IN THE SUPREME COURT OF NEW ZEALAND SC 96/2012

[2013] NZSC Trans 11

JAMIE AHSIN
Appellant

v

THE QUEEN
Respondent

Hearing:	4 July 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Tipping J
Appearances:	C W J Stevenson and E A Hall for the Appellant M F Laracy and J E Mildenhall for the Respondent

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CRIMINAL APPEAL

MR STEVENSON:
May it please Your Honours. Counsel's name is Stevenson along with Ms Hall for Ms Ahsin, the appellant.

ELIAS CJ:
Thank you Mr Stevenson.

MS LARACY:

May it please the Court. Ms Laracy for the Crown. I appear with my learned friend Ms Mildenhall.

ELIAS CJ:

Thank you Ms Laracy. Yes Mr Stevenson.

MR STEVENSON:

May it please the Court. The appellant in this case, as Your Honours will be familiar by now, was convicted of murder arising out of allegations concerning the assault of a Paul Kumeroa in Whanganui in 2008. She was indicted and tried with three others, another female, Raeleen Rameka, and two males, Mr Clarke McCallum, who is said to be the principal offender and a further male, Mr Daniel Rippon. All four were convicted of murder. The Crown case in respect of the appellant, Ms Ahsin, was that she was the driver. That she had driven to a point at which the assault occurred during which the victim was first assaulted with fists and then a short time later with a weapon. Further to that the Crown case was, going back chronologically if you like, the accused had formed a common intention to prosecute an unlawful purpose of intimidating or assaulting Mongrel Mob members and that what occurred was a probable consequence of such common intention.

The approved ground in this case is whether or not withdrawal as a defence, if I can put it that way, should have been left by the trial Judge. The trial Judge did, as Your Honours will know, leave withdrawal in terms of the Crown case under section 66(2) but not under 66(1). The appellant's submission –

TIPPING J:

Did the Judge give any clear indication as to the distinction he was making between those two, or are we left to infer that from materials that may not – may or may not show.

MR STEVENSON:

The record certainly doesn't contain any summation of –

TIPPING J:

But there's not other, there's nothing?

MR STEVENSON:

No –

GLAZEBROOK J:

Was it trial counsel's acceptance, perhaps, that it didn't apply to section 66(1)?

MR STEVENSON:

That was certainly the –

TIPPING J:

That seems to be the case, doesn't it, a concession? Or not perhaps a concession but at least not an argument.

MR STEVENSON:

Well, it was certainly the, I think the genesis of the arrival at a point by which withdrawal was not left under 66(1), and certainly Mr Sainsbury in the Court of Appeal made that –

TIPPING J:

I found it quite startling that he appears in the Court of Appeal saying that he might help. In my day that was unheard of. Is that common practice nowadays?

MR STEVENSON:

Well, it's not, Sir, although I suppose he may have taken the view that the concession is absolute and we just –

TIPPING J:

I don't suggest anything turns on it, it just –

MR STEVENSON:

No, no.

TIPPING J:

– it's quite a startling thing for me to read.

ELIAS CJ:

Was their argument before subsection – before the Judge summed up?

MR STEVENSON:
In terms of withdrawal?

ELIAS CJ:
In – yes, yes, in terms of withdrawal in terms of subsection (2).

MR STEVENSON:
Not as far as I'm aware. Two things from that. I enquired with trial counsel as to this very point, and he best recollection was there may have been some informal discussion in chambers, which again is perhaps not modern practice, whereby things happen in front of the accused and are recorded and we're not left in this position, but that's his best recollection of what occurred.

The other point that I would make in response to the observation or enquiry, Chief Justice, is that at no point have I seen any suggestion that the Crown opposed leaving withdrawal under 66(2). Now that's in no way definitive, but certainly the appellant says, supports its argument that there was an evidential basis for leaving withdrawal in toto, if you like.

WILLIAM YOUNG J:
But don't you, wouldn't you have to leave withdrawal under section 66(2), because isn't it a component of the case that the murder was committed in the prosecution of the common purpose? Well, if the common purpose had come to an end, it couldn't be, and it's not for the Judge to find that an element of the case has been proved beyond reasonable doubt.

MR STEVENSON:
Well, that may –

WILLIAM YOUNG J:
I mean, it wouldn't have been right for the Judge to say, "You must conclude, if you're with the Crown so far, you must conclude that the murder occurred in the prosecution of the common purpose," because that would be the Judge taking away the issue from the jury.

TIPPING J:

And that she was still part of the common purpose.

WILLIAM YOUNG J:
Yes, yes.

MR STEVENSON:
I would have thought that was, it was rather an aspect of assessment of the evidence in terms of the Crown allegations under 66(2) and the defence response to it.

WILLIAM YOUNG J:
So it's a jury question, not a Judge's question, or –

MR STEVENSON:
Yes.

WILLIAM YOUNG J:
– sorry, am I – do you accept – I mean, I'm not pushing you on it –

MR STEVENSON:
No.

WILLIAM YOUNG J:
– I'm just putting it to you to test it.

MR STEVENSON:
I think the point is one has to assess things chronologically and sequentially in terms of 66(2) and 66(1). 66(2) involves the offence of joining the common purpose at an earlier point in time, here it may have been some time earlier in the day, and so one might withdraw because of the change of mind, but would need to demonstrate that, we say, by unequivocal notice. Similarly, in terms of 66(1), the important point is to focus on the sequence, because mens rea and actus reus coincide at the point at which, for example, the appellant has driven the accused, McCallum and Rippon, and it's after that that she is entitled to withdrawn. She can't before, because her liability doesn't form until she does what was alleged here to be her party –

TIPPING J:
But that is the –

MR STEVENSON:

– her assistance.

TIPPING J:

You say confidently that she's entitled to withdraw, but that is the essential question –

MR STEVENSON:

Well…

TIPPING J:

– isn't it?

MR STEVENSON:

Absolutely, Sir. I should rephrase that and say that as a matter of law it's open to her, assuming that she discharges the evidential onus on her, which is very much the, I suppose, the critical question in this case.

ELIAS CJ:

It still has to be a purpose that carries through to the crime otherwise you'd simply have an encouraged crime of taking steps preparatory.

MR STEVENSON:

My understanding of the way the law has approached this, at least in terms of 66(1), is that a party who assists is liable because they have the relevant mens rea at the time they commit the act of assistance and those two things must happen together so in this case driving when she knew that McCallum had murderous intent. It's because her liability crystallises at that point, before the offence has been committed, that there is this window of opportunity during which the doctrine of withdrawal enables somebody to step back, if you like, but only assuming they satisfy certain criteria.

TIPPING J:

But can you withdraw once your assistance is complete?

MR STEVENSON:

Well that's very much the issue.

ELIAS CJ:

Well you must be able to it's just what does withdrawal consist in because as I say otherwise you'd have a completed encouraged crime but not necessarily a completed crime.

MR STEVENSON:

That's right and for example if there were a crime in New Zealand have taken preparatory steps or something of that nature one might be guilty of that. In terms of –

ELIAS CJ:

Is there such a crime by the way, I can't remember.

TIPPING J:

No, well, if you assist you take the risk, don't you, of whether the crime is actually going to be committed. If your assistance stops – what I find difficult, and you'll no doubt be helping, is that once your physical assistance, it maybe different if it's a verbal type assistance, like encouraging, because the old cases are command cases, but once you've done all that's necessary, with the requisite mens rea, it's your good luck if the crime doesn't take place but it's your bad luck if it does. I mean I'm putting it to you colloquially.

MR STEVENSON:

It's your bad luck if all you exhibit is mere private repentance, that's your bad luck because the crime was committed despite you not having the so-called malicious mind or guilty mind but you can't just sit there and privately repent and that's what the law has urged, I suppose, since say 1941 and the Sloan J case, I'll come back to the Canadian case. What's required, in my submission, as has been set out consistently over the last 75 years or so in such a situation is that you do more than privately repent. That you give unequivocal notice of your withdrawal, so inherent in that the withdrawal must be real, and you communicate that to the principal. Now should you have to go further, per Justice Tipping's observation or query, once you've already provided assistance, that's the nub of this case, I suppose in terms –

ELIAS CJ:

Well that's the stepping on the fuse suggestion, isn't it?

MR STEVENSON:

It is.

McGRATH J:

Are you really saying, do you really come down to the position of saying that the effectiveness of communication is not an issue, it's the clarity and certainty of it that is enough to establish the withdrawal defence?

MR STEVENSON:

That's right and the answer to this question very much depends, and I think it's a question of policy, it very much depends on the underlying rationale for permitting withdrawal at all.

McGRATH J:

Yes, I think that's a good point.

TIPPING J:

Shouldn't you though, as a matter of policy, have to undo. You undo the command when you countermand. You undo the incitement and you undo the counselling when you countermand it. But if you have a physical act of assistance, shouldn't you have to do something physically to undo it? Not just sort of say, I'm sorry, but I don't think this is such a good idea anymore. That's – and it's that issue that we have to sharply focus on because that's the fourth step in *R v Pink* [2001] 2 NALR 860 (HC), isn't it, however formulated.

MR STEVENSON:

That's right, which the appellant says is contrary to the English position and ought not to be required. Could I just say that the appellant's case is she did enough to discharge the evidential burden in respect of the fourth step of *Pink* so even if we're wrong about the fourth step of *Pink*, the appellant's case is she did enough because she did all that she reasonably could as a female in the circumstances –

WILLIAM YOUNG J:

Could she not have done something with the car she was driving?

MR STEVENSON:
Well, perhaps and that –

WILLIAM YOUNG J:
Like come to the assistance of the deceased by using the car?

MR STEVENSON:
Driving it and, yes.

TIPPING J:
Or at least driving away.

MR STEVENSON:
Perhaps, and those would be jury issues. But certainly there's an evidential basis to say that she had done enough by doing this. Having driven the male offenders to the point at which the attack is launched, before the weapon is produced, while an assault is occurring with fists, she has said, "That's enough," and they are key words in the appellant's case, which weren't picked up by the Court of Appeal, more than, "Get in the car," she said, "That's enough," and it's unequivocal, it's in the record, and I'll take Your Honours to it. "Get in the car," and also, "The police are coming." All of those things said before the axe was produced. Now – sorry.

WILLIAM YOUNG J:
We can sort of ignore section 66(2), can't we, because – and for the sake of the case assume she was found guilty under section 66(1), is that…

MR STEVENSON:
Well, yes.

WILLIAM YOUNG J:
Under section 66(1), where does this withdrawal come, and what words in section 66(1) give rise to this defence of withdrawal, from what language does the defence hang?

MR STEVENSON:

I'm not sure that –

GLAZEBROOK J:

Or is it just a common law defence that subsists under whatever section it is of the Crimes Act?

MR STEVENSON:

Yes, and I think that's right. The Australian Court seems to have taken a different approach, although I found it difficult to follow the precise code that was being referred to in the two Australian cases which my learned friend has provided, but they seem to take the point we've codified the common law, it says nothing about withdrawal, so if you can't undo your actus reus you're guilty. The New Zealand position per the exposition or the enunciation of Hammond J in *Pink* is that there is a common law defence, well recognised, tracing some 500-odd years, and it allow one to emancipate themselves from criminal liability.

TIPPING J:

It seems to depend on the premise that you must still be aiding at the time the crucial fatal act takes place. Now, I think that could be a misunderstanding of the law. The aiding can be prior to .

MR STEVENSON:

Yes. I mean, even Hammond J in *Pink* didn't say, "You have to undo your prior assistance," he simply said, "You have to take reasonable steps –

TIPPING J:

Yes.

ELIAS CJ:

Well, that's what Glanville Williams says. He say that you don't have to step on the fuse, as the American case colourfully put it, but you have to attempt to step on the fuse. In other words, it's contextual. What you have to do may be enough, and on your argument it's enough if it's a verbal exhortation. But you have to do something.

GLAZEBROOK J:

Well, say this had happened a month before and she had given him the axe, and then two days later had said, "No, you can't use that axe. I know I gave it to you, but

you can't use it, and I don't want to have anything more to do with this and can you give it back to me," or something of that nature, I mean, that's merely verbal, isn't it, and it's not in the heat of the moment, which –

MR STEVENSON:
Well, that's another point.

GLAZEBROOK J:
– I think confuses this –

MR STEVENSON:
Yes.

GLAZEBROOK J:
– and also the other thing that's confusing it of course is that arguably she continued her assistance, so there's actually an unbroken chain of assistance, in fact, because evidentially she still stayed there and drove them away afterwards and there's also evidence of her possibly saying some things. But you would say anyway, "Well, that might be so, but it's a jury question," I imagine?

MR STEVENSON:
Those are matters of inference post ipso the event, from which the Crown would be legitimately entitled to say this wasn't real withdrawal.

GLAZEBROOK J:
Yes.

MR STEVENSON:
In terms of Your Honour's example, again, if one comes back to the underlying rationales for permitting withdrawal, they're effectively twofold. One is to encourage people to attempt to withdraw and communicate it to the principal, thereby reducing the risk of harm, hopefully dissuading the principal from going ahead by saying, "You're on your own, I'm no longer part of this." Secondly, the defence recognises what's been described as the reduced future dangerousness, reduced moral culpability of somebody, who not only offers private repentance but communicates it to the principal. If you take those two underlying rationale together and equate them into any given example, they do support that so long as an appellant or accused has

genuinely withdrawn and given unequivocal notice of that to the principal, they ought to be able to rely upon that.

McGRATH J:
That second rationale though really depends, doesn't it, on the act of withdrawal being an effective act, and effective in relation to having a significant effect on the principal?

MR STEVENSON:
Reduced –

McGRATH J:
By taking away the effect of the original act.

MR STEVENSON:
Well –

McGRATH J:
I mean if it's to reduce dangerousness it's got to have some impact doesn't it?

MR STEVENSON:
Although I think certainly the academic commentators, and I think it was one of the authors Smith, in 2001, the English Law Review article described it in broader terms, that they're demonstrating by their change of mind a reduced future dangerousness. Not necessarily in relation to the incident but they've had a rehabilitation of sorts but I appreciate, Your Honour, one could relate that to the incident case also.

McGRATH J:
I can see that for your first rationale. Your second rationale well, the principal that the greater the initial involvement the more the accused has to do to withdraw which I think is Simester & Brookbanks, seems to me to have some relevance.

MR STEVENSON:
There's certainly force in that and the appellant doesn't disregard it. We simply say that would be a matter for the jury rather than holding as a legal requirement step 4, an accused must take steps to undo their prior assistance. A Judge would rightly direct when considering whether or not there was genuine withdrawal, it was

unequivocal, you would have regard to the nature of the assistance and the nature of the response which is called in aid in support of the asserted withdrawal. So that would very much be in the mix. We simply say it's too onerous and potentially creates too many downstream difficulties by having that as a formal requirement because it will always be fact dependent, as the English cases say, in not requiring that as a formal requirement and they talk about the reality in a particular situation for an accused to withdraw. They may be fearful, they may be physically unable to do it in the Canadian case, which the Crown has referred to. The 2009 case of the young female who was acquitted of murder, makes that very point, that she said nothing apart from disengaging and walking away from the scene at which the victim was being assaulted and subsequently killed but the Court took cognisance of the fact, although she'd done nothing to undo her prior assistance, which was very significant including pinning the victim down and assaulting her, the Court took cognisance of the fact that she was afraid of the male offenders and so those are the sorts of things that one would –

ELIAS CJ:

We've got no evidence of that. She didn't give evidence. She didn't say anything like that.

MR STEVENSON:

No in the incident case although one would fairly infer, in my submission, from what she's watching go on whereby Rippon, Daniel Rippon, before the weapon is produced is physically trying to pull Mr McCallum and is being "staunched out and intimidated" by McCallum and then she would have seen all those things happen which is –

ELIAS CJ:

What do you say about the fact that the initial assault, which could well have been fatal in itself, occurred before there's any suggestion of withdrawal?

MR STEVENSON:

Well murder was predicated on her foresight of the risk that McCallum would kill with a weapon and –

ELIAS CJ:

Was that the way it was put?

MR STEVENSON:

Yes as I recall and –

ELIAS CJ:

Can we see what the Judge said in summing up on that?

MR STEVENSON:

Maybe the question trail Your Honour is perhaps helpful. That's at volume 1, right at the back, the volume on the case on appeal. The numbers which I refer to are the bottom typed numbers so at 271 of volume 1 and over 272 the question trail regarding section 66(1).

ELIAS CJ:

And which –

MR STEVENSON:

B2, I beg your –

GLAZEBROOK J:

It's B2, B2A.

ELIAS CJ:

B2, oh, yes.

MR STEVENSON:

And then the actual record of the charge to the jury, the summing up, which is at 195 again, same booklet, using those right-hand typed numbers in the bottom right-hand corner, 195. "The mens rea must incorporate an assault of the type which occurred here," ie, must have foresight of weapons, and really a direct –

McGRATH J:

So your paragraph…

MR STEVENSON:

I beg your pardon, Sir, 25.

ELIAS CJ:

So it is all put on the use of the axe handle?

MR STEVENSON:

Yes, and indeed Ms Ahsin in the Court of Appeal ran a further ground in that she, or it couldn't be proven she had knowledge of the axe, and the Court of Appeal said no, but it could be proven she had knowledge of a knife which was produced earlier, and they are both deadly weapons, and vis-à-vis *R v Hartley* [2007] NZCA 31; [2007] 3 NZLR 299 and so forth, it didn't matter, but that was very much the essence of the case, not that she was assisting with the knowledge there would be an assault, with the risk of death by way of fists, but rather with weapons.

TIPPING J:

Don't you have to withdrawn the relevant assistance? Because it's the assistance that makes you guilty. Isn't a question of how you withdrawn the relevant assistance –

MR STEVENSON:

If –

TIPPING J:

– or whether you can withdraw the relevant assistance?

MR STEVENSON:

Well, certainly *Pink* didn't go that far, it said –

TIPPING J:

Well, I'm not too worried about *Pink*, I'm just hypothesising really, and seeking your assistance.

MR STEVENSON:

The –

TIPPING J:

I mean, conceptually isn't that sort of getting close to the heart of what you've got to do?

MR STEVENSON:
In a perfect situation –

TIPPING J:
In a perfect world.

MR STEVENSON:
– for everyone, for the appellant and the intended victim, that would be right. But I suppose my reading of the case law and so forth is that those sort of absolutist requirements can create injustice, and in many occasions it's simply not possible to completely undo and prevent the offence occurring, and can I –

TIPPING J:
Well, as to that, I would suggest that you may in these cases have reached a point of no return.

MR STEVENSON:
Crossed the –

TIPPING J:
Crossed the Rubicon –

MR STEVENSON:
– Rubicon.

TIPPING J:
– whatever metaphor you want to use. And, arguably, this is one of those cases.

MR STEVENSON:
Well, the English Court of Appeal has on a number of occasions said that that sort of charge to a jury that you have to prevent the offence occurring as an error of law, and more recently in *R v O'Flaherty, Ryan and Toussaint* [2004] 2 Cr App R20, different case, spontaneous violence and so forth, did say it's sometimes been said that where you provide assistance you have to take steps to prevent the offence occurring, and said but that is, that is not the position.

TIPPING J:

Well, the authorities are not in a very consistent state, are they?

MR STEVENSON:
No, no.

TIPPING J:
I mean, it's not as if there's a clear line of authority around the world, or indeed anywhere –

MR STEVENSON:
No.

TIPPING J:
– on this sort of problem.

MR STEVENSON:
No.

GLAZEBROOK J:
If you don't have that requirement though, if it is possible to undo your assistance, is it just enough to say, "Oh," because you say it's an indication of whether you have withdrawn. But if you unequivocally say you're withdrawing, "I'm having absolutely nothing more to do with this," but you don't attempt to undo assistance that would be very easy to undo, and I can understand it doesn't go so far as to say that you've got to squelch on your mates, if you like and go to the police so one can understand maybe in policy terms you don't expect people to, you would still rather they withdraw even if they're not willing to go to the extent of preventing it by going to the police. But if it's easy to withdraw so say for instance here she could have run off with the axe handle, for instance, then shouldn't she have done so?

MR STEVENSON:
Well –

GLAZEBROOK J:
Just as an example. Now this is not suggesting that – I mean if she was a very, very strong man for instance then shouldn't she have run off with the axe handle, if it was possible?

MR STEVENSON:
In my submission those –

ELIAS CJ:
In his trousers, she might have had to run –

GLAZEBROOK J:
No, no, it's just an example to say – I mean if it is easy to undo the assistance why shouldn't you have to do that? Because it wouldn't just be evidential to say you hadn't withdrawn because you could have an absolutely unequivocal withdrawal but then you just – are you entitled just to sit back then and say, well I'm not going to do anything about it.

MR STEVENSON:
I think the answer would be consistent with the appellant's case that that, as Archbold puts it, is a matter of fact and degree to the jury.

GLAZEBROOK J:
But it wouldn't be on your test because on your test an unequivocal withdrawal is absolutely enough and if you unequivocally withdraw, and there can be no question that you've done so, and you could have very easily undone something that you'd done, maybe drive away in the getaway car or something. I'm not suggesting that it was practical in this circumstance, so it would always be subject to practicality because it would do everything reasonably possible.

MR STEVENSON:
Well it maybe that the answer is slightly more nuanced than that in the sense that in a case such as that it would be open for a jury to say, rather than having a *Pink* number 4 requirement that that is evidence that in fact this was not an unequivocal withdrawal because –

GLAZEBROOK J:
Well but say it is? You say I'm having absolutely nothing to do with it, you write to every single one of them, you don't turn up or do anything more and you say you're not allowed to use whatever I've given you in terms of assistance. It's pretty

unequivocal, isn't it? So it's difficult to say well that he didn't actually walk in and whatever else, you know, take the axe away.

MR STEVENSON:

In an extreme example, I'm sort of trying to conjure one at the moment, factually that may well be a policy concern if you don't have number 4 but I still wonder whether or not it would be open to a jury to say well an expression here which is said to be unequivocal is taken with a grain of salt because if you have the right set of facts more wasn't done and so those considerations could more have been done were steps taken still in form those –

GLAZEBROOK J:

Well wouldn't it be better to have the fourth one and then just say you do what you can in the circumstances and then it's to a jury to say well could she have done more in these circumstances and the jury may well say, given the sort of things that you're saying, probably strengthened if she gave evidence of her, what she was thinking at the time.

MR STEVENSON:

The danger is that it becomes overly prescriptive and narrows the test, that's the appellant's concern –

GLAZEBROOK J:

I can understand that. It's just in policy terms it seems to me, especially with physical assistance, if you can undo it, well you should do and it's not just an evidential thing to show you didn't withdraw.

MR STEVENSON:

One wonders why, with that always being an issue in these cases, why the English have consistently rejected that.

GLAZEBROOK J:

No, no, I understand that.

MR STEVENSON:

And –

GLAZEBROOK J:

Why – what are the policy reasons for rejecting that? Just because you really want to encourage withdrawal without people putting themselves in danger necessarily?

MR STEVENSON:

That's right and one of the, I think, the academics talks about the policy concern about such a high threshold, if you like, in having that fourth requirement, that it may discourage people because that may involve them taking steps that would alert the authorities, those sorts of things. There are a number of examples, you can imagine –

McGRATH J:

Perhaps it's time to start taking us to one or two of these because when we come back and read the transcript later and we see this general comment –

MR STEVENSON:

Yes.

McGRATH J:

– we wonder where to go.

MR STEVENSON:

Should I perhaps just thumbnail sketch the authorities in support of the appellant's case?

ELIAS CJ:

Well, does it go beyond what you have in your written submissions, is there additional emphasis? Because we have read your submissions.

MR STEVENSON:

No, perhaps if I just pick up on –

ELIAS CJ:

Yes.

MR STEVENSON:

– two cases, just to reiterate the appellant's position.

WILLIAM YOUNG J:
Can I just ask you before you do –

MR STEVENSON:
Yes.

WILLIAM YOUNG J:
– just to bear in mind, I see a difference between joint enterprise, which correlates broadly to section 66(2) in aiding cases, so perhaps you can bear that in mind when you take us to the cases?

MR STEVENSON:
Well, yes, and it's certainly true that most of the cases appear to be the sort of common enterprise 66(2) cases, it's not always clear actually but…

WILLIAM YOUNG J:
No. Well, it's not even clear in *Pink*, although –

MR STEVENSON:
No.

WILLIAM YOUNG J:
– it presumably was a section 66(1) case?

MR STEVENSON:
He'd been seen handling the firearm and so forth.

ELIAS CJ:
I don't know the answer to this, but in UK practice are you permitted to leave charges to the jury on the alternatives of aiding and abetting or joint enterprise? You might not know the answer to that, no.

MR STEVENSON:
Mmm, no, I don't.

TIPPING J:

Well, the Crown usually relies on both, and if either is established –

ELIAS CJ:

In New Zealand.

TIPPING J:

Oh, sorry.

ELIAS CJ:

I'm just wondering whether we're a little aberrant, because it does make it extremely complicated, and it may be an explanation as to why the cases are mainly about the – anyway, that's fine –

MR STEVENSON:

The common enterprise.

ELIAS CJ:

– yes. I just have a doubt in my own mind whether New Zealand practice is appropriate and should be reviewed at some stage, but that's not before us.

MR STEVENSON:

The appellant's list of authorities, numbers 1, and you'll see them listed on the front page, 1, 2, 3, 4 and 5 really trace chronologically – *Pink's* in the middle, the New Zealand case – the development of the law in the UK, and I've really covered that in terms of the dicta expressed in case number 4, *R v Whitehouse* [1941] 1 DLR 683, there must –

GLAZEBROOK J:

Sorry, where are you referring to?

MR STEVENSON:

I beg your pardon, the list of authorities –

GLAZEBROOK J:

Oh, the list of authorities, right.

MR STEVENSON:

– there should be a booklet for the appellant.

GLAZEBROOK J:

And you said 1 – just so I've got it – 1 –

MR STEVENSON:

1, 2, 4, 5 and 6 really trace the development. All of those cases reaffirm the test set out in the appellant's number 4, which was the Canadian case, *R v Whitehouse*, and that's –

TIPPING J:

Are you going to be referring in due course to the High Court of Australia case of *White v Ridley* (1978) 140 CLR 342?

MR STEVENSON:

I think I will have to, Sir, come to that, I –

TIPPING J:

Yes, I think you should –

MR STEVENSON:

– yes.

TIPPING J:

– because Justice Gibbs' judgment there I make no secret of the fact that it appealed to me.

MR STEVENSON:

And I think that's bound up in the statutory framework there, but, yes, I will come back to that.

TIPPING J:

Yes, well, I don't think the statutory framework there makes much difference for the points of principle that the learned Judge was discussing.

MR STEVENSON:

Unless Your Honour's –

TIPPING J:

Unless I've missed something and unless there's something in their statutory framework that expressly addresses withdrawal, which I don't think there is.

MR STEVENSON:

No, no.

TIPPING J:

No.

MR STEVENSON:

Unless Your Honours wish me to do so, I won't go specifically to cases 1 through 6, and just pick up in *R v Whitefield* (1984) 79 Cr App R36, which is case number 7 or tab number 7 in the appellant's list of authorities. Now, *Whitefield* concerned a burglary and the admissions of the appellant that he had provided information to the principal about the burglary, but beforehand said he would not take part and communicated that to the principal. On page 38 of the report the judgment sets out the trial Judge's –

ELIAS CJ:

48?

MR STEVENSON:

38, sets out the trial Judge's direction to counsel, and after that the appellant pleaded guilty, he effectively thought that withdrawal wasn't open to him and that was subsequently this direction found to be an error of law. So at page 38, and Your Honours will see it in quote marks, third paragraph in, which begins, "After considerable discussion," you'll see the trial Judge's direction, if I can put it that way.

ELIAS CJ:

Sorry, where are we?

MR STEVENSON:

Page 38.

ELIAS CJ:

Oh before I do that. What are you referring to?

MR STEVENSON:

I'm referring to a direction of –

ELIAS CJ:

Well what's the –

MR STEVENSON:

What's the point?

ELIAS CJ:

Say what it is.

MR STEVENSON:

The trial Judge said that withdrawal wasn't open to that –

ELIAS CJ:

No, no, sorry, what's the passage you're referring to?

GLAZEBROOK J:

Can you go through into the actual ruling, I'm just half way through it, because the ruling is in the following paragraph, isn't it?

MR STEVENSON:

It is.

GLAZEBROOK J:

The formal ruling.

MR STEVENSON:

But the trial Judge –

GLAZEBROOK J:

Made no communication with the police.

MR STEVENSON:

The trial Judge said, and this is half way down 38, “He did nothing to prevent the commission of the offence.”

TIPPING J:

The key ratio of this case is at the bottom of page 39 starting, “The law upon,” and the Judge says, “If a person has counselled another,” which is verbal, “he may escape liability by withdrawal... If his participation is confined to advice or encouragement he must at least,” so they’re making the distinction between verbal complicity and physical complicity.

MR STEVENSON:

The important passage from the appellant’s point of view is the following Sir on page 40.

TIPPING J:

Yes.

MR STEVENSON:

“In this case there was, if the jury accepted it, evidence in the answers given by the appellant to the police he’d served unequivocal notice on Gallagher that if he proceeded with the burglary he would do so without the aid or assistance of the appellant. In his ruling,” which I touched on over the page, “the Judge stated that such notice was not enough and – ”

TIPPING J:

Well that was wrong in law.

MR STEVENSON:

Yes.

TIPPING J:

But my point is, that this is not a case concerned with physical assistance, this is a case concerned with verbal encouragement.

MR STEVENSON:

Well assistance in the sense he provided information.

GLAZEBROOK J:

You couldn't undo that though. Once the information is provided you couldn't undo that unlike the provision of a weapon that you could take back.

MR STEVENSON:

Yes but the point in this case that the Court of Appeal found that it was an error or law to say that the appellant had to take further steps and that's on page 40. In his ruling the Judge said, "Notice is not enough and failing to communicate with the police or take any other steps to prevent the burglary, he remained liable in law." And the judgment in this Court in making that statement the Judge fell into error.

WILLIAM YOUNG J:

They don't explain why.

MR STEVENSON:

No.

WILLIAM YOUNG J:

It seems a simple enough thing to expect someone who's repented of his crime to do.

GLAZEBROOK J:

They did say that if it's confined to advice or encouragement –

TIPPING J:

Yes, yes.

GLAZEBROOK J:

– and this was confined to advice or encouragement so that the statement of law is the one at the bottom of page 39 to 40 so if it's advice or encouragement, and here it was advice and encouragement, then you can unequivocally withdraw by withdrawing their support.

ELIAS CJ:

Even if it's physical assistance, however, what you can do to withdraw must be intensely contextual and here the physical assistance is preparatory to the commission of the assault, driving him to it, obviously encouraging the course on which he's bent. It's not – which is why if in the example of dynamiting the building, if the fuse has been lit it's not so I don't want any part of this anymore, you need to step on the fuse. But in this sort of case it's almost a little bit intermediate between providing information or providing – prompting the initial enterprise and being right there assisting in the act which constitutes the crime.

MR STEVENSON:

That's true Your Honour and it's why I said at the outset that the appellant maintains that the fourth requirement is not necessarily a matter of law but nonetheless in the circumstances of this case it's not to say that if it is included we don't submit that she had still satisfied the evidential burden she had put the issue in play and that those questions whether or not she had done what was reasonable in the circumstances to undo her prior acts was for the jury.

WILLIAM YOUNG J:

Just looking, trying to correlate what was said in *Whitefield* with our section 66. It's – you can say that someone who initially incited but then stops inciting before the offence is committed is no longer within the reach of section 66(1).

MR STEVENSON:

Well, I'm not sure about that, Sir, because they had the, presumably, the requisite mens rea –

WILLIAM YOUNG J:

But it's pretty referable, I mean, the idea of inciting counsel into procuring a person to commit the offence perhaps conveys the idea that the incitement, counselling and procuring are active at the time of the offence.

ELIAS CJ:

Yes.

MR STEVENSON:

Oh, absolutely. But liability attaches for having the relevant mens rea at the time the incitement occurs, but –

ELIAS CJ:

Well, I'd query whether that's right.

WILLIAM YOUNG J:

But there might not be an actus reus, there might actus reus.

GLAZEBROOK J:

Yes, I'm not sure that's right.

MR STEVENSON:

Well, if it's not, then it assists the appellant –

ELIAS CJ:

Because the –

MR STEVENSON:

– in the sense of a mens rea it's stopped if she's saying, "That's enough."

GLAZEBROOK J:

Well, that's a possibility, yes.

ELIAS CJ:

If it was effective, withdrawal of her mens rea.

MR STEVENSON:

Yes…

GLAZEBROOK J:

Because there's a continuing purpose, and then there's the actus reus. I would have thought that on basic principle the two need to coincide at the time of the crime, but the question is whether the continuity of purpose is interrupted before the commission of the crime.

TIPPING J:

The problem here is that they'd already been given a bit of a hiding before the, "That's enough," is said, so you're going to introduce very fine distinctions about, you know, when do you have to say, "That's enough"?

ELIAS CJ:
Well, the Judge though did put it on the basis of the weapon, I suppose.

TIPPING J:
Well, whether as a matter of policy you can get out half way through the beating and then have to sort of work out which was the fatal act, that's…

GLAZEBROOK J:
That's one of the difficulties, I know.

TIPPING J:
That's one of the difficulties.

MR STEVENSON:
Well, if the fatal attack has commenced, and there are gradations and degrees of course and it's not a straightforward exercise, then it must be difficult to withdraw, because there's a reference, and my learned friend certainly relies on it, it must be timely, in the sense it must have the capacity to have some utility –

TIPPING J:
But if people are in hot –

GLAZEBROOK J:
Although actually you'd really like people to withdraw and try and stop something half way through.

TIPPING J:
You would.

GLAZEBROOK J:

Because in fact you probably want to encourage people to be able to stop half way through an assault and say, “That’s actually enough, I only – bashing him up to this extent has been sufficient.”

MR STEVENSON:

Absolutely, though of course you can’t once, once the real fatal assault has commenced, if you like.

GLAZEBROOK J:

No, no, that’s…

MR STEVENSON:

I mean, you know, if somebody is striking with a weapon, that's too late to withdraw, in this case for example.

TIPPING J:

But over the continuum, and everyone’s in hot blood, you don’t know whether they fully heard the, “That’s enough,” I mean it’s, it’s a very hard thing to administer, I would have thought. That's why I’m concerned about this point of no return, that once you’ve set, you’ve contributed to setting a course of events in train, with the requisite mens rea, ie, with the foresight of, possibility of killing an so on, can you half way through say, “I’m sorry, but I think we’ve gone far enough,” that's the question, and it’s a difficult one.

MR STEVENSON:

It is, and that's why withdrawal hasn’t always been cohesive in terms of the various observations about it, because there is that tension, obviously.

TIPPING J:

If, immediately on arrival she’d said to them, “Look, this is a bad idea, I’m not having any more to do with it,” and driven away after they’d got out or something, then you’d have had a much better case, but the thing’s already in train.

MR STEVENSON:

And those would be difficulties for her before a jury.

TIPPING J:

Well, you know, there may be difficulties before us too.

MR STEVENSON:

But - well, she merely has to discharge an evidential –

TIPPING J:

I know –

MR STEVENSON:

– onus on her.

TIPPING J:

– but we're setting quite a tiger loose here, if we're going to allow people half way through what ultimately becomes a fatal beating, to say, "Well," you know, "that's enough," or, you know, "Don't use the axe," or whatever it might be that they say, or claim to say.

MR STEVENSON:

I suppose one would simply have to defer to the community standard and anticipate that they would get it right in the instant case. But the distinction between the trial Judge and jury is a significant one, she has the right to trial by jury and –

TIPPING J:

But cases do say, don't they, interestingly enough under the concept of timeliness, that it may be too late to withdraw?

MR STEVENSON:

Only if the fatal assault, if that's what it is, for example, has commenced, I think.

TIPPING J:

It's an interesting conjunction of ideas but there's got to be a time limit or meaning before things have started to sort of get underway I would have thought.

MR STEVENSON:

Well it maybe by reference to this case for example if he had the axe and was holding it over his head then –

TIPPING J:

And she says, “Don’t strike.” Now is that going to be enough to leave it to the jury?

MR STEVENSON:

Well she’s –

TIPPING J:

When he’s got it up over his head, about to bash the ultimate deceased.

MR STEVENSON:

Well don’t we want to encourage that Sir?

TIPPING J:

I beg your pardon?

MR STEVENSON:

Don’t we want to encourage that sort of action, that withdrawal is available because –

TIPPING J:

Well yes in one sense we do but I’m concerned about the difficulties that we’re going to set in train. I agree that when you have a mandatory penalty, and that sort of conduct can't be taken into account in sentencing, it exacerbates the difficulty.

ELIAS CJ:

Mr Stevenson, I wonder, because I too thought that Justice Gibbs’ judgment in *White v Ridley* is very thoughtful, whether you want to take us to that, because there are things in it that are adverse to your position, which I think you need to address.

MR STEVENSON:

May I just give Your Honours one final reference?

ELIAS CJ:

Yes.

MR STEVENSON:

Before I do that and it's under tab 8 of the appellant's booklet which is simply a further authority. It's in my written submissions and cited but to give Your Honours the reference this is further authority to the appellant's submission that the *Pink* number 4 requirement is not the position in the UK.

GLAZEBROOK J:
Was this the street brawl one, was it, or the group brawl?

MR STEVENSON:
That's right, the two incidents and so forth, *O'Flaherty, Ryan and Toussaint*, and Ryan and Toussaint were acquitted in the Court of Appeal and at page 331 of that report, sorry 331, para 60 or not 60 on the - Your Honours have that. There's an observation which the appellant...

TIPPING J:
I'm not sure that that does help you actually. And how imminent the infliction of that fatal injury is as well as...

GLAZEBROOK J:
Well you'd say it's just a question of fact and degree for the jury –

TIPPING J:
For the jury, yes.

GLAZEBROOK J:
The issue I suppose I have, actually both, if you don't leave it to the jury and if you do is what – how do you articulate the test as to whether you do or don't leave it to the jury and you'd just say unequivocal, but you can take into account things like the fact she drove away. So that's sort of whether you can take into account whether it was feasible to undo your assistance and whether you should have done something to, but that's only in terms of working out whether it was unequivocal withdrawal –

MR STEVENSON:
Yes.

GLAZEBROOK J:

– rather than a separate requirement on its own. I mean if you did have a separate requirement on its own you would say, you only do what's reasonably necessary and that will depend on the facts of the case.

MR STEVENSON:
Which is as expressed in *Pink* now.

GLAZEBROOK J:
Yes.

MR STEVENSON:
And it's certainly not the appellant's intention to be transient, if you like, over this issue. We accept, of course, that it's well arguable it should be included but there are arguments, which I attempted to articulate also, in favour of not having it and rather leaving those issues to the jury.

GLAZEBROOK J:
And I suppose you would say in any event there isn't a threshold Judge question here except possibly – well the only threshold Judge question, sorry, is whether there is an evidential foundation to leave it to the jury and as soon as there's any evidential foundation then you would say, the words here clearly provide that evidential foundation and it should have been left to the jury.

MR STEVENSON:
That's right and that's –

GLAZEBROOK J:
So there's no threshold – that's the only threshold question for the Judge, is that the submission i.e. it's a jury question, whatever the test is it's a jury question?

MR STEVENSON:
Absolutely and I don't think that's ever been controversial. Hammond J certainly put it that way. He considered it a defence to be disproven.

GLAZEBROOK J:
No, I understand that, but in this case the argument is, well, there was enough here to go to the jury even if there was the fourth requirement. And, in any event, in the

circumstances, maybe it would have been reasonable to do absolutely nothing, apart from unequivocally stating, so it still should have been left to the jury.

MR STEVENSON:
That's right, the appellant's position is you couldn't say this is fanciful that –

GLAZEBROOK J:
Yes.

MR STEVENSON:
– you know, that, like self-defence, it's just not a runner, and having reference to what's required, and that's why I've cited the Canadian case, there's nothing new about the evidential burden, Judges should be careful not to assess the weight and reliability and credibility, just whether or not the issue has been put in play in the sense a jury could reasonably entertain a reasonable doubt, and it's a low threshold, and so that's certainly a point the applicant endeavours to make in support of why it should have been left in this case.

ELIAS CJ:
It has to be, I suppose, recognised too that *Pink* was a 347 application, wasn't it, so that's really why it was necessary for the Judge to get into all of this, it wasn't a case deciding whether there was sufficient to leave the matter to the jury?

MR STEVENSON:
No, although I suppose one might –

TIPPING J:
It was really the reverse, the Judge said that on this evidence that no reasonable jury could convict.

MR STEVENSON:
Mmm, the Crown couldn't disprove it, yes.

TIPPING J:
Yes, yes.

MR STEVENSON:

And that's certainly what's happened in some other cases, I think the *O'Flaherty* one I was just referring to, but that's right. And, I mean, the appellant, Mr Pink, in that case, had, one might say, taken pretty significant steps, seen handling the firearm and so forth, but clearly established or satisfied the evidential onus on him and a jury couldn't exclude the reasonable possibility he's withdrawn.

So, I should turn to the cases which are very much against some of what I've been saying, which is the Australian position, which is twofold really, I think, the *White v Ridley* and then a case not long after that, and those are in my learned friend, the Crown's, bundle of authorities. *R v Menniti* [1985] 1 Qd R 520 and *White v Ridley.*

ELIAS CJ:
Yes, that's almost the worst authority for you, isn't it?

MR STEVENSON:
Mmm, they're both cannabis cases.

ELIAS CJ:
Yes.

MR STEVENSON:
Menniti is the undercover officer one in Brisbane and Mr, or the appellant, thinks the police are on to them and attempts to disengage, and *White v Ridley,* as I recall, was the one where he attempted to send some cannabis from Singapore via the post and then sent a telex to stop it. But going to perhaps *White v Ridley* first, which is number 5 of the Crown casebook, and comments Justice Tipping was referring to earlier from Gibbs J. Perhaps the best snapshot of it is at 352, so just recalling that the facts were he had sent a consignment of cannabis from Singapore and sends this telex trying to stop it, that's the top of 352, I'll just leave Your Honours to read that for a moment.

GLAZEBROOK J:
That's almost equivalent to saying that you haven't already been guilty of the offence, I suppose, so there must at least have been an attempt, because if you had disclosed to the airline that it contained cannabis, then presumably you were at that stage…

TIPPING J:

It's the learned Judge's statements of principle rather than the application of it to these particular facts which the –

ELIAS CJ:

It's really page 351, isn't it?

TIPPING J:

It's 348, 350 and 351, where you've got about three or four passages. Let's start with the last on 351, middle of the page, citing from Smith and Hogan, is, to my mind, if correct, and I'm inclined to think it is, very helpful. And then there's a citation from Archbold, in the bottom of 348, and then between those two citations there are number of passages which suggest that you do have to take steps to nullify as best you can what you've already done, and in the countermand cases is it's easy, because a command can be countermanded, but in the assistance cases it's more sophisticated.

MR STEVENSON:

It's certainly an exposition of that contrary position.

TIPPING J:

The other Judges in this case got rather, went down the causation, novus actus interveniens line which, with greatest respect, doesn't appeal to me, although it is a possible analysis.

MR STEVENSON:

I suppose one thing I would say, which comes back to something, a point which was made earlier in terms of the policy rationale for encouraging withdrawal, is if you have this requirement, as was put upon the appellant, in this case he needed to advise exactly what was going on, then you're less likely to have withdrawal, because that involved him effectively admitting the offending. That's just an observation. As to the implications –

ELIAS CJ:

This was an appeal as to whether – well, this was just an appeal, wasn't it, as to whether he was properly convicted? Does the, is there any indication of what needs to be left to the jury? I mean, presumably there was a, he was convicted –

MR STEVENSON:

Mmm.

ELIAS CJ:

– and he said this, what, "This is against the evidence," or was there a complaint about the trial Judge's direction? I can't, I just read the judgment without looking at that.

MR STEVENSON:

It was a case stated originally.

ELIAS CJ:

Oh, it was a magistrate's decision.

MR STEVENSON:

Yes.

TIPPING J:

I think there was a problem, it was thought, in the decision of Judge Gray, about causation.

MR STEVENSON:

Mmm, sort of the practicalities –

TIPPING J:

Yes.

MR STEVENSON:

– case stated, could he do anything –

TIPPING J:

Yes.

MR STEVENSON:

– and it transmogrified into a –

TIPPING J:

And they got themselves sort of –

MR STEVENSON:

Yes.

TIPPING J:

– in fact I think Mr Justice Murphy –

ELIAS CJ:

Oh the – yes.

TIPPING J:

– got himself a bit involved in that but Justice Gibbs it seems to me, with great respect, to have come out into the fresh air.

MR STEVENSON:

Yes, yes, it was, because originally it was a causation thing, and whether or not his conduct in Singapore caused the importation –

TIPPING J:

Yes, yes, and it all got very –

MR STEVENSON:

– and then you –

TIPPING J:

– refined and sort of tortious-like.

ELIAS CJ:

So, I mean, this is an appeal from a decision of a magistrate where reasons have been given, so it's not really considering whether it was a question for the trier of fact.

MR STEVENSON:

No.

GLAZEBROOK J:

Although it does come and say you have to do something more than merely countermand.

ELIAS CJ:
Yes, yes.

MR STEVENSON:
Mmm.

GLAZEBROOK J:
And I think especially in cases of physical assistance, although it may not, it may even be saying counselling and procurement, just looking at that, what's said at the top of 351.

ELIAS CJ:
But that –

GLAZEBROOK J:
Because they say, "Undoing, encouragement or participation."

ELIAS CJ:
But that would inform the content of directions to be given to a jury, wouldn't it? It's a bit of a stretch from that to say that the matter shouldn't have been left to the jury.

MR STEVENSON:
No, it's really, you can take from that that the Australian position as at that time was that there was the further requirement that he would have had to have taken further steps to prevent the offence occurring, ie, tell them exactly what was in the consignment to impress upon the them the urgency of intercepting it, that's what I took from it.

GLAZEBROOK J:
So you'd, so that if there wasn't an evidential foundation for taking steps, which they'd probably said wasn't there in this case, then…

MR STEVENSON:
I think that's the effect of the judgment, that –

GLAZEBROOK J:
Although they may still have left it to the jury to decide themselves whether there had been sufficient steps taken because –

MR STEVENSON:
He did send the telex.

GLAZEBROOK J:
– he did send the telex.

TIPPING J:
There is a passage on 351 which I think I should expressly put to you, Mr Stevenson, which also seems to me to have some merit, where His Honour says – it's about two-thirds of the way down that first primary paragraph – "The countermand will not have been timely," and this is talking about a countermand, in this case the a fortiori, present case, a fortiori, that, if it was given when it was too late to stop the train of events which was started by his request. Now that's where I was wondering a few minutes ago…

MR STEVENSON:
Yes, and –

TIPPING J:
It is distinctly arguable here that it was just too late.

MR STEVENSON:
And a submission that could well be made by the prosecution would be at a retrial, but in my submission one couldn't say as a matter of law, there is no evidence upon which that is put in play because before the axe is produced –

TIPPING J:
Well, if it was too late, whatever was done or said is not capable in law of amounting to a withdrawal.

MR STEVENSON:

That's true. If in a given case the facts simply don't support a reasonable submission of timely notice, then of course that is so. But here the appellant's case is her assistance was driving them, and before the fatal assault occurred she had told them in a timely way, whatever you say about the extent of her conduct, she'd told them, "Get in the car, that's enough, the police are coming."

TIPPING J:
That's the high water mark on the facts, "That's enough, get in the car, the police are coming."

MR STEVENSON:
The high water mark, certainly on the facts, is the middle of those three statements, and Mr Tarogi, he was watching across from the window, gave that evidence, it was overlooked by the Court of Appeal –

TIPPING J:
What, "That's enough"?

MR STEVENSON:
"That's enough," which in my submission is significant, and it's significant that the Court of Appeal, for what it's worth, seems to have overlooked that, but in fairness I'm sure that was drawn to their attention in the appeal, they simply said the exhortations to get in the car wasn't enough to discharge the evidentiary onus on her.

GLAZEBROOK J:
So do you just was to just allow me to mark that passage in the evidence that – you've got it in your submissions, I think?

MR STEVENSON:
But I'll – probably easier if I give Your Honours in the notes of evidence.

GLAZEBROOK J:
Yes.

MR STEVENSON:
So that's volume 2 of the case on appeal.

GLAZEBROOK J:

And, just so I'm clear, you say that that's because the assault actually changed in character as soon as the weapon came out, and the charge in any event related to the weapon, is that…

MR STEVENSON:

Yes, and if it's before the weapon's even produced, and it's open on the evidence to assert that I think, then that more powerfully supports the appellant's position because it's before the weapon's even produced, the assault with fists, that she's saying, "Enough." So it's 356 of the notes of evidence case on appeal volume 2.

GLAZEBROOK J:

357?

MR STEVENSON:

356.

ELIAS CJ:

Sorry, which witness is this, Mr –

MR STEVENSON:

This is Mr Tarogi, if I'm pronouncing his name right. He was a, I think a teenage Fijian boy from across the road.

ELIAS CJ:

Yes.

MR STEVENSON:

It's really from line 15 on is, and over to 357, again down to about line 15, or those two pages really capture it. That's effectively corroborated by the earlier witness, Mrs Dethierry, who was looking out the window and the incident was playing out in front of her.

ELIAS CJ:

So, how many – were there three witnesses who said that they heard it, say that, "Let's go get in the car, yeah"?

MR STEVENSON:

The car pulls up –

ELIAS CJ:

Yes.

MR STEVENSON:

– at the side of the road, Mr Kumeroa is on the pavement and assaulted there.

ELIAS CJ:

Oh, yes.

MR STEVENSON:

The house directly at that footpath is occupied by Mrs Dethierry –

ELIAS CJ:

Oh, yes, Mrs –

MR STEVENSON:

– and her partner, Mr Uruamo. They both confirmed before the axe is used the female, and on one occasion referred to as, "The driver," is saying, "Get in the car, let's go," and then Mr Tarogi, who's across the road, and I've just referred Your Honours to his evidence, interestingly he's looking at the driver's side, he confirms that in evidence-in-chief, so he's looking at where the appellant is, as opposed to Dethierry and Uruamo, who are looking at the other side of the vehicle, and he's the one who says before again the axe was used, not only, "Get in the car, let's go," but, "That's enough." The reference, for ease of reference, Ms Dethierry really is, it's at page 256 to 258, but that's in my submissions, and I've outlined what she says. Could I perhaps just summarise all of that by drawing Your Honours' attention to Archbold, which is 11 of the appellant's list of authorities and material, which summarises the position in England, so appellant's list of authorities number 11. And the learned authors at paras 18-26 deal with countermand and withdrawal, and I'd refer Your Honours over the page to 1824, summarises much of what I've been saying about the English position of not being required to take steps to prevent the crime occurring, it being –

McGRATH J:

That was 1824 on the left-hand side?

MR STEVENSON:

I'm sorry, I'm probably being confusing. So it's by reference to the page numbers at the bottom, it's 1824 – sorry, Sir, that was my mistake –

McGRATH J:

Coincidence.

MR STEVENSON:

– and really the paragraphs taking the left-hand numbering, 1827, 1828, that final portion on that topic, the authors say, "These things, in a case of assistance, it's not an essential prerequisite of an effective withdrawal, reasonable steps should have been taken to prevent the crime," 1827, "Where there is evidence of withdrawal by a secondary party evidence should be left to the jury to decide whether it amounts to an effective withdrawal in the particular circumstances," *Whitefield*, to which I've referred, burglary case, it was held to be an error of law for the Judge to rule that in failing to communicate with the police or take steps to prevent the burglary the defendant remained liable. There's reference at 1828 to *Becerra and Cooper,* talking about many of the things that have been discussed here, i.e. "The quality of the withdrawal will be assessed by reference to the nature of the assistance," but the authors conclude, just above 1829, in each case it should be for the jury to decide whether there has been an effective neutralisation.

GLAZEBROOK J:

Have we got *Becerra and Cooper*?

MR STEVENSON:

Yes, you do, and that's in –

GLAZEBROOK J:

Because that seems to be making a difference between encouragement and physical acts.

MR STEVENSON:

That's in my casebook, so if you stick with that bundle it's at number 5. Another set of really unfortunate facts, I'm not sure if Your Honours want me to just outline the facts and what the Judge said or didn't say but…

GLAZEBROOK J:
The knife had already been used so…

TIPPING J:
This was a common purpose case, wasn't it, I think? Well, I'm just looking at the head note, and it talks about, "Disassociating themselves from the contemplated crime," and so on, and then later on it says, "Withdrawal from the common design."

MR STEVENSON:
What the appellant in that case had said was, "Come on, let's go," once he'd already provided the knife –

GLAZEBROOK J:
The knife had actually been used as well, if you look at page 219, so the knife had already been used, which does make a bit of a difference, I think.

MR STEVENSON:
And also what's interesting about that case is "Come on, let's go," on the evidence doesn't appear to have been heard anyway by the principal offender.

GLAZEBROOK J:
They assume for the purpose that it did, but –

MR STEVENSON:
They –

GLAZEBROOK J:
– they left open whether, in those circumstances, physical help, you needed to go further.

MR STEVENSON:
Absolutely, they say, well, it's –

GLAZEBROOK J:
So it's not an authority –

MR STEVENSON:
– no.

GLAZEBROOK J:
– in your favour in the sense that it decided that you didn't need that, but left it open. If you're looking –

MR STEVENSON:
Oh, absolutely, that's right, on 219.

GLAZEBROOK J:
219.

MR STEVENSON:
That's right, and they say, "We don't need to resolve that question," but of course the later cases did, and I've referred to those.

GLAZEBROOK J:
Well, did they though, because they only referred to this case as being authority in respect of mere verbal encouragement. So they picked up the comment about mere verbal encouragement, but this was much more, because this was the provision of the knife, and actually the presence at the time the knife was being used. So, one can certainly argue it wasn't timely withdrawal, even if it was withdrawal, given that the attack had already occurred or started.

MR STEVENSON:
The point, the other point I would make in terms of *Whitefield*, the burglary one, where they say it was an error of law to say he had to go further and, you know, take steps to prevent the burglary occurring, in a sense was more than encouragement also because he provided information which enabled the principal –

GLAZEBROOK J:

Well, they say, “Advice and encouragement,” in that case though, then that's what it’s related to. So they did accept that it was more than their encouragement, it was –

MR STEVENSON:
Mmm, that the flat’s unoccupied.

GLAZEBROOK J:
Did they say – I’m not sure whether they used the word “advice”, but they were certainly taking the view that there was further, something further that had been done than – because he’d provided effectively information upon which the…

MR STEVENSON:
So *R v Becerra and Cooper* (1976) 62 Cr App R 212 really, on the facts, they said that that would not be adequate, “Come on, let’s go,” and something vastly more effective would be needed when he provided the knife, knowing that it was going –

GLAZEBROOK J:
But what was going to be more effective if – did they say that just isn’t – I mean, one suspects they were saying something more than merely trying to stop it in its tracks, but that just might be the timeliness of it, given the knife had already been used.

MR STEVENSON:
Maybe.

ELIAS CJ:
Well, and there is academic criticism, isn’t there, I think, of the idea that it has to be, it has to be actioned by the accused, which was effective to amount to his withdrawal. But whether it has to be effective in relation to the other perpetrator, I think there is some suggestion that that's not the focus, because it’s the culpability of the accused that’s –

TIPPING J:
If it’s effective to prevent the perpetrator then there will be no crime.

ELIAS CJ:

Yes, exactly. Yes, yes, I think that's the point that's made –

GLAZEBROOK J:

Well, that's what they say, that's what they –

ELIAS CJ:

– isn't it?

GLAZEBROOK J:

The point is made, yes –

ELIAS CJ:

Yes, that's right.

GLAZEBROOK J:

– as there wouldn't be a crime, then it's not, that's not what you need to look at.

ELIAS CJ:

Yes, yes.

MR STEVENSON:

That's right, that's a hypothetical that – it's no more than that.

TIPPING J:

I think the *White v* – the High Court of Australia case, is it's got to be capable of being effective rather than actually effective.

MR STEVENSON:

That…

TIPPING J:

Which is a rather peculiar distinction, with great respect, but, I mean, it's a distinction that's entirely rational, but what's meant by, "Capable of being effective," it ought to have been effective if you – oh, no, but we won't, I don't think we need to go down that route.

GLAZEBROOK J:

Well, you would say, wouldn't you, that it should be, do everything that you can reasonably do in the circumstances to undo, which then brings the focus back on the particular person and their culpability and what they're capable of?

MR STEVENSON:
That's right, and that –

GLAZEBROOK J:
That's if there is a fourth step though, I understand your submission is –

MR STEVENSON:
That's right, and it certainly –

GLAZEBROOK J:
– there shouldn't be?

MR STEVENSON:
Yes, and that fourth step in *Pink* is certainly less onerous than preventing the crime. I mean, it may be semantics at one level, but, taking steps to undo your assistance –

TIPPING J:
But you can't have a duty to prevent the crime, because if you fulfil the duty there'll be no crime. I mean, it's sort of circular.

WILLIAM YOUNG J:
Well, unless – well, unless it means you can't have withdrawal.

TIPPING J:
Well, that – yes, you can't have withdrawal at all.

WILLIAM YOUNG J:
That's the correlative of that, yes.

MR STEVENSON:
The only other case I wanted to refer, unless Your Honours want me to turn to any other authorities, was a case relied on or referred to by the Crown, which is a Canadian case, *R v Bird* [2009] 3 SCR 638, and I don't necessarily need

Your Honours to go to it unless you want me to take you to it. But it's the Supreme Court of Canada affirming the English approach, citing with approval *O'Flaherty*, the question of withdrawal as a matter of fact and degree for the jury, and no requirement to take steps to prevent the offence occurring, and also in terms of an assessment of the facts relevant to the appellant's case, talks about having regard to the dynamics that were at play in a particular case –

TIPPING J:
When you say, "The Supreme Court of Canada," I'm not sure that I'm looking at the right case. The one I'm looking at is the Alberta Court of Appeal.

MR STEVENSON:
I beg your pardon, Sir, yes, yes, I'm confused with cases I've relied on. Alberta, Court of Appeal. But in that case there was reference to, although one might say the accused or the appellant having done very little other than walked off, she had satisfied the evidential onus for withdrawal in light of the circumstances as they arose, and obviously that would be a question in every case.

Unless Your Honours have any questions, those are the essential points I wanted to traverse, but I'm not sure if I need to go any further on any particular matter.

ELIAS CJ:
No, thank you, Mr Stevenson.

WILLIAM YOUNG J:
Can I just ask something?

ELIAS CJ:
Oh, sorry.

WILLIAM YOUNG J:
Section 66, the case was basically presented almost, but not completely exclusively, on section 66(2).

MR STEVENSON:
Mmm.

WILLIAM YOUNG J:

There are passing references in the closing addresses of counsel to liability on the basis of she drove the car up, with knowledge of what was going to happen, I think that there's sort of about a sentence or two in each address, and the Judge really sums up on section 66(2) primarily where he does lead withdrawal, and only in passing on section 66(1). Is it very likely that she would have been found guilty on section 66(1) if the jury weren't prepared to convict on, under section 66(2), because it was far stronger case under section 66(2).

MR STEVENSON:

Well, first of all the Crown, in my recollection of the closing, did make some, I –

WILLIAM YOUNG J:

Well, I'll –

MR STEVENSON:

– thought a fair go –

WILLIAM YOUNG J:

– take you to what I –

MR STEVENSON:

– at 66(1)…

WILLIAM YOUNG J:

Look, I may be wrong, because I may not have picked all the right bits and pieces. I'm looking at 156…

MR STEVENSON:

I'm just being given a summary of the Crown case by the Judge under 66(1), which might be an easier reference point, in his summing up to the jury.

ELIAS CJ:

So where are we to look?

MR STEVENSON:

Volume 1, the Judge's summing up, Crown case Ahsin.

ELIAS CJ:

Sorry, what page?

MR STEVENSON:

218.

ELIAS CJ:

Whereabouts is the 218?

MR STEVENSON:

Asking where the Crown case attributes importance to her role as the driver.

ELIAS CJ:

Well is this not the numbering at the bottom.

MR STEVENSON:

Oh look I beg your pardon, yes.

GLAZEBROOK J:

Oh is the numbering at the top, 218?

MR STEVENSON:

209 at the bottom.

ELIAS CJ:

Well isn't this – is this necessary section 66(1) that's being referred to because it would be evidence of common purpose also wouldn't it?

MR STEVENSON:

It would. The Crown closing itself –

GLAZEBROOK J:

That's the trouble mixing up those two, it's just –

MR STEVENSON:

It is pretty generic.

WILLIAM YOUNG J:

Well at 174, there's a mention in passing – this is the prosecutor's address.

ELIAS CJ:

174, paragraph is it?

WILLIAM YOUNG J:

No, no, at the bottom. It's volume 1, the number at the bottom. And as far as I can see, there's a reference in passing, she's guilty as a part, must be party under section 66(1) and also because of that common purpose.

GLAZEBROOK J:

Whereabouts on 17 –

WILLIAM YOUNG J:

The top paragraph.

ELIAS CJ:

What is this – is this –

WILLIAM YOUNG J:

The closing address.

ELIAS CJ:

The closing address, the Crown prosecutor.

WILLIAM YOUNG J:

I mean the whole thing, everything else in the closing address, addressed her as section 66(2) and there's just this passing reference to section 66(1) which sort of seems to rest on the basis that she's the driver and if you, that's pretty much the way that Mr Sainsbury dealt with it, at 187, 188. He just says, "Well you've got to be sure she's the driver, and you can only find her guilty on that basis if she knew if this was the purpose of a murderous assault."

MR STEVENSON:

Sorry what page is that Sir?

WILLIAM YOUNG J:
187, 188. It's just another reference in passing.

MR STEVENSON:
Well it may not have been dwelt upon for a long time, but the reality was it was put on that basis, she was the driver of the car and she stopped it. The allegation was the car did a u-turn and pulled up to Mr Kumeroa and she enables them to get out to launch the attack.

WILLIAM YOUNG J:
Yes, well you've got – and the summing up really, it's hard, it only really deals with it in the question trail actually because the actual text of the summing up, that part of the Crown case doesn't seem to get a mention.

ELIAS CJ:
Although section 66(1) is there.

WILLIAM YOUNG J:
It's in the question trail, yes.

ELIAS CJ:
No, no it is also in para 25 of the summing up at page 195.

WILLIAM YOUNG J:
195, but is that generic.

ELIAS CJ:
Yes it is generic.

WILLIAM YOUNG J:
I know section 66(1)(b) is an issue, is in play, it is no taken out of play but it is a very minor element of the case because the primary case, does seem to me to be section 66(2).

TIPPING J:

If the jury rejected withdrawal under common purpose, it seems extremely unlikely that they would have accepted it under aiding and abetting.

WILLIAM YOUNG J:
Yes exactly, yes.

TIPPING J:
I am sorry I am stealing my brother's thunder.

ELIAS CJ:
But that is proviso territory is it not?

WILLIAM YOUNG J:
Well it is. But what I am interested in, is whether it is conceivable that the jury would have acquitted if the direction had been given as you said, primarily because section 66(2) does seem to be the centre of gravity of the case.

GLAZEBROOK J:
Looking at those passages I would actually have put it the other way round because I must say I have never been convinced that juries actually understand common purpose especially in situations like this and what they would have been looking at, is what did she do, just before the act and whether that was aiding and abetting and one problem might be that they might have accepted withdrawal under section 66(2) but they never got to it, because they said, "Well she was driving the car, she stopped and that was the aiding and abetting" and were never told that they then had to decide whether she withdrew from that.

MR STEVENSON:
It is important to recall that they were also charged under 66(2) with intentional damage, an incident which happened just before really, in the hour or two before the spanner incident and they were acquitted of that. And so that suggests that the jury had rejected common purpose. It was a point made –

WILLIAM YOUNG J:
At that point?

MR STEVENSON:

Well – or perhaps before.

WILLIAM YOUNG J:
Because if the common purpose argument at trial did encompass what happened at the scene.

MR STEVENSON:
Did?

WILLIAM YOUNG J:
Yes.

MR STEVENSON:
I think though the Crown case was the common purpose had been running throughout events leading up to it and this was –

WILLIAM YOUNG J:
It got a bit sharper.

MR STEVENSON:
– sorry?

WILLIAM YOUNG J:
It got a bit sharper.

MR STEVENSON:
That's right. But if the jury and the defence very much said, look, their purpose was going around drinking and partying and that was the occurring motif, and if that had got traction and the jury had rejected common purpose and that was the basis they were acquitted on the intentional damage, than not leaving withdrawal under 66(1), is really put on focus. And I would just say, also in opening, there is reference too Jamie Ahsin being the driver and doing a u-turn.

WILLIAM YOUNG J:
Oh yes, well the Crown case was, on section 66(1) had to be that she drove up to and stopped and did a u-turn, to really facilitate the attack on the deceased.

MR STEVENSON:

And the jury, I mean, we were often told certainly, as counsel appearing, not to speculate on what the jury may or may not have done but it is difficult not to contemplate how this is all played out. But one can imagine them saying, "Look I am not prepared to accept the common purpose, it's too obtuse but I will go with the Crown allegation, she is the driver. That's real assistance and withdrawal is not there as an option."

WILLIAM YOUNG J:

Well in favour of your argument is that the question trail would ask the jury to go to section 66(1)(b) first.

MR STEVENSON:

Though they don't have to.

WILLIAM YOUNG J:

But they don't have to. Just in this case, the common purpose and the mens rea, sorry the actus reus of the section 66(1)(b) element of the charge, are very close.

ELIAS CJ:

Thank you Mr Stevenson, alright we will take the morning adjournment now.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.54 AM

ELIAS CJ:

Yes, Ms Laracy.

MS LARACY:

May it please the Court. The Crown's primary submission is that the outcome of this appeal should turn on the evidence rather than on the undoubtedly very interesting legal policy issues which arise, and that whatever the scope of the defence and the precise articulation of the requirements of withdrawal the bare minimum is not present here, and that bare minimum is conduct, by words or actions, demonstrating unequivocal withdrawal, when the conduct as a whole is looked at. And the fatal point, in my submission, is that, as the Court of Appeal found, there was on the evidence no actual disengagement here at all. The undisputed evidence is that Ms

Ahsin maintained the car in its position, despite having the means to do otherwise, during the various steps in the attack, she then drove the car away after the attack with the offenders in it. As I have said, she had the opportunity, as the driver with the keys, to have departed, but she never left the scene. Added to that, the submission that when the words alone are looked, which is not the test, but when her words alone are focused on, they leave the listener or the principals in the offending, if we can call them that, or this Court, or the Court of Appeal, she should leave those audiences with the overwhelming impression that those words were, as best, equivocal. But the important thing is to focus on the conduct as a whole and ask –

ELIAS CJ:

Sorry, so what's the equivocation?

MS LARACY:

The words are equivocal in that, in my submission, they are just as consistent, if not more consistent, with being the words of an anxious getaway driver, rather than someone who was signalling a personal disengagement from the offending.

GLAZEBROOK J:

Isn't that a jury question though, and if it's, they're equally consistent one way or the other, wouldn't that possibly raise a reasonable doubt?

MS LARACY:

Well, the test of course, Your Honour, is unequivocal withdrawal, and my submission, which –

GLAZEBROOK J:

Oh, okay, so that – I understand the submission.

MS LARACY:

– is that the – so there's a minimum threshold there at the very least –

ELIAS CJ:

But –

GLAZEBROOK J:

So you say “unequivocal” has to mean “unequivocally understood by the other party” you must be saying, because if the jury was capable of saying, “Well, those words were equivocal but we, we think there’s a reasonable possibility that they meant unequivocal withdrawal from her point of view.” You say you also have to have it as understood as unequivocal by the other party, is that the submission?

MS LARACY:

Well, it would be too much to ask for evidence that that's how it was or must have been understood, but they must be words that are capable of being interpreted as words announcing an unequivocal departure by the party from the course of action.

ELIAS CJ:

Why isn’t it enough, if you're right, for the Judge to tell the jury that that's what they must be satisfied of? Why should it not have been left for jury assessment?

MS LARACY:

The reason for that, Your Honour, is that there is always a legal threshold before defences go to a jury, and there has to be the evidential foundation before the trial process that the jury has to go through gets complicated with further legal directions, and, as is apparent from looking at the summing up and the directions in this case, as with most cases involving murder or manslaughter and party offending, there was a lot of complex law and there was already a lot of complex material in the question trail for the jury to work through, and as a matter of policy it’s undesirable that –

ELIAS CJ:

I thought you weren’t going to, you were putting this on the basis of fact not policy.

MS LARACY:

Yes, no, but just in terms of what’s the threshold for when a defence should go to a jury.

TIPPING J:

I think what you're saying, Ms Laracy, as I understand you, is that the words in context were not capable of being sufficient unequivocal.

MS LARACY:

On the facts, I certainly –

TIPPING J:
Yes.

MS LARACY:
– do say that, and as a matter of law there's an evaluative process for the Judge to determine whether there is some evidence which is capable of supporting the defence, and my submission is that what the Judge in a case such as this has to look for is whether there is some evidence of unequivocal withdrawal, if there's evidence that could be interpreted as unequivocal withdrawal that would be appropriate for the matter to go to the jury. Now let's assume that –

ELIAS CJ:
So the Judge was wrong to leave it under section 66(2)?

MS LARACY:
That's was certainly the submission made in the –

ELIAS CJ:
Yes.

MS LARACY:
– Court of Appeal by the Crown, and that submission is reiterated here, yes.

WILLIAM YOUNG J:
But if she had, the jury – I mean, you may disagree with my analysis, and it's not a firm one, but continuing participation in the common purpose up until the time of the principle offence being committed was a necessary element of the Crown case, because only if that was established, could the Crown point to everything required for liability under the statute as having been established. Do you accept that? So that withdrawal – the jury had to be positively satisfied that she was, that the offence was committed in the pursuant to a common purpose to which she was still a party.

MS LARACY:
Yes and her liability for that crystallises at the time the agreement is made as between the parties.

WILLIAM YOUNG J:

Well I am not sure that is right. Is there an authority on that? I would have thought that her liability, under section 66(2) rests on the common purpose still being in existence.

TIPPING J:

I think there is a danger of confusing conspiracy with common purpose here.

MS LARACY:

Yes, yes. Perhaps the most useful way of looking at this is to have a look at the question trail which sets that out. And that's in volume 1, bottom right-hand corner, numbers at page 273. And the particular question that I suggest answers your question is the one that's numbered C3 in the left-hand column.

WILLIAM YOUNG J:

That's a fair enough question because that's consistent with my analysis isn't it?

MS LARACY :

"Are you satisfied that the accused did not withdraw from the unlawful common purpose at the time of the fatal injuries were inflicted." That there still had to be a common purpose at the time but her liability for that, crystallised at the time that she made an agreement to join with –

WILLIAM YOUNG J:

Well for the moment I don't agree with that. I think that she still has to be a party to the common purpose at the time when the offence is committed. Under 66(2) she is "Liable for any offence committed by any of the people involved, in the prosecution of the common purpose." Now if she is no longer "in on the joke" if I can put it that way, then the murder is committed and the prosecution of a common purpose to which she is no longer party.

MS LARACY:

To which she is not a party and she wouldn't be liable.

WILLIAM YOUNG J:

So withdrawal is an element of the Crown case, it is a part of the statutory elements that have to be established. The difference between 66(2) and 66(1) is the wording of section 66(1), "Doesn't admit of such an analysis, at least as easily."

MS LARACY:
Yes, yes I accept that.

TIPPING J:
And that is the hypothesis, undoubtedly, on which the Judge's C3 is based.

MS LARACY:
Namely, Sir, that the jury have to be satisfied that she is still a party to the –

TIPPING J:
Her mind is still within the common purpose at the time the facial injuries were inflicted.

MS LARACY:
– yes and if she has in fact withdrawn prior to that, then that element of being a party is not established.

YOUNG J:
But at that point the Judge can't withdraw, he can't withdraw a component of an element of the offence from the jury. He can't tell the jury, well that part of it is established, so you don't need to worry if in fact the defendant doesn't accept that. So I think the Judge had to leave withdrawal to the jury under section 66(2).

MS LARACY:
That the –

TIPPING J:
And the fact that the jury must have been satisfied that her mind was guilty, I will use that shorthand, meaning, fell within the common purpose at the time the fatal injuries were inflicted, makes it very hard to suggest that she had withdrawn.

MS LARACY:
Yes.

TIPPING J:

At the time, for the purposes of section 66(1). But I am not saying that is the complete answer.

MS LARACY:

There is some discussion of the conceptual difficulties here in the English Court of Appeal's decision in *O'Flaherty* which I have mentioned briefly in my submissions where the observation is made that in the common purpose cases, perhaps the analysis is not so much really one of withdrawal but rather does the point at which, for the sake of simplicity what, just use the language disengage or withdrawal, the point at which the offender says they're withdrawing does that, in fact, identify the scope of their involvement in the common purpose? So that evidence –

ELIAS CJ:

It's evidence –

MS LARACY:

Of the scope of their –

ELIAS CJ:

– that they're –

MS LARACY:

– of the common purpose –

ELIAS CJ:

– not involved.

MS LARACY:

– yes, well, it delimits the scope of the plan.

WILLIAM YOUNG J:

In English terms, they're no longer part of the joint enterprise.

MS LARACY:

That's right.

WILLIAM YOUNG J:
In the English terminology.

MS LARACY:
And that makes, that analysis has a lot of resonance in the cases where there is, in fact, no clear prior agreement between the parties such as in those cases of spontaneous violence where what they actually did is the evidence of what they intended to do so there's no pre-planning, in the *O'Flaherty* case, to get together and assault the other group, it just happened and people joined in and then there was a cessation and some members of the assaulting group continued to chase the victim to another area and further assault them there and the issue was if the accused didn't go on to that second assault, could it still be said that he was part of a common purpose with what happened at the second assault, which was a fatal killing and the Court said, well in fact his – the scope of what he intended in those cases is likely to have to be assessed by the point at which he physically stopped because there is no underlying common agreement which will tell the finder of fact what he intended, to what he joined his mind with the other accused.

On the issue of at what point does the defence go to the jury, there's some discussion of this by Justice Thomas in the *R v Menniti* case at paragraph 258, which is in my bundle, sorry 528. Just briefly Justice Thomas says there, "The remaining question is whether the evidence in this case was such as to require that issue to be left to the issue. If the circumstances are incapable of satisfying the appropriate tests then it should not go to the jury," and the Court goes on to cite in support of that the Court of Appeal's approach in the *Becerra and Cooper* case where the Court of Appeal considered the trial Judge was right not to allow the jury to consider withdrawal where the words that were said, and the conduct that was said to support withdrawal were, "Come on, let's go," and that's where that line of something vastly more effective and vastly different was required.

GLAZEBROOK J:
Actually that wasn't what the Court in *Becerra and Cooper* said but – but if they'd had to go much further that they left open whether you'd have to have done something more such as physically interpose.

MS LARACY:

Yes but the Court was satisfied that there was insufficient evidence of withdrawal, whatever the further requirements of withdrawal were, to meet that primary threshold. IT's probably unnecessary for me to take you to it but in the *R v Bird* [2009] 3 SCR 638 case at paragraph 6 there's also a discussion from the perspective of the Canadian Court which is to much the same effect as what I've just suggested which is that there has to be evidence capable of amounting to unequivocal withdrawal for the –

McGRATH J:

Which case is that in?

MS LARACY:

That's *R v Bird*, the *Bird* case at tab –

GLAZEBROOK J:

If we're not with you on the words, because for myself if they're equivocal and capable of being understood that way then I don't see how we can say there couldn't have been an unequivocal withdrawal, unless you're right and you have to say that their effect would have been understood – could have been understood as an unequivocal withdrawal by the other party, but I would have thought you would be actually looking more at what the person did. But you're saying the whole context, in terms of maintaining the car in position and then driving it away afterwards, shows that there wasn't an unequivocal withdrawal.

MS LARACY:

Yes.

GLAZEBROOK J:

Combined with the – perhaps unequivocal words.

MS LARACY:

That's right. The law looks for unequivocal withdrawal and in many cases unequivocal withdrawal will be evidenced and sufficiently evidenced, by words of unequivocal withdrawal, notice, communication that the person has no further part in it and that might be sufficient in those cases where there was –

GLAZEBROOK J:

But if you have to have evidence of unequivocal withdrawal before it goes to the jury, why don't you have the Judge deciding whether there's unequivocal withdrawal and it only has to be the reasonable possibility of unequivocal withdrawal doesn't it?

MS LARACY:

Yes, that the evidence has to be capable of being interpreted as unequivocal withdrawal, whether it's words of conduct. And in this case –

GLAZEBROOK J:

But it only has to be interpreted so that there is for a reasonable possibility of there being unequivocal withdrawal. I think there is a difference, between what you just said and what I've just said.

MS LARACY:

Yes because, well we are talki8ng about interpretation and if there is conduct, whether words or action, but conduct as a whole which is capable of being interpreted by the jury as unequivocal withdrawal, then the matter should be left to the jury.

TIPPING J:

What's unequivocal, in the context about, "That's enough?"

MS LARACY:

Well what I say, if the words alone are looked at and the surrounding conduct is ignored for the purposes of Your Honour's question, the words, "That's enough" in my submission are –

TIPPING J:

Well I did say, in the context. I admit immediately that you can't divorce the words from the context.

MS LARACY:

Yes.

TIPPING J:

But what is it about the context which denies the words, “That’s enough.” They’re apparent in equivocality.

MS LARACY:

“That’s enough, let’s get out of here and save our skins.” There’s nothing to indicate that the words, “That’s enough” are a statement of “I’m not participating in this any more, you’re on your own.” And that’s essentially what the doctrine of withdrawal looks to.

WILLIAM YOUNG J:

Or the murderous attack has gone on far enough, and I’m concerned the police might come, so let’s go.

MS LARACY:

Yes.

WILLIAM YOUNG J:

Because I think I’m right. The words attributed to the appellant were said after the attack had started, after violence had been used?

MS LARACY:

Yes.

TIPPING J:

But before the weapon.

WILLIAM YOUNG J:

But before, arguably the axe was –

MS LARACY:

Yes, putting evidence at it’s highest as we have to on this appeal. My learned friend has already taken you to the evidence of Mr Tarogi and his evidence, if I could recover some of that ground as well. It’s in volume 2. And what I’m particularly looking at is the cross-examination on page 357. Counsel, in cross-examination put it to Mr Tarogi, at line 8, “That the girl who got out of the car had shouted out, “Let’s go” before anyone had grabbed a weapon.” So those are those specific words, “Let’s go.” He says, “Yeah” and then the next important question is, “Then after the

weapon came into view, and you say after the car reversed the driver got out of the car again and said, “Get in the car,” or “Let’s go, the police are coming” didn’t you.” So that’s, those are words after the axe has been produced, and in the –

ELIAS CJ:

This is based on his, what, his deposition –

MS LARACY:

Yes.

ELIAS CJ:

– evidence?

MS LARACY:

Yes, he had –

ELIAS CJ:

Because, I mean –

MS LARACY:

His depositions evidence –

ELIAS CJ:

– it’s got some basis, saying, it’s not just counsel putting propositions.

McGRATH J:

Yes.

MS LARACY:

That –

McGRATH J:

Yes.

MS LARACY:

This witness’s evidence was not entirely consistent with the statements he had made at depositions and there’s a ruling on this which –

ELIAS CJ:

Oh, yes.

MS LARACY:

– might be useful for Your Honours to look at in due course.

TIPPING J:

Well, I'm not quite sure –

GLAZEBROOK J:

Well, he's adopted this anyway.

TIPPING J:

– why you're referring to the cross-examination in the sense of sort of depreciating the evidence-in-chief. If anything, it seems to be reinforcing it.

MS LARACY:

Yes, I'm just – these were the passages referred to by my learned friend, but even on that, when the re-examination is looked at, which is over the page at page 359, the prosecutor says to Mr Tarogi, "From your recollection, when did you hear her yell?" and he says, "After the guy took out the weapon, ah, the bat, from the car." So, for what it's worth, the evidence is not entirely consistent even from the best witnesses as to what happened when, but he certainly does make it clear that many of the particular words relied on by my learned friend were ones that were said after the fatal weapon was produce.

ELIAS CJ:

Well, although it may be its production that triggered it, which would be significant evidence of withdrawal.

MS LARACY:

Well, it's, at best, some evidence.

ELIAS CJ:

But you don't have any evidence that it was after the axe handle was used that the, "Let's go," statement was made. So it's simply before, well, it's clearly before that.

MS LARACY:

No, I don't, I believe the position is not, that the Crown cannot say that there was clear evidence that put all of these statements after the weapon was either produced or used, I accept I cannot say that the evidence is not that –

ELIAS CJ:

Well, but I'm suggesting that there's quite a big difference between making a statement like that on production of the weapon and after it had started to be used. Do you want to comment on that?

MS LARACY:

Well, my submission is that goes to the issue of timeliness, which –

ELIAS CJ:

Yes, I accept.

MS LARACY:

– I would like to address the Court on.

ELIAS CJ:

Yes.

MS LARACY:

But I suppose the key point that I would like to emphasise is that, is the one made in my written submissions, which is that all of the words used were at least as consistent with a getaway driver wanting to hurry everyone up in order to avoid detection by the police and get away, and if that's the case, and that was the finding of the Court of Appeal, then there was no sufficient evidential foundation of unequivocal withdrawal. Further –

GLAZEBROOK J:

But how can – I mean, that means, what you're saying is they're unequivocal, they're at least as consistent with that. But that can't mean that because something's at least as consistent with something else that you don't leave it with the jury, because it's only a reasonable possibility that it was unequivocal withdrawal, isn't it? So "at least as consistent" sounds like "balance of probabilities" to me.

MS LARACY:

No, my submission, Your Honour, is that the words are at least – if the test was that that defence should go to the jury if there's any evidence of withdrawal or an attempt to withdrawn, perhaps, but the law requires more than that, it requires conduct which can be, which is capable of being assessed as unequivocal, and in my submission those words are not capable of being assessed as unequivocal, and that's the, that the distinction.

WILLIAM YOUNG J:

So you're saying that conduct intended to be unequivocal but which isn't doesn't amount to a defence?

MS LARACY:

Yes.

WILLIAM YOUNG J:

So that's the argument.

MS LARACY:

And of course we have no evidence here of her intent at all, so that has to be surmised from all of the circumstances, which is a perfectly legitimate process, but it adds to the risk that the conduct will not be interpreted as being unequivocal.

GLAZEBROOK J:

But isn't that, leaving with the Judge, looking at whether the conduct is unequivocal because you say if it isn't objectively capable of being, if it isn't objectively unequivocal, then you don't leave it to the jury. So the Judge is deciding whether it's unequivocal or not.

MS LARACY:

The Judge, in my submission, has to decide whether there's a reasonable possibility, as Your Honour put it earlier, that the jury could interpret the conduct as a whole as being unequivocal withdrawal.

GLAZEBROOK J:

I am happy with conduct as a whole. What I am not happy with is this business about the words that you are trying to put now.

TIPPING J:

I think you just have to say, as you have been saying several times, that in your submission, right or wrong, these words are not capable of being unequivocal and therefore, if we differ from you on that, then that might have a vary but that has to be the submission doesn't it?

MS LARACY:

And certainly, Sir, that is the submission and that was what the Court of Appeal found and –

TIPPING J:

Well the proposition that they are equally consistent does not easily fit with your "not capable" proposition, that I think is the difficulty that members of the Court are having.

MS LARACY:

And I think that arises from the word "unequivocal". It's not simply evidence of withdrawal and looking at whether that could be consistent with withdrawing or consistent with escaping from the scene. My submission is that it is important for what it is worth, that the words have to be, the test is that the words must be unequivocal notice of withdrawal, where the focus is simply on words and that these words do not, on any analysis, meet that test.

WILLIAM YOUNG J:

Or she could have said, "I'm off."

TIPPING J:

Yes.

WILLIAM YOUNG J:

"You want to come, you come with me now, otherwise you will be waiting for the police." That would be one way of withdrawal from the assault.

MS LARACY:

That would be one, yes. The Crown submission would be that, that wouldn't be sufficient but that would certainly be worth, that would be closer to amounting to -

TIPPING J:
Or "I'm off" and then going off, that might have been better still.

ELIAS CJ:
It was a very sort of, close sequence of events and I just wonder whether that's a realistic approach to adopt.

MS LARACY:
And again, I think Your Honours' concern is probably met with the principal of timeliness, that where you have got a quick series of violent events and the risk that someone will change their mind during those events and the circumstances of themselves are unlikely to allow them to give effect to that, the legal policy answer is that it is too late.

ELIAS CJ:
What is the legal policy in finding somebody guilty, who has intended to withdraw and has done something which – I know you say it's not capable of amounting to withdrawal. What is the legal policy in bringing the portcullis up or down, or whatever?

MS LARACY:
The legal policy there, the concern is that accepted evidence of an intent to withdraw, after the offence has been committed –

ELIAS CJ:
So does timeliness depend upon whether the offence has been committed?

MS LARACY:
Yes in that it has to be capable –

GLAZEBROOK J:
You can't withdraw after an offence has been committed.

WILLIAM YOUNG J:

You mean withdrawal after the act of the aiding and abetting has occurred?

MS LARACY:
Yes in that the –

GLAZEBROOK J:
Oh okay.

MS LARACY:
– yes and the legal policy is that the withdrawal should be timely because then it has got the possibility of being effective. Whereas if it is left too late then it has no chance of being effective and the law would be absolving people of criminality who have done everything they needed to do for their criminality to crystallise and the substantive offence has been committed.

ELIAS CJ:
Have you got any authority for this language of crystallisation because isn't timeliness itself intensely contextual and it will depend on what the assistance consists of. If it's at a very preparatory stage, it can't be the case that liability has crystallised, so what's the approach that the law takes to withdrawal? Is it just that the ultimate crime is inexorable, or what's the test that you would propose –

MS LARACY:
There's a useful –

ELIAS CJ:
– for timeliness, that is?

MS LARACY:
For timeliness. The test that we, that I have proposed in the submissions is that the withdrawal has to be timely in the sense that it's capable of, it's capable of being effective, it's capable of signalling to the others –

ELIAS CJ:
Yes.

MS LARACY:

– that this is something they do on their own and, depending on the position the Court reaches on the other elements in *Pink*, the Crown would say it also has to be, at the very least, capable of undoing substantially the effect of the accused's actions. Some would go further, as the – well, as the judgment of Justices and Stephen and Aickin in the *White v Ridley* case, and say that indeed you would actually have to almost have a supervening event brought about by the accused, such that it could be said that they had taken steps to actually prevent the offence being committed and that it was committed but without the impact of their assistance having contributed to that. The decision of Justice Gibbs is not, well, it analyses the issue of liability differently, but would say that it was enough that that individual had taken reasonable steps to undo their role in the offending. But, as to timeliness, Justice Gibbs in *White v Ridley* at page 351 has a useful comment on that point.

GLAZEBROOK J:

Is your submission here, just so we can understand it, that the, that the closer you get to the commission of the offence the more you have to do in order to, or the more that has to be possible to do in order to stop the offending? And would your submission here, which is a point that was put to Mr Stevenson, be in effect the crime had already started here?

MS LARACY:

Yes, yes.

GLAZEBROOK J:

Maybe not the crime with the weapon but certainly the train of events that led to the death.

MS LARACY:

Yes.

TIPPING J:

I would put it that the risk of death that she was hitherto voluntarily running could hardly, at that point, be undone.

MS LARACY:

Yes. That is, for what it is worth conceptually, that can be contrasted with the type of scenario in the admittedly different but, the case of *O'Flaherty*, where the second event, which was the fatal event, was quite separate from the original assault, where the victim was also hurt, but the fatal event was separated in time and geographic distance by a number of blocks and different assailants being involved. In this case, we have one ongoing assault, albeit the primary offender stepped out at one point, got the fatal weapon from the car, and went straight back to the kerb.

ELIAS CJ:

It is capable of being put on the basis of two stages.

MS LARACY:

My submission is that, if we focus on the timeliness aspect, there was certainly no scope for a timely withdrawal once the physical assault on the victim was started.

McGRATH J:

When you refer back to Justice Gibbs you're talking about that phrase of being, "Too late to stop the train of events" –

MS LARACY:

Yes.

McGRATH J:

– are you?

MS LARACY:

Yes, Sir, that's page 351.

McGRATH J:

So, we've referred to that. Is there anything further you want to take out of that?

MS LARACY:

I thought also, in *Menniti,* where Their Honours picked up and endorsed the reasoning of Justice Gibbs, there was also a useful paragraph at page 353 – that decision's at tab 4 of my bundle. This is the decision of Justice Derrington and he picks up on the very passage Your Honour has just identified from Justice Gibbs at the top, the passage about it being too late to stop the train of events. But the next paragraph is also useful. So –

GLAZEBROOK J:
Which paragraph, which page sorry?

MS LARACY:
So the first full paragraph at page 535. "When his conduct is irretrievably conduced to the Criminal Act it is not open to a person whose conduct is within section 7" which is our equivalent of 66(1), "to enjoy the luxury or resiling knowing that the offence may still be committed yet that he is totally absolved because of his ineffective countermand. The scheme provided by the section is logical, practical and –

ELIAS CJ:
Is this an appeal on the basis –

MS LARACY:
That the defence –

ELIAS CJ:
– was this on the basis that the evidence can support the conviction, what was it?

MS LARACY:
That this was on the basis that the defence of withdrawal should have been left to the jury and wasn't.

TIPPING J:
Yes that is apparent from 521, line 33.

MS LARACY:
The decision of Thomas J in *Menniti* at 527 also makes a comment about timeliness really having to be equated with the possibility that the withdrawal might be effective. And His Honour cites *White v Ridley*, *Becerra and Cooper* and indeed the Canadian

decision of *Whitehouse* which is probably the most useful for my learned friend but having cited those, His Honour makes the statement that, "If events have gone too far for effective withdrawal of the aid, then the countermand or withdrawal are not timely."

GLAZEBROOK J:
Sorry I have now lost you again.

MS LARACY:
That is page 527 of *Menniti*.

TIPPING J:
Whereabouts?

MS LARACY:
That is half way down, page 527.

TIPPING J:
I think Justice Derrington says almost exactly the same thing at 535 about 10 lines up from the bottom. "If it was too late for the appellant to do anything effective, then his countermand was not timely."

MS LARACY:
Yes.

GLAZEBROOK J:
And actually just looking at 527, that was the point that Justice Sian was making, in fact about common purpose, if you look at the rest of that paragraph, that we referred to.

MCGRATH J:
Have you finished with *Menniti*?

MS LARACY:
Yes, Sir I have. Those were the comments –

MCGRATH J:

Did you also have some academic commentary that you were going to draw to our attention, Professor Lanham comes to mind.

MS LARACY:

Yes. That's at tab 11 of my bundle. In my submission, this is probably the most useful academic article for breaking down the particular conceptual problems that arise at difficult points with this defence and scrutinising them and at paragraph 5 or section 5 on page 588, Professor Lanham does talk about timeliness in light of the *White v Ridley* decision. He suggests there that Justice Gibbs' express view that withdrawal much be sufficiently timely to be capable of being effective – this is the bottom of page 588 – is implicitly supported by the –

ELIAS CJ:

Sorry, what –

MS LARACY:

This is page 588 in the Lanham article, which is tab 11 – is implicitly supported by Justices Stephen and Aickin in the High Court.

TIPPING J:

I also thought that there was a helpful passage at the bottom of 590, where the author says, "In principle, an attempt, however serious, to withdrawn, should not be sufficient," that's his opinion –

MS LARACY:

Yes.

TIPPING J:

– "since the law looks for some kind of abrogation of the influence of the accomplice's prior act." I'm not sure that that definitive statement is entirely supported by the authorities, frankly, but at least it's the author's view.

MS LARACY:

Yes. And that concept of abrogation of the inference, in my submission, is just another way of expressing the element which Justice Hammond has commented on in *Pink*, which is that there will frequently be a requirement to undo the effect of the

accused's own conduct, that's the abrogation of the influence that the accused's conduct has had on the substantive offence.

TIPPING J:
And of course, putting it that way demonstrates how clearly that it may obviously be too late to have any effect –

MS LARACY:
Yes.

TIPPING J:
– on your prior conduct –

MS LARACY:
Yes.

TIPPING J:
– in realistic terms –

MS LARACY:
Yes.

TIPPING J:
– however astutely one might analyse the case.

MS LARACY:
Yes. And as a matter of legal policy, there is no unfairness to an accused if the law does not allow them to escape liability by changing their mind too later, because of course at that point they have done everything they needed to do in law in order to be convicted as a party to the offence. So something more than a mere change of mind or an ineffective countermand should be required to absolve such serious criminal conduct.

TIPPING J:
The bible in England, Archbold's, seems to be somewhat equivocal on this point. I think Archbold has to go, if you like, with some of those recent English cases, but I get the impression that the authors are not entirely comfortable –

MS LARACY:

Yes.

TIPPING J:

– with the jurisprudence that they are discussing. Do you want to – because Archbold is something of a bible, and it's not entirely favourable to your case.

MS LARACY:

I think that's a fair assessment of Archbold. I'm just identifying the section on countermanding withdrawal, which is in my learned friend's bundle…

TIPPING J:

It's tab 11, I think, of his bundle, is it? I think it's little more, frankly, than a narration of where the English law seems to have got to, and it doesn't have a great deal of, as it were, commentary.

MS LARACY:

Yes, that's right. To put it bluntly, the – if Archbold alone is looked at, the passage which is perhaps the greatest obstacle for the Crown here if it were correct as a matter of law is in paragraph 18.26, where Archbold says, "In cases of assistance it is not an essential prerequisite of an effective withdrawal that reasonable steps should be taken," and the authors of Archbold there say that in the context of the *O'Flaherty* case, which I've referred to and which, in my submission, is highly distinguishable, and these comments were very much obiter, given the way that the Court analysed the issue of withdrawal in that case. For what it's worth, I note that the Court of Appeal in the *Hartley* decision, which is in my bundle, also looked at *O'Flaherty* and said –

TIPPING J:

Part of the problem in Archbold and in perhaps in other writings, is that there isn't an astute distinction between common purpose, accessory, liability and aiding and abetting in a more concrete way, party liability, that they seem to merge the two which may not be very helpful.

MCGRATH J:

Which page is that?

TIPPING J:
1824, 1823 and 1823 of the Archbold.

MS LARACY:
And I was referring to paragraph –

MCGRATH J:
It's in the top part of it?

MS LARACY:
Yes 1826 where the authors are discussing the *O'Flaherty* decision which does indeed say that but my submission is that both the decision and any commentary on it –

MCGRATH J:
Yes thank you.

MS LARACY:
And my submission is that the context of that case is all important. What I do rely on from Archbold however, is the passage at 1828, the next one which starts with the discussion of *Becerra and Cooper* and *R v Rook* [1993] 2 All ER 955. Now in both of those cases, the English Court of Appeal left open, expressly left open the question of beyond words of unequivocal withdrawal, if you had that and in neither of those cases, was there. But if you did have that, what more is required and the Court said, "We don't need to go into that for the purposes of these cases and we expressly leave it open." And I do support the statement at the bottom of paragraph 28 from the learned authors of Archbold, that in principal it seems clear that the measures necessary to absolve a person from liabilities and accessory, will vary according to what assistant encouragement he is given. If for example, a party provides a gun for a murder, it is submitted that even the plainest spoken communication to the principal, would be insufficient on its own to absolve him from liability but in each case it is for the jury to decide whether there has been an effective neutralisation. Now my submission, that is a proper role for the jury. Once withdrawal has gone to

them if this fourth element of *Pink* is indeed a requirement, it is for the jury to decide if there has been an effective withdrawal.

ELIAS CJ:

Just looking at this, reminds me that we have not looked at the minority Judges in *White v Ridley.*

TIPPING J:

They are tougher against the accused because they require something in the nature of a novus actus interveniens.

ELIAS CJ:

No, I think that is the other members in the majority.

TIPPING J:

Sorry, that is them.

MS LARACY:

There are two other judgments that are never –

ELIAS CJ:

I am talking about Murphy and James.

TIPPING J:

I am sorry.

ELIAS CJ:

Murphy, I think, not a bad criminal, very kind.

MS LARACY:

Was there something in particular, Your Honour, in their analysis?

ELIAS CJ:

Well it is just that it is a different, it's a more, it's a less tough line that they take which perhaps we should consider. You don't need to take us to it. If there are any

comments you want to make though on what they say, perhaps you should. There is no reason why we should follow the majority is what I am saying.

GLAZEBROOK J:
So just an assumption that the proper test is whether the applicant had done all he reasonably could, so I don't know if they really say anything.

ELIAS CJ:
I am only raising it because Archbold seems to think that they do.

GLAZEBROOK J:
It's a case stated procedure so it didn't seem terribly satisfactory.

MS LARACY:
Even within the – even in the *Menniti* decision, Justice Thomas says that he prefers the reasoning of Justice Gibbs to that of the majority in the *White v Ridley* case. He thinks that it goes too far to actually require prevention of the offence. Rather it would be enough if withdrawal is evidenced by action or countermanding that is capable of being effective and accompanied by such action as the accused could reasonably take to undo the effect of his previous participation." So, again, even within the Australian High Court case, there's a degree of stringency which Justice Gibbs, puts him at the slightly softer end compared to that of Justices Stephen and Aickin.

If I could just do a very brief survey of the law from England and Wales on this point. My submission is that the specific issue of what more is required beyond words and conduct of unequivocal withdrawal in a section 66(1)-type case has been expressly left open by the Court of Appeal, except perhaps in the situation which the Court has already extensively considered, which is the *Whitefield* situation where the assistance comes in the form of words, words of advice, words of counsel, words of encouragement, and in that case the Court of Appeal undoubtedly did say that, in the context of advice or encouragement, it would be sufficient for, it may be sufficient for unequivocal notice, and that the Judge was wrong to direct the jury that they had to look for more. So, that wasn't a case that dealt with physical or concrete actions of assisting to commit an offence, whether by procuring an offender, which is the situation in *Rook*, contracting someone to actually come along and commit the murder, or *Becerra*, which, while it was described as being a common-purpose case,

could probably equally be analysed as being one of physical assistance by turning up with the other party and providing the knife and allowing it to be used to break into the house. But my point is simple the, in cases that are akin to the type of situation we have under consideration in this case, there is no assistance for the appellant in the English law in that that issue has certainly been, it hasn't been closed off but it's been left open, that policy issue, where more than words are done, where if the offender assisted with more than words, the English Courts have not had to determine what more might be required to undo that, or whether indeed more is required.

The Canadian case law, in my submission, is unhelpful only to the extent that it's difficult to identify a clear statement of what is required in the equivalent of a section 66(1) case, and the *Whitehouse* statement, which has been enormously influential in, around, in the common law world, which includes that passage from Justice Sloan about what's reasonable might have to be determined from the circumstances, and the appellant puts considerable reliance on that. In my submission that case has to be confined again to its facts, which was a common purpose case, where there had been an agreement and then, at a reasonably stage, the appellant sought to absent himself from any further activity involved in the common purpose.

And then in Australia, both the *Menniti* decision but, more importantly, and I should have emphasised this more in my written submissions, for which I apologise, the Australian High Court decision of *White v Ridley* are very much on point in terms in terms of cases involving actual concrete assistance, and whether the decision of Justice Gibbs is looked at or the reasoning of Justices Stephen and Aickin are looked at, what they say is that something more than timely words of unequivocal withdrawal are required. Justice Gibbs' assessment of the law, in my submission, would put his understanding of withdrawal very close, if not identical to that of Justice Hammond in the *Pink* decision. Arguably, the Justices Stephen and Aickin decision would go further.

And unless there's something that I could usefully further address the Court on, I would like to finish by just making the submission that, given the very similar evidence that's supported the case under both section 66(1) and section 66(2) in this case, it could hardly be said that there's a realistic chance that a different result could have followed, had withdrawal under section –

ELIAS CJ:

Well, is that a proviso –

MS LARACY:

It is –

ELIAS CJ:

– argument?

MS LARACY:

– and in my submission its, without wanting to be presumptuous, and I haven't addressed it in my written submissions, my submission is that it shouldn't arise, but –

TIPPING J:

If it does arise –

MS LARACY:

Yes.

TIPPING J:

– how do we know that they didn't convict under 66(1) without – on the premise that we're considering – considering withdrawal at all? That was Justice Glazebrook's point earlier in the morning.

MS LARACY:

That the jury may well have in fact considered withdrawal in the context of section –

TIPPING J:

No.

GLAZEBROOK J:

No, that they stopped at 66(1), so they –

TIPPING J:

They said –

GLAZEBROOK J:

– went through the question trail and said, “Guilty,” after 66(1).

TIPPING J:

No consideration of withdrawal, and the premise is that that they should have been, because if we’re not saying they should have been you’re going to win before you get to the proviso. That's the only point that trouble – well, I’m not going to say the only point, it is a bit of a troubling point. We don’t know, and indeed it’s a distinct possibility, that they could have gone down the 66(1) route first, because that was the first step in the question trail –

MS LARACY:

Yes.

TIPPING J:

– and said, “Oh, she undoubtedly assisted, she had the necessary mind, no question of withdrawal here, guilty.”

WILLIAM YOUNG J:

Let us say the jury’s state of mind was along these lines, they concluded that she was liable under section 66(1)(b) and that she knowingly facilitated a murderous attack by stopping the car adjacent to the deceased, but that she sought to prevent the continuation of the murderous attack after it began but before the weapon was used. Now, on that basis, it’s possible that had they gone to section 66(2) they would have found her not guilty and, on that basis, it seems to me to be a bit difficult to conclude that there’s nothing in the point because section 66(2) supplies the answer.

MS LARACY:

I think that's a fair point.

WILLIAM YOUNG J:

Yes.

MS LARACY:

The way the question trail is worded, if the jury approached it in this way, starting at the beginning and working through in the order as set out here, then at the end of

their analysis of 66(1), if they were satisfied of everything the Crown needed to satisfy them of, they would have stopped at murder, or manslaughter, and then moved on to Mr McCallum, and they would not have gone on to address section 66(2), that is a distinct possibility and, indeed, as I say, if they approached it in this order then that's what they must have done. Of course, we don't know how they approached it, but I couldn't argue against that.

ELIAS CJ:
Well that is the way the question trail asks them to approach it.

GLAZEBROOK J:
And one really would assume they do follow that because it is complicated enough without them trying to do something totally different I would have thought.

TIPPING J:
Against that line of argument, I am trying to sort of look at it both ways, is the proposition that if, as – well we don't know do we, whether they, because if they didn't get to section 66(2), we don't know what their view was on withdrawal, or would have been on withdrawal.

MS LARACY:
No.

WILLIAM YOUNG J:
Pretty hard to see how she could have, I agree, I consider the question of withdrawal had to be left to the jury. Given the fact that she continued to play her role as getaway driver, it's very hard to see where the withdrawal was for the purposes of common purpose.

TIPPING J:
It was an interim withdrawal.

WILLIAM YOUNG J:
It was a suggestion perhaps that the course of events that was contemplated should take another form but if it is not acted on, then that may not matter.

ELIAS CJ:

Well I should flag that I do not necessarily accept that any intention carried on to the getaway aspect of the matters. I am just left undecided about that because it rather begs the question of what they were intending to do and I can see that someone might drive people away without necessarily having adhered to the important purpose or intending the consequences of their aiding. I am uncomfortable about the emphasis in the Court of Appeal decision on the fact that she drove them away.

MS LARACY:

My submission is that the legal answer to that is that the scenario Your Honour has identified, is a change of mind. What you have is potentially someone who no longer intended to continue assisting but that doesn't, that no longer helps her certainly on a section 66(1) basis. She has already provided her assistance.

ELIAS CJ:

No, no I understand that. But it's really the emphasis being placed on driving them away. I really wonder how realistic it is to say, "Ah ha" because she helped them get away. Any withdrawal can't have been an effective or real one.

MS LARACY:

I think the Court of Appeal's position is that, at its best, the withdrawal would have had to have been extremely temporarily. It was, at the time she said the words –

ELIAS CJ:

Well that is what I am indicating. I am not sure that you can look at it confidently as a continuum in which there is a temporary withdrawal and a resumption of the original purpose.

MS LARACY:

This is where, in my submission, it is artificial to focus on the words and the Court hasn't emphasised the words particularly. What the Court of Appeal has done, is it has looked at the entirety of the conduct and the question the Court of Appeal has done, is it has looked at the entirety of the conduct and the question the Court of Appeal has really asked and it's the right question, has there in fact been a withdrawal. Now, of course, that raises the question, what is a withdrawal but a withdrawal is a disengagement. In fact a disengagement, and there was no walking

away, there was no driving away. She had the means to do both of those things. Instead she said, some highly ambiguous words and stuck with them and it's that package of conduct which, in my submission, points to there being a continuation of engagement as opposed to anything amounting to a disengagement let alone an unequivocal disengagement, if that's what is required before the matter arises.

On Your Honour's point, just briefly about section 66(2) and the mental element. I recall there is a useful discussion of the coincidence of actus reus and mens rea in the context of a common purpose in the *Becerra* decision which is in my bundle and the particular issue there was, "Where the actus reus and the mens rea coincided at the relevant time when the plan was hatched, but later on there was evidence that the appellant didn't actually want the crime to be committed, he just hoped maybe that the person got beaten up but didn't want them to get murdered, was that, did that change of intent affect his liability for having provided the assistance, by joining in the plot and having done certain activities relating to the provision of a weapon at an earlier stage, and the Court of Appeal said it didn't, that his liability had crystallised, albeit he couldn't be convicted, unless there was also evidence that the substantive offence had in fact been committed, and that substantive offence was outside his control because he wasn't the person committing the substantive offence, he was just the complicitous assistant.

TIPPING J:
The actus reus in a party case is the actus reus accompanying what makes you a party.

MS LARACY:
Yes, it's the actus reus of providing assistance which in fact assists, which is another way of looking at the *White v Ridley* problem. If you have a supervening act that has the effect of negativing what the appellant did, then it can also be said that in fact there was, that an element of the offence has not been established, there was no assistance, in fact there was an attempt to assist. And mens rea and an attempt to assist coincided, but there was no operative assistance that was given to the substantive offence. But I did find the *Becerra* decision useful for pinpointing the mens rea and the actus rea and the point at which liability, the offender is at risk of being held liable, point at which that crystallises.

ELIAS CJ:

Ms Laracy, have you concluded, or – because otherwise we'll take the adjournment.

MS LARACY:
I have finished, Ma'am, yes.

ELIAS CJ:
All right. Ms Stevenson, how long do you expect to be in reply?

MR STEVENSON:
Watching the time, Ma'am, and I'm thinking that I may be able to complete, it if we had 10 minutes, but obviously we've reached the adjournment –

ELIAS CJ:
Yes.

MR STEVENSON:
– not very long at all, but I expect around 10 minutes.

ELIAS CJ:
All right, perhaps we'll go ahead Mr Stevenson, thank you.

MR STEVENSON:
It may well be less, I think.

First of all, the appellant's submission generally is the one which was made earlier this morning, that much of what has been discussed is effectively material for the jury and the words spoken were capable of satisfying whichever test is contemplated. I agree with my learned friend, context is important in assessing whether or not the evidential onus is being discharged, one has to look at the developing narrative and simply observe at that point, for example, there is an important aspect of what's happening outside of the car from the appellant's point of view, that is, before the axe is produced there's evidence established, particularly by counsel for Mr Rippon at trial, that Mr Rippon was trying to physically restrain and pull back Mr McCallum to the car. Now that's relevant, in my submission, when assessing the conduct relied on by the appellant and her words, having just seen another male trying to restrain unsuccessfully Mr McCallum before he uses the axe, the suggestion that she should have done more, and she doesn't cross the line here for that reason in my

submission, goes too far. The jury may well concede that she should have done more, but one recalls that she only has to demonstrate a reasonable possibility, what she did satisfied the test –

WILLIAM YOUNG J:
You say the test is what, unequivocal withdrawal of support?

MR STEVENSON:
Sorry, Sir?

WILLIAM YOUNG J:
Unequivocal withdrawal of support and encouragement?

MR STEVENSON:
What's interesting, which was really the next point I just wanted to clarify was withdrawal must be clear and it must be communicated but what the original case said in terms of picking up on unequivocality, if I can just go to that.

ELIAS CJ:
What is your short answer to the question though? Do you accept that test or not?

MR STEVENSON:
Well I rather thought it was the notice which had to be unequivocal. You must demonstrate an intention to withdraw and that you communicate it and that's certainly the way that it was put by Justice Sloan in the early case of *Whitehouse,* where he said, "Where reasonable and practicable, there must be timely communication of the intention to abandon the common purpose" and says, "What's timely communication must be assessed by reference to the facts of the case."

WILLIAM YOUNG J:
This is section 66(2) stuff isn't it?

MR STEVENSON:
Oh the case itself?

WILLIAM YOUNG J:
Yes.

MR STEVENSON:
It's difficult to say Sir.

WILLIAM YOUNG J:
But when he talks about common purpose, it makes me think it is section 66(2).

MR STEVENSON:
Perhaps. All I would say is, the expression of unequivocality is a link to the notice, that's what's got to be unequivocal. I may be splitting hairs but it was certainly the position which seems to have been carried through when this statement of law has been adopted.

TIPPING J:
May you have to give unequivocal notice of an unequivocal withdrawal, because that is really what the people are trying to say, aren't they?

MR STEVENSON:
Certainly in my written submissions I have said the withdrawal has to be genuine and real.

GLAZEBROOK J:
But isn't Ms Laracy's point that there was unequivocal notice because the wording was necessarily unequivocal. I can't say that attracts me as an argument because you are then quibbling hairs in terms of whether somebody said something, what somebody might have understood by it.

MR STEVENSON:
Well the appellant takes what may be seen as the easy route out, and says look, that debate is a legitimate one, but it is a debate for the jury. You couldn't say that the words, "That's enough" in a context that I have just explained it, "Get in the car, that's enough, let's go." Is not capable of satisfying the testing, I have already made that submission. Timeliness, I have already covered that. My learned friend understandably points to the requirement for timeliness but again by deferring to the original statement from Justice Sloan, which I have just read out, His Honour did say that, "Where practicable and reasonable, there must be timely communication." It is not such an issue in this case because in my submission, before the weapon has

been produced, the notice is given but again, those are issues for the jury. Like all of them, one has reference to the narrative in total and you couldn't say at the front end, it's not capable here that Ms Ahsin's words before the acts were used, could not be construed as timely. Of course the Crown would say, well she should have done it sooner. She should have, before she stopped, driven off and they are legitimate observations and submissions but for another forum. The appellant's case is.

GLAZEBROOK J:
Does he use the word "unequivocal"?

MR STEVENSON:
Sorry, who Ma'am?

GLAZEBROOK J:
In *Whitehouse.*

MR STEVENSON:
In *Whitehouse*, if Your Honour has page 685 open. He does, but in the context of notice.

GLAZEBROOK J:
I just haven't been able to find it, so which line is it on?

MR STEVENSON:
Well if you come up about 10 lines from the bottom of the page, perhaps a little more, and there's a paragraph beginning "What is timely communication?"

GLAZEBROOK J:
Okay, because actually he doesn't say that earlier.

MR STEVENSON:
No. And so that the expression "unequivocal" was originally with reference but for practical purposes it may not make any difference in the sense the appellant accepts that the withdrawal must be real. Very briefly, the article by Professor Lanham has been referred to and the only thing I would want to say about that is he made the comment which I had endeavoured to expressly earlier at 583, "If the law refuses to accept withdrawal by demanding an additional, in additional reasonable efforts to

prevent the crime, it may simply remove a participant's incentive to withdraw his support by countermand." I'm not sure I need to address the proviso points because I simply adopt the observations which have been made in terms of how far one can go about the way in which the jury approached it, assuming that they took it in the sequence outlined to them.

GLAZEBROOK J:
Of course, *Matenga* would say that we need to look at that ourselves, rather than worrying about what the jury would have done. So, what do you say?

MR STEVENSON:
Well, as I recall, the position is, could one say that a conviction would be inevitable –

WILLIAM YOUNG J:
Well, I think the inference is, do we think she was – are we satisfied beyond reasonable doubt –

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
– that she's guilty, that's what I think the test is.

GLAZEBROOK J:
That's certainly the test, rather than whether the jury would have found her so.

TIPPING J:
But if there was a reasonability possibility that there is evidence of withdraw – or that the jury could have found withdrawal, it might be rather hard for this Court –

GLAZEBROOK J:
Yes.

TIPPING J:
– to inevitably find her guilty.

GLAZEBROOK J:

Yes, yes.

MR STEVENSON:

There's just one other thing which has occurred to Ms Hall, and she's conveyed it to me, during the discussion earlier today about her involvement as a party to the assaults. It was possible for the Crown to include a charge of, for example, injuring or grievous bodily harm, and no doubt for tactical reasons they chose not to do that, and that's understandable, but it's not as if there was no route to liability in terms of the party to the assault before the weapon was produced, and what the appellant's case amounts to here is that she's, if withdrawal is accepted, not guilty to murder, but that doesn't exculpate her for her party assistance in terms of the assault prior to the weapon being used. Not that that's being encouraged, but I think I should make that acknowledgement that that certainly arises.

TIPPING J:

Are you accepting that there is some criminal conduct that took place to which she is complicit before her purported withdrawal?

MR STEVENSON:

As things presently stand, taking the conviction –

TIPPING J:

So that makes it rather hard to say that the train of events, if one was attracted to that sort of proposition, hadn't commenced.

MR STEVENSON:

Well, the distinction is liability was run on the basis of a conscience of the principal's murderous intent by reference to a weapon, and I think that's the important distinction.

GLAZEBROOK J:

So, it's submission would be until the weapon was actually produced, the train of events hasn't started –

MR STEVENSON:

That's right.

GLAZEBROOK J:

– or the relevant train of events has started, does that…

MR STEVENSON:

Mmm, that catches it.

So I don't know that I can assist further. They were the brief points I just wished to pick up in response, unless Your Honours have any questions?

ELIAS CJ:

No, thank you very much.

Thank you, all counsel, for your helpful submissions, we will take time to consider our decision in this matter.

COURT ADJOURNS: 1.14 PM