue of an extreme physical act, and earlier acts of both neglect and violence, were seen as admissible by the Courts in Canada, even though Canadian Courts adopt a similar fact frame of reasoning for admissibility, but then when they come to direction

where there's a single victim, say actually that doesn't require propensity direction, a point that again was touched upon by Justice –

YOUNG J:

I think that's the same with the English cases too.

MR DOWNS:

I'd like to be able to say I know the answer, regrettably I don't, but I have hopefully identified the textbook which contains it, it's identified in the Crown's submissions.

YOUNG J:

What, *Spencer* [Professor JR Spencer, *Evidence of Bad Character* (2nd ed, Hart Publishing, Oxford, 2009)]?

MR DOWNS:

Yes. I think we'll find the answer in –

YOUNG J:

I think there's a comment, look I may be wrong, I think there's a comment in *Archbold* where a Judge says, "Well yes evidence of bad behaviour by the defendant towards the victim is within the rule, but we just don't have to deal with it in any other way", and there's a case called *Gillespie* where the Court of Appeal has discouraged appeals based on non-direction on matters of common sense in this area.

MR DOWNS:

What I can say with some confidence, that at common law in England, there was a distinction drawn between violence, neglect and so forth in relation to the same victim, which was seen as being the motive line, as against the violence and so forth, sexual offending in relation to multiple victims which was seen as being squarely within the similar fact line and they had different principles, both of admissibility and direction.

YOUNG J:

In straddling the fence, there's the great case of the *R v Ball* [1911] AC 47 (HL).

MR DOWNS:

Yes, yes it can be traced back to *Ball* for what it is worth we accept. But all of which is a long way of saying that when it came to direction, it might have been too much to ask the Judge to identify for the jury, the various modes or reasons why they had heard this evidence, but instead the question is really, is whether His Honour was obliged by virtue of the risk of otherwise improper reasoning, to direct the jury that they shouldn't automatically assume that simply because they have engaged in this behaviour eight or nine days earlier, that they were therefore by that fact alone, guilty of the crimes in issue.

TIPPING J:

You very skilfully articulated at the beginning of your address, four ways in which the evidence was claimed to be relevant.

MR DOWNS:

Yes**.**

TIPPING J:

Now I would've thought that's exactly the sort of exercise a trial Judge ought to engage in, in a case of this kind.

MR DOWNS:

May I make one response to that? And that is that if they had, there would've been a great deal more said about the carpark incident by the trial Judge, than there was, and whether the appellants would really have wanted that, remains to be seen. As it happens, not a great deal was said about the carpark incident, not a great deal, although some, by either the Crown or the trial Judge. Now the appellants sought to effectively distance themselves from this evidence, because it was, with respect, legitimately damning, by simply saying, well it was neither here nor there.

TIPPING J:

But they actually asked the Judge at trial.

MR DOWNS:

They did, I accept that, they did.

YOUNG J:

But for a *Stewart* direction.

MR DOWNS:

But they asked, they asked, I think I must defend the trial Judge.

TIPPING J:

Oh they asked for a *Stewart* direction.

MR DOWNS:

They asked for a *Stewart* direction, and understandably the Judge, reading *Stewart* might well have thought, well this is going to be awkward, or indeed unnecessary. If the request had been, "We would like Your Honour to say to the jury, 'Please don't automatically assume that because we left the child in the car we're therefore guilty," I'm truncating it obviously but that's the gist of it. Then the response might well have been different, we don't know, but that wasn't actually the request. The request was for a *Stewart* direction with all its bells and whistles.

TIPPING J:

Yes, well I don't know that *Stewart's* actually – well I'll say no more.

MR DOWNS:

And that was the point we tried to make earlier. Not well. But that because of – because of the complexity, I wanted to speak neutrally, because of the complexity associated with *Stewart,* but maybe that Judges have wanted to shy away from a propensity analysis and therefore say, well actually there's a more direct route to it.

TIPPING J:

Well I didn't, and I'm grateful, I didn't appreciate that the request was for a *Stewart* type direction.

MR DOWNS:

Yes.

TIPPING J:

But *Stewart* was a wholly different case wasn't it?

MR DOWNS:

Well *Stewart* was, because that was a case of sexual offending and the allegation was that there – I should know I had a feature in it – but there was at least an allegation of like behaviour in relation to, I think I'm right to say, another girl, of similar age, admittedly in the very distant past, it was an historical case.

TIPPING J:

Yes.

YOUNG J:

Stewart actually illustrates another way in which the N-word might be used, legitimately because the similar fact witness referred to an incident that had occurred in the presence of both her and the complainant.

MR DOWNS:

Yes –

YOUNG J:

That rather did suggest directly a sexual interest on the part of Stewart and the complainant.

MR DOWNS:

Yes I think from memory, I don't want to go into needless detail, there was some suggestion that perhaps they could all have some fun together.

TIPPING J:

Oh the 'N-word' – 'narrative'. Sorry Mr Downs, you and I, I think, are in good company here.

MR DOWNS:

I should say in relation to the written material, that the reason I or the reason the Crown sought to put a tag on this material, was simply to say if we had to look for a tag, it seemed to us that the narrative tag was better. It wasn't to say that the narrative is a means for avoiding proper consideration of admissibility, either under section 8 or section 40. It was simply to say that in the past, this is how we would look at things, and we think that that still has some validity, when we come to assess what evidence is for and what it does.

YOUNG J:

You say there is a pattern of events, each one of which is directly related to the other event in the same pattern.

MR DOWNS:

Indeed.

YOUNG J:

And you can start really at the beginning of December and you can probably go on right through to the end of January in the last of the intercepts.

MR DOWNS:

Or as the prosecutor put it, all of the other evidence in the case was circumstantial but here was an instance in which the jury heard direct evidence of the girl's apparent mistreatment or neglect, by virtue of being left in the car and that that was of assistance to the jury in assessing the various issues that they needed to decide. I wonder whether that is the end, perhaps, of the admissibility point, at least the commencement or continuation of discussion about directions, as the Court pleases. As to that, we have already made the point about the complexity associated with *Stewart*, and we respectfully suggest that perhaps the real issue in the case, insomuch as we have the wit to identify it, is that really whether there has been a miscarriage of justice or the risk of a miscarriage of justice, because the trial judge didn't give the jury a direction to the effect of automatically leaping from that behaviour in the carpark, to guilt in relation to the various counts. We see that, with respect, as perhaps being the issue that the Court may need to grapple with. We say, as to that, that it is not clear to us that there was a real risk that the jury would automatically assume, that simply because that had happened, that there was, therefore, guilt from the other counts.

YOUNG J:

A very silly thing to assume.

MR DOWNS:

Well particularly when the Judge has gone to some trouble to identify the ingredients of the various counts in the issue sheet, all of which rather suggested that the jury had to approach the enquiry logically and in a structured way.

ELIAS CJ:

Do we have the issue sheet?

MR DOWNS:

Yes we do Ma'am, although – not too hard to find it in the rest of the –

ELIAS CJ:

Don't worry, I will find it.

MR DOWNS:

But we most certainly do. My friend very kindly pointed me to 039, volume 2. Sorry this is volume 2, it begins at page 392.

ELIAS CJ:

Yes.

MR DOWNS:

These were the sheets that were given, I assume, following consultation with counsel to the jury in relation to each of the counts. The Court, when considers the material, may ask what has this got to do with the case. It is simply that by virtue of these issue sheets, the jury are obviously being invited to clinically examine the various counts and it may be thought, at least in part, we can't put it any higher than that, then that is in answer to the indiscriminate and irrational jumping from assumption, that the carpark incident equals guilt in relation to the various matters initially.

TIPPING J:

I think what we have to grapple with here is the lack of directions, coupled with the actual directions, because Mr King pointed to paragraphs 40, was it, and 63, or 1, where he said that that really exacerbated, if anything, the situation.

Now I am not taking sides on this, I just say that it seems to me that it is not just an absence, it's –

MR DOWNS:

Well as I – and obviously it is only the Crown speaking, as I look at the direction at page 413 of volume 2, what the Judge is saying is that this is the Crown case in relation to the murder count. That the daughter, the younger daughter had assumed

a nuisance value to Mr Mahomed and it is part of the picture, one part for you to consider, and whether the crime of murder is proved.

TIPPING J:

For us lawyers it would seem an extraordinary leap from the proposition that if you have got a negligent uncaring attitude towards a child, you must be guilty of murder but the way the Judge has put it here, if you take it literally, it seems to suggest that if that is the case, then it's murder.

MR DOWNS:

I had hoped to read it, or at least persuade the Court to read it in a different way, and that was an invitation when seeing the context, that that was simply a feature of the Crown's case, rather than just saying, if you find that this has happened, that therefore meant –

TIPPING J:

Well it may not be quite as high as that but with great respect, it is a most uncomfortable direction.

MR DOWNS:

It may be that it assumes that appearance in writing, because the Judge has broken His Honour's directions in relation to each count so if we went further, for example, this is page 416 of the same volume. Your Honour will see at paragraph 51, that the Judge then gives the other side of the coin, as it were, this is paragraph 51 Sir at page 416 of the same volume.

TIPPING J:

Well again, what I have discomfort with, is that this is just a recitation of the cases on either side, the Judge doesn't tell the jury what the correct position is.

MR DOWNS:

I accept, as I must. The Judge nowhere in the summing up, says, leaving the children in the car, doesn't mean that they are guilty of these crimes. I accept that, because there isn't reference in the summing up.

TIPPING J:

Or nor does he say, or where it is irrelevant to the Crown case is blah, blah, blah, and where it is not relevant is blah, blah, blah.

MR DOWNS:

Well I suppose it comes back to whether the Judge needed to say that they shouldn't automatically assume that the person –

TIPPING J:

That is a mantra that people think, will get them by. It probably will in most cases.

MR DOWNS:

Except that, it may come back to the point as to what extent the Evidence Act requires a Judge to undertake the rather elaborate exercise, identified by virtue of –

TIPPING J:

Well I don't know whether it turns entirely on the Evidence Act. These people are entitled to a fair trial.

MR DOWNS:

I don't take any issue with that proposition.

TIPPING J:

If they are meant to get the required help from the Judge, it is starting to –

MR DOWNS:

If the trial was unfair in the *Howse v R* [2005] UKPC 30 sense, that is it, we acknowledge, there has been a substantial miscarriage –

TIPPING J:

Well it is not as bad as *Howse* is, in the sense that there were more extreme problems in *Howse.*

ELIAS CJ:

It is on the same continuum though

TIPPING J:

Continuum yes.

MR DOWNS:

Well we would respectfully suggest that it is unlikely that the jury would have reasoned, in the way that the appellant's content, namely that they would simply assume that their behaviour and the voluntary exposure of the risk of harm, nine days earlier, necessarily meant they were guilty.

YOUNG J:

And in truth, I mean, put that way it would be a ludicrous way of reasoning.

MR DOWNS:

Well it would.

TIPPING J:

What would they have thought was the relevance, directly relevant to the murder charge. What would they have thought was the relevance, which actually was for them to determine, which again, is a bit problematical because –

MR DOWNS:

That would be the hostile animus.

TIPPING J:

I don't know whether it would signal animus. It seems to me to signal more negligence or indifference.

MR DOWNS:

If we look at it. If we look at this, I suppose, the contextual point, if we look at the carpark incident, in conjunction with the intercepted materials and the reference to the parents discussing how they left Tahani in a very bad way, how they hadn't fed her, how they hadn't changed her nappy for an entire day one day, how, in fact they left her in the car, I suspect a reasonable juror could well conclude, including my reference to the injuries themselves, that there was a hostile animus, that lamentably,

and I have to be as blunt as this, they didn't care at all about the child, in fact that she was a nuisance as Mr Hamlin, the prosecutor, alleged.

YOUNG J:

Well, she probably became a distinct nuisance once she started to carry serious injuries which if detected were going to cause him a lot of grief which may be what he meant.

TIPPING J:

There's quite a long step from what seems to me to be the primary thrust of this negligence, indifference and nuisance value, at least on the murder count, to killing with murderous intent.

MR DOWNS:

I just wonder whether it's assuming that dimension because we're seeing it in black and white and the Judge has divided it according to the counts. So for example, if we go on to page 418 in the same volume, the Judge then goes on to talk about how this evidence was relevant in consciousness of guilt dimension in relation to Mr Mahomed.

TIPPING J:

But here he's talking about the GBH count –

MR DOWNS:

Yes.

TIPPING J:

– not the murder count.

MR DOWNS:

No, indeed, my point again, hidden, is that the Judge has divided, or sought to subdivide the uses of the evidence to some extent according to count and my point is that having done so it may be that in black and white it's appearing to assume more significance that it did –

ELIAS CJ:

Well it is of more significance in relation to the murder count. It's not where he's thrown it all in and said deal with it in the round, he's specifically acknowledged its relevance to the murder charge.

MR DOWNS:

Yes but I must also observe, if we look at pages –

ELIAS CJ:

So what this illustrates actually is that it's not unworkable to give some help to the jury because the Judge has purported to do that in respect of each count, how they can use the evidence.

MR DOWNS:

Well, I would also observe that if we look at pages 412 and 413, the Judge is simply saying this is the fourth area that touches upon this. For example, the third area of the evidence that the Judge refers to are the intercepted communications. The second area is the uncontradicted medical evidence and so on. So the Judge is just approaching this by virtue of categorisation of the evidence. So I, again, it may be a case of hopefully reasonable minds disagreeing but the Judge, as we read it, isn't saying in 40, the carpark equals guilty of murder, it's just a feature of the case and something for you to consider in relation to hostile animus.

TIPPING J:

The issue is whether you consider it shows that Mr Mahomed was in the habit of acting negligently.

MR DOWNS:

Again, whether you agree or whether it isn't relevant to the murder is entirely for you. I read that as saying that the matter for you is to what extent you consider it germane to this particular issue.

TIPPING J:

Mmm.

MR DOWNS:

Well –

TIPPING J:

And if you – surely, he should have said, if you find that it shows that then it could be relevant to your deliberations in the following way but be careful not to equate negligence, if you like, with murderous intent, or at least something like that.

MR DOWNS:

We may, with respect, just have to agree to disagree in relation to the interpretation –

TIPPING J:

Well I haven't made up my mind Mr Downs, I'm just –

MR DOWNS:

No, no, I accept that.

TIPPING J:

– teasing it with you, it's a –

MR DOWNS:

We don't read the Judge as saying that in 40 when we look at the surrounding passages. What the Judge, we say, is seeking to do for the jury is to identify those areas that the Crown has relied upon by reference to the various counts and it's just according to the broad category of evidence and we make –

TIPPING J:

Thank you. Well, it's not a straightforward issue.

YOUNG J:

One way of reading it is that the 'punch line', as Mr Hamlin says, is that this incident illustrates how Tahani has assumed a nuisance value for appearance and that everything else in that paragraph are precursors, that if you take this, if you go along with the Crown, if you go along with the Crown, you may form the view at the end of the day that she has formed – had a nuisance value and if that's the case well then you've still got to decide whether you think it's relevant to a charge or murder.

MR DOWNS:

And again, I don't wish to be repetitive because it's never helpful but I would also invite the counter balance which is at paragraph 51, when the Judge refers to the defence contention in relation to this evidence.

BLANCHARD J:

Do you think that the Judge was there taking the view that what Mr Wilkinson-Smith said was so obviously correct that he didn't need to say anything about it?

MR DOWNS:

I don't know if I can say, obviously I'd like to say that but I don't know that I can responsibly. What I would observe is that as a proposition, at least reading it, it appears to be self-evident.

BLANCHARD J:

Mmm.

MR DOWNS:

And it might well have been seen as self-evident by a fair minded, typically fair minded New Zealand jury. I should add that however we approach it, it was an awful case and I mention that simply because obviously the jury needed to confront that in their assessment of the evidence. To a fair minded person it would seem to be self-evident still, that simply leaving the person in the car, irrespective for how long I might add, doesn't equate to murder, it can't do, in relation to a separate incident but it may be part of a pattern of conduct that goes to whether the person had the requisite intent on the latter occasion.

ELIAS CJ:

What was the – I haven't read the evidence on the carpark incident but what was the length, or period, that was – it was done by reference to how long they'd been there and that people had seen them with their other daughter –

MR DOWNS:

Yes.

ELIAS CJ:

– it was quite – there was, was there any – I mean, how long was the shopkeeper who had first alerted it, how long before anyone arrived?

MR DOWNS:

If I can answer it this way. The family were setting up at 9.00 am. The child was discovered shortly after midday. On the evidence, it is not clear exactly, exactly how long the child had been in the car for on a continuous period. On one view of the evidence because no one had seen the baby with the parents, other than when the baby was discovered in the car, the baby had been in there the whole time because they had seemingly arrived as a family. On another view of the evidence which is what Mrs –

ELIAS CJ:

That's a fairly long inference.

MR DOWNS:

Well, on the other view of the evidence which is what Mrs Mahomed said in the intercepted communications, the child was only in the car, she's later recollecting it, she said for about 10 minutes. But, I should also observe in closing, it may be relevant it may not be, in closing, Mr Mahomed through his counsel said that irrespective of how long, the child shouldn't have been left there and there was no dispute from either appellant that the incident in fact occurred, that the child had been left there for a period longer than was acceptable and implicit upon that –

ELIAS CJ:

Well no period is acceptable –

MR DOWNS:

No but –

ELIAS CJ:

– so –

MR DOWNS:

– I shouldn't have used a moral dimension, what I meant to say was acceptable in terms of the risk exposure to harm, given the temperature and so forth.

YOUNG J:

The transcripts on this issue were a bit sort of, I mean, well it's got the – they're not that clear at the best of times but there's more than one reference to the car, isn't there?

MR DOWNS:

Yes, the difficulty for the Crown was that of course it had to mount a circumstantial case in relation to arrival and who was where and what and that's why the evidence probably took some time. But I should also make another observation in that neither Mr Mahomed nor Mrs Mahomed gave an account to the jury in the witness box as to how long they said the child had been in the car for.

BLANCHARD J:

Mr Downs, on the murder charge at trial, as there any attempt made to say that this child was not treated by someone with murderous intent, as it's encompassing 167(a) and (b).

MR DOWNS:

If Your Honour were to read the address of Mr Mahomed, he made a point of saying to the jury that they still had to find murderous intent, even if they found that he was the person that administered the blow. So it was a feature, it wasn't a large feature of the defence case but it was a feature of the defence case that they still had to find a murder in the sense of a blow with the requisite intent, in terms of section 167. So there was a subsidiary dimension to his case that yes, even if you are satisfied beyond reasonable doubt that I was the assailant but I acted with the requisite intent and we see that in the address.

TIPPING J:

So that wasn't a given that once you found the perpetrator, it was a murder.

MR DOWNS:

No, no it wasn't a given, it wasn't a given. That said the defence didn't frame in neon the suggestion that the person didn't have intent, but it wasn't a case of anyone saying to the jury, by virtue of the blow, there was therefore murder. Everyone can agree on that. It wasn't one of those cases.

BLANCHARD J:

But it was primarily, "Who struck the blow?"

MR DOWNS:

Yes, yes it was. The Court may recall that Mr Mahomed asserted both through his counsel and in the form of an address, and by identification and cross-examination of various pieces of evidence, that his wife Mrs Mahomed might have been the assailant. For her part, Mrs Mahomed didn't seek to dispel that proposition. She of course didn't face the violence counts and the Court may recall that the trial Judge described that as a passive cut-throat defence. I think that phraseology is in the record somewhere. So it was an unusual case in that respect. And that is where the carpark incident had some undoubted value, because Mr Mahomed's flight from the scene and his concern not to wait for the authorities, suggested, tended to prove I should say, that he was the assailant in relation to the older injuries, therefore being of assistance in relation, albeit indirectly, to the murder count as well. This may or may not be a convenient time, but I wondered if the Court wished to hear from me in relation to the proviso in the event it concluded either that this evidence was wrongly introduced in relation to one or other appellant. Or alternatively that the trial Judge had not summed up in accordance with the requirements of the case, thereby causing a miscarriage of justice.

We have in the written submission foreshadowed the Crown's contention that the proviso would be appropriate, and obviously we can speak to that if the Court would wish us to do so.

ELIAS CJ:

Well is there anything you want to elaborate on?

MR DOWNS:

No, other than to say, not in a tokenistic way that there was a very, very, powerful Crown case. And that the intercepted communications clearly demonstrated that Mr Mahomed was the perpetrator of the physical acts in question and that Mrs Mahomed knew of the, what turned out to be the murderous assault, shortly thereafter. In relation to the failure to provide necessaries we would observe that even after medical evidence that they should take the child to hospital, there was a delay approaching two hours. They lived, I think I'm right to say, about four Ks away

from Middlemore and it took a police officer seven minutes to drive there. And both the nurse and the doctor that spoke to, I think it was Mrs Mahomed, on the relevant morning, told her they didn't resile in cross-examination that their advice was to seek urgent medical attention. The other point that may be significant is this.

The medical evidence was compelling with respect, the Court may recall that one of the experts said in relation to the fatal head injury, "That the force", I wish to make sure I've got this correct, "was significant". That was Dr Campanella the paediatrician. A Dr Zucollo who had more significant expertise, the prenatal pathologist, said that the head injury involved, "Severe impact on a hard surface". And that testimony from a duly qualified expert in the field, with respect, probably cemented the fate of Mr Mahomed in relation to an allegation that he acted with murderous intent. Unless I can be of assistance to the Court further, those are the submissions on behalf of the Crown in relation to this case.

ELIAS CJ:

Thank you Mr Downs.

MR DOWNS:

May it please the Court.

ELIAS CJ:

Mr King are you going to go first?

MR KING:

Just very briefly Your Honours. In my submission, the Court needs to be careful on an application of the proviso in this case. There was a strong challenge to the accuracy of the interpretations given to the intercepted communications, and of course if one does accept those intercepted communications at face value, then that would tend to diminish I submit, the flight inference from the carpark incident. The Crown say that one of the bases of relevance is that by taking the child away from the scene, Mr Mahomed was conscious of the injuries and was avoiding the police finding details of them. But if one is to accept that that is the logic behind his actions in that way, then it is counted to an extent by the fact that the intercepted communications it's – Mrs Mahomed is also talking about shielding the injuries from the police and so on. So on that basic question of who had committed the injuries, that the logic can go both ways. That Mr Mahomed's flight could have been to cover

for Mrs Mahomed. Mrs Mahomed's conversations in the intercepted communications were equally capable to sinister interpretation that she as trying to shield the injuries from the police.

Finally my submission, the –

ELIAS CJ:

That's as to identity?

MR KING:

Yes indeed. So the flight issue of relevancy didn't really assist on that, because it's balanced by Mrs Mahomed also trying to cover up or fabricate evidence in the words of the Crown.

The final point I would make is that the request for propensity directions, as set out in the minute of the learned trial Judge, does not refer at all to the *Stewart* type of directions. It was a request for propensity directions, and in my submission that could encompass the types of non-*Stewart* cautions that have been talked about. The ones that are really encapsulated in section 43(4) of the, "Don't draw an adverse inference assumed that they've had people –

TIPPING J:

But are you saying that your understanding or instructions are that there was no express reference to *Stewart*?

MR KING:

No, there was clearly reference to the *Stewart* case, but in my submission it wasn't limited in that way. It was a talk about the need for propensity directions. Albeit it's accepted with reference to the *Stewart* case. I'll just confirm that with my learned friend. So it's accepted that there was reference to *Stewart* case, but it's submitted that the request was wider than that, it was for propensity directions per se. And unless I can be of any further assistance, that's all I can properly add in reply.

ELIAS CJ:

Thank you Mr King. Mr Borich?

MR BORICH:

Just dealing with a couple of matters raised by my learned friend, those four bases he relied upon, the last one I just adopt the position of Justice Blanchard when one has regard to the nature of the questioning and in essence the Crown is saying, well look we rely on the lie, as it were, for two bases. One, it's the straight credibility thing. Two, it proves that she's a liar when she says she's a good mother. All of that questioning is in the context of questions relating to the head injury and the head injury alone. And so in terms of that value in my submission that must be borne in mind.

Once senses that the Court's uncomfortable with the *Stewart* formulation and it may well be that there are some difficulties with that formulation. But from a defence perspective, the importance of the formulation, whatever it is, is to ensure the jury hear the protective directions, the things that are in section 43, which the Judge is alerted to when considering admissibility issues, they need to be brought home to the jury, and to alert them of that forbidden reasoning that, that would go. So whether *Stewart* is appropriate, too full or not full enough, the importance in terms of an accused's position, is to draw the jury's attention as to what they mustn't use the evidence for, and that's the failing. So a modified *Stewart* of some sort, a protected direction was required.

My learned friend makes the point that the Act would appear to permit propensity reasoning now, and that may be where we are, but there's a corresponding obligation in my submission perhaps for the Court to be more vigilant now, to acknowledge that we've had 100 years of caution for a particular reason and that when this type of evidence is admitted, that the Court is cautious to ensure those fair trial rights are protected by way of those protective directions, an holistic approach of, because we may think it's too difficult to give the direction and just to give the evidence to the jury and trust that they'll do the right thing, is, in my respectful submission, inadequate.

In response to the submission that the summing up reads in black and white, perhaps a little bit harsher than it sounded. Both counsel thought it didn't sound right, and immediately alerted the Judge to that fact, and so I don't think I need to deal with that further and my learned friend is right, it was an awful case, because it involved the killing of a child and not by Mrs Mahomed and if ever a case is going to derail through improper means or sympathy or prejudice, one would've thought a

case involving the death of a child where the allegation is that the killer is the husband and the wife appears to have done nothing about it, is the sort of case that one would struggle to think of a case more susceptible to improper reasoning and the perils of sympathy and prejudice.

The last point relates to miscarriage, and my submission is it's not necessarily fair to characterise the case against Mrs Mahomed as strong, and I need to perhaps examine the ground which the Court disallowed in the leave application, just to make the point. The ground which was not part of this appeal, related to the elements of the offence, which in essence the argument went along the lines of, the Crown needed to be able to satisfy the jury beyond reasonable doubt that the initial blow was survivable. So if the administration of that initial blow, if the die was cast at that point, if that blow from that point was unsurvivable, then delay, no matter how long or for what period of –

YOUNG J:

What's the point of this submission?

ELIAS CJ:

Yes.

MR BORICH:

The point of this submission is simply to counter the submission by the Crown that this was a strong case against Mrs Mahomed.

YOUNG J:

No, but if you accept that the survivability thesis is irrelevant, then it's got nothing to do with the proviso.

MR BORICH:

No, because what the jury did and the Court of Appeal didn't resolve the legal issue relating to that, they said, well we don't need to resolve the legal issue, we can find some evidence in the case which pointed to survivability and to do that, they preferred the evidence of the paediatrician Dr Campanella over the evidence of the two pathologists, Dr Synek and Dr Zucollo who couldn't exclude that possibility.

ELIAS CJ:

I don't understand the submission, I don't understand how it bears on the proviso.

MR BORICH:

The point my learned friend is making is that in essence, if there was an error, it didn't matter because the case was so strong.

YOUNG J:

You say, well you'd give the survivability theory another outing.

MR BORICH:

Well what we did, what we got was that the jury were able to put –

ELIAS CJ:

But the case would have to be assessed, leaving aside that point, surely.

MR BORICH:

Well in my respectful submission, the –

ELIAS CJ:

On its merits.

MR BORICH:

Yes. But in terms of that particular point, the jury would've had to have had to put to one side the pathologists' evidence and preferred the paediatrician's evidence, and –

YOUNG J:

But did the Judge direct on survivability? Didn't he treat it as irrelevant?

MR BORICH:

The Judge gave – he ruled against the 347 in relation to that. So the point I'm seeking –

YOUNG J:

But how did he leave it with the jury? I thought he treated survivability as irrelevant, providing, it was just enough that there was chance the she might have done better,

and she only had to live another hour or so for it to be, even on your theory, a material influence in what happened.

BLANCHARD J:

I thought this was disposed of at the leave stage, that we just didn't think the point was arguable.

MR BORICH:

Yes, in terms of in a – the way it was disposed of in the leave stage, was that this Court identified that the Court of Appeal was able to identify some evidence that the jury could've come to that conclusion on and the point I'm saying, is that came down to a preference between two witnesses.

ELIAS CJ:

But it's not live. And if we get to the proviso, it's going to be on the basis of the evidence relating to the actual offence. Sorry, it's going to set that to one side. The question of survivability, it's not logically in there.

TIPPING J:

I wonder if counsel's point is this? That if we provide the proviso, the conviction will stand and the survivability point has not yet been either finally or adequately addressed. But that would run up against the fact that this Court decided to refuse leave on it. I'm just trying – I'm having the same difficulties as other members of the Court -

MR BORICH:

Yes, I'll try and explain it.

TIPPING J:

– but I'm just trying to help you.

MR BORICH:

Yes I understand.

YOUNG J:

Well Mr Borich in doing that could you look please at page 421, para 74 on the summing up.

MR BORICH:

Yes.

YOUNG J:

The Judge says, "The survivability isn't on the table". The question for you is not whether the fatal blow was or was not survivable?

MR BORICH:

Well that's an issue, and because we've disposed of it. I guess if I can leave it, try and explain the point a different way and then I'll have to leave it. In my submission, the issue became whether there was evidence that the jury could rely on, that the initial blow was survivable.

TIPPING J:

Was the Judge's direction in the summing up, which my brother's just referred to, challenged in the Court of Appeal?

MR BORICH:

Yes, it was one of the grounds that was raised in the Court of Appeal. And raised in this leave application.

TIPPING J:

And declined –

MR BORICH:

Yes.

TIPPING J:

So we have in effect endorsed, by declining leave, the Judge's direction. That's where I'm having difficulty. How can you come out against –

ELIAS CJ:

So survivability is off the table, and we have to look –

BLANCHARD J:

What we said was, "The Court of Appeal was able to identify evidence that immediate medical attention might have made a difference. Where the possibility of survival existed, the failure to seek medical treatment must be regarded as an endangerment of life of the child."

TIPPING J:

But we didn't directly endorse the –

BLANCHARD J:

No, we didn't endorse it at all.

MR BORICH:

I understood the Court to be really saying, there was some evidence there, that the jury could've relied on to deal with that issue, that's in essence what it was saying.

TIPPING J:

If the evidence were susceptible of the view that this victim could not have lived any longer, irrespective of medical intervention, you say that was a defence to the charge?

MR BORICH:

Yes. What I'm saying is that because the life could no longer be endangered.

YOUNG J:

Well, what do you mean by survivable? Would have survived, or might have survived?

MR BORICH:

If the – if it be the infliction of the point of injury, there was no chance of survival from that point on.

BLANCHARD J:

But no expert said that.

MR BORICH:

Well two experts couldn't exclude it, and this is my point. Two experts couldn't exclude it, Dr Campanella was of a view that it would've made a difference and the point I'm really seeking to make is that the jury had to choose between the two and their feelings against Mrs Mahomed as a result of the evidence in the non-direction are what have triggered, if you like, the choice. And this Court has said in its leave application, well in essence there was evidence available that could've satisfied the jury as to that fact.

YOUNG J:

A chance, just a chance of survival, a chance of living longer than 9.00 am on the 1st of January would be enough even on your theory wouldn't it?

ELIAS CJ:

And indeed I'm not sure that I wouldn't think that supplying the necessities of life would extend to easing death. Easing the process. It's – do you have any authority for saying that if an injury is non-survivable this charge can't be made out?

MR BORICH:

The element is endangerment of life. If the life is not capable of being endangered.

TIPPING J:

Because it's already fore-doomed?

MR BORICH:

Yes.

YOUNG J:

But you would, I mean this is sort of something that's not easily susceptible of proof, because you're talking about a hypothesis, we know the child didn't get medical treatment, we know the child died three or four days later. Isn't there a danger, irrespective of whether – I mean we'll never know what would've happened if she'd got treatment.

TIPPING J:

There's a danger of dying earlier.

YOUNG J:

A danger of dying earlier.

ELIAS CJ:

We all die.

YOUNG J:

Can I just ask you to leave that aside for one moment? It's clear that the injuries from which this little girl died, were inflicted around 12 hours before she was brought to hospital?

MR BORICH:

Yes.

YOUNG J:

And that narrative rather fits in with what the defendant said at interview as to the pattern of events, some feeding, getting a start or a fright, going to bed around nine. Attempts to wake her at midnight and at three and then at five, and then the phone calls to the doctor, Plunket and the health line. Is it conceivable that your client was not aware that this little girl had been badly injured and had developed that awareness sometime around the time the injuries were inflicted? And if not at the normal times when the child would've been fed?

MR BORICH:

It becomes a question of degree. Now the injury may have been inflicted at some time when she wasn't present, or close by and then the child's sleepy, doesn't wake the first feed, that's not necessarily at midnight.

YOUNG J:

These are quite serious injuries. I mean these are injuries that – this injury does render the little girl blind in the right eye.

MR BORICH:

That may not be apparent if the child is drowsy or dopey or sleeping. We're talking about a reasonably, well a very young child, whose appearance might be that of a

sleeping baby, we're not talking about say, a three or four year old that might be walking around or whatever.

TIPPING J:

Were there any external marks on the head?

MR BORICH:

Um, I don't think there was –

YOUNG J:

When did the swelling develop? Was there swelling when the child was –

MR BORICH:

Well there was swelling certainly at the hospital in the morning, but it's – I need to check –

YOUNG J:

Well there was gross swelling in the morning wasn't there, where the skull was starting to come apart?

MR BORICH:

Yes, no break in the skin or anything of that sort.

TIPPING J:

If you're told by a medical source, that there's urgent need, or a quasi medical source, that there's an urgent need to go to the hospital, and you do nothing for two hours, isn't that in itself?

MR BORICH:

Providing the life is capable of being endangered.

TIPPING J:

Oh yes, subject to that point?

MR BORICH:

Yes.

TIPPING J:

Isn't that in itself, a knockdown blow, ignoring all else? This is relevant to the proviso –

MR BORICH:

Yes.

TIPPING J:

– assuming we reach it?

MR BORICH:

Well one would think, one would have to accept that if medical people tell you, go to the hospital straight away and you fail to, without reasonable excuse or explanation, then that would be a major departure.

TIPPING J:

It would. And subject to this esoteric endangerment point, then isn't that the answer on the proviso? That the case is unanswerable, even on that narrow basis? Never mind what other wider connotations there might be. I'm just putting it to you because the thought is crossing my mind and there may be a valid answer to it.

MR BORICH:

Well it depends what view you take of what may or may not have occurred.

BLANCHARD J:

Did Mrs Mahomed deny being told this by the medical people?

MR BORICH:

No.

TIPPING J:

Well if we get to the proviso, we have to make up our own minds according to *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145 that's why I'm cogitating upon it as a Judge, not as pseudo jury, and it seems to me that it's almost unanswerable.

MR BORICH:

Only if you don't appreciate the seriousness of the situation.

TIPPING J:

But if you're told by a medical person, or quasi medical that it's an urgent need to take a child to hospital, and you don't, and the hospital is sort of, what, four Ks or something away, it's pretty difficult to –

BLANCHARD J:

You're not entitled just to ignore, what is virtually an instruction from a medical person in relation to your child are you?

MR BORICH:

If you don't appreciate the, and you need to appreciate the need, and obviously that's a factor, the fact that someone's telling you to go.

TIPPING J:

An authoritative person, not just a busybody.

MR BORICH:

Yes.

YOUNG J:

But can I just take it a little bit further, I mean here she and Mr Mahomed gave an account of the state of the little girl at the time, that simply can't have been true. They say, "She's right as rain, the only – she's bright, she's following our finger, which she couldn't have been because she was blind, and so on, and the only thing is that she won't take milk." And yet, you know, basically when she's at the hospital at 8.11 am she's moribund. There's no – they don't suggest at all that this was – there was a sudden deterioration in her condition, but you know, they're really saying, well it's all the hospital's fault, we give them a beautiful healthy little girl, and next thing we know she's dying. It's a pretty formidable case isn't it?

MR BORICH:

Providing at the time you get the information, the life's capable of being endangered.

TIPPING J:

Oh yes.

MR BORICH:

And that's the point, that's the point that in my submission the jury had to grapple with and what I'm really saying is that they've assumed the worse and they've set aside the two pathologists in favour of the paediatricians.

TIPPING J:

But the Judge told them it wasn't on the table. So no wonder they – I mean, yes –

YOUNG J:

I think the Judge will have told them that there had to be evidence that the life was endangered, but he didn't say that that turned on the Crown proving that the injury was survivable.

MR BORICH:

I don't know whether I can advance the point further, except perhaps to draw the Court's attention the argument that I've sought to make, is contained in volume 2, page 489, which includes the Court of Appeal submissions. Unless I can assist the Court further, those are my submissions.

ELIAS CJ:

Thank you Mr Borich. Thank you counsel. We'll consider our decision, thank you for your submissions.

COURT ADJOURNS: 15:47